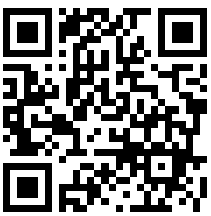

The green bag

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SUPREME JUDICIAL COURT OF LIBERIA

ROBERT B. RICHARDSON
Associate Justice

ZACHARIA B. ROBERTS
Chief Justice

JAMES JENKINS DOSSEN
Associate Justice

The Green Bag

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Anglo-Saxon Law in Liberia

By Arthur W. Spencer

LIBERIA, the most advanced negro community, probably, in the world, a country which has effectively disbarred white men from active participation in its affairs, offers a striking example of the successful adoption of the common law of England and the United States by its colored inhabitants. Strange to say, the law embodied in the Constitution and statutes of the republic of Liberia, and in the decisions of its courts of law, partakes rather of the naturalness of an indigenous growth, than of the character of a superimposed institution transplanted from beyond the seas.

The decisions of the Supreme Judicial Court of Liberia, the first volume of which, including those handed down from 1861 to 1907, has been issued, show that its judges are careful students of the law, men of sufficient intelligence and education to lend dignity to the bench, and of high ideals as to the dignified and proper conduct of the duties of their office. But Liberia is a young country, and the blending of an old jurisprudence with the institutions of a new country is as picturesque now as was the similar phenomenon that could have been observed in the United States just after the close of the Revolutionary War.

American negroes have by no means had so important a part in settling Liberia as might hastily be assumed. After the United States had passed the statute of 1807 prohibiting the slave trade, the practice was adopted of sending to Africa slaves recaptured at sea by United States revenue ships. When the Liberian colony had been planted, these liberated slaves, together with slaves freed after being brought into the country illegally, were sent to Liberia. No fewer than five thousand negroes thus became settlers of Liberia who had never actually been American slaves, and had scarcely become familiar with American institutions. It is true that in 1819, when the first settlers were sent out by the American Colonization Society, there were several thousand free negroes in the Southern states whose families had been located in America for one or more generations. Many of them were educated, and this element seems to have exerted a controlling influence upon the character of the new republic, to which it contributed the chief upbuilders. But the numerical preponderance of this class over the other negroes, those practically strangers to Anglo-Saxon institutions, has doubtless been commonly overrated. We may therefore say that the Liberia of the present, reaping the benefits of President Barclay's wise policy of assimilation of the native population, is not so much a country of American negroes as a native African community

governed by a class of American ancestry or traditions and impregnated with the ideals of Anglo-Saxondom.

English was the language of the early settlers of Liberia, and they were more familiar with the governments and laws of the United States and England than with those of any other country. The common law was near at hand. The legal systems of continental Europe were remote and inaccessible. The adoption of the common law came about naturally, as a result of the adoption of the form of government of the United States. Early in the days of Liberia, the advantages of a country governed by Anglo-Saxon institutions were appreciated even by the most ignorant natives. One poor fellow from the region of the Congo, asked if he was going back to that place, said: "No, no, if I go back to my country, they make me slave. I am here free; no one dare trouble me. I got my wife—my lands—my children learn book—all free—I am here a white man —me no go back!" Anglo-Saxon institutions have shown themselves much better suited to the negro character, in Liberia, than French and Spanish institutions, for instance, in the West Indies. The unassimilated Kru tribes in the hinterland will doubtless, in years to come, find themselves in much closer sympathy with Liberian institutions than with those of the contiguous French possessions.

The history of the republic is interesting as showing the process of impregnating the new country with Anglo-Saxon institutions. When the Maryland colonists, with Dr. Hall as their leader, settled Cape Palmas in 1834, the natives were in the habit of committing innumerable thefts. "They would slip their hands," says Dr. Hall, "through the wattling of the houses, and strip the bedclothes from the sick." The governor forced the king of the natives to pay for these thefts. Presently a colonist was caught stealing from a native's field. King Freeman wanted to know why the governor would not pay for it, but Dr. Hall explained, "I have a law that punishes theft and you have not."

Finding that the governor's law came from America, King Freeman announced his intention to have one of his own from the same source.

Accordingly Simleh Ballah, "the king's mouth," was dispatched to the United States. He appeared before the board of managers of the American Colonization Society,* and said:—

"I'm Ballah, head man for King Freeman, of Cape Palmas. Him send me dis country. I come for peak (speak) his word. Pose (suppose) him savee (know) book, I no come. He make book and send him; but 'cause he no savee make book, I come for look country and peak him words."

A criminal code was then prepared for King Freeman, none of its provisions being accepted by Simleh Ballah till he had had it fully explained to him. Here are some of the sections of this code, selected at random:—

All men must do to each other as they would have men do unto them.

All men must speak truth; none but bad men lie.

If a man kill another man because he hated and wanted to kill him, he must be hung.

If a man kill another man, and did not hate him or want to kill him, but did not take care, and killed him, he must go to jail and be punished as the judge says.

If a man have one wife, and while she lives take another wife, so as to have more than one wife living, he must go to jail and be punished as the judge says; besides, he must give to both wives and their children a house to live in, and enough to eat and drink as long as they live.

*See "Maryland in Liberia," by John H. B. Latrobe, Baltimore, 1885, for what here follows.

If a woman do anything wrong, she must be punished the same as a man.

If a man or woman do anything which these or any other laws say is wrong, the constable, when he is told of it by anybody, must catch the man or woman that has done wrong, and bring them before the judge. If the constable will not do so, he must pay for the wrong and be punished as the judge says. If he looks good and tries to find the man or woman that did wrong, but cannot find them, he must not be punished.

When any man or woman is said to have done any wrong, the judge must hear what everybody says that was there or knew anything about it, and if he thinks the man or woman has done the wrong, which is called being Guilty, he must punish the man or woman according to the law, but if the judge, after he has heard what everybody who was there has to say, does not think the man or woman guilty, he must let him or her go free. The judge must go by what the people say that were there or knew anything about it.

When the section limiting a man to one wife at a time was read to Simleh Ballah, he objected, saying that he had six, and if he had to choose one of them the other five would starve, as nobody else would take them. Consideration of the provision was postponed, and on the following evening, Simleh Ballah reported that he had "looked his head" (reflected), and was ready to accept the section in a qualified way,—

"That be good law for my pickaninny, but not for me. I say to pickaninny, 'you want wife, look good you no hab two wife'; good law for pickaninny, bad law for Simleh Ballah."

The proposed law seems to have been objectionable to Simleh Ballah as *ex post facto* legislation.

It would not be at all sensible or fair to take Simleh Ballah and King Freeman as fair types of the present public men of Liberia, or to compare King Freeman's code with the laws which the country has adopted, or to see the same motive underlying King Freeman's zeal in emulating the colonists by getting his own law from America, and the ready adoption of the American Constitution, with minor alterations, by the republic. Liberia is an English-speaking country, the leaders of which are to be classed as belonging to a high level of Western civilization. Instead of being a barbaric country, it is one of the most promising and advanced of African communities. Yet it is upon such material as King Freeman and Simleh Ballah that the republic has had to draw largely for its supply of newer citizens among the aborigines of the interior.

That the colored citizens of Liberia were unquestionably able to govern themselves under free institutions was the conviction of Commodore Perry, who wrote in 1844:—

"Governor Roberts of Liberia and Russworm of Cape Palmas are intelligent and estimable men, executing their responsible functions with wisdom and dignity, and we have in the example of these two gentlemen irrefragable proof of the capability of colored people to govern themselves."

The assimilation of the natives has steadily gone on since the early days of the country, and has made such progress that there is good reason to hope for the spread of Liberian institutions among those tribes of the hinterland which have not yet fully accepted the political and legal institutions of the country.

A leading authority on conditions in Liberia, Sir Harry H. Johnston, K. C. B., expresses his opinion as follows:—

The best hope of the American colony that has been planted—painfully, but at last successfully—in the coast lands of Liberia, lies in fusion with the fine indigenous African peoples—Fulas, Mandingoes, Vais, Kpwesis, and that remarkable congeries of Kru peoples one tribe of which, the Grebo, may be said to have attained something like stable civilization. The present power of Liberia must not be measured by the fact that the Liberians

of American descent are estimated at some 12,000 in number. By their schools, and by the mastery which they have acquired over much of the coast lands, they have gradually added to their numbers, as the civilized citizens of the modern state, some forty to fifty thousand Vai, Gora, Basa, Kru, and Grebo natives, who make common cause with the American negroes and mulattoes in their attitude toward the natives of the interior. Some of the Kru tribes are still recalcitrant. But since the advent to power of President Barclay, the influence of the Liberian government at Monrovia extends very far inland, and is constantly being appealed to by native chiefs as an arbiter in the quarrels between tribe and tribe.*

Some of the Kru tribes, which the foregoing writer speaks of as recalcitrant, have curious customs which have been brought before the Supreme Court of Liberia on appeal from decisions of lower courts. In one case, a man had abducted another man's wife, and when in turn she left him for another husband, he was aggrieved because he could not collect the dowry he had been obliged to pay to her previous husband, in accordance with Kru custom. He was not so recalcitrant that he could not avail himself of his legal remedies in the Court of Monthly Sessions, where he won his action.

The case was appealed, the facts, as summarized by the Supreme Court, being as follows:—

Peter, alias Debbooh Wreh, plaintiff, now appellee, "pryed," that is, abducted (the word is Kru) one Tetee, the wife of Blackwill Sherman's son, which occasioned much dissatisfaction and trouble, to the extent that the town's people were two days deciding the matter, which they finally succeeded in doing by the plaintiff, now appellee, agreeing to pay the dowry money to Blackwell Sherman's son, according to the native or Kru custom when a man "pryes" another man's wife, which according to evidence he did. The woman Tetee then became the wife of appellee. A short time subsequently, Yantee M'lanh (sister of Tetee) desired to go to the coast to see her mother, who was reported to be very sick; but appellee would not allow her to go at that time, so the question rested. A short time after, his wife Tetee left him and went to Manny Gofah (aunt of Tetee). Appellee then agreed that his wife go to the coast to see her mother if Manny Gofah and Debbey (Yantee M'lanh) would become security for her return to him in one month and fifteen days' time. They, Manny Gofah and Debbey, bound themselves by a written instrument to appellee for the safe return of Tetee within the stipulated time. Being thus secured, appellee allowed his wife Tetee to go. But it appears that Tetee did not return at the stipulated time, but was away for six months. Before she returned, however, appellee himself went to the coast, and after his return home the bondsmen produced and delivered his wife Tetee to him and he received her; but in a day or two his wife told him that she was not his wife, and she did not wish to stay with him, for she had another husband.*

On these facts the court below had given judgment in favor of Peter, to the effect that Tetee's sister and aunt should produce her body within a month, each giving a bond of $100 for her safe production; in default thereof, they should repay Peter his dowry money of £28.

The Supreme Court, however, held that the judgment of the court below was not in accord with Kru customs respecting marriage. Peter was estopped from holding security against Manny Gofah and Debbey, because one of them delivered his wife to him on his return from the coast, and he did not then refuse to receive her and hold the bondsmen responsible for breach of the stipulation, as he might have done. Peter had lost his remedy of an action on the bond. Nor could he receive his dowry money from Tetee's relatives, in accordance with the native custom whereby the relatives to whom a wife runs away repay the dowry money given by the husband; for Tetee had left

*"The Future of Liberia," *The Independent*, Oct. 11, 1906.

**Gofah et al.* v. *Wreh*, p. 458.

Peter as another man's wife, and Peter should have sued this new "pryer" to return to him his dowry money.

This case is of interest as exhibiting the attempt of a Liberian court of Anglo-Saxon traditions to administer native customary law. In only a few instances does the Supreme Court seem to have passed upon such matters. Usually it has been called upon to settle questions of the law of property, contracts or admiralty arising among the better educated class of citizens, and has settled such questions in accordance with the principles laid down by Blackstone and Chancellor Kent, and other standard writers on the common law.* There are a few, but not many references to United States cases. The Court rarely cites its own decisions, and no complete sets of American or English law reports seem to have been accessible, though Chief Justice Marshall and other American judges are sometimes quoted with marked respect.

The absence of an organic body of precedents strips the style of the Supreme Court decisions of elaborate technicality. In fact, in many instances the only method applied seems to have been that based on unaided common sense. Countless decisions are handed down without reference to a solitary precedent or citation of a single authority. For example, in *Davis* v. *Republic* (1862), p. 17, the court brought natives under the Liberian Constitution by ruling that "our native inhabitants under treaty stipulations, which treaties are laws when confirmed by the Legislature, are *bona fide* subjects of this state, and the political authority of the same covers them in all of their relations." No legal principles or authorities were referred to for this assertion of the right of sovereignty over natives, just as in another case (*Harris* v. *Republic*, p. 39) no authority was cited for the principle of territorial sovereignty over aliens.

An interesting example of the blending of native and Anglo-Saxon institutions is shown in the case of *Gray* v. *Beverly*, p. 500. The Court here ruled that an act passed in 1869, creating an Interior Department, was designed to confer upon the Secretary of the Interior the power of acting as a sort of arbiter in all purely native matters, "which he must settle with due regard to native customary law and native institutions, where not repugnant to the organic law of the state."

The Court expressed the opinion that in dealing with questions regarding "the rightful ownership and possession of native women, who according to native law are regarded and treated as chattels," occasions might arise where the Secretary of the Interior would have to issue orders for the arrest and delivery of individuals to a native chief.

But the Court decided that to permit the detention of such individuals, without evidence that their detention was lawful, was repugnant to the Constitution when their cases were brought before the Court on a writ of *habeas corpus*, "this highest writ of the country, the privilege and benefit of which, according to the language of the Constitution, 'shall be enjoyed in this Republic, in the most free, easy, cheap, expeditious, and ample manner.' "

In this case, though the decision dealt with a problem of great moment, the only citations were those referring to the Constitution and statutes of Liberia.

*The works cited include Bouvier's Dictionary, Bouvier's Institutes, Story on the Constitution, Story's Equity, Adams on Equity, Greenleaf's Evidence, Parsons on Contracts, Redfield on Wills, Broom's Commentaries and Legal Maxims, Freeman on Judgments, Raymond on Bill of Exceptions, Bacon's Abridgment, Benedict's Admiralty, Hindmarch on Patents, etc.

The Court itself sometimes recognizes the fact that it is paying greater heed to common sense than to the teachings of legal science. In the earlier days of the country, "every case was decided on its own circumstances by the exercise of common sense." But as the community "advances in wealth and refinement, relative rights become more complicated and difficult. Doubtful questions arise daily, which cannot be easily decided by the exercise of common sense without fringement upon the constitutional rights of one of the parties to the suit." Hence those "who know nothing of the spirit and reason of law, and who must consequently be ignorant of the natural foundation of justice," must learn "always to respectfully bow to the decisions of courts of justice, reserving always their constitutional rights."*

In other words, when a court of law tries to decide difficult questions as common sense dictates, some one's constitutional rights are apt to be invaded; hence the Court ought rather to employ its legal learning, but constitutional rights are also likely to be invaded then.

Perhaps the Court sometimes wavered in trying to make up its mind whether the common sense or the learned method offered the better way of unraveling knotty problems. In one case, in 1867, it delivered itself of the following opinion: "It is to be admitted, however, that courts often find difficulty in freeing cases from those misty intricacies into which they are sometimes taken by the astute lawyer. He, by his sagacity and skill, throws them into a labyrinth of almost inextricable mystery, from which it is sometimes hard to relieve them. This, however, is our duty, and we must perform it."†

In these earlier years the Court seemed to be groping its way out of the darkness of confused principles into the daylight of legal knowledge. The later decisions convey an impression of greater confidence and exactitude. In 1892 we come upon this eloquent and striking assertion of the dignity of Liberian institutions, which also throws light on the reason for giving the Supreme Court appellate jurisdiction in all cases:—

> We find in the idea of the Constitution that the right of appeal in civil and criminal cases is one of the fundamental prerogatives upon which the liberty of the people stands. To do away with this idea would be to set aside the dearest provision of the fathers, made in the bulwark of our national fabric, which serves as a preventive against oppression and a security to the enjoyment of civil liberty; without which, the people must become dwarfed in manhood and enterprise, and as a consequence energy, thrift, enterprise and noble aspirations will cease to exist and flourish under our national flag, and will seek some other land for encouragement and protection. The framers of the Constitution, knowing this, and considering our situation, disadvantages, and our limited knowledge of law and of political government at that time, sought to make our national road to greatness plain and easy, and to be understood by the whole people; hence, by the Constitution, they clothed the Supreme Court with appellate jurisdiction in all cases of appeal.*

The formal adoption of the common law came about in the earlier period of the Republic's existence, by means of a statute which read:—

> Blackstone's Commentaries, as revised and modified by Chitty or Wendell, and the works referred to as the sources of municipal or common law in Kent's Commentaries on American Law, volume first, shall be the civil and criminal code of laws for the Republic of Liberia, except such parts as may be changed by the laws now in force, and such as may hereafter be enacted; and all laws and parts of laws conflicting with the provisions of this act be and the same is hereby repea led.

Benson v. *Roberts*, p. 32.

†*Harris* v. *Republic*, p. 39.

*Page 526.

The Supreme Court in 1878 upheld a devise of real estate under a will by showing that the common law principles of wills, in the absence of a statute, had prevailed in Liberia since its earliest days.* In the same year, the Court held† that an offense not punishable by any statutory penalty which would bring it before the Court of Common Pleas, could be punished by whatever penalty should be determined to be fair by applying the principles of the common law, and might come before the Court of Common Pleas, after all, on indictment. That a common law system of criminal jurisprudence was adequate for all the needs of justice, was the implication of a decision handed down as late as 1899. In that year the Supreme Court held‡ that statutes defining specific crimes and punishments were not necessary, with Blackstone and Kent serving as guides in the application of common law principles, for the conviction of crime, and adjudged two prisoners guilty of assault and battery under the common law. One year later, however, in 1900, the Legislature saw fit to adopt a criminal code, which was more specific than anything previously enacted.

In view of the apparent adoption of the common law *in toto* by the young republic at the outset of its career, it might be supposed that the jurisprudence of the country would be top-heavy; that the people would find themselves overburdened with a mass of unintelligible precedents and rules which they could not follow without great confusion and injustice. But this was not to be the result. Liberia was far more fortunate than those older communities of the eastern hemisphere which erect between jarring races a barrier of cumbrous organic law. The common law, though legally in existence in Liberia since an early date, was as a matter of history gradually made over into an organic law of the country by the process of adjudication as fast as the necessity arose. This process favored the complete assimilation of the common law tradition. The highest court has always had the good fortune, apparently, to be composed from the first of judges who have avoided pedantry and have labored to serve the ends of justice and increase the stability of the system that they have been called upon to administer.

*Roberts v. Roberts, p. 107; compare with *Brown v. Brown*, p. 14.
†*Paine et al.* v. *Republic*, p. 101.
‡In *Flowers et al.* v. *Republic*, p. 334.

Is the Unearned Increment of Value of Public Service Company Property Protected by the Constitution?

By Frank Hendrick

Of the New York bar; Author of "Railway Control by Commission"; "The Power to Regulate Corporations and Commerce"; "Policies, Reaction and the Constitution," etc., etc.

THE movement which has had for its purpose the solution of what is called the corporation problem has been characterized by a popular passion for new legislation and for the punishment of individuals. Preliminary to the settlement of the question must come a realization that new legislation is not necessary and that the responsibility for the misconduct of individuals is properly chargeable largely to the public.

So far as the acts of business corporations are concerned, the prevalence of wrong-doing can be explained only by the non-enforcement of the law by public officers and the timidity of judges applied to for relief. By business corporation is meant the ordinary trading or manufacturing corporation, in which the public is not concerned except in so far as it should be guarded from fraud. To be convinced that a corporation problem remains for settlement as to the private corporation, one must be unmindful of the vigor of the common law and the continued existence of the judiciary.

Absolutely distinct is the position of the public service corporation, *i. e.*, the corporation which has special rights or franchises necessarily tends to a monopoly, and therefore requires constant supervision by the state. The special "business" of such a corporation is to exercise a public function, to perform a service for the public, to use public property. Like the public itself, such a corporation exercises the power of eminent domain. Through a grant from the public and by virtue of this power it acquires property.

Private property condemned by such a corporation can be devoted only to the public purpose served by the corporation and becomes therefore, to that extent, public property; a franchise granted by the public to such a corporation can have no other purpose than the service of the public and does not by reason of the temporary exercise of it by the corporation for profit cease to be a public franchise. Whether tangible or intangible, property held by public service corporations remains, in a certain sense, public property.

A public service corporation cannot, therefore, exist except by using public property. How the corporation gets public property, to what use it puts the property, and to what extent it asserts dominion over what belongs to the public are questions to which the body-politic, the property of which is in the disposition of the public service corporation, must attend at its peril. In fact, the word of the public service corporation enigma is that if the public administers its own property as an honest steward, it will be difficult for the public service corporation to offend.

While it is difficult to state with distinctness the limits upon the power of taking land or disposing of franchises imposed upon the public service corporation, it is certain that as to both land and intangible property, the ownership of the public service corporation never extends to the absolute *dominium* exercised by a private owner.

Land has, to be sure, been given to railroads, as a bonus, to be sold to settlers. The very purpose served by the corporation brings this proceeding into conformity with the rule that no more is to be taken than is necessary for the accomplishment of the public object.* In land taken to advance a public service, the corporation can never have the absolute fee. The reverter to the individual owner may be cut off by the condemnation of his fee and full compensation, but the abandonment of the public use must bring about a termination of the control of the property taken from public ownership only for a public use. Land, easements, and franchises may well be conveyed without the destruction of the property, but the burden upon the land of continuing the public use cannot be shed by a mere transfer of ownership.

Can a gas company, for example, by agreeing with a competitor not to exercise a franchise or not to devote land to the public purpose for which it was acquired, prevent the reverter of the franchise to the public and, as inseparable from the intangible franchise, the tangible property indispensable to its continued exercise? Admitting that fairness would demand the compensation of the company for the loss of tangible property, should that loss be estimated at more than the actual loss sustained, *i. e.*, should the supposed loss be so compensated by payment by individuals or the public to the company of the value of the property in the market for its most profitable purpose, rather than exactly the actual total cost to the public service company? Should a public service company be permitted to convert public property into private property and to its own profit by its own wrong, or by an unwarranted extension of its powers? If this is not permitted to be done by an abandonment of the public service, should the same result be attainable during the continuance of the public service? Gas companies, for example, may find it more profitable to deal in realty held for the purposes of their franchises than to limit themselves to the manufacture and distribution of gas. Unfortunately, under their franchises, they levy a sort of tax, proportioned to the benefit, for the public service performed by them. The assessment must be reasonably apportioned to the cost. In assessing the cost of the manufacture of gas, may the supposed market value of lands and franchises be taken as the basis? In other words, does the growth of a community, and the consequent creation of an unearned increment in the value of the franchises of public service and the property devoted to the exercise of these franchises, result in no benefit to the community, but only in the maintenance of a high rate of charges for the public service, adequate to the payment to the bondholders and stockholders of the corporation of returns upon the bonding and capitalization of the unearned increment?

So predominant has become the public service as an element, not only in social, industrial, and commercial progress, but in the cost of living of the average man, that the old abstractions of rights and liberties seem unreal in the face of a threatened peril of social, industrial, and commercial slavery enforced by appeals to the Constitution of the United States. An examination, however, of a few fundamental principles will show that the law does not aid, but properly asserted prevents the substitution of private for public ownership of the common wealth. The

*Mills, Eminent Domain, §49 and cases cited.

pertinency and importance of these principles were demonstrated in an opinion of Mr. Justice Lacombe* justifying a temporary injunction against the enforcement of the eighty-cent gas rate by the New York commission. Mr. Justice Lacombe said:

"Under the authorities, in fixing the rate to be charged for 'public service' by private corporations, two elements of calculation are of fundamental importance: what is the true *present* value of the property embarked in the enterprise? and what, in view of the risks of the business, is a fair annual percentage of return thereon? . . . . In estimating the value of the property of complainant embarked in the business, the commission reached the conclusion that the franchises under which it has laid mains and is delivering gas, and which are a part of its property, should be considered as of no value whatever, although the state, through the action of its taxing officers, has declared that they were worth several millions of dollars. It is suggested that some of these franchises have expired or lapsed in some way. The complainant has taken over the franchises of many different corporations, granted at different times. The reason assigned by the commission for not including the value of the franchises is that 'they were granted by the people without compensation.' That is so. These franchises were granted many years ago when there seems to have been no intelligent appreciation of the fact that they might become enormously valuable, when reckless improvidence was the rule, and all sorts of franchises were given away without any provision for *securing to the state its fair share of unearned increment thereon*. Nevertheless, when the state offers a franchise to whoever will take it without requiring any money return thereon, and for the sole consideration that the taker shall promptly, continuously, and fully develop it by the expenditure of its own money, and such offer is accepted, and the terms of the agreement carried out by the taker, there results a contract, which, with due consideration of all proper conditions and limitations inherent in the nature of the particular contract, is as much within the protection of the Constitution as are all other contracts. If the state, twenty-five or thirty years thereafter, should say to the taker: 'We were very improvident in not providing that you should pay us something each year for this franchise; therefore hereafter you shall pay us eight per cent annually on $10,000,000 or $20,000,000, or we will evict you from the franchise,' it might find itself embarrassed by the provisions of the Constitution in thus undertaking to avoid the results of its own improvidence. A franchise, whatever its value may be, which has not expired nor lapsed, nor been in some way forfeited, is property in the hands of its holder. There is force in the argument that when the state says: 'We will value this property at several millions of dollars when we tax you on it, but at nothing at all when we fix the rate you may charge for your product in order to receive an eight per cent return on your property,' it is seeking to accomplish by indirect methods what it might not be able to accomplish directly."

The argument upon the regulation of public service corporations must be based, apparently, upon a definition of the "property" of such corporations. The use of public property and the exercise of a common or public calling has no necessary relation to corporate ex-

Consolidated Gas Co. v. *Mayer*, 146 Fed. 150, at p. 156.

istence. "A railroad," for example, "is a public highway and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state."* "A railroad's right of way has, however, the *substantiality of a fee* and it is private property *even to the public in all else but an interest and benefit in its uses*."† Both corporations performing public services and the people beneficially interested have rights in the property used in the exercise of public franchises.‡ It is nowhere asserted that the property of a public service corporation is held as absolutely as that of a private individual. Whether the limitation is viewed as upon the *property* of the public or upon that of the corporation, that of the corporation is something other than private. That a public service corporation administers its property as the servant primarily of the public was held in *Erie & N. E. R. R. Co.* v. *Casey*, by the Supreme Court of Pennsylvania.‖ Though the authorities certainly afford a pretext for controversy upon the nature of the corporation's property, the only real basis for discussion is found in *dicta* of judges who did not sound the depths of the question of property. That it is fundamental and preliminary to discussion of the justice of a particular public regulation was clearly shown by Jeremiah S. Black in his address delivered before the Judiciary Committee of the Pennsylvania Senate, at the session of 1883, on "Corporations under Eminent Domain." The cases leave no doubt as to the character of the property interest of the public service corporation. A truer public appreciation thereof is evidenced by the creation of franchise bureaux, watchfulness against private encroachment upon public property of municipalities, the limitation of franchises to short terms, and the requirements that the accounts of public service corporations shall expose transactions in public property to constant publicity.*

Everything used by a public service corporation is impressed with a trust in favor of the public. The franchises of corporations having public duties to perform, such as railway companies, canal companies, turnpike companies, gaslight companies, and the like, cannot be alienated or seized under judicial process by creditors, without the consent of the legislature, because this would disable them from discharging the public duties they have assumed, and in consideration of which they have been granted to them.† Nor can a railway, without legislative authority, turn over to another company its road and the right to use its franchises in respect of the same, and thereby exempt itself from the responsibility of the conduct and management of the road, and from the performance of its public duties in connection therewith.‡ Whatever property the corporation uses, it must acquire from the prior owner, whether an individual or a municipality, and in the acquisition the purposes for which the property is to be used must be defined. Protected as property, not even the dissolution of the corporation by the legislature will divest the ownership.‖

There is a distinction between the estate which a corporation may take for the purposes of alienation and the

* Mr. Justice Harlan, in *Smyth* v. *Ames*, 169 U. S. 466.

† *Western Union Telegraph Co.* v. *Pennsylvania*, 195 U. S. 540.

‡ *Smyth* v. *Ames*, 169 U. S. 466.

‖ 2 Casey, pp. 307–324.

* Order issued December, 1908, by New York Public Service Commission.

† Cyclopedia of Law and Procedure, vol. 10, p 1090, and cases cited.

‡ Cyclopedia of Law and Procedure, vol. 10, p 1092, and cases cited.

‖ *People* v. *O'Brien*, 111 N. Y. 1.

estate which it may take for purposes of enjoyment. If a corporation may take land with the power of conveying it, the title of its grantee will not be affected by its subsequent dissolution.* Where a corporation takes a determinable fee for the purposes of enjoyment, the land should upon its dissolution revert to the original grantor or his heirs.† But the grantor to a corporation always divests himself of his fee and in condemnation proceedings asserts his claim to compensation as for a total loss, both of the present ownership and the reversion. If a corporation is authorized to purchase land for certain purposes, and for no other, a deed of land executed to it, by one having capacity to convey, will vest title in it, which title can be assailed, on the ground that the purchase is *ultra vires*, only by the state or by a shareholder but not by the grantor.‡ The owner's right to object to a taking by condemnation must be made before the date of vesting of title by the order of a court. A court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law.‖ Upon the dissolution of a private corporation, all its estate, whether consisting of lands or goods, passes into administration, for the benefit of its creditors first, and its shareholders afterward.§ But inasmuch as neither the creditors nor the stockholders of a public service corporation can sustain a relation of ownership to the land of the corporation except as successors to the rights of the corporation in that land, it is certain that, when abandonment is definitely made of the use for which the land was acquired, the private ownership of the grantor to the public service corporation having been extinguished by purchase, the only possible reversionary of the fee is the community.

As, however, the *jus disponendi* is an incident of ownership, whenever a corporation has the power to *own* land it has the power to dispose of it in like manner, as a natural person might do.* Although as against the state the corporation may not have the power to hold land to which it has acquired a fee-simple title, and although it may hold it subject to the constant risk of intervention by the state, yet, until the state intervenes to escheat it, the corporation may transfer it to another and pass a good title to him. A private corporation may grant to another corporation the right to use such land for any purpose within the powers of the grantee, although such purpose was not within the powers of the grantor.† Although a corporation may not have power to hold particular land for the reason that it is not required for the purpose of the corporation, yet it may sell such land and pass a good title to the purchaser.‡ But the corporation can transfer only such right to the exercise of its franchises with reference to the land as the statutes creating and regulating it permit and it actually enjoys.‖ It is in the relation of the franchise to the land and other property that the value of the land and of the franchise principally consists. The only substantial value of the tangible property is the right to use it in connection with the franchise, and hence it is in-

* *People* v. *O'Brien*, 111 N. Y. 1.

† 1 Blackstone 484.

‡ *Hough* v. *Cook County Land Co.*, 73 Ill. 23, 24 Am. Rep. 230.

‖ *Pacific Railroad Co.* v. *Seely*, 45 Mo. 212; *Case* v. *Kelly*, 133 U. S. 21; 10 S. Ct. 216, 33 L. Ed. 513.

§ *Health* v. *Barmore*, 50 N. Y. 302; Cyclopedia of Law, X, 1131; XXI, G 6 a.

* *Benton* v. *Elisabeth*, 61 N. J. L. 411, 39 Atl. 683, 906, affirming 41 N. J. L. 693, 40 Atl. 1132.

† *Ibid.*

‡ *Freeman* v. *Sea View Hotel Co.*, 57 N. J. Eq. 68, 40 Atl. 218; *Reddell* v. *J. B. Watkins Land Co.*, (Tex. Civ. App.) 37 S. W. 608; *Beggaley* v. *Pittsburgh (etc.) Iron Co.*, 90 Fed. 636, 33 C. C. A. 202.

‖ *Blair* v. *City of Chicago*, 201 U. S. 400, 481, 488.

cidental to the franchise.* An extension of such right would violate property rights of the community, especially of a municipality.† "The present value of the property embarked in the enterprise" of a public service corporation adverted to by Mr. Justice Lacombe, has, therefore, attributes of precariousness not suggested by a consideration of the private property rights protected by the Constitution of the United States. The community's right in public property is certainly no less sacred than that of its servant holding the property for a public purpose. Nothing short of abandonment of the use defined in the acquisition of the property will be a cause of a reverter to the public. Nothing but the consent of the body-politic will extend the ownership of the corporation beyond the use already defined. The use, then, is the thing really owned by the corporation; the use is a benefit running to the public.

The reversion, then, of all property of public service corporations, as well as the user, is held for the public. This principle affords the broadest and the most justifiable basis for the public regulation of their affairs. Public bodies proceeding upon this principle will not only avoid the pitfalls which are now regarded as guide posts in the path of regulation, but they will attain success by processes largely automatic. If, for instance, the property belongs to the public, subject to and inseparable from the exercise of the public service franchise, what constitutional provision is violated, as is suggested by Mr. Justice Lacombe, by taxation or regulation "securing to the public its fair share of unearned increment thereon?"‡ Neither tangible property nor franchise is taken away by regulation of the exercise of the franchise or by taxation of both the franchise and the tangible property. Neither is directly touched; taxation and regulation are directed at a distinct property created by the exercise of the franchise in conjunction with the tangible property. The government does not guarantee the value of either stocks or bonds. It does not guarantee even the value of tangible property or franchise. It must, however, guarantee the proper service of the public by those using public property in the exercise of a franchise, and the reasonableness of charges to the public. Charges based upon the bonding or capitalization of unearned increment in the value of tangible property above its cost and of franchises above their cost are by that very fact unreasonable and should be prohibited. The constitutional protection of the private property of a public service corporation cannot be supported upon any principle that does not take into account the nature of that property and the interest of the public therein.

The justification of regulation, therefore, far from being negatived by the attribution of value to special franchises as property by the New York Franchise Tax Act, is actually supported thereby.* "We regard the tangible property," said the Court of Appeals,† "as an inseparable part of the special franchise mentioned in the statute, constituting with them *a new entity*, which as a going concern can neither be assessed nor sold to advantage except as one thing single and entire." The *new entity* may be taxed as income-

* *Metropolitan St. Ry. Co.* v. *Tax Commissioners*, 174 U. S. 417, affirmed U. S.

† *Matter of New York and Long Island Bridge*, 148 N. Y. 540, 557; *Cahill* v. *Hogan*, 180 N. Y. 304.

‡ *Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150, at p. 156.

* Special Franchise Tax Law, Laws 1899, chapter 712; upheld in *Metropolitan Street Ry. Co.* v. *Commissioners*, 174 N. Y. 714; affirmed in 199 U. S. 1.

† *Metropolitan Street Ry. Co.* v. *Commissioners*, 174 N. Y. 714.

producing property and valued for purposes of taxation in proportion to earnings.* Yet to base charges to the public upon a capitalization based upon earnings would be to form a vicious circle of increased charges and increased capitalization without issue and without limit. There is no basis of property value in such a proceeding upon which a constitutional principle can impinge. The total cost of both tangible and intangible property may be considered. In self-protection the corporation must prove such value; a "physical valuation" is its salvation. Public regulation is really not a matter for litigation but only of bookkeeping. Every consumer should have all the facts easily accessible upon which to base his appeal to a court against an unreasonable rate. Every intending investor should have the facts upon which true values are estimated. Only holders of bonds and stockholders already deceived by inflated values and insisting upon their right to tax future generations can object to an open book and a square deal between the public and its servants, the public service corporations.

* Opinion of Hon. Martin Saxe, referee, in *People ex rel. Brooklyn (etc.) R. R. Co.* v. *Tax Commissioners*, N. Y. Law Journal, March 5, 1907.

New York, N. Y.

Theodore Roosevelt

By Harry R. Blythe

Iron is in his blood. He lives to fight,
To yield not, fear not, nor retreat;
Give him the giant odds that mean defeat—
He still fights on! Whatever he deems right
He guards with the reserve-corps of his might;
Swiftly he strikes. His triumphs are complete;
He has no flag of truce. The foe must meet
Him face to face, or safety find in flight.

More men like him we need! Who dare to face
The odds he craves, and give their very blood
For sake of principle. The groping race
Through such as he finds better brotherhood;
There lives no foe that ever can erase
The record of his battles for the good.

His Honor—The Judge

By Frank Warren Hackett

THE respect exhibited by the bar and by the people of the United States towards the individual person who occupies judicial office greatly helps, no doubt, the Judge himself in preserving a like measure of regard for his brethren of the bench. Rarely does it happen that a judge permits himself to speak disparagingly of the attainments, or of the acts of another justice with whom he is associated. The writer of a dissenting opinion may upon occasion go so far as to treat with scarcely veiled contempt the reasoning put forward by the majority of the court, but he is most careful even in this extreme instance to maintain an outward show of deferential regard for his mistaken brethren.

Every lawyer knows with what scrupulous care the secrets of the consultation room are guarded. If discord at times has its way there, the world outside as a rule hears nothing of it. No volume entitled "The Confessions of a Judge" has yet been published, nor is it likely ever to be announced. Of course, the "inside history" of many a hard-fought cause might furnish interesting material for the man who "writes things up for the magazines"; but details as to the process by which courts manage to reach a decision in difficult cases will continue, we may be sure, to be hidden from the eye of the public.

An unwritten rule of the court-room requires every one present to behold in the person of the Judge the grave and dignified office that he is administering. Members of the bar instinctively accord to "Your Honor" a large measure of consideration, whether they are addressing that personage upon the floor of the court-room, or chance to meet him upon the street. This deep-seated respect for the office, familiar as it is, plays a significant part in holding all good citizens to abide by the law itself.

Where several judges sit together as a bench, the court acquires a character of its own. It may be a strong tribunal, or a weak one, according as its members are well-equipped intellectually, or the reverse. In an appellate court one or two at least of the judges are sure to be lawyers of ability. There have been periods when a single member of the court was seen to tower head and shoulders above his fellows. Fortunate is it when in the event that such superiority exists, it marks the occupant of the office of Chief Justice. That bench where sits a truly great judge, may be depended upon not only to reach sound conclusions, but to put forth decisions marked by uniformity and by consistency—qualities that prove helpful in building up a system of jurisprudence.

It is related of Chief Justice Shaw that once he happened to enter the consultation-room just in time to hear the closing words of the draft of an opinion that one of the judges had been reading as the language of the court. "What!" exclaimed the Chief Justice, in a tone of surprise, "I did not so understand it." He then concisely stated the facts, and applied certain principles of law, with such precision and aptitude that the other judges voted straightway to reverse their former action. If this incident really occurred, we have here at least one example where no great harm could have attended the divulging of a

secret, which took place, it is probable, only after the lapse of years.

Instances are not unknown to the bar where a court has decided a case, and assigned to one of its number the preparation of the opinion; the judge has gone ahead with his task of setting out the reasons for the conclusions agreed upon, only to discover after he has proceeded for some distance, that he finds it impossible logically to support the views which at the conference he together with the others had deemed controlling. The result has been a reconsideration, and a reversal of a decision which at first had approved itself as just and sound. Such are the uncertainties of the law, not easily explained to clients.

That the Supreme Court of the United States in several instances has divided, five to four, upon the decision of important questions (chiefly those of a public nature) has by no means escaped notice. The circumstance, however, calls for no special comment. While a nearer approach to unanimity is desirable, the record as it is serves to illustrate the truth that many a legal controversy presents a turning-point, where, whichever way the judgment goes, it remains that strong and convincing argument can be adduced upon either side.

The following bit of pleasantry is familiar to old practitioners, though it has been credited to more than one other judge than the true author, who was the late David K. Cartter, for many years Chief Justice of the Supreme Court of the District of Columbia. A man of large frame, his face pitted with smallpox, Cartter had a slight impediment of speech, which he overcame in a moment by an explosive utterance. He was noted for a refreshing contempt of forms and technicalities, as well as for exhibitions of wit, that, to say the truth, were at times not over and above refined. He seldom looked into a law book, and never but once, so it is said, had he reduced an opinion to writing. Cartter's instinct for doing exact justice carried him by the quickest path to the real merits of a cause. His conceptions were usually sound—his reasoning forcible and logical.

At an evening entertainment in Washington one of the Associate Justices of the Supreme Court of the United States, coming up to Cartter, shook him by the hand and began to rally him on account of a decision which the Supreme Court had just announced reversing the court of the district. Chief Justice Cartter, returning the greeting in a manner quite as hearty, made prompt disposition of his stammer by ejaculating: "All right, M—; the only advantage your court has over ours (aside from the salary) is that you fellows on the Hill have the last guess."

There are two qualities which should combine in the man to make one a good judge,—first, a thorough knowledge of the law, and next a readiness in the dispatch of business. Common sense, that splendid quality in every walk of life, bears a special value when possessed by an occupant of the bench. The bar, with all its tendency to criticise—a disposition not infrequently sharpened where counsel are smarting under a sense of unmerited defeat because of the action of the court,—is really tolerant and considerate in its estimate of judicial worth. Aware that all of us are fallible, the profession seeks to discover in the person of the judge respectable attainments. If it finds them, and sees likewise a temperament indicative of fairness and of an earnest desire to reach just results, the bar for the most part is perfectly satisfied.

Fortunate for the due administration of justice is it that the bar and the bench are uniformly in accord. Indeed, it is this hearty support by lawyers who practice before a court that renders judicial life, as a rule, so grateful and so enjoyable. A judge at once feels reasonably sure that his bar not only view him with kindly regard, but entertain towards him, with a possible exception here and there, a genuine affection. The circumstance that the intercourse between lawyers and the judge is perfectly open, and devoid of personal prejudice, affords an opportunity for the rapid growth of cordiality.

The tributes which upon special occasions are paid by the bar to the memory of a judge who, after years of service has retired from the bench, or has died at his post, abundantly testify to the kindly nature of that relation which exists between the bench and members of the bar. The record of these occasions demonstrates how sincere is the esteem with which practitioners, both the young and the old, regard the man who has long and ably administered the judicial office. Moreover, the value of this admirable personal relation in furthering the cause of justice, and thereby advancing the interests of the community at large, is not easily to be overestimated.

Washington, D. C.

A Remarkable Will Case

By Lawrence Irwell

[*For obvious reasons the real names of the persons involved in this case are not given.*]

At the time when the trial took place, the case of *Grantham* v. *Garland* did not excite any particular attention. Although it was a will case, it was not reported in the newspapers, probably because it appeared to be devoid of sensational features. The circumstances were, on the face of them, very ordinary, and such as may come before any surrogate's court. There were, however, some extraordinary features which made it almost unique. The facts as submitted to the court were briefly as follows: An old gentleman formerly in the grain business, Joshua Garland by name, had died possessed of about three-quarters of a million dollars in real and personal property and leaving two sons and a nephew, George James Grantham, his sister's only child. The two sons, Arthur and Thomas, were not exactly model young men. Arthur, the elder, though good-hearted and a gentleman, was unreasonably careless in money matters. Thomas, the younger, was without redeeming virtues of any kind. Old Mr. Garland, himself careful to the point of parsimony, and a rigid stickler for the proprieties, had long ago quarreled with both his sons, and had transferred all his favors to his nephew, George J. Grantham. The latter was a young man after his uncle's heart—a steady, shrewd boy with considerable

business capacity, who had bought the controlling interest in a brewery which was doing a good business. He lived with his uncle, whose right hand he was, and the old gentleman made no secret of the fact that his nephew would inherit most, if not all of his property.

On first quarreling with his sons ten years before, Joshua had destroyed his former will and had made a new one in George Grantham's favor; and notwithstanding his lawyer's remonstrance he had positively refused to leave anything to either of his sons. If he had left this document with his attorney or with a trust company, there would have been little trouble after his death. But he insisted upon keeping it himself, and the result was that when he died the document was nowhere to be found. Every possible place was searched, every inquiry made, but to no avail. Arthur Garland therefore applied for an order for administration of his deceased father's estate. His cousin promptly opposed such a proceeding. The consequence was that the case came before the probate court for trial.

The nephew's attorney argued that it was contrary to all reason and probability that his uncle would have destroyed his will himself, thereby transmitting his whole property, as he must have known he would be doing, to his two sons, with whom he was not on friendly terms; that the deceased had often stated his intention of leaving the bulk of his property to his nephew, and that, on the whole, the explanation on which the other side relied was in view of the facts impossible.

The brothers Garland, on their part, contended that their father had destroyed the will himself; and they produced a couple of letters written by the deceased to Arthur shortly before his death, showing some sign of relenting.

Many witnesses were called in support of both sides, and the judge decided in favor of the sons. It was quite natural, he considered, that towards the end of his life the old gentleman might have wished to repair what was certainly an act of injustice towards his own children, and he therefore held that Joshua Garland had died intestate.

Thus the two brothers came into the whole of their father's estate, George Grantham's lawyers having told him that it would be useless to appeal. Nevertheless, this young man did not take his defeat well. He insisted that he had been cheated out of his uncle's estate, although he could not explain how his cousins had managed to get hold of the will, for neither of them had been inside their father's house for ten years. Still, it might not have been very difficult to bribe some person in his employ.

George Grantham had a particular reason for disliking Arthur Garland. The two men had fallen in love with the same girl. She had refused the model young man and accepted his cousin. With George, the bitterest point in his failure to win the suit was not the loss of the money, but the fact that Arthur could now marry Ethel Watson, a thing which his serious indebtedness and his lack of funds had hitherto made impossible.

"If the will has been stolen," said Grantham to his attorney, whose name was Marsden, "you have the draft of the will, and we could offer it for probate if we could show that the will itself was stolen."

"Certainly," was the reply, "but the hypothesis rests upon no substantial basis. If there were any thief, he could be relied upon to keep silent for his own sake."

"I intend to drag the truth from

him," answered George Grantham, with determination.

Marsden, the lawyer, received a check for his services, and thought no more about the matter until eighteen months later. Then he was suddenly reminded of the case by a flurried visit from Grantham, who entered the office in excitement.

"Mr. Marsden," said Grantham, "I came to tell you about what I received this morning, but you'd better take a look for yourself."

He drew a long envelope from his pocket. The lawyer hastily drew out the contents, and said: "That's the will, I'm sure. Where did you get it?"

"It reached me by mail. No letter accompanied it. I was thunderstruck."

"Very extraordinary. The handwriting of the address is strange to you, I suppose?"

"Completely."

"I notice by the postmark that it was mailed in Franklin Square. We'll see if we can trace the sender."

"You will take the necessary steps to probate the instrument?" asked Grantham, somewhat nervously, the lawyer thought.

"I will give the matter my prompt attention," Marsden replied.

The client took his departure, with a suppressed excitement in his manner that Marsden felt at a loss to explain, and left the lawyer still holding the envelope in his hand. He held it up to the light and subjected it to a careful scrutiny. He happened to get it in such a position that the light shone through it, and he then noticed that it was more opaque at the lower end than elsewhere. He immediately thrust in his hand to explore the cause, and discovered a thin slip of paper clinging to the side, which had evidently escaped Grantham's observation.

He drew out the slip. To his disappointment, it proved to be not a communication from the sender, but merely a receipted restaurant bill which had evidently got into the envelope by accident.

Then it dawned upon Marsden that this slip might serve as an important clue. It also occurred to him that what a rogue does by accident is often a better key to his secrets than what he does designedly. On the top of the restaurant bill were the words "Hotel Comet, 34 West Madison Street," and also a date—that of the day before yesterday.

Marsden went directly to the restaurant, where he ascertained from the cashier that the number on the check indicated a waiter named "Peter." Mr. Marsden stated the object of his visit to Peter, who soon recalled a man with his arm in a sling.

"He told me that his right hand had been so badly hurt in a railroad wreck as to make him unable to write, and he asked me to address an envelope for him."

"To whom did you address it?"

"I can't remember, but the street was 'Bryant.' "

"Is this the envelope which you addressed?" asked the lawyer, producing the one which Grantham had left at his office.

"That's my writing? Are you the man I addressed it to?"

"No, I'm a lawyer, and if you can tell me a little more about the man I can reward you. What was he like?"

"He was just an ordinary looking man—brown hair, clean-shaved and medium size, if I remember."

"If he should come again, I want you to telephone to me. This is my card, and here's a ten-dollar bill. Wait a minute! I think my client, Mr. George

J. Grantham, the owner of the Sun Brewery, would like to talk with you. Can you arrange to come to my office the day after tomorrow between ten and eleven?"

"Yes, sir."

Promptly at ten o'clock in the morning of the second day following, George Grantham entered Marsden's office. He had hardly had time to sit down before a man entered who stared hard at Grantham, his face showing signs of great surprise.

"So you've found the man," he remarked.

"Found whom?" ejaculated Marsden, frowning perplexedly.

"Why, this man (pointing at Grantham). He's the one as asked me to direct that envelope."

Joshua Garland's will, although genuine, was never presented for probate by the sole beneficiary, his nephew, George James Grantham. That extraordinary man, who evidently cared little for money, being fully determined to punish the woman who had refused to marry him, as well as his favored cousin, had hit upon the expedient of suppressing his uncle's will. As a result, Arthur and Thomas Garland had divided the whole of their father's property. When George Grantham had reason to believe that his two cousins had disposed of a considerable part of their inheritance, he "found" the will, and he intended to take steps to get possession of whatever remained of his deceased uncle's estate, the temporary possession of which by Arthur Garland was essential to the carrying out of Grantham's diabolical plot, because without it the former could never have married.

Mr. Marsden was irate at his client's attempt to impose upon him, and his annoyance caused him to take a peculiar step. He insisted that unless the will was destroyed then and there, the matter would be brought to the surrogate's notice the following morning. This threat was effectual, and the document was burned before Grantham left the office.

Two Georgia Judges

By L. B. Ellis

IT has been about a hundred years since John M. Dooly first took a seat upon the Bench of Georgia, but his judicial keenness and strength are still held in honor, while his quick Irish wit can never be forgotten. Indeed, the very name of Dooly is associated with some of the most humorous traditions of the Georgia bar. An appreciative biographer says of him that, "like Charles II, Dooly could not only say good things to set off his bad deeds, but, what was more fortunate, could say them of the deeds themselves, and always thus gild the pills of impropriety which he administered to the public."

This judge it was who went to a noted faro-table and broke the bank during that very court-session in which he had so eloquently charged the Grand Jury against the vice and crime of gaming. What was his excuse? "Gentlemen," he modestly remarked, when the play was at an end, "finding that I could not

suppress this evil by juries, I have taken the only other method within my cognizance."

Judge Dooly it was too, who, becoming involved in an unfortunate dispute with a brother of the bench, Judge Tait, received from him a request for satisfaction by the *code duello*, then widely in vogue throughout the South. Now Judge Tait had a wooden leg, and his adversary, receiving the challenge, replied with serene good nature that the two could scarcely fight on equal terms and hence he must in honor decline. But Judge Tait, more than ever indignant, wrote in return taunting him with rank cowardice, and repeated the demand for satisfaction on the field.

Still preserving his equanimity, Dooly replied by saying that he was sorry to find himself mistaken in supposing his brother of the bench too magnanimous to take advantage of an adversary by putting up his old wooden leg against two live ones. "But," he went on, "since you are determined to settle the matter in the way proposed, I am ready to meet you at any place or on any day agreed upon, provided I am allowed to put one of my own legs in a bee-gum!"

This clever bit of strategy simply infuriated Judge Tait, who wrote in reply that, seeing he could get no satisfaction from such a craven, he now proposed to publish the affair all over the state.

But still his unruffled adversary proved impervious to threats and closed the belligerent correspondence with genuine Celtic blitheness! "Go ahead, my dear brother," he wrote; "I'd rather fill all the newspapers in Georgia than one coffin!"

Dooly it was, again, who, while at a public dinner, fell into dispute with Major Freeman Walker, and, to make bad matters worse, kept firing away at his martial opponent until forbearance was at an end; the Major sprang up and came at his enemy with an uplifted chair. Dooly thereupon seized a carving knife, and squared himself to do some very genuine execution. Several gentlemen instantly laid hold of the quite too well-armed judge, while only one seemed to think it necessary to lay a restraining hand upon the martial aggressor.

"Stop, gentlemen," cried Dooly, in impetuous tones, "stop! One of you will be enough to keep me from doing mischief. All the rest of you for God's sake take hold of Major Walker!"

Amid the ensuing laughter, hostilities came to a happy close, and the pleasant finale of a "handshake all round" closed the unique affair.

That portion of the Georgia Reports which is filled by the decisions of Chief Justice Logan E. Bleckley makes fascinating reading for lawyer or layman. His judicial opinions, models as they are of precision and perspicuity, intensely characterized, also, by sound judgment and correct apprehension of the law, are yet rich in imagery and metaphor, and scintillant with pure, spontaneous humor, a humor which, though trenchant, never sinks to buffoonery or farce.

Scarcely another judge but Bleckley, in rendering the decision that, while the assets of a corporation may be seized by the Federal Courts, yet the body corporate can not be dissolved, would have summed up the whole matter so aptly. "Your money, not your life," said he, "is the demand of the Bankrupt Act."

And no other but he could have said, when deciding that the purchaser of property from one who has no title, cannot recover the price unless he tenders back the property, "Restitution before absolution is as sound in law as in theology."

One of the most delightful—and certainly wholesome—of Judge Bleckley's judicial opinions, is that rendered in a case where a wife's property, bought with the hard earnings she had made by keeping boarders, was being defended against seizure by her husband's creditors.

"The legal unity of husband and wife," pronounced the judge, "has in Georgia, for most purposes, been dissolved, and a legal duality been established. A wife is a wife and not a husband, as she was formerly. Legislative chemistry has analyzed the conjugal unit, and it is no longer treated as an element but as a compound. A husband can make a gift to his own wife, although she lives in the house with him and attends to her household duties,—as easily as he can make a present to his neighbor's wife. This puts her on an equality with other ladies, and looks like progress. Under the new order of things, when he induces her to enter into the business of keeping boarders, and promises to let her have all the proceeds, he is allowed to keep his promise if she keeps the boarders. It would seem that the law ought to tolerate him in being faithful to his word in such a matter, and we think it does."

Another verdict of his that will be held in grateful remembrance by the gentler sex is that containing the following sentiment: "Between the passenger and the baggage, there is a relation beyond that of mere partnership. When baggage is lost, it is not simply privation,—it is bereavement."

That Bleckley is a master of epigram, no one can doubt who recalls how aptly he hit off appellate tribunals: "Some courts live by correcting the errors of others and adhering to their own." Or again, in regard to one of his own decisions: "Any one who seriously doubts the correctness of this ruling, may readily solve his doubts by studying law." Or his comment when a sheriff, in answer to charges of dereliction of duty, claimed that he had acted under advice from a lawyer: "We suppose, from the quality of the advice, that he must have obtained it *gratis*." Or his quaint reply, when a young barrister had just completed an impassioned and chivalrous plea in behalf of a female client: "In protecting women, courts and juries should be careful to protect men, too, for men are not only useful to general society, but to women especially."

It is always more difficult to stop reciting Bleckley stories and quotations than it is to begin. For rare is a lawyer in Georgia, or in the South for that matter, who does not possess a well-stocked repertoire of "Bleckleyana."

But the present collection may well be closed with a bit of a story that the public has not yet gotten hold of.

It was in the privacy of the Judge's family circle, and one of the younger members was giving, rather excitedly, a detailed account of a "revival meeting" she had just been attending.

"And, O Papa, who do you suppose went up and gave his hand to the minister and asked to be prayed for? It was Judge T—."

"No, no, my child," remonstrated the father. "Not Judge T—. You must be mistaken." For Judge T—was an especially upright friend and neighbor, gray-haired, benignant, and amiable.

"But it was Judge T—, Papa! And he asked for the prayers of the church because he said he was such a dreadful sinner."

"What a sad hallucination," mused Mr. Chief Justice, in a hurt tone, and with a deprecatory shake of his head. "Why, Judge T— never committed a sin in his life. Or, if he did, it is barred by the Statute of Limitations."

Review of Periodicals

JURISPRUDENCE takes the lead in the current magazines in the number of articles and perhaps in importance, although there are so many other valuable papers noticed that the distinction may not be concurred in. Under the heads of bankruptcy, conflict of laws, constitutional and criminal law, evidence and suretyship readers will find articles that well deserve especial attention.

Admiralty. "Maritime Salvage and Chartered Freight," by M. A. Rundell. *Law Quarterly Review* (vol. xxiv, p. 385).

In the April number of the same journal Mr. Birch Sharpe stated and discussed the following proposition:

"When a ship under charter proceeding in ballast to an outward port, there to load and bring back a specified cargo, is rescued from danger under circumstances which entitle her rescuer to rank as a salvor in the courts of this country, can the salvor make good a claim for remuneration in respect of the freight then in course of being earned under the charter-party?"

Mr. Sharpe's conclusion was that chartered freight under such circumstances is not a subject of maritime salvage. Mr. Rundell's analysis leads him to the contrary view.

Bankruptcy (Partnership). "Some New Aspects of Partnership Bankruptcy under the Act of 1898," by Charles M. Hough. *Columbia Law Review* (vol. viii, p. 599).

Arguing for the full acceptance of the doctrine of "partnership entity," declared to have arisen out of the blunt words "a partnership may be declared a bankrupt." This doctrine would make a partnership insolvent when the aggregate of the joint property is not sufficient to pay the joint debts.

"A partnership being now a person for bankruptcy purposes,—if some of the incidents of adjudication are inappropriate to such artificial personality the same condition has long existed as to corporations; it is also true that one object of bankruptcy proceedings is to relieve debtors, but it is quite as much an object to secure equitable distribution of assets, and the latter procedure is first in order of time. Partners who wish release from liability have an open path before them, but creditors who wish dividends and desire to prevent preferences must act quickly and should not be hampered by nice questions of possible solvency of possible partners. The legislature builded better than it knew, and the duty of the courts is to take the statutory words at their full value and not prevent relief by adherence to old definitions that do not square with the result promised by the act."

Biography. "A Great Judicial Character—Roger Brooke Taney," by Charles Noble Gregory. *Yale Law Journal* (vol. xviii, p. 10).

Constitutional Law (Judicial Power). "The Extent of the Judicial Power of the United States," by Simeon E. Baldwin. *Yale Law Journal* (vol. xviii, p. 1).

Arguing that the judicial power of the United States is limited to the cases enumerated in the Constitution, contrary to some observations of Mr. Justice Brewer in the recent case of Kansas *v.* Colorado, 206 U. S. 46. These observations, Judge Baldwin says, were merely *dicta*.

Charitable Bequests (Scotland). "Charitable Bequests," by A. C. Black. *Juridical Review* (vol. xx, p. 227).

Discussion of the Scotch cases interpreting the title.

Consideration (England). "Consideration Under the Finance Act, 1894," by P. J. Hamilton-Grierson. *Juridical Review* (vol. xx, p. 203).

From the terms of the English Finance Act, 1894, it is clear it was the intention of the legislature to treat transactions of gift as

dutiable, and transactions of sale and purchase as exempt from duty. This article considers the English cases in which it was necessary to decide to which class a transaction belonged.

Conflict of Laws (Domicile). "Domicile in Countries Granting Extraterritorial Privileges to Foreigners," by Charles Henry Huberich. *Law Quarterly Review* (vol. xxiv, p. 440).

The question discussed here is, Can a person acquire a domicile in a place where, by virtue of capitulation, treaties, law, or usage, he enjoys exemption from the operation of the ordinary local laws? The author does not take up the domicile of diplomatic agents and their suites, but limits himself to the acquisition of domicile in countries such as Turkey and China, where citizens or subjects of certain states are governed by their own national law.

The power to acquire a domicile in such cases was denied by Mr. Justice Chitty in the much-discussed case of Tootal's Trusts. A contrary view is taken by Judge Wilfley in a case recently decided. [*In re* Allen's Will, United States Court for China, Shanghai Term, August 16, 1907. Pamphlet (not officially reported).]

The increasing number of persons of British and American nationality permanently residing in the Orient makes the question one of considerable practical importance. The English view, it is submitted, is based on erroneous conceptions of domicile and exterritoriality. It is supported by the authority of a single case, has been vigorously attacked, and may yet be repudiated by courts not bound by the precedent.

Mr. Huberich prefers the latter view. He says in summing up:

"The acquisition of a domicile in a country granting exterritorial privileges is governed by the same principles of law as the acquisition of a domicile in other countries. Where the requisite *factum* and *animus* are shown to exist there is no valid reason why an Englishman or an American should not be held to acquire a domicile in China. In respect of all matters which private international law refers to the law of the domicile he would be governed by the Chinese law, the law of the territorial sovereign. The law to which he would be subject would be none the less the law of China because it provides that persons of British and American nationality shall be governed by such laws as their respective countries may enact to govern their nationals in China. The legislative power of China extends to all persons and things within the territorial limits of the Empire; the British Parliament in legislating for British nationals in China acts merely under a delegation of authority. Such laws are operative within the territory of China only because China recognizes them as part of the law of the land. The Chinese law subjects certain persons owing allegiance to a foreign government to rules of law which may differ from those that are applied to persons of Chinese nationality, just as the common law subjects certain transactions having their origin in foreign countries to rules of law which may differ from those that are applied to transactions taking place in the forum. Nor is the principle affected by the circumstance that this law is administered by officials appointed by a foreign government.

"It follows from these principles that if the so-called exterritorial privileges are withdrawn by the territorial sovereign, even in violation of treaties, the domicile acquired in such country would continue, the persons remaining subject to such rules of law as the state of their domicile makes applicable to them. It follows further that a change in the nationality of a person domiciled in a country granting exterritorial privileges may involve a considerable change in the applicatory law governing matters subject to the law of domicile."

Constitutional Law (Right to Discharge Servant at Will). "The Adair Case," by Charles R. Darling. *American Law Review* (vol. xlii, p. 884).

Arguing in favor of the decision of the United States Supreme Court that a law forbidding a carrier from discriminating against a workman because of his membership in a labor union is unconstitutional. The author says, however, in conclusion:

"The labor men have no just ground for finding fault with the decision in the Adair case, but they may pertinently ask whether the logic of that decision does not require the courts to say that any strike for any reason is lawful."

Criminal Law (Responsibility). "The Case of Marie Jeanneret," by Charles F.

Folsom, M.D. *American Law Review* (vol. xlii, p. 801).

A study by a distinguished physician, now dead, of several cases of abnormal criminals, especially that of Marie Jeanneret, a French nurse who committed eleven poisonings and six murders. Others mentioned are Jesse Pomeroy, whom Dr. Folsom thought responsible, "Slugger" Perry, John Wilkes Booth, Guiteau and Czolgolz.

Extracts follow:—

"The real question at issue was, in each case, whether there was any mental quality or lack of quality which inhibited a reasonable self-control and which was due to brain defect or disease of the mind.

"Authority and precedent, which at least among English speaking people aim to voice the common law and common sense, in the main have held such people responsible for their criminal motives and acts; and they are supported thus far by the predominating weight of expert medical opinion, although individual views differ regarding them. There is another class of individuals . . . in whom there is no evidence of irresponsibility outside of their criminal acts, and none indicated or suspected before them, where the question of insanity lies in the answer to the inquiry whether or how far there is in the crimes themselves inherent evidence of mental unsoundness.

" . . . I should like to propose . . . an amendment to our laws so that the punishment for murder in the first degree shall be death or imprisonment for life, at the discretion and judgment of the jury, with such instructions as the courts may give them—thereby following the precedent of the recent change in the United States law, even if not quite attaining to the admirable provisions of the French code.

"If we could at the same time eliminate from our nosology and more particularly from our jurisprudence the term 'moral insanity,' we should confer a boon on the medical profession and the world at large like that which came from abolishing Jonathan Edwards's 'original sin.' "

Copyright (England). "The Origin and Growth of Copyright," by W. F. Wyndham Brown. *Law Magazine and Review* (vol. xxxiv, p. 54).

A history of English copyright legislation.

Criminal Law. "Ignorance and Mistake in the Criminal Law," by Edwin R. Keedy. *Harvard Law Review* (vol. xxii, p. 75).

"*Ignorantia juris non excusat, ignorantia facti excusat* is a maxim familiar to the layman as well as to the lawyer. The purpose of this article is to discuss the origin of this maxim; to consider the scope of its influence in criminal jurisprudence; to discover the extent to which the decisions referring to it are founded upon general principles; and finally to determine what is the state of the law today regarding *ignorantia juris* and *ignorantia facti* as defenses to criminal prosecutions."

Debtors' Act (England). "Defects of the Debtors' Act," by "Appellant." *Law Magazine and Review* (vol. xxxiv, p. 17).

Deceased Wife's Sister Act (England). "Communicants and the Deceased Wife's Sister Act, 1907," by G. A. Ring. *Law Magazine and Review* (vol. xxxiv, p. 66).

Comments upon judicial and ecclesiastical interpretation of the act.

Evidence (Prior Accidents). "A Point of Evidence in Colorado," by Arthur March Brown. *American Law Review* (vol. xlii, p. 834).

In the case of Diamond Rubber Co. *v.* Harryman (Colo.), 92 Pac. 922, the Colorado Supreme Court in a suit for personal injuries received by tripping over a pipe projecting above the surface of a sidewalk, excluded evidence that other persons had tripped over the same pipe. This was contrary to a former opinion of the same court and to the great weight of authority in this country. Massachusetts and a few other states are in accord with the later decision and even Massachusetts admits such evidence in cases of injuries caused by shying or frightened horses and Chief Justice Knowlton expresses in a horse-shying case doubt of the wisdom of his state's general policy. After stating the rules of the different jurisdictions the author says:

"Can the argument of the minority be held to prevail over the great weight of judicial authority to the effect that evidence of

prior accidents leads reasonably and legitimately to an inference as to the conditions causing the accident in question, that such happenings are in the nature of an experimental use of the instrumentality under consideration, and that they tend to bring home to the responsible parties knowledge of the existing conditions? Against this there is only the contention that such evidence confuses the minds of jurymen with collateral issues, and tends to delay trials. It is difficult to see, however, why jurymen cannot be trusted with such evidence in the court room, when it is precisely the kind they would give weight to in their ordinary affairs —the experience of others under similar circumstances. As to delaying trials, that is not a light charge, in these days of overworked courts; but, after all, the courts exist, not to expedite business, but to do justice and to ascertain truth. Where so many able minds have recorded their conviction that this is a class of evidence which helps us to get at the truth, shall a court lean towards the side of exclusion rather than admission?"

Equity (Conversion). "The Inconsistencies of the Doctrine of Equitable Conversion," by Walter J. Hart. *Law Quarterly Review* (vol. xxiv, p. 403).

Consideration of the cases on contracts for sale or purchase and trusts for sale or purchase leads the author to the conclusion that the decisions cannot be reconciled with any consistent principle and the result is that the student must commit to memory a long series of complicated rules which are merely arbitrary.

Future Interests (Personalty). "Interests for Life and Quasi-Remainders in Chattels Personal," by David T. Oliver. *Law Qu. Review* (vol. xxiv, p. 431).

The survey of the cases leads the author "to the conclusion that the doctrine of the modern textbooks that all ulterior interests in personalty are executory is erroneous, and that in the case of a gift of personal chattels to *A* for life and then to *B*, in a will (and, perhaps, in a deed also), *A* is to be regarded as a usufructuary and the property vests at once in *B*."

Government (Direct Legislation). "Some Experiments in Direct Legislation," by Robert Treat Platt. *Yale Law Journal* (vol. xviii, p. 40).

Commenting on the working of the Oregon system of initiative and referendum.

History (England). "The House of Lords," by C. R. A. Howden. *Juridical Review* (vol. xx, p. 247).

Third in a series of articles on the history and constitution of the House of Lords.

Income Tax (England). "The Assessment of Public Bodies for Income Tax," by E. J. Moore. *Law Magazine and Review* (vol. xxxiv, p. 26).

International Law. "History of Contraband of War. II," by H. J. Randall. *Law Quarterly Review* (vol. xxiv, p. 449).

Second and final instalment of a valuable historical article.

Judgments (Foreign). "The Law of Foreign Judgments with Special Reference to Default Judgments of English and Colonial Courts *Inter Se*," by C. C. McCaul, K. C. *Law Quarterly Review* (vol. xxiv, p. 412).

Jurisprudence (Corporations). "The Juristic Person. I," by George F. Deiser. *University of Pennsylvania Law Review and American Law Register* (vol. lvii, p. 131).

An attempt to determine the nature of the person, being or group, through which the will of the collection of members of the corporation finds expression. The problem is defined as follows:

"Corporations, under existing legal systems, for judicial or legislative purposes are regarded in two ways:

"I. The corporation is a fictitious person or entity (as in England and the United States).

"II. The corporation is a real person (as in Germany, France, Spain, and some other continental countries).

"The problems arising under both of these attitudes are these:

"A. Does the corporation as a group or unit possess rights and owe duties?

"B. Has the corporation as a group or unit criminal or moral responsibility?

"C. What is the nature of the shareholders' interest?

"If again, we examine the nature of corporate existence with reference to proffered solutions, we shall find again that the corporation is a fictitious person, or a real person, or a form of co-ownership, or a form of agency or action by representation. It remains to consider these views with reference to the extent to which they resolve the problem."

Jurisprudence (Hungary). "Hungarian Law," by F. Nagg: *Law Magazine and Review* (vol. xxxiv, p. 1).

Address given at Budapest, September 22, 1908, at the 25th conference of the International Law Association.

Jurisprudence (Early Development of Equity). "Reason and Conscience in Sixteenth-Century Jurisprudence," by Paul Vinogradoff. *Law Quarterly Review* (vol. xxiv, p. 373).

Interesting analysis of St. Germain's Doctor and Student as showing "what a stimulating influence was exerted on the English jurisprudence of the fifteenth and sixteenth centuries by the later Schoolmen and canon lawyers. Henry VIII and the Reformation put an end to canon law in England, but the process described by St. Germain had not taken place in vain; it left distinct traces on the theory and jurisdiction of English equity."

Jurisprudence. "Law and Morals," by James Barr Ames. *Harvard Law Review* (vol. xxii, p. 97).

"Primitive law," says Professor Ames, "regards the word and the act of the individual; it searches not his heart. 'The thought of man shall not be tried,' said Chief Justice Brian, one of the best mediæval lawyers, 'for the devil himself knoweth not the thought of man.' As a consequence, early law is formal and immoral."

Dean Ames sets out to see if this is true of the English common law. He finds that it was in the early days but he also finds and gives many instances to show that it has progressed much in this respect. The work, however, is not done.

"It is obvious that the spirit of reform which during the last six hundred years has been bringing our system of law more and more into harmony with moral principles has not yet achieved its purpose. It is worth while to realize the great ethical advance of the English law in the past, if only as an encouragement to effort for future improvement. In this work for the future there is an admirable field for the law professor. The professor has, while the judge and the practising lawyer have not, the time for systematic and comprehensive study, and for becoming familiar with the decisions and legislation of other countries. This systematic study and the knowledge of what is going on in other countries are indispensable if we would make one system of law the best possible instrument of justice. The training of students must always be the chief object of the law school, but this work should be supplemented by solid contributions of their profession to the improvement of the law."

Jurisprudence (Danger from Science). "Mechanical Jurisprudence," by Roscoe Pound. *Columbia Law Review* (vol. viii, p. 605).

A strong and interesting paper on the present condition of our law, which Mr. Pound regards as too mechanical.

"Two dangers have to be guarded against in a scientific legal system, one of them in the direction of the effect of its scientific and artificial character upon the public, the other in the direction of its effect upon the courts and the legal profession. With respect to the first danger, it is well to remember that law must not become too scientific for the people to appreciate its workings. . . . It must not become so completely artificial that the public is led to regard it as wholly arbitrary. No institution can stand upon such a basis to-day. Reverence for institutions of the past will not preserve, of itself, an institution that touches everyday life as profoundly as does the law. Legal theory can no more stand as a sacred tradition in the modern world than can political theory. It has been one of the great merits of English law that its votaries have always borne this in mind. When Lord Esher said, 'the law of England is not a science,' he meant to protest against a pseudo-science of technical rules existing for their own sake and subserving supposed ends of science, while defeating justice. And it is the importance of the rôle of jurors in tempering the administration of justice with common sense and preserving a due connection of the rules

governing everyday relations with everyday needs of ordinary men that has atoned for the manifold and conspicuous defects of trial by jury and is keeping it alive. In Germany today one of the problems of law reform is how to achieve a similar tempering of the justice administered by highly trained specialists.

"In the other direction, the effect of a scientific legal system upon the courts and upon the legal profession is more subtle and far-reaching. The effect of all system is apt to be petrifaction of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. . . . . .

"That our case law at its maturity has acquired the sterility of a fully developed system, may be shown by abundant examples of its failure to respond to vital needs of present-day life. Its inadequacy to deal with employers' liability; the failure of the theory of 'general jurisprudence' of the Supreme Court of the United States to give us a uniform commercial law; the failure of American courts, with centuries of discussion before them, to work out a reasonable or certain law of future interests in land; the breakdown of the common law in the matter of discrimination by public service companies because of inability to make procedure enforce its doctrines and rules; its breakdown in the attempt to adjust water rights in our newer states, where there was opportunity for free development; its inability to hold promoters to their duty and to protect the interests of those who invest in corporate enterprises against mismanagement and breach of trust; its failure to work out a scheme of responsibility that will hold legal entities, or those who hide behind their skirts, to their duty to the public—all these failures, and many more might be adduced, speak for themselves. But compare these failures with the great achievements of the youth of our case-law, with Lord Mansfield's development of a law of quasi-contracts from the fictions of the common counts, with Lord Mansfield's development of mercantile law by judicial decision, with Kent's working out of equity for America from a handful of English decisions, with Marshall's work in giving us a living Constitution by judicial interpretation. Now and then, at present, we see vigorous life in remote corners of our case law, as, for instance, in the newer decisions as to surface and underground waters. But judicial revolt from mechanical methods to-day is more likely to take the form of 'officious kindness' and flabby equitable application of law. Our judge-made law is losing its vitality, and it is a normal phenomenon that it should do so."

Mr. Pound sees the remedy only in legislation, and calls on common-lawyers to abandon their traditional attitude toward legislation and to make it what it should be.

Jurisprudence. "The Basis of Law," by John Mahon. *American Law Review* (vol. xlii, p. 872).

A discussion of the two traditional attitudes of jurists toward law: That, on the one hand, it is an absolute science; on the other, that its basis in the last resort is expediency.

The former attitude tends to promote stability of legal rules, but fails to afford complete justice in individual instances; the second, to provide adequately "for individual cases and arising contingencies," but where indiscriminately adhered to, it creates a menacing instability—substituting individual opinions for the wisdom of the past. The author discusses many instances of the effect of the two views.

Legal History (England). "Two Problems in Legal History," by W. C. Bolland. *Law Quarterly Review* (vol. xxiv, p. 392).

A discussion of these two questions: How and when did the courts begin to recognize the qualifications of a Barrister of the Inn to practise before them? And why did the appellation of Barrister entirely supersede that of Apprentice?

Literature. "The Law and Lawyers of Pickwick," by John Marshall Gest. *University of Pennsylvania Law Review and American Law Register* (vol. lvii, p. 143).

Monopolies (Anti-Trust Act and Common Law). "The Federal Anti-Trust Act and Minority Holdings of the Shares of Railroads by Competing Com-

panies," by G. Carroll Todd. *Harvard Law Review* (vol. xxii, p. 114).

Mr. Todd contends that it is a violation of the Anti-Trust Act, because destructive of competition and promotive of monopoly, for one of two competing railroads to acquire any shares whatever of the other. This was the common law, which Congress has made, "with widened scope, the very law of the United States."

Practice. "The Delays of the Law," by William Howard Taft. *Yale Law Journal* (vol. xviii, p. 28).

President-elect Taft's address before the Virginia Bar Association, August 6, 1908.

Railroad Regulation. "Railroads: National *vs.* State Control," by Hiram Glass. *American Law Review* (vol. xlii, p. 848).

Starting with the premise "that the country is now thoroughly committed to the policy of control and regulation of railroad rates through the instrumentality of commissions created for that purpose," the author thinks the question has become this: Which commission, state or national? In this article which was read before the Texas State Bar Association, July 7, 1908, Mr. Glass takes the ground that only national control will give effective supervision. State control means endless confusion and complexity, of which he gives illustrations, due to differences between state laws. "The railroads are, in fact, national in scope and character, and why should they not be so recognized by law?"

Rate Regulation. "Commutation Tickets and Rate Regulation," by Borden D. Whiting. *Columbia Law Review* (vol. viii, p. 636).

Arguing that even under the apparently sweeping power of ratemaking given by the Hepburn bill the Interstate Commerce Commission is under certain limitations, notably in the case of commutation tickets. The position is taken that a carrier may arbitrarily increase or cut off such rates. The author bases this on the decision of the commission in Sprigg *v.* Baltimore & Ohio R. R. Co. (1900), 1 I. C. C. Rep. 443, which says, "We could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class." This conclusion is supported by Lake Shore & M. S. R. *v.* Smith (1899), 173 U. S. 684. Subsequent cases to the same effect are also cited.

Suretyship (Rights of Surety). "The Cancellation of Depository Bonds," by Luther E. Mackall. *American Law Review* (vol. xlii, p. 820).

"During the financial panic of October, 1907, after a number of banks and trust companies in New York and elsewhere had closed their doors, . . . several of the surety companies, having on their books some depository bonds, without provision for cancellation, on banks of doubtful financial strength, began to send telegrams broadcast over the country demanding that the respective obligees withdraw all funds covered by the bonds, and notifying them that unless they did so the surety would not be liable in case of the subsequent insolvency of the depository.

"This is believed to have been the first attempt to cancel depository bonds in this manner, it having been generally supposed that unless a depository bond contained a provision for cancellation or there was some statutory provision therefor, the liability continued until the obligee saw fit to withdraw the funds, or until the bond expired by its own limitation. . . .

"Inasmuch as the right to cancel a depository bond is one of the important elements in determining its desirability as a risk, it is evident that the correct solution of this question is important to surety companies."

Mr. Mackall examines the question in the light of the legal and equitable rules of suretyship; his analysis would require too much space for this department. His conclusion, however, is that on the whole—

"The power of a surety on a depository bond to cancel it, without a provision to that effect in the bond, is so questionable that it would be unwise for surety companies to write such bonds on the assumption that they can be thus canceled."

Waste. "Liability for Waste. II," by George W. Kirchwey. *Columbia Law Review* (vol. vii, p. 624).

This concluding article deals with the history and present state of the modern English doctrine on the subject.

*Notes of Cases**

ALIENS. (Naturalization denied to married woman.) U. S. D. C.—Harriet Rionda, born in Great Britain, married to a Spanish subject, dwelling in this country, applied for naturalization. The United States District Court in *In re Rionda*, 164 Fed. Rep. 368, held that as the Federal statute provides that an American woman who marries a foreigner loses her citizenship during the marital relation, it was difficult to see how a foreign-born married woman was in a position to acquire the rights given by naturalization. The application was denied.

BANKRUPTCY. (Musicians are servants entitled to priority for wages.) U. S. D. C.—The bankrupt in the case *In re Caldwell*, 164 Fed. Rep. 515, had operated a roof garden. Petitioners, who were musicians, for a period of three months had been drawing soft seductive melodies from their instruments, but in that time had been unable to draw anything from the proprietor. They claimed to be servants within the meaning of the Federal Bankruptcy Act, entitling them to priority of payment of their wages. The United States District Court held that a musician, employed by the month at regular wages, while not a "menial servant," is still one within the Bankruptcy statute.

BASTARDS. (Legitimation of by father married to woman not the mother.) Okl.—The father of an illegitimate child married a woman other than the mother, and sought to legitimize the child by adopting it into his family. To this arrangement the mother objected, asserting that she was entitled to the custody of her illegitimate child. Both parties appeared to be able to care for the child. In *Allison et al.* v. *Bryan*, 97 Pac. Rep. 282, the Supreme Court of Oklahoma held that the primary question was the preparation of the infant to confront the world in his later life. If he remained by his mother's side the circumstances of his birth would be a blighting handicap to him, for which his mother's care would constitute no antidote. If he remained in his father's house he should be surrounded by conditions which would relieve him entirely of stigma, and give him a standing and a place in society. Even though the mother objects, the father is entitled to the child's custody for the purpose of legitimation.

BILLS AND NOTES. (Presentation of note over telephone.) N. Y. Sup. Ct.—The Negotiable Instruments Law of New York requires an instrument to be exhibited to the person from whom payment is demanded. In *Gilpin* v. *Savage*, 112 New York Supplement 802, it appeared that a clerk of indorsee, a bank, called up the maker on the telephone and requested payment. Upon the maker's statement of his inability to pay he was informed that the note would be protested. An indorser who was sought to be held contended that there was no presentation to the maker within the fair meaning of the statute. The Supreme Court of New York held that although the maker had a right to insist on the exhibition of the note to him he waived it by declining to pay on another ground. For every purpose the talk over the telephone was as effective as though the conversation had been within the walls of the house.

CARRIERS. (Rebates to Standard Oil Co.) U. S. C. C.—In *Standard Oil Company of Indiana* v. *U. S.*, 164 Fed. Rep. 376, the corporation was indicted for receiving concessions from a carrier. It appeared that defendant's capital stock was $1,000,000, and its assets were not in excess of that sum. The majority of its capital stock was held by the Standard Oil Company of New Jersey, whose capital stock was $100,000,000. The latter was a holding company. The offense was committed by transporting oil in 1642 cars under the illegal rate. In the indictment and upon sentence, the use of each car was dealt with as a separate offense. Attaching the maximum penalty, the fine aggregated $29,400,000. The United States Circuit Court of Appeals, however, held that the offense

* Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

consisted of the receipt of the concession and constituted a single transaction. It was apparent that the holding company was the real quarry, the plan being to encompass the punishment of the octopus through the financial correction of the tenacle. Although the fine was only one-third the net revenue of the holding company, it was excessive when assessed against the Indiana corporation, and would bankrupt it. The court having no jurisdiction of the New Jersey corporation, which had not even been indicated, it was fine-proof.

COLLEGES AND UNIVERSITIES. (Co-education of races.) U. S. Sup. Ct.—The Supreme Court of the United States has just affirmed a conviction of Berea College in *Berea College* v. *Commonwealth of Kentucky*, 29 Sup. Ct. Rep. 33, of the offense of teaching white and negro pupils in the same institution. The corporation was sentenced to a $1,000 fine under Ky. Acts 1904, c. 85, p. 181, making it unlawful for any person, corporation or association of persons to maintain or operate any college or institution where persons of the white and negro races are both received as pupils for instruction. Berea College was organized under Act March 9, 1854, authorizing the incorporation of voluntary associations, which was amended in 1856 by reserving to the general assembly the right to alter or repeal the charter of any association formed thereunder. The principal discussion in the case is based on the question whether the statute was a valid amendment of the charter of the institution.

In construing the statute, the Kentucky Court of Appeals held that if the same school taught the different races at different times, though at the same place, it would not be unlawful. The Supreme Court in disposing of the question as to the amendment says that an amendment to the original charter which does not destroy the power of the college to furnish education to all persons, but which simply separates them by time or place of instruction, cannot be said to "defeat or substantially impair the object of the grant." The language of the statute is not in terms an amendment, yet its effect is an amendment, and it would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated. The act itself, being separable, is to be read as though it, in one section, prohibited any person, in another section any corporation, and, in a third, any association of persons from doing the acts named. Reading the statute as containing a separate prohibition on all corporations, it substantially declares that any authority given by previous charters to instruct the two races at the same time and in the same place is forbidden, and that prohibition, being a departure from the terms of the original charter in this case, may properly be adjudged an amendment.

NOTE

This case has been greatly misinterpreted and misrepresented by the daily press. "Who would have dreamed forty years ago, that the Supreme Court of the United States would make it illegal to teach colored children and white children under the same roof?" asks one Northern paper, and similar questions have been found everywhere in the editorial comment. The real fact is, that the Supreme Court of the Nation has not made anything legal or illegal. It has merely followed its usual custom and refused to interfere with a state police regulation which has met with the approval of the state courts and of the state legislature. The segregation of the white and colored races has been everywhere judicially defended and sustained as a proper police policy directed toward the end, not merely of preventing race conflict, but (to use the language of the Supreme Court of Pennsylvania, in the case of *Westchester R. R. Co.* v. *Miles*, 55 Pa. State 209) to prevent the social amalgamation from which "it is but a step to illicit intercourse and but another to intermarriage," and which "cannot but prove detrimental to both races." The policy of segregation is, in fact, of Northern and not of Southern origin. It certainly prevailed in Boston at the beginning of the last century. It was sustained by the Supreme Court of Massachusetts in 1849, in the case of *Roberts* v. *The City of Boston*, 5 Cush. 198, and by the Supreme Court of Pennsylvania in 1857, in the case of *Westchester R. R. Co.* v. *Lyons*, *supra*. Every subsequent case has merely followed the reasoning of these decisions. Nor can the fact that Berea College is a private institution throw this particular case outside of the line of authority. If the public policy of the state is against the intermarriage of the races and is afraid that intimacy will lead not only to this, but to

illicit relationships, the harm would be just as likely to occur and the public policy to be violated in a private, as in a public institution. Neither does the charter of the corporation present any new element. It has been thoroughly settled that no legislature can barter away the police powers of its successors. It is also to be remembered that the restrictions of the Kentucky statutes apply to white persons as well as to black, and that the white child is as much precluded from entering the classroom of the black, as is the black from entering that of the white.

ANDREW A. BRUCE.

COMMERCE. (Federal regulation of interstate commerce.)—Under the Safety Appliance Act, penalties were sought to be recovered against a carrier for moving a car, with a faulty coupling device, between two points within the state of Alabama. In *United States* v. *Southern Ry. Co.*, 164 Fed. Rep. 347, defendant asserted that the act in question was invalid as it enabled Congress, under the guise of regulating commerce among the several states, to regulate the instrumentalities of railroads used in carrying on interstate commerce, irrespective of whether the instrumentality was at the time of such use engaged in interstate commerce. The United States District Court upheld the validity of the statute and concluded that its provisions extended to transportation between points in the same state of a vehicle belonging to a carrier, regularly engaged in interstate commerce.

CONSTITUTIONAL LAW. (Carriage of their own product by railroads.) U. S. C. C.—Several carriers were prosecuted for violating the interstate commerce act, forbidding railroads carrying anything except timber produced from their own property, by carrying coal from their own mines. In *U. S.* v. *Delaware & H. Company*, 164 Fed. Rep. 215, the government contended that Congress was authorized to enact this law in pursuance of its power to regulate commerce. It appeared that some of the carriers, long prior to the passage of the act in question, had been granted charters, which entitled them to carry their own coal; that it could not be practically transported over other lines; that if they were restrained from carrying it the people without the state dependent on their anthracite coal for domestic purposes would be subjected to great suffering and deprivation; and that the property of the carriers would be greatly depreciated in value. The United States Circuit Court held that this provision was void as inimical to that article of the Constitution providing that no person shall be deprived of life, liberty, or property without due process of law. It is not a regulation of commerce, but entirely excludes from such commerce a certain class of persons and a useful subject thereof.

CONSTITUTIONAL LAW. (Self-incrimination.) U. S. Sup. Ct.—The question whether the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States, which the Fourteenth Amendment forbids the states to abridge, is considered in *Twining* v. *State of New Jersey*, 29 Sup. Ct. Rep. 14. Twining and another, as officers of a trust company, were convicted of having knowingly exhibited a false paper to a bank examiner, with intent to deceive.

The paper was referred to in the indictment, and in the course of the trial defendant called no witnesses and did not testify himself, though the New Jersey law gave him the right to do so, if he chose. The jury were instructed that they might draw an unfavorable inference against him from his failure to testify, where it was within his power, in denial of the evidence which tended to incriminate him. The law of New Jersey permitted such an inference to be drawn. The general question was whether such a law violated the Fourteenth Amendment by abridging the privileges or immunities of citizens of the United States. The court stated in the outset that it was incumbent on defendant to prove that the exemption from compulsory self-incrimination was guaranteed by the Federal Constitution against impairment by the states. After a clear and logical discussion and review of former opinions of the court, the conclusion is reached that such exemption was not one of the fundamental rights of national citizenship, so as to be included among the privileges and immunities of citizens of the United States.

CONSTITUTIONAL LAW. (Statute prohibiting traffic in game.) U. S. S. C.—The constitutionality of the New York statute providing that grouse and plover shall not be possessed during the close season, whether killed within or without the state, was attacked in *New York ex rel. Silz* v. *Hesterberg*, 29 Sup. Ct. Rep. 10. It appeared that relator, a dealer in imported game, had in his possession two birds, one of each of the species

mentioned. They were unlike the native birds of their family, and were easily distinguishable both before and after culinary attention. It was contended that while the protection of the game supply was within the police power of a state, the law in question was an unreasonable exercise thereof; that it was an unconstitutional regulation of foreign commerce; that it denied due process of law. The United States Supreme Court held that a state had the power to make a law that would remove from its dealers the temptation to traffic in native game by also prohibiting them from handling foreign birds, and that the statute was not unconstitutional.

CONTRACTS. (Patent ambiguities.) Mo. App.—The effect of a patent ambiguity in a lease is considered in *Conservative Realty Co.* v. *St. Louis Brewing Association*, 113 S. W. Rep. 229. The lease bound the lessor not to lease to another saloon in the block, and if said saloon license could not be secured on the premises, the lease should be void on ninety days' notice. No particular license had been mentioned, nor had the word "license" been used before in the instrument. The lessor contended that the stipulation meant that only in the event a single license for six months could not be procured, the lessee might end the term by giving the notice, whereas the lessee contended that if at any time during the five-year term a license could not be procured, he might surrender. The court says that, according to the old law, the patent ambiguity of the clause might make the stipulation void; but this doctrine is no longer enforced as strictly as formerly, and, whether an ambiguity is patent or latent, a court will endeavor to glean the intention of the parties from the whole instrument and the instances attendant on its execution. Taking into account the law regarding saloon licenses, and the purpose for which the premises were taken by defendant, no doubt the intention of the parties was to make the existence of the lease contingent on the ability of defendant to procure from time to time a license; that is to say, defendant was accorded the privilege of ending the term on ninety days' notice whenever it became impossible to obtain a license.

NOTE

It is a great pleasure to record one more case against the common statement that latent ambiguities may be explained by parol evidence but that patent ambiguities may not be. Parsons' discussion of the matter to which the court refers is good. Consult also an excellent essay by Professor Charles A. Graves printed in 28 Amer. Law Rev. 321. The Hibernian statement that the only ambiguities that cannot be cured by extrinsic or parol evidence are the incurable ones is no doubt the law. The sooner the alleged distinction between latent and patent ambiguities is forgotten the better. It does not exist. In fact, it never did exist. Thayer, Preliminary Treatise on Evidence, 422-426, 471-474.

CONTRACTS. (Release of promise of marriage.) Cal.—A contract to support plaintiff in consideration of her releasing defendant from a promise of marriage is considered in *Henderson* v. *Spratten*, 98 Pac. Rep. 14. It appears that the parties cohabited after defendant's promise to marry plaintiff, and at his instance and request she submitted to severe surgical operations, causing her serious injuries and unfitting her to marry and to perform domestic and wifely duties. In consideration of a subsequent agreement by plaintiff to release defendant from his promise of marriage he agreed to take care of her and support her as long as she suffered from her injuries. Defendant made payments on account of the contract even after the subsequent marriage and divorce of plaintiff. His claim was mainly that there was no consideration for the contract and that there could be no novation of a void contract.

In discussing this phase of the case the court says: These positions are based upon the ground that the contract of marriage was illegal and void because based upon an illegal consideration, but the testimony does not bear out the defendant's contention that the contract of marriage was based upon an illegal consideration. The testimony of the plaintiff shows that there were no illicit relations between her and the defendant until a long time after the defendant had promised to marry the plaintiff. Then, when the plaintiff agreed to release the defendant from the promise of marriage in consideration of his agreement to support and maintain her, and provide her with medical attendance, she was not substituting a valid contract for a void one, but she was making a legal contract and releasing the defendant from a legal contract; and the law authorizes and allows contracts of this character to be made, and, when

so made, the substituted contract will be enforced.

CRIMINAL LAW. (Misconduct of counsel.) S. D.—In *State* v. *Kaufman*, 118 N. W. Rep. 337, that case which has been so glaringly presented by the press, Emma Kaufman, having been convicted of manslaughter, appealed from an order denying a new trial. Many errors were set forth, the most apparent of these being the conduct of the prosecuting attorney. His efforts to convict led him into asking witnesses improper questions and arguing for their propriety, thus calling them to the attention of the jury. Frequent impassioned, sensational appeals made to the jury and sometimes to the onlookers characterized his address, which was abusive in the extreme. To further arouse his thoroughly excited auditors he referred to the residence of accused as palatial. The Supreme Court of South Dakota reversed the order refusing a new trial, remarking that even had accused dwelt in a palace, she was entitled to the same presumption of innocence as if she had lived in a hovel. To sustain the conviction, it concluded, upon the record before us, would mean the approval of methods of procedure inevitably subversive of the most sacred constitutional rights, it would encourage—where no encouragement it needed—disregard of universally recognized professional obligations, and ultimately render the administration of justice in this jurisdiction a disgrace to American civilization.

CRIMINAL LAW. (Sentence for crime no bar to trial for another offense.) Ct. App. Ga.—One Coleman, while under sentence of twelve months to the chain gang for assault with intent to murder, was convicted of the disturbance of public asemblage. It appeared that he had snatched a would-be preacher from the pulpit, telling him that if he attempted to preach he would give him the worst whipping a man ever got. He was duly convicted. In *Coleman* v. *State*, 62 Southeastern Reporter 487, plaintiff in error denied the jurisdiction of the city court, alleging that at the time of his conviction of disturbing public assemblage he was under sentence of a superior court on another charge. The Court of Appeals of Georgia held that the former conviction did not present a bar to his trial for misdemeanor before the city court.

DISTURBANCE OF PUBLIC ASSEMBLAGE. (Interruption of sermon by rival preacher.) Ct. App. Ga.—In the case of *Woodall* v. *State*, 62 Southeastern Reporter 485, it appeared that defendant, a negro preacher, had been indicted for the disturbance of a congregation assembled for divine worship. The evidence showed that defendant, to keep the ears of his flock unsullied by doubtful doctrines of a rival minister, arose, interrupted and himself began an harangue. No force or violence was indulged in. The Court of Appeals of Georgia held that as the purpose of defendant was to carry on divine worship, and not to prevent it, he was not guilty. It remarked also that it is beyond the power of the courts to settle by criminal prosecutions the respective rights of contesting claimants to a benefice, even in a negro church.

EVIDENCE. (Admissibility of telephone communication.) Ct. App. Ky.—Just after a man had been fatally stabbed, some one giving the name of appellant called up a doctor telling him that the man slain required attention, and adding that he had stabbed him. It appeared that no other communication had been received by the doctor relative to the affair and that appellant had stated to another that he had telephoned to the doctor. In *Chapman* v. *Commonwealth*, 112 S. W. Rep. 567, the Court of Appeals of Kentucky held the conversation admissible in evidence.

EVIDENCE. (Judicial notice of football season.) Iowa.—Appellant in *Sieberts* v. *Spangler*, 118 N. W. Rep. 292, was employed as assistant manager of a football team for the season of 1903. Appellant contended that as the contract fixed no date for payment of the agreed sum the court could not arbitrarily name the date (December 1) at which interest could begin to accrue. The Supreme Court of Iowa remarked that it was a matter of common observation, of which the court may take notice, that while the remainder of the year in our great American institutions of learning may be religiously devoted to the study of football, the "season" proper, in which academic investigation gives place to the applied science, begins with the first frost, and ends very appropriately with the day of general Thanksgiving.

GARNISHMENT. (Stenographer is laborer.) Ct. App. Ga.—The case of *Cohen* v. *Aldrich*, 62 S. E. Rep. 1015, arose from the garnishment of $35 of the salary of a stenographer by a person named Cohen. The

defendant claimed an exemption, asserting that his employment was labor. The Court of Appeals of Georgia held that even though proficiency in stenography was the reward of steady practice and experience, the stenographer exercises no discretion. If his employer indulges in the pastime of murdering the king's English, he must become *particeps criminis* and join in the assassination. No one who has gone through that backbreaking ordeal will hesitate to range it in the category of hard physical labor. A stenographer is entitled to a laborer's wage exemption.

HOMICIDE. (Justifiable killing of pursuer.) Ct. App. Ga.—A negro woman complained to the police that defendant, also a negro, had cursed her. Without having secured a warrant an officer went to defendant's residence and having stated the purpose of his visit attempted to arrest him. Other officers had arrived and a crowd had assembled when defendant, seizing a shot-gun, broke away and fled. He was shot at by the officers, sustaining several wounds. The crowd was yelling "shoot him," "kill him." One of them joined in the pursuit, running ahead of the officers. Defendant wheeled, shot and killed the pursuing citizen. In *Holmes* v. *State*, 62 Southeastern Reporter 716, the Court of Appeals of Georgia held that even had the officer been provided with a warrant, shooting at one accused of a misdemeanor was unauthorized. The facts were sufficient to justify the fear of a reasonable man that his life was threatened, and the killing was justifiable homicide.

INSURANCE. (Hunting deer for pleasure as engaging in act of professional hunter.) Ct. Civ. App. Tex.—One Lane insured himself as a "sheep farmer," agreeing that, if he were injured while doing any act pertaining to a more hazardous occupation, he was to receive the indemnity fixed for the latter. The Court of Civil Appeals of Texas, in *Lane* v. *General Accident Ins. Co.*, 113 S. W. Rep. 324, held that insured, who was accidentally shot by a companion while hunting deer for recreation, was entitled only to the indemnity fixed for a professional hunter. The court remarked that pursuing wild deer for the purpose of killing them was undoubtedly an act pertaining to the occupation of a hunter.

INSURANCE. (Liability of insurer for fires caused by earthquakes.) U. S. C. C.—The property of the insured was consumed in a general conflagration in San Francisco which had its origin in the earthquake of 1906. The fire was started at several points in the city and spread to the insured property. The policy provided that the company should not be liable for loss caused directly or indirectly by invasion . . . or for loss or damage occasioned by or through any earthquakes. In *Williamsburgh City Fire Ins. Co.* v. *Willard*, 164 Fed. Rep. 404, the United States Circuit Court of Appeals held that although the words "directly or indirectly" applied to invasions, they could not be made to embrace earthquakes; "occasioned" was equivalent to "caused"; the phrase "by or through" was a mere repetition of words, meaning the same thing; a loss indirectly caused by the progress of a fire from a distance, originally started by an earthquake, was without the exemption.

NOTE

The Civil Code of California contains the following provision:

"When a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss was a peril which was not excepted" (§ 2628).

The policy here specially excepted loss or damage "occasioned by or through earthquakes." The fire was communicated to the insured premises in the general conflagration which was originally started and caused directly by earthquake. It would therefore seem to make no difference whether we think that the peril specially excepted was earthquakes generally, or was fire caused by earthquakes, or was, as the court here holds, loss by fire caused directly by earthquakes. Whichever way we define the excepted peril, it is obvious that the loss would not have occurred *but for* such peril, and under the code section that is the sole test. Taking the narrowest view of the wording of the policy, the loss here would not have occurred but for the original loss by fire caused directly by the earthquake, which started the conflagration.

Moreover the *peril* would seem to be the dangerous substance or occurrence which might be expected to cause loss—in other words, the earthquake. Loss by fire is the thing insured against, but it can hardly be what is referred to by the word peril in the California Code section. It is rather the result of the peril or the damage caused by the

peril. And since the earthquake was one of the perils especially excepted, the loss here, which would not have occurred but for that peril, was thereby excepted on the strength of the code provision. Such was the view of one of the lower courts as expressed in its charge to the jury in *Henry Hilp Co.* v. *Williamsburgh City Insurance Co.*, 157 Fed. 285.

The decision probably reflects the popular feeling that the conflagration losses were within the intent of the insurance contracts and must be paid by the insurance companies regardless of policy conditions or code sections that were made to cover very different situations, but which seem sufficiently broad in form to cover this unforeseen catastrophe.

F. T. C.

MANDAMUS. (To compel registration of osteopath as physician.) Ct. App. N. Y.—The statute of New York makes doctors of osteopathy physicians. The Sanitary Code requires every physician in the City of New York to register his name with the department of health. Unless one were so registered any patient dying while attended by him would be subjected to a coroner's inquest in order that a burial permit might be obtained. The respondent in *Bandel* v. *Department of Health*, 85 N. E. Rep. 1067, appreciating the disadvantage under which an osteopath not registered as a physician was placed, owing to the fact that few people would employ one whose services would be followed by the unpleasant inquest of a coroner in the event of the patient's death, applied for registration, which was refused. The Court of Appeals of New York held that he was entitled to registration, which might be compelled by mandamus.

MASTER AND SERVANT. (Liability of master for injuries sustained through knobless doors.) Ct. App. Ky.—It was the duty of a bookkeeper to switch a telephone connection from the office to the engine-room before he departed. The 'phone in the machinery room was in a booth, the handle to the lock of which was missing. One evening, after answering the 'phone in this booth, he discovered that he was unable to get out. His efforts to attract attention failed. Finally he pushed the booth from the wall and made his exit at the back. In his exertions his left forefinger was hurt, and caused him much suffering thereafter and never became normal again. The evidence tended to show that a man confined in the booth for a short time would become unconscious through lack of air. In *Georgetown Water, Gas, Electric & Power Co.* v. *Forwood*, 113 S. W. Rep. 112, the Court of Appeals of Kentucky held that a telephone so constructed that the door cannot be opened from the inside is not a reasonably safe appliance for the use of a servant, and rendered the master liable for injuries sustained while escaping therefrom.

MUNICIPAL CORPORATIONS. (Revocation of permit by city.) Ill.—An ordinance of Chicago prohibits the use of the space under the roadway of any street or public ground. Appellee in the case of *Burton* v. *City of Chicago*, 86 N. E. Rep. 93, had secured from the commissioner of public works a permit to use the space under an alley, and had incurred expense in the making of plans and purchase of material for a building to be erected, a vault of which was to occupy the underground space. The Supreme Court of Illinois held that an alley was a roadway within the ordinance, and that appellee should have known that the commissioner had no right to issue such a permit, and, notwithstanding the fact that appellee had incurred expense by relying on the permit, the city was not estopped to revoke it.

TAXATION. (Privilege taxes on labor.) Miss.—The Mississippi code provides a privilege tax on each individual, firm or corporation doing a plumbing business in municipalities of a certain population. Wilby, a plumber performing his own labor, hiring no assistants, did plumbing work for a barber. While so engaged, the sheriff demanded of him a privilege tax. On his refusal to pay, he was indicted for carrying on a plumbing business without paying the tax. In *Wilby* v. *State*, 47 So. Rep. 465, the Supreme Court of Mississippi in unmistakably hostile terms censured legislation the purpose of which was to promote monopolies and deny the constitutional right of citizens to follow any ordinary calling untrammeled, and held that a man earning his living by his brawn and muscle, by the sweat of his own brow, by doing plumbing work, was not engaged in the plumbing business within the statute.

WATERS AND WATER COURSES. (Intentional explosion of boiler.) Ct. App. Cal.—A laundry was in the habit of wrongfully using the pipe of a water company to relieve its boiler of excessive pressure. The water

company was aware of this use and knew moreover that the boiler had no other exhaust. Without notice to the laundry, and with knowledge of its probable effect, the water company arranged a check valve within the pipe which furnished the boiler water. In due time, the boiler exploded, damaging the building. The Court of Appeal of California, in *Bowie* v. *Spring Valley Water Co.*, 97 Pac. Rep. 530, held that defendant was liable for the explosion, and plaintiff could have recovered but for the fact that its complaint failed to allege that it was at the time of the installation of the valve using the feed pipe as a vent, and had no other means of relieving the pressure in the boiler, and that defendant was aware of these circumstances.

Reviews of Books

LIBERIAN LAW REPORTS

Supreme Court Reports, Republic of Liberia, vol. 1. The Boston Book Company, Boston, 1908.

FOR the first time in the history of the republic, the reports of the Supreme Judicial Court of Liberia have been issued in book form, the volume including cases decided between January, 1861, and January, 1907. One of the justices of the Supreme Court, Hon. James Jenkins Dossen, LL. D., has made the compilation under an appointment of the President of Liberia, made in conformity with special acts of the Legislature.

The judicial department of the Republic of Liberia is vested in a Supreme Court, consisting of a chief justice and three associates, and lower courts. The Supreme Court has original jurisdiction "in all cases affecting ambassadors, or other public ministers and consuls, and those to which a county shall be a party." In all other cases it has appellate jurisdiction "both as to law and fact, with such exceptions, and under such regulations, as the Legislature shall from time to time make." In the early days of the republic, Samuel Benedict, the first Chief Justice, and John Day, his successor, rendered decisions, but copies of them have apparently not been preserved. Beginning with 1861, the Chief Justices of the Court have been Boston Jenkins Brayton, E. J. Roye, C. L. Parsons, and Zacharia B. Roberts.

This volume of reports is of great interest as showing the attempts of an African court of Negro judges to apply the principles of the common law to questions arising from everyday transactions affecting matters of trade and property in an undeveloped country. These principles have been applied in an intelligent manner, without pedantry and with marked common sense, and the Court seems to have maintained a dignified standard of practice. If it has not exhibited the learning of courts in more advanced countries, it has certainly shown great respect for the weight of legal authority in England and America, and has applied principles enunciated by standard text-book writers in a logical and effective manner.

The relatively undeveloped state of the country shows itself in the reports, where one will look in vain for decisions dealing minutely with the complicated problems of modern commerce, yet commercial law is not a subject untouched upon, and a wide scope of subjects, both of public and of private law, has been covered.

This volume is made the subject of an article in the *Green Bag* this month, in which further information with regard to its character and contents will be found.

BOOKS RECEIVED

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

The Elements of International Law, with an Account of its Origin, Sources, and Historical Development. By George B. Davis, Judge-Advocate-General, United States Army, and Delegate Plenipotentiary to the Geneva Conference of 1906 and to the Second Peace Conference at The Hague, 1907. Third revised and enlarged edition, 1908. Harper & Brothers.

The Mystery of the Pinckney Draught. By Charles C. Nott, formerly Chief Justice of the United States Court of Claims. The Century Company.

The Editor's Bag

AS TO THE FUTURE

AS the *Green Bag*, now in its twenty-first year, leaves its parental abode to begin a new and independent existence, it desires to make its gratitude for the good-will already discovered in many quarters a matter of record. It hopes that it may be so guided and governed in future as to merit the continued support of those contributors and readers, whether famous or infamous, who have had an active share in building up its fame (or obscurity), and whom the editor blesses for their helpful (or misdirected) zeal.

The plans of the *Green Bag* for the future contemplate no radical change of policy. The bag has its own distinctive and capacious interior, which is roomy enough to contain many possibilities as yet untried. Its lining must not be soiled with anything which fails to approach a high standard of legal and literary excellence, or which seeks other ends than the progressive welfare of the community and the profession. By adhering to this principle, and by offering its readers, if encouraged, more for the subscription price than they have been receiving, it hopes to develop its circulation to extend into all countries where the English language is read—it already has subscribers in New Zealand and India—and to conquer a field of enlarged influence and usefulness.

Twenty years ago the *Green Bag* was started to meet a want then perceived to exist, of a legal magazine fulfilling a function intermediate between that of the learned reviews on the one hand, and the law newspapers or journals on the other. In its earlier days it styled itself "A useless but entertaining magazine for lawyers," and we have heard of one extremely busy practitioner who wishes that this sub-title might be restored, as he looks to the *Green Bag* for relaxation from the cares of professional toil. We have not seen fit to act on the suggestion, because of our conviction that a law magazine can be at the same time entertaining and useful. But the point that the *Green Bag* finds its *raison d'être* in the demand for a periodical devoted to the lighter side of the law is ever to be kept clearly in view as the central feature of its policy. There exists an unlimited reservoir of anecdotes and *curiosa*, and biographical and humorous miscellany, upon which this publication can draw as can no other in like degree for material appropriate to its pages. Innumerable are the topics upon which lighter disquisitions may be written by persons keenly alive to the multifarious charm of the law in its complicated relationships with every department of life, art, morals, and history. The aim of the *Green Bag* is to be interesting first of all, and to furnish that unique species of recreation to be found only in the sphere of the law—that sphere with which no other compares in universality of content, sharpness of wit, and breadth of human sympathy.

At the same time, the province of the *Green Bag* impinges upon two others,

those of the serious reviews and news journals. To be not simply entertaining, but also useful, the *Green Bag* must try to help its readers to keep in touch with current legal literature and current events of direct concern to the profession. It must aim, in some measure, to digest current literature and current facts, to serve, indeed, as a sort of legal review of reviews for busy lawyers. At first glance, this would seem to involve considerable heaviness, for how can such a review free itself from the seriousness of the subjects which it with deals? And how can a magazine devoted to the lighter side of the law consistently strive for an object entailing seriousness and solemnity?

But there is really no dilemma. A magazine can direct its readers' attention to the most important contemporary developments in the science and practice of law, can indicate events of special significance, can roughly estimate the value to be ascribed to recent contributions to legal literature, and can epitomize a vast amount of that bulky material of which the law is so hopelessly prolific, without becoming heavy and tedious in consequence. This it can do by brevity and clearness of presentation, by variety and attractiveness of arrangement, by earnest effort to make every subject as interesting as possible. Accordingly the object of the *Green Bag* is to serve the needs of the profession by acting as a light and entertaining review such as will satisfactorily meet the want of those thousands and thousands of lawyers—a majority of the profession—who by reason of scanty leisure or other circumstance cannot read more than one law periodical regularly, and would prefer to look to that alike for entertainment and for information.

NEW YORK GAS LAW UPHELD

The significant 80-cent gas decision handed down January 4 by the United States Supreme Court was anticipated by the article by Mr. Frank Hendrick contributed to this number of the *Green Bag*, and tends to bear out the contentions of this writer.

This interesting decision may be examined in many different aspects, but in its simplest phase it can be pointed out as a denial of the right of the court below to value the franchises of the New York Consolidated Gas Company at a higher figure than at the time of consolidation, without positive evidence being adduced of an increase in value. Whereas the franchises of the constituent companies had been valued by them at $7,781,000 at the time of the consolidation, Mr. Justice Hough, in the United States Circuit Court for the southern district of New York, had ruled that the company was entitled to a fair return on $12,000,000, the capitalized value of the franchises given by the state. As both Circuit Court and Supreme Court agreed in maintaining that good will could not be capitalized, the chief difference of opinion arose in connection with the franchises.

"A franchise is valuable," Judge Hough had held, "because it authorizes the use for gain of private property in a particular manner. . . . . I am compelled to consider franchises not only as property, but as productive and inherently valuable property, and to add their value, if ascertainable, to complainant's capital account."

Mr. Justice Peckham of the United States Supreme Court was careful to state that the question of the method of ascertaining the value of franchises was left undecided. But he held (we are referring only to newspaper reports) that

where a consolidation has been effected in accordance with a state statute fixing the value of the franchises, and the state has never questioned the validity or fairness of the valuation, the state cannot later question the value at the time of consolidation, nor should an increase in their value, after consolidation, be admitted without evidence sufficient to warrant the finding of such increase.

The Court further denied that an increase in the real estate and tangible property of the corporations made it reasonable to suppose that the value of the franchises had increased in like ratio, as maintained by the court below.

The Supreme Court thus seems to have been loth to recognize that a franchise is "productive and inherently valuable property," *as a franchise*, without evidence to show that its value has been increased by the operation of specific causes. The implication of Judge Peckham's opinion is clearly that values of franchises must be scrutinized with great care before one jumps to any conclusion regarding them. And the tendency of the opinion, though it is difficult to quote any words to that effect, is unmistakably in the direction of the lowest valuation of franchises compatible with constitutional rights. Its trend is in the direction of the doctrine that franchises are public property and should not be a source of private profit.

No comment is here offered on the doctrine in question, beyond an expression of the conviction that public franchises, as public powers exercised by private persons for the public benefit, are of a value which is arbitrary and not accurately ascertainable; and as property which has never really passed into private ownership, they should be treated as neither capitalizable nor taxable, the state obtaining needed revenue by taxing the tangible rather than the intangible property of public service corporations. While this theory has not yet received the impress of judicial authority, it is likely in time to become law, and its ultimate adoption would tend to simplify many tangled problems.

AN EDIFYING CHARGE

It would probably be well to disguise the identity of those mentioned in the following report, sent us by a correspondent who writes:—

"This memo of the Judge's charge is submitted 'without prejudice.' Every actor mentioned in the report has passed from the stage. I knew them all, well. If the names were needed by the editor, they could be furnished. One of the counsel was my office-mate for more than twenty years and then Governor of the state.

"The portion of the charge embraced was reduced to writing the day it was delivered. The enclosed report was made for the *Green Bag*, years ago, pigeon-holed, misplaced, and forgotten until the old file turned up last week. The number of years in the report is corrected according to this date."

The report follows:—

STATE *v.* WILSON

It was bordering on thirty years ago, in one of the courts in the Ohio Valley.

The case had been argued; the judge had charged the jury—if such an effort could be called a charge—and at the close had fallen into an error much to the prejudice of the accused. Col. T. arose and called attention to the error to the prejudice of his client and asked to have it corrected. The judge proceeded as follows:

"Gen-l-men of jury:

"I didn't shay that. If I did (hic) 'twas a mishtake. Counsel states the law c'rectly. My friend, Mr. T., 's bin (hic) Secretary of State, 's 'tinguished lawyer, and knows what

the law is. W'en he's in a case you don't need any charge from the (hic) Court.

"There's George N.; .he's 'n this case. Every man, woman and child in F. County knows George (hic) N. He's bin Prosecutin' 'torney two terms, an' bin 'torney-General an' Supreme Judge, an' he knows the law, too. You don't need any charge of the (hic) Court when George N. is one of the (hic) 'torneys 'n a case.

"An' my old friend Judge W.—a tenacious though not (hic) brilliant lawyer—he's in the case. He's been on the wool shack an' knows how it is (hic) himself. Gen-l-men of jury, you don't need any charge about the law when Judge W.'s in a case.

"An' there's Bob M., he's the Prosecutin' 'torney an' Robert knows the (hic) law. When he's prosecutin' a case the jury don't need any law from the (hic) Court.

"Take the case, gen-l-men of the (hic) jury."

And then, with consciousness of duty well done, his Honor retired to the bar below and the jury took care of the interests of the accused.

MEDICO-LEGAL NOTE

"Down in Texas," said Judge Sam Cowan of that state, according to the *Saturday Evening Post*, "we had a case in one of the minor courts where a lawyer was trying to collect a bill he claimed was owed to the late husband of his client.

" 'He didn't pay no money to the diseased,' said the lawyer. 'He didn't get the money, the diseased didn't. He didn't receive one cent, the diseased didn't.'

" 'Diseased?' inquired the judge. 'What was this person you are speaking about diseased of?'

" 'May it please your honor,' said the lawyer, 'he was diseased of death.' "

We do not know that it has ever been ruled, in medical jurisprudence, that death cannot be a disease, and the evident conviction of the Texas lawyer, that it is to be so regarded, should be treated with due seriousness, and we see no occasion for any criticism of his use of the English language.

MURDER JUSTIFIABLE, COMMITTED BY MURDERER TO PROVE INNOCENCE?

The criminal law is lenient toward those who commit homicide in self-defense. Its policy is also to afford accused persons every possible means of proving their innocence. If these two propositions are put together, it would seem that an accused person might kill an attorney whose services were clearly injurious to his cause and of whom he could not otherwise rid himself, that being a case of justifiable homicide. While the point may never have been decided, it also seems to us that in the case of a prisoner accused of murder who commits murder during the progress of the trial, the rule forbidding self-incrimination should protect the prisoner from having the second murder brought to the attention of the public prosecutor, as such a murder is simply committed in pursuance of his common law right to withhold injurious testmony, and it is the withholding of self-incriminating evidence, rather than the taking of life, which is of the essence of the murderous act. This principle is suggested by the following incident recorded by one of our exchanges:—

A man arrested for murder was assigned a shyster whose crude appearance caused the unfortunate prisoner to ask the judge:—

"Is this my lawyer?"

"Yes," replied his Honor.

"Is he going to defend me?"

"Yes."

"If he should die, could I have another?"

"Yes."

"Can I see him alone in the back room for a few minutes?"

DOMESTIC LAW ILLUSTRATED

A barrister, pleading a case, may courteously refer to an opposing advocate as "my learned brother," and no breach of loyalty to a client is implied, when the "brother" is counsel for the client's bitterest enemy. In London there is a barrister who is frequently seen to plead before his father, who sits on the Bench, and two of the sons recently appeared before their parent on opposite sides of a case at an Old Bailey trial. It does not seem to us that there would be any serious impropriety were the sons, under such circumstances, to address the Court as "my learned father." Lawyers are presumed to be capable of setting aside personal considerations in their disinterested loyalty to the standards of professional etiquette. If members of the bar do this in their relations with one another, why should the same custom not hold in relations between bench and bar?

Likewise with other family relationships—why should such conversation as this, for instance, during the progress of a trial, not be perfectly proper, the good reputation of all the parties being taken for granted:—

A FAMILY AFFAIR

(Plaintiff's attorney is a woman who has been admitted to practice as a member of the Oklachusetts state bar. The judge presiding at the trial is her father; her nephew is attorney for the defendant. The latter is examining a witness.)

Plaintiff's Attorney (*addressing the Court*)—"My learned father, with your leave I will take exception to the question of my learned nephew."

Attorney for Defendant (*to the Court*)—"My learned grandfather, I protest. My learned aunt, the counsel for the plaintiff, seems to have misunderstood the purpose of the question."

The Court (*to witness*)—"You may answer the question put to you by counsel."

Witness (*to the Court*)—"Who shall I answer, papa, my sister or Charley?"

A POINT OF HONOR WITH THE JURY

Not long ago in a small Western town a man was arrested for stealing a load of hay. He had deliberately driven upon a field, helped himself from a stack belonging to William Smith, and gone quietly away.

Smith immediately brought suit, and the unfortunate man was dragged into court.

The jury was sworn to hear carefully and without prejudice the testimony and render a verdict. The evidence developed that the accused man had bought a stack of hay from Sam Jones and had paid for it. Now it happened that Jones' and Smith's stacks of hay were on the same field and the taking of Smith's was only a mistake. The accused averred he believed he was taking what rightfully belonged to him. The prosecution was nonplussed and the case was submitted without argument, both attorneys honestly expecting an acquittal.

Much to the surprise of all, the jury remained out for several hours, and as the sun sank below the horizon sent word that they could not agree. They were dismissed, and upon motion of the defence the justice dismissed the case.

The curiosity concerning the action of the jury was so great that both lawyers stopped one of the men before he left the building and asked the reason for the disagreement.

"Well," replied the juror, "we were all convinced that the fellow didn't mean any harm, and oughtn't to be held for stealing the hay, but there were three of us thought Smith should have pay for his hay."

THE JUDGE'S FIRST CASE

In the early days of Minnesota, according to *Harper's Magasine*, a man named Johnson was elected justice of the peace in a little town. He pretended to no judicial attainments, and was elevated to the place solely because he was the oldest man in the community.

The first case which came before him was that of a man charged with stealing a calf. Justice Johnson was conscious of his legal inexperience, so as much as possible to avoid the scrutiny of the public he put down the hearing for the next morning at seven o'clock. This was so early that when the time arrived the Prosecuting Attorney was not on hand, and his honor faced only the Sheriff and the prisoner and his lawyer.

"Gentlemen, you will please come to order," said the Court, thumping on the table with his fist.

The lawyer arose and said:

"Your honor, I represent the prisoner in the case. This is the hour at which the court was announced to open, and as the Prosecuting Attorney is not present, as he ought to be, I desire to make a motion that the prisoner be discharged."

The judge fidgeted about a moment and then said:

"Gentlemen, it is moved that the prisoner be discharged."

The lawyer nudged his client vigorously with his elbow.

"I second the motion," blurted out the prisoner.

"Gentlemen, you have heard the motion," said the Court. "As many of you as are in favor of it signify by saying 'aye.' "

"Aye," called out the lawyer and the prisoner.

"Contrary minded, 'no.' "

"No," shouted the Sheriff.

"The 'ayes' have it. The prisoner is discharged. A motion to adjourn is in order."

The lawyer responded with the motion, the prisoner with the second, and Justice Johnson's first term of court was a thing of the past.

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

Maurice Untermyer, a member of the New York law firm of Untermyer, Guggenheimer & Marshall, the personal counsel of several of the largest brokers in Wall street, died December 29 of heart disease. His brother, Samuel Untermyer, is senior member of the law firm with which for twenty years he had been connected as a junior member.

The Boston Bar Association voted at a meeting held January 9 to send a committee of five members to wait upon Congress and favor the passage of the Senate bill for the increase of the salaries of United States Circuit Court judges to $10,000 a year and District Court judges to $9000. The Association adopted a resolution urging more frequent examination of property in the care of trustees by beneficiaries themselves or by some competent persons in their behalf.

James B. Whitfield was on January 5, 1909, chosen for the second time Chief Justice of the Supreme Court of Florida. Judge Whitfield was first appointed to the bench in 1904 to fill a vacancy. Since then he has been twice elected. In January, 1905, he was chosen Chief Justice, but as his commission under the appointment expired in June of that year, he was Chief Justice only five months. He will now be Chief Justice until 1913. Prior to his appointment to the Supreme Bench he had been Clerk of the Supreme Court, County Judge, State Treasurer and Attorney-General of the State. He is a native of North Carolina, but has spent most of his life at Tallahassee, Florida.

The Commercial Law League of America, at the midwinter meeting of the executive committee held in Cincinnati on January 1, selected Narragansett Pier, Rhode Island, as the place for the convention to be held July 19 to 23 of this year.

General John B. Cotton of Washington, D. C., who was conspicuous in Massachusetts five years ago on account of the controversy over the payment of his commission on Civil War claims which he had collected for this State for the Federal Government, and who was Assistant Attorney-General of the United States under Attorney-General Miller, in the cabinet of President Harrison, died January 5 at the age of sixty-eight. He was first admitted to the bar in Maine in 1866, and during twenty years of practice there rose to a commanding position at the Maine bar. He later devoted much attention to the collection of war claims, and five years ago collected $1,611,740.85 from the national government for the State of Massachusetts. He retained the warrant of the Secretary of the Treasury in his possession, claiming a lien of $161,174 thereon for his services. After considerable correspondence and litigation, General Cotton succeeded in obtaining the fee which he had asked for.

The annual meeting of the Maine State Bar Association was held January 14 at Augusta, Me. The principal address was by former Attorney-General Albert E. Pillsbury of Boston, whose subject was the scope of a constitutional amendment, suggested by a *North American Review* article in which a federal ex-judge attacks the validity of the 15th amendment, and incidentally of the 13th and 14th also, as "additions" to the Constitution and not amendments of it and therefore beyond the amending power and void. The address pointed out that amendment is universally defined and understood as extending to additions, that there is nothing in the history of judicial or other discussion of the Constitution to warrant the claim that additions cannot be made to it by amendment, and no judicial or other authority for this claim; that if the question whether an amendment is "germane" in the parliamentary sense can be applied to amendment of the Constitution, which he denies, the war amendments are germane to the purpose of the Constitution, as declared in the preamble.

The *Allahabad Law Journal* confesses to "a feeling of disappointment" upon reading "Hindu Family Law as Administered in British India," by Ernest John Trevelyan, D.C.L., Reader in Indian Law in the University of Oxford. "In the first place we are not clear as to whether there was any need for it, and secondly, supposing there were, we doubt whether that need has been efficiently supplied." *Calcutta Weekly Notes*, on the contrary, says that the materials of the work "have been worked up with an amount of thoroughness and judgment which will considerably lighten the labors of the bench and bar."

A. Lawrence Lowell, the newly elected president of Harvard University, was admitted to the Massachusetts bar in 1880, and for seventeen years thereafter he engaged in the active practice of law in Boston, having as his partner his cousin, Francis Cabot Lowell of the class of '76, now better known as Judge Lowell of the United States Circuit Court. In 1891 the two took as their third partner Frederick Jesup Stimson, who is now Professor of Comparative Administration at Harvard, and this partnership continued until 1897. During these seventeen years of active practice Mr. Lowell acquired an extensive *clientèle* and proved particularly efficient and prudent in the handling of large estates and similar interests.

Apropos of Lord Loreburn's bill for the addition of two Indian judges to the Court of Appeal, the London *Law Journal* says: "If the creation of the Court of Criminal Appeal was one of the most striking incidents of 1907, the first sitting of the Court, which took place about the middle of May, may be counted one of the most notable events of 1908. . . . . The Appellate Jurisdiction Act, in addition to empowering the Lord Chancellor to require Chancery as well as King's Bench judges to sit as additional judges in the Court of Appeal, provides for the better representation of India on the Judicial Committee [of the Privy Council], and for the attendance of judges from all the more important British possessions as assessors at the sittings of the Committee—an instalment of reform which will, it may be hoped, be soon followed by those larger measures which are required to make the 'Imperial Court of Appeal' worthy of its name and functions."

ADELBERT MOOT, ESQ., OF BUFFALO

THE NEWLY ELECTED PRESIDENT OF THE NEW YORK STATE BAR ASSOCIATION

[*See page* 69

The Green Bag

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The Lawyer's Livelihood

By Francis Lynde Stetson

The Annual President's Address Delivered before the New York State Bar Association, Buffalo, January 28, 1909

THE first decade of the Nineteenth Century fixed upon the Republic of Thomas Jefferson for nearly one hundred years the paramount idea of individualistic liberty. The first decade of the Twentieth Century witnesses a fierce assault upon that idea, by the crusaders for collectivism. Before a general insistence upon the duties of men, the rights of man are losing support. A growing sense of the superior right of the Community threatens to submerge personal prerogative.

But the movement, helpful though it has been to the development of a collective conscience, will not continue indefinitely. Our republic founded upon the right of all men to "life, liberty and the pursuit of happiness" has flourished largely, if not chiefly, because of this ideal which is not likely to fade away or to pass wholly into obscurity. The phrase, possibly of more generous import, "Liberty, Equality, Fraternity" is the motto of another republic, not of our own. We recognize indeed that the safety of the people is the supreme law, but heretofore the good of all has been sought by us with an anxious desire to cause the least possible disturbance of the right of each.

To live and to pursue happiness it is essential that there should be no abridgment of the rights to labor, and to realize the just rewards of labor. These rights are not more precious to the men of any calling than to those of the so-called learned professions, and in particular to the gentlemen of the bar. As a class lawyers may be said to live from hand to mouth, and not infrequently within sight of want. Years of preparation without recompense must precede years of toil for a daily wage, which only by prudence and self-denial may be nursed into a competency. The right of the lawyer by the gainful exercise of his professional skill to earn an honorable living, is an absolute right subject to limitation only by the law of the land or by moral principle. How far it is thus limited is the subject of our present consideration.

At our annual banquet in New York last January Governor Hughes, replying for our Empire State, declared that there is no organization of the state with whose members he comes in such close fellowship and with such a feeling of cordial sympathy as members of the bar, and then he added some pertinent disclaimers:

"We are not here to-night," he said, "to take pride in the wealth that has been amassed by any of the more fortunate of our membership. Still less are we here to take pride in the cunning that has been shown in the course of the conduct of professional work." And he denounced as sordid, base and belittling, and as entitled to no respect, the riches realized from fees heaped on fees though "beyond the dreams of avarice," unless accompanied by integrity and independence of character and by loyalty to a high ideal both unpurchaseable and incorruptible by material advantage.

The Governor's first point suggests the question: What is the object of our activities in the practice of the law?

For the overwhelming majority of lawyers, as already we have intimated, there is, and there can be, but one answer, "To gain a living." Notwithstanding our splendid opportunities of public service, often to be availed of and never to be disregarded, the pressing duty of most is to support one's family and to keep out of harrowing debt. In providing for ourselves and for those dependent upon us a dignified and appropriate maintenance, here is nothing which even in the Governor's view can be "sordid, base or belittling." This obligation has been felt and recognized by the chief as well as by the least of our brethren. Our first great leader, unsurpassed in the loftiness of his spirit, the brilliancy of his intellect, or the splendid results of his devoted patriotism, Alexander Hamilton, resigned from the cabinet of George Washington, as we are told by Oliver, "because he was in debt, and had no mind to die in debt. He was actually conscious that his public work had entailed a sacrifice not merely of his own ease, but of the interests of his family. The last nine years of his life were devoted to the honorable but undramatic end of discharging his debts and providing for his children." And Oliver adds, "He was the leader of the New York bar during the whole of this period, and although, had he abstained altogether from public work, he doubtless might have added considerably to his income, his earnings were substantial, even if we judge them by modern standards, and very large indeed compared with the rewards of his own day."

In our day, as in that of Hamilton, the avoidance of debt and the acquisition of a competence is a proper object for the honorable desire and effort of any lawyer. Those harvesting the sufficient results of honorable labor may be deemed, as they were termed by our Governor, "the more fortunate of our membership," though he disclaimed any pride in their wealth. Not less than those rendering exceptionally valuable service in any other calling, the learned and capable lawyer may expect adequate compensation and sometimes wealth.

But wealth is a term of relative and varying significance. Under present conditions the millionaire may be one who enjoys, not, as formerly, the income of a million, but a million of income. Such the Governor may have had in mind when he borrowed from Dr. Johnson the phrase "wealth beyond the dreams of avarice," rotund enough for the Eighteenth Century, but not sufficiently grandiose to measure the large heaps from which sleepless if not dreamless financiers of the present era may draw excitement, and possibly satisfaction.

In the pursuit of wealth, as distinguished from competency, our most highly remunerated counsel necessarily and properly lag far behind the finan-

ciers, the manufacturers, and the merchants, as far, relatively, as in the heroic age when the traditional fate of the lawyer was to die poor, a destiny reserved now for particular pursuit by philanthropists arranging for posthumous praise.

But amplitude of means may result to the lawyer from contact with affairs of twentieth century magnitude, and this without a suggestion of "touch" in the specific sense recently developed in the language of the street. Auber repelled the imputation of advancing years, suggested by a stray gray hair on his shoulder, by declaring that "some old man in the crowd must have brushed against me." So, the trusted and congenial counsel of the present day may find that his justly earned remuneration, willingly accorded, by clients of timely fortune, partakes of the circumambient affluence.

Accordingly lawyers of our time both in England and America, highly esteemed by the general public as well as by their professional brethren, not infrequently have enjoyed very considerable incomes.

No explanation would be expected of the fact that an estate larger probably than any left before his day by any American lawyer, was distributed by the will of James C. Carter, leader of the bar, lover of his country and benefactor of his fellow man; and no one justly could begrudge the material recompense that has attested the value of the professional services of some of the distinguished presidents of the New York City Bar Association, including our brilliant Secretary of State, and the delightful symposiarch before whom the Governor was speaking at our last annual banquet.

Not solely by "heaping fees upon fees," but sometimes merely by systematic economy and prudent investment the industrious lawyer of moderate professional income may insure "peace with honor" in his old age for both himself and his family. The meteoric course of the brilliant counsel who despite the continuous receipt of large and merited compensation finally found himself unable to release from attachment the dinner that he was spreading before a Lord Chief Justice, may be contrasted with that of a contemporaneous Judge of the Supreme Court of the same state, whose average annual earnings did not exceed $3,000, but who, nevertheless, was able to crown a career altogether honorable by large bequests for the education of youth in New England and for the advancement of poor blacks in the South.

Except in the view of social economists professing aversion to private property and to all men of wealth as products of a vicious order, the fortunes of lawyers such as these, being "honestly come by," in the phrase of Mr. Lowell, will not be regarded as "sordid, base or belittling." Their right to live upon terms of self-respect in the sphere of their activities will not be denied.

But the lawyer who chooses or who pursues his profession primarily, or even principally, as a money-getter, falls into twofold error. First, he selects for his purpose an inferior instrument, for, as already observed, in money-making, as in the opportunities for money-making, the lawyer lags behind the trader of equal ability, and second, he compromises his own tone, and correspondingly the standing of his profession, which will be privileged so long, and only so long, as it preserves its distinction as a learned profession. The attorney who shares or who competes with his client in trading adventures consents that such actions and such methods be estimated in the terms of the adventure. As was observed by

the late Charles O'Conor, even the amount of the fee may tend to indicate the character of the attorney's activities, whether as professional or as merely a participation in the undertaking. The lawyer outclassed by the merchant in the competition for great riches will win only patronizing condescension. But if he shall retain and maintain his traditional familiarity with the science of the law, entering into and shaping the affairs of even the most resourceful laymen, he will command and will receive from the public as well as from his fellows respectful consideration and esteem. Adverse popular criticism is not easily sustained against a lawyer who enjoys the unqualified approval of his professional brethren; and this will not be withheld from the conscientious, capable counsel, merely because, as in the case of Alexander Hamilton, "his earnings are very large indeed compared with the rewards of his own day."

To the mere money-seeking lawyer indeed the love of money will prove the root of all evil, and though, as conceded by the Governor, those conspicuous for their attainment of a competence may be deemed fortunate, they will be most fortunate if their acquisitions have been consistent with good repute for character and learning, and with a record of service to the state, such as has given distinction to the names of our brethren Hamilton and Marcy and Seward and Tilden and Cleveland and Carter and Choate and Root.

Thus far probably the argument accords with the general understanding, but it leads to a proposition which provokes dispute always, and often denial, namely that in the practice of his profession, upon which his living depends, the lawyer is entitled to accept employment for the honest presentation of any claim, or of any defense which it is proper for a court to hear and determine, and in behalf of his client to adopt any expedient not in itself conflicting with moral principle or the law of the land.

In a sense this proposition may seem to have been challenged by the Governor's declaration that the bar was not assembled "to take pride in the cunning that has been shown in the course of the conduct of professional work," and in the particular intendment of his observation the challenge would be well founded. Even the selfish and sordid pursuit of wealth may be less degrading to the lawyer than his habitual resort to cunning in the conduct of professional work, that is, in work done by him directly for the advantage of his client and only indirectly for his own profit. Though such service includes an element of altruism, this could not offset the harm that would result alike to the bar and to the public, if generally we were to come to tolerate cunning as a substitute for learning or for sagacity. That the bar willingly adopts and possibly prefers sharp practice, is a popular belief, encouraged persistently by writers of fiction, as well as by journalists and by moralists, sometimes within the profession.

Out of thirty-five lawyers portrayed by Charles Dickens only one is outlined for respect, though in passing it may be noted that that one has been identified as the one lawyer with whom the novelist had close personal acquaintance. The others he held up for ridicule, and generally for distrust. He personified the "Bar" as a busy bee that has to get verdicts against evidence, and by setting snares for the gentlemen of the jury. Anthony Trollope by way of reproach wrote that "no amount of eloquence will make an English lawyer think that loyalty to truth should come before

loyalty to his client." "Quirk, Gammon & Snap," were figments of the imagination of a writer who himself was a lawyer. Herbert Spencer, in seeking concrete examples of good style, chose and perpetuated phrases such as these: "The low morality of the bar" and "He, who when reading a lawyer's letter should say 'Vile rascal'!"

A recent editorial upon the new Code of Professional Ethics declared that "Among laymen there is a strong impression that lawyers form a sort of guild and, like Roman augurs, wink when they meet each other" and that "some of the ablest, the most successful and the most influential lawyers are themselves wholly unprincipled. It is their chief business to tell wealthy clients how to keep the law in the letter, and break it in the spirit."

Similar slurs upon real or imagined practices of lawyers might be adduced indefinitely, though the sincerity of the distrust is not always beyond question in view of the apparent willingness of parents of every class and calling to devote their most promising offspring (like the eldest son of Anthony Trollope himself) to the pursuit of our much abused vocation, and to the peril of attracting clients of wealth and influence.

But it would be neither wise nor helpful to pretend indifference to well meant criticism or to assume that widespread public suspiciousness is without any reasonable justification. In the palace of truth, we must admit that in every rank of our profession may be found some who care little for high ideals, if indeed they suspect their existence. This, however, would not prove that in our profession the tone is lower than in others. Of course, it should be conspicuously higher, for in public affairs it assumes to lead, and is permitted to lead practically to the exclusion of almost every other calling, except journalism.

The declared object of this Association is "to elevate the standard of integrity, honor and courtesy in the legal profession" no less than "to cherish the spirit of brotherhood," and though we believe that to-day our ideals are not receding, we must recognize that general conditions and peculiar privileges, as well as this declared purpose, command the bar of this Empire State and its representative association to lead as well as to aid in advancing our professional standards. To this end we are bound to maintain and to enforce our newly adopted Code of Professional Ethics, a code which despite newspaper incredulity attests sincerely and specifically the bar's comprehension of principles that should govern every lawyer in the discharge of professional duty.

Undoubtedly much popular discontent results from inability or unwillingness to recognize that of necessity the lawyer's obligation is twofold. As has been stated with discrimination in the Boston *Green Bag*,—

> It is easy to say that the fundamental principles of common honesty are simple and sufficient, but it is a fact that there is a conflict very hard to adjust between the theory that the lawyer is a public officer, and the doctrine of loyalty to a client. To the lay reader these principles have long been hopelessly irreconcilable, and only the legal mind accustomed to complexities and fine distinctions has been able to announce with certainty that the two are wholly harmonious. Few of the bar, however, have agreed as to the exact manner of reconciling them or as to the legal limits for the application of each to the specific problems of practice.

The paramount claim of the state upon the lawyer as a citizen will continue to be asserted with emphasis and without qualification by public moralists who themselves when in peril of life

or liberty or reputation or property, or even when assuming new risks of business, will expect from their counsel exclusive regard for their own particular interests. But the unwearied contention over the lawyer's diverse loyalties has not yet demonstrated that either morality or civilization would gain by relaxation of his legal obligation to invoke for his client any and every appropriate protection afforded by the law of the land, it being understood that the law of the land differs from the moral law generally in being more specific and more exacting.

It is true that sometimes apparent injustice may result from particular applications of strict legal defenses such as the statute of limitations, or of frauds, or those concerning usury or married women or infants, or other provisions of positive law as to incompetency, including the *ultra vires* proceedings of corporations. Such defenses are discountenanced by Hoffman in his Fifty Resolutions. Nevertheless, we submit that every client is entitled to invoke any and every appropriate enactment of the legislature for the general good, and also that in the assertion or protection of such right the client is entitled to invoke and to receive the aid of competent counsel. Nor can such right of the client be limited to the comparatively insignificant portion of his interests that may have become involved in litigation. He is entitled to the advice of his solicitor as to what it is lawful for him to undertake; and he may undertake lawfully whatever is not in contravention of sound morals or of some concrete rule of law. The moral sense must be respected, but this restriction being faithfully observed, an advocate of individualistic liberty may feel it his duty to assert individual rights in and through any and every way not barred by statute. Though wide enough for the traditional coach and four a way through or around a faulty statute has been forced or found by many a learned and virtuous predecessor, in the cause of liberty. Whatever is neither *malum in se* nor *malum prohibitum* is open to the client's enterprising advance, and nothing is *malum prohibitum* unless there can be pointed out words of express prohibition. No more dangerous device of tyranny or injustice could be invoked than the extension of a statute to cover cases not embraced within its letter, upon the plea that they are within its spirit. It is not the duty of the lawyer or of a judge to be astute to extend prohibitory provisions. This power, and, if it be a duty, this obligation pertains solely to the legislature.

Every citizen, whether lawyer or layman, undoubtedly owes the duty of loyalty to the law, but who will pretend that this duty generally is regarded as of equal obligation with reference to every statute?

Viewed from its source the authority of the fugitive slave law appeared to be supreme, and so it was regarded by Abraham Lincoln, but nevertheless its obligation was denied and defied throughout the North. The Dred Scot decision was flouted by ministers, laymen and lawyers who followed Charles Sumner in the doctrine that no question is settled until it is settled right. A very recent statement of this doctrine is the following from the *Outlook* of January 2, 1909:—

> It is not always immoral to violate laws or even to set law at defiance. Sunday-school scholars are constantly exhorted to imitate the example of Daniel, who violated the law which forbade him to worship Jehovah; the men who conducted the underground railroad and permitted slaves to escape were violating the law; yet, history has generally commended their action. There are times when

the higher moral obligation calls on the citizen to obey the "higher law" and set the unjust human law at naught. If, however, he does so, he must be prepared to take the punishment for the violation of the law.

Revenue laws notoriously are observed to the extent that their violation is believed to involve unpleasant personal consequences and often no further. Statutory prohibitions against Sunday labor, against election betting, against usury, against carrying concealed weapons, and sumptuary statutes regarded as undue restrictions of personal liberty, are ignored on every side, and criminal prosecutions for their infringement meet with scant public favor.

This propensity to discriminate between laws and laws, and to select some for present enforcement and others for consignment to the limbo of ancient history, is not to be encouraged or fostered, for as has been justly observed by President Hadley, "When any nation looks upon law as a thing which the individual may use when it suits him, and evade or defy when it does not suit him, that nation is losing the bulwarks of social order."

The lawyer is bound always to advise conformity to the clear requirements of every valid law. As a breach of this duty might involve considerable personal inconvenience, we may assume that it is observed by those who are conscious of its existence. How painful may become the performance of this duty none know better than some of us who at times have been compelled to insist that at the cost of social opprobrium the client must tell the whole truth, or at other times have been compelled to decline to interpose a defense desired by some tender-hearted but erring and distressed man or woman.

Whether or not a lawyer shall give advice as to any particular transaction not within the express prohibition of law, or of morals, as already intimated, is a question for his own judgment. But his judgment must be exercised with a full sense of his responsibility as a man and a citizen, and with the certain expectation of public disapproval if his participation shall appear to be out of harmony with his general reputation or shall seem to involve injury to the public interests. Such public disapproval sometimes it becomes the lawyer's duty to incur, but, generally, the best service to his client, to his profession, and to himself will result if in every case of doubt he shall first satisfy himself that his advice is given under a strict sense of professional duty, uninfluenced by expectation of a fee. If, after such self-searching, his doubt persists, he should conform to its warning, despite the necessities of his client, or even of a family dependent upon his fruitful industry.

Often it may be found that the purpose of the client appears questionable only because ill-considered and that by a change of plan it may be effectuated legally. The lawyer discovering and suggesting such a free course for legitimate enterprise will deserve credit for acumen and sagacity, not criticism for "cunning shown in the course of the conduct of professional work."

Procedure so advised in good faith, though irreproachable in morals and free from express statutory prohibition, sometimes has been challenged as an evasion of the law, but the contention has not always been sustained by the courts. To avoid misunderstanding, a few illustrations may be given.

A corporation being in need of funds and lacking credit, has a solvent president B, willing to obligate himself in aid of his corporation, who arranges for a usurious loan to himself, in order that

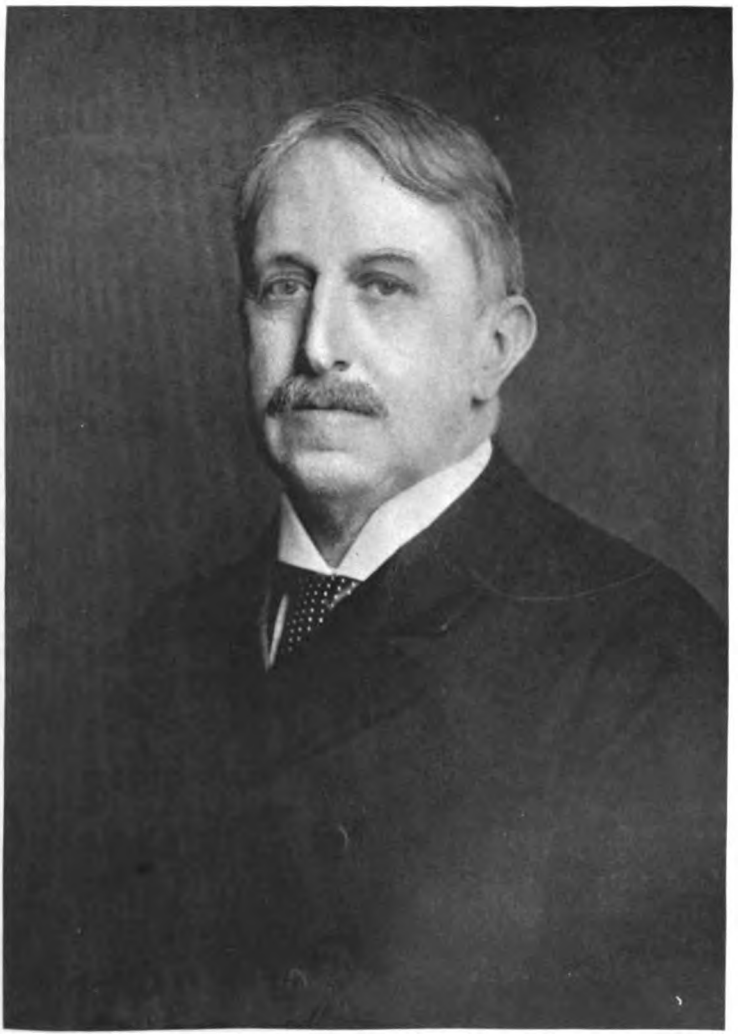
he may turn the same over to his corporation. The plan originally devised by the parties being deemed by counsel an evasion of the law forbidding usury and making the lender a criminal, is rejected as illegal. Upon sound advice the transaction is changed in form, and the loan at the excessive rate is made not to the individual B, but to his corporation upon its note guaranteed by B; this course being legal under the decisions of the New York Court of Appeals. (See *Rosa* v. *Butterfield*, 33 N. Y. 665.)

Pursuant to advice of counsel, parties in Tennessee gave notes dated, payable and secured in Arkansas at a rate of interest allowed there, but not in Tennessee. The U. S. Circuit Court (Mr. Justice Jackson) sustained the transaction, denying the contention that thereby it was intended to evade the laws of Tennessee and saying, "It was certainly intended to obtain the Arkansas rather than the Tennessee rate of interest. That intention was no violation or evasion of the law of Tennessee." (*Van Vliet* v. *Sledge*, 45 Fed. 743–752.)

The tariff of 1883 imposed a certain duty upon dress goods *wholly* of wool and a lower duty upon dress goods only partly of wool, provided that the higher duty should be charged upon goods of wool with *threads* of other materials introduced for the purpose of changing the classification. The importers caused goods to be woven of wool with a very slight intermixture of cotton, not in the form of *threads*. The collector deemed this to be an evasion of the law for the purpose of changing the classification, and levied duty at the higher rate. But both the Circuit Court and the Supreme Court overruled the collector and sustained the importers, holding that "they were not prohibited from so manufacturing goods as to conform to a lower rather than a higher exaction of the tariff—and that though they might have adopted a very technical device to escape the higher rate, the question presented by the case was only whether their goods were embraced within the higher rate and not whether they had evaded the law." (*Magone* v. *Luckemeyer*, 139 U. S. 612.)

In the case of *Kelley* v. *Rhoads* (188 U. S. 1) it was held that a flock of 10,000 sheep driven from Utah to Nebraska at the rate of nine miles a day across Wyoming, and grazing as it moved, was a subject of interstate commerce and therefore exempt from the Wyoming tax on livestock brought into that state for grazing purposes. The fact that the sheep might have been moved by rail was disregarded, for "the owner had the right to avail himself of such means of transportation as he preferred, and in estimating the probable cost he was at liberty to consider the fact that he was licensed to make use of the public lands of the United States for the sustenance of his sheep. . . . We do not deny that it may have been the plaintiff's intention not only to graze but to fatten his sheep while en route through Wyoming. Indeed we may suspect it, but there is nothing in the agreed state of facts to justify that inference."

William M. Prichard, an honored member of the New York bar, died leaving a will by which he appointed as executors three lawyers, two living in New York and one in New Jersey. For the purpose of escaping New York taxation the securities of the estate were deposited with a company in the home of the New Jersey executor. Upon the suit of Mr. Charles C. Beaman, executor, and the argument of Mr. J. Hampden Dougherty, it was held that these securities were not taxable in New York, the Court observing: "The suggestion is made that if this rule is to prevail it furnishes an



FRANCIS LYNDE STETSON, ESQ., OF NEW YORK

THE RETIRING PRESIDENT OF THE NEW YORK STATE BAR ASSOCIATION

easy and convenient method for escaping taxation. This is unquestionably true, but the fault is with the Legislature, from which body, if any, relief must be obtained." (*People ex rel. Beaman* v. *Feitner*, 63 App. Div. 174.)

It might be argued that in each of these cases the fair intent of the lawmakers was thwarted, but in the opinion of the courts the parties were free to proceed upon lines left open by the language of the statutes, or by the conflict of laws. If such was the right of the parties, it would seem to follow that they were entitled to receive advice to that effect from counsel learned in the law.

The lawyer must respect the moral law, and under canon 32 of the new Code of Ethics "he must observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent."

This right of the client to ask and to receive advice from competent counsel, especially with reference to intended transactions, and the extent to which the counsel may go in giving such advice, are subjects regarded by the public with particular scrutiny where the client is a corporation.

Despite the fact that perhaps ninety per cent in amount of the active business of the country involves the participation of corporations; despite the fact that there is hardly a business man of importance who is not a stockholder in some corporation or in cordial relations with some stockholder; despite the steadily increasing and general tendency and practice to adopt the form of corporate organization for private businesses heretofore conducted by partnerships and individuals—there still persists a formidable and aggressive suspicion of the methods of corporations and of their officers, and in particular of their legal advisers.

At the August meeting of the bar of Virginia, the association was favored, as three years ago we were honored, by an address from the learned and eloquent William Lindsay, formerly Senator from Kentucky. In the course of his address, Judge Lindsay said:—

> Officers of corporations may be equal in integrity, good citizenship and morality to the average members of society, but in the management of corporate business they act not personally but officially, and the municipal and not the moral law measures the extent and defines the limitations of their duties and responsibilities.
>
> The substitution of the corporation for the individual in the ordinary business transactions of life seriously affects society and its members, and tends to diminish the influence for good at one time attending the profession of the law.

And finally:—

> Those great corporations are proving themselves the greatest instruments for evil man has ever devised. They may promote the further increase of material prosperity, but if their power for evil remains they will do so at the expense of free institutions and to the peril of our personal and political freedom.

More recently and perhaps more discriminatingly a similar warning has been sounded by the historian James Schouler, who observes that—

> The corporation has been of immense advantage to society in enabling great material projects to be successfully carried out. But it has brought prodigious evils in its train and one of those evils is the diminishing sense among business men of personal honor, personal responsibility, personal integrity. . . . Its real element for good or evil lies in the character of the individuals who work it, who possess control and give it direction. (Ideals of the Republic, 270.)

As both Judge Lindsay and Mr. Schouler appear to concur in the public belief that these corporations must continue to abide with us, we may seek and find relief from gloomy forebodings in the more genial utterance of President Butler in September, 1908, before the University of Copenhagen:—

> The large corporations are both a legitimate and a necessary outgrowth of modern economic conditions as these exist in the United States, and the balance of advantage and disadvantage is largely in their favor, provided only that they be restrained from using their great strength inequitably or from damaging some other or more important interest. A corporation is co-operative and co-operation is the best use any individual can make of his individuality. (The American As He Is, 53.)

Judge Lindsay is entitled to high respect, but I would venture to question whether in and of itself the corporate form of organization is the specific germ of the ills depicted or predicted by him. The dislike and popular resentment of that extraordinarily successful business known as the Standard Oil Trust eventuated prior to the incorporation of the holders of the trust certificates; the phenomenal development of the great Carnegie Steel business was through a partnership whose forty-four members preceded and formed the corporation of 1899: the greatest financial transactions are conducted not by corporations but by unincorporated bankers and syndicates: even the New York Stock Exchange personified under the name of "Wall Street" is not a corporation. The distrust expressed in such utterances as that of Judge Lindsay implies really a distrust of the power possessed by any combination or association of wealth, irrespective of the form in which the combination may choose to constitute itself. Mr. John Graham Brooks quotes a Massachusetts leader as saying, "The great interest which unites us all is the dangerous business and political influence which the money power has at last got in this country."

This would indicate that protection against the dreaded evils is not certainly to be found in more legislation against corporations. Undoubtedly there will be further experiments in legislation, both state and federal, to the continued repression of business enterprise; but this result, though regrettable, is not to be avoided by any concession to unmoral methods. What is wanted is not legislation so much as the "righteousness which alone exalteth a nation." This is not self-righteousness, nor is it that sentimental righteousness that lacks a sense of justice. In a popular government this may involve popular tyranny and spoiliation of individual rights. On the other hand relief is hardly to be secured through the relentless enforcement of strictly legal rights, tending to popular outbreaks like the anti-rent war of 1844–1846.

The righteousness that alone exalteth a nation cannot disregard the *meum* and *tuum*, nor will it ignore those interests of humanity which challenge the rights of property. Very recently it has been declared by Mr. Justice Moody, speaking with authority in the Knoxville Water Case, that: "Our social system rests largely upon the sanctity of private property, and that state or community which seeks to invade it will soon discover the error in the disaster which follows." True though it is that without respect for the rights of property there can be no progressive civilization, it is no less true that something more is necessary to the highest civilization. Accordingly business combinations fashioned primarily and solely with reference to property rights, have failed to meet the expectation of the general public,

which never tires of hearing that "corporations have no souls."

This dictum of Lord Chief Justice Coke may be modified effectually by future Pygmalions of corporate creation, who shall impart to the work of their hands not only the right to perpetual existence, but some other attributes of the human soul. This, of course, can be accomplished only by a system of soul transference to corporate transactions from corporate managers having souls to transfer. The privilege and the opportunity of lawyers advising corporations and combinations, and their creators and managers, is to aid in the process of developing a managerial soul, and of infusing it into corporate action, and thus to promote the righteousness that shall exalt the nation. Judge Lindsay conceded as possible, though he might have stated positively, that "Officers of corporations *may* be equal in integrity, good citizenship and morality to the ordinary members of society." In my observation their important actions, being generally the result of conference and the subject of record, are apt to be more regular and more nearly correct, at least in form, than those of natural persons engaged in like transactions. These managers usually desire to observe and not to transgress the moral law and the law of the land, a desire akin to the higher qualities that we attribute to the human soul. This praiseworthy disposition may be developed and stimulated by the judicious and helpful advice of the corporation lawyers. If in the discharge of this conscientious duty we shall be tactful and persistent we may help to establish for our corporations a higher standard of methods and morals, so that in operation they shall meet at least the popular conception of beings with souls and consciences. That in this particular the bar has failed to realize its high opportunity or to discharge its duty is an opinion that prevails very generally, and with considerable justification. But from this birthday of our Code of Ethics we may start afresh, and for our profession, and for the corporations advised by us, seek high and permanent place in the public confidence. The question recently asked, "Shall the people rule?" according to the opinion of some of us, has been answered in the affirmative. Let the like answer be given to the question, "Shall the lawyers lead?"

If we are to lead, it must be because of the character of our leadership, and not because of traditional prestige. Class prestige is a privilege of the past, wrested in turn from the army, from the church, and from the bar. Just now it may have passed to the press, which, like every predecessor class, will lose it when, as is inevitable with the possessor of irresponsible power, it shall become self-sufficient and accordingly presumptuous. As was observed by Phillips Brooks, "No dignity of office can secure men's respect for itself continuously, unless it can show a worthy character in those who hold it."

This is fine and it is true, but it is not more certainly true as to public office and the sacred office than it is in respect of our own profession, whose leadership in this country is vindicated in the renewed advancement of lawyers Taft and Root and Hughes. Such leadership of the bar, sustained by the prevalent character of its members, will be promoted powerfully by tradition, and by deserved reputation for learning.

To this end, we may borrow from our Governor's noble speech his invocation of the "spirit of conservatism which is essential to the maintenance of the dignity of the bar, that spirit which at

all times stands for the individual character and strength of honest and intellectual work, the strength of independence before court or people, that independence upon which everything in a free country must at last depend."

The lawyer thus inspired will not cringe. He will respect, but he will not fear, the courts. He will discharge his duty as he sees it, undeterred by clamor of the public or the press. With such composure as he can command, he will await the ultimate judgment of his community. He will not abandon his prerogative at the summons of some pamphleteer whose immunity from prosecution is due to the past powerful interventions of the great Erskine and his successors. The press temporarily, even though unintentionally, may confuse but it will not finally mislead the general estimate of the lawyer following the guidance of an intelligent conscience.

The lawyer's right to live, and to live by the application of his trained abilities in the protection of every right and in the maintenance of every defense authorized by the law of the land, is part of our Anglo-Saxon liberties. When that right is surrendered, those liberties also will suffer diminution in periods of popular clamor at times as cruel and as senseless as the raving of wild beasts.

Sometimes, as a ground of reproach against lawyers, it is alleged that they are not alert to disclose for prosecution cases of wrongdoing within their knowledge. Of course they must not compound felonies, but is it certain that the best interests of society or of the state itself would be promoted by detection and prosecution in every single case of a violation of law?

In the "Ideals of the Republic," in which is sympathetically cited the Massachusetts Statute of 1780, recommending the government to encourage "good humor" among the people, Mr. Schouler says (p. 204):—

> Much may be done by warning, by holding up ideals of duty by encouraging the community to keep the right path. But the rod of discipline should not always be brandished nor a culprit's foes or the immune be incited to gleeful vindictiveness. There is not, I suppose, a male reader of this page who has not at some moment of temptation in his life committed a crime of some kind which might have been criminally punished. And whether the offence, more or less heinous, was ever disclosed to others or not, has he not been better in the end by having his own conscience left to its secret remorse and repentance for lifting eventually his better nature?

Mr. Schouler's supposition of a general prevalence of intentional crime is startling, and not so easy of acceptance as would be the hypothesis that without realizing the legal or illegal quality of his act nearly every man some time has incurred some penalty prescribed by the criminal law. "Who can tell how oft he offendeth?"

So in the pursuit of his livelihood the wise and conscientious lawyer sometimes may promote the peace of communities, the happiness of families, and the reformation of wrongdoers, by using his ability and even his influence to avoid public prosecutions. In so doing, is he faithful to his obligation to the state? I will not take the responsibility of answering, Yes; but his offense, if it be an offense, would not smell rank to Heaven.

The law must be maintained and enforced; it must be vindicated, but this must be for the healing of the nation, not for vengeance upon the individual. The Hebrew prophets who declared that "righteousness alone exalteth a nation," proclaimed also the rise of a Son of righteousness "with healing in his wings." The divine requirement is to love mercy as well as to do justly.

There was a lawyer of our time who holds the highest place in our regard, the warmest place in our hearts. He was just as he was merciful. He was true, but he was tender. He was faithful in the discharge of duties as exacting as any ever laid upon man. In the midst of cares distracting beyond precedent he sought "to encourage good humor among the people." So the people now celebrate the centenary of Abraham Lincoln, the lawyer. Many were his words of wisdom and love, but none were more characteristic of him or more fitting for the lawyer than those of his last inaugural address, "With malice towards none, with charity for all, with firmness in the right as God gives us to see the right."

The lawyer who, with learning and a sense of justice, pursues his vocation in the spirit of Lincoln, seeking ever to promote righteousness, in charity and not in wrath, and, when consistent with duty, to avert sorrow and disgrace from the erring penitent, will have done most to justify to the public the lawyer's right to his livelihood; a livelihood as ample and genial as legitimately may follow the free exercise of his skill and sagacity in the protection and the assertion of his client's legal rights.

New York, N. Y.

The American Bar Association Recommendations as to Judicial Procedure

By Everett P. Wheeler

A Paper Presented at the Thirty-second Annual Meeting of the New York State Bar Association, Buffalo, January 28–29, 1909

THE tie between the American Bar Association and the New York State Bar Association has always been close. Many of the founders of that Association were New York lawyers. For a long period its meetings were held in alternate years at Saratoga. Its recommendations are, therefore, entitled to friendly consideration in this assembly.

At the annual meeting of the American Bar Association, held in 1906, a paper was read by Mr. Roscoe Pound, then a lawyer in Nebraska, who has since become a professor of law in the Northwestern University at Chicago, which was entitled, "Causes of Popular Dissatisfaction with the Administration of Justice." The subject-matter of this paper was referred to the Committee on judicial administration and remedial procedure for consideration. That Committee reported in 1907 that "many evils suggested in Mr. Pound's paper do exist; that an attempt should be made to remedy these evils; that we, the organized lawyers of the American bar, could not devote our efforts to a nobler purpose," and that a special committee be appointed, "selected as far as practicable for their peculiar abilities and special study, qualifying them for the work, whose duty it shall be to consider carefully alleged evils, suggest remedies, formulate proposed laws."

This special committee was appointed, and made its report at the annual meeting of 1908. The recommendations of this report, with one exception, were adopted, and have been embodied in a bill which, by direction of that Association, has been presented to Congress and is now before the Judiciary Committees of both Houses for consideration. The recommendations relate in form only to federal procedure. But in substance they are applicable to procedure in the state courts, and some of them apply to the procedure by which, in criminal cases, the judgments of the state courts can be reviewed in the federal courts. I therefore ask your attention to them.

There are five recommendations embodied in the bill. The last four relate solely to procedure in criminal cases, and it will be most convenient to consider them first. In substance they provide that writs of error in criminal cases shall not issue until a judge of the Appellate Court "has certified that there is probable cause to believe that the defendant was unjustly convicted," and that no appeal shall be taken in *habeas corpus* cases unless a justice of the Appellate Court has certified that there is probable cause to believe that the petitioner in such *habeas corpus* proceeding is unjustly deprived of his liberty. The evil which the legislation has proposed to remedy is thus stated by the committee:—

> A still more flagrant abuse which exists in judicial procedure is also an innovation upon the common law. This is the unrestricted right to a writ of error in criminal cases. These writs are constantly sued out solely for delay. The punishment of notorious criminals is constantly being postponed in violation of every principle of justice. This is especially flagrant in the suing out of writs of error from the Supreme Court of the United States to review the decision of the highest courts of criminal jurisdiction in the different states. We recommend that no writ of error in criminal cases, returnable to the Supreme Court of the United States, should be allowed, unless a justice of that Court shall certify that there is probable cause to believe that the defendant was unjustly convicted.
>
> It is not proposed to divest the Supreme Court of jurisdiction of writs of error in criminal cases which involve questions of Constitutional law. It is, however, essential to the administration of justice that such writs of error should not be sued out as a matter of right, but only when a justice of the Supreme Court shall certify that there is probable cause to believe that the defendant was unjustly convicted. It is well known that Constitutional questions have been ostensibly raised on the record upon frivolous pretexts, and solely for the purpose of obtaining delay by writ of error returnable to the Supreme Court. It seems to have been forgotten that society has an interest in the punishment of criminals. All authorities on criminology agree that the certainty of punishment is far more important in the prevention of crime than its severity. The present system tends to make the punishment of crime as uncertain as human laws can make it. The old maxim is forgotten: *Judex damnatur cum nocens absolvitur.*
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> A favorite device of the gentlemen who achieve success in the manumission of murderers and the protection of the criminal classes is to apply to a federal judge for a writ of *habeas corpus*. He finds there is no cause for its issue and orders the prisoner remanded. Then an appeal is taken to the Supreme Court and the execution of a just sentence is stayed, while hysterical appeals are being made for pardon. On the other hand, we see the populace, enraged by the delays of justice, engaged in equally hysterical lynching. The innocent suffer. The guilty escape. And we call this civilization.
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> Every day we see fulfilled the words of the wise Hebrew monarch:—
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> "Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil."
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> To quote the language of the Honorable Andrew D. White, in an address delivered at Ithaca:—
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> "While the number of murders is rapidly increasing, the procedure against them is becoming more and more ineffective, and in

the light of recent cases in New York and elsewhere, is seen to be a farce.

"One of the worst results of these cases is the growing opinion among the people at large that men with money can so delay justice by every sort of chicanery, that there is a virtual immunity from punishment for the highest crimes. I favor preventing appeals based on mere technical matters and upon errors of trial judges in trifling matters of procedure and the like, which have nothing to do with the question of guilt or innocence."

The recommendation as to the certificate of reasonable doubt is taken from the New York Code of Criminal Procedure, section 527. The change which the committee recommended, and which we thought an improvement, is this: Under the New York practice a certificate of probable cause may be granted by any justice of the Supreme Court. Under the proposed federal legislation such certificate can only be granted by a judge of the Appellate Court. Under the New York practice, and in view of the great number of judges having jurisdiction, the certificate of probable cause has become a matter of course. If one judge does not grant it, it can almost always be obtained from another. In effect, therefore, the requirement is almost nugatory. It should only be granted by a judge of the Appellate Court, because it is that Court that is to pass upon the question finally. If the counsel for the culprit cannot *ex parte* satisfy a judge of that Court that there is merit in his appeal, it would certainly seem reasonable that the appeal should not be taken. To succeed in it he must, after an argument in which his adversary is heard, convince the majority of the judges that there is merit. If he cannot, *ex parte*, produce such conviction in the mind of the single judge, it would seem clear enough that the appeal is taken solely for delay, and this is the prevalent evil which should by all means be rectified.

If this proposed change should meet with the approval of the bar of this state, it might well be recommended to the Legislature for adoption. In that case it should take the form of an amendment to the section of the Code of Criminal Procedure before mentioned, which would read as follows:—

§527. An appeal to the supreme court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing, with the notice of appeal, a certificate of the judge who presided at the trial, or of a justice *of the appellate division* of the supreme court, that, in his opinion, there is reasonable doubt whether the judgment should stand, but not otherwise. And the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below. *No judgment shall be reversed, or new trial granted, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error on any matter of pleading or procedure, unless, in the opinion of the appellate court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.*

We come next to the first recommendation of the Committee of the American Bar Association which proposes to add to section 1011 of the United States Revised Statutes, which deals with the power of Appellate Courts, the following clause:—

No judgment shall be set aside, or new trial granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

The present provision of the Code of Civil Procedure on this subject is section 1317, which is as follows:—

> Upon an appeal from a judgment or an order, the appellate division of the supreme court, or general term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties, and it may, if necessary or proper, grant a new trial or hearing. A judgment affirming wholly or partly a judgment from which an appeal has been taken, shall not, expressly and in terms, award to the respondent a sum of money, or other relief, which was awarded to him by the judgment so affirmed.

To understand the decisions of the courts upon the subject dealt with in this section of the Code, it is necessary to consider its history.

When David Dudley Field undertook the reform of the system of practice which prevailed in New York, it was his purpose to assimilate as far as possible the practice in common law cases to that which had prevailed in equity, so far as the pleadings and the powers of the appellate tribunal to pass upon the merits were concerned. His Code of Practice of 1848 abolished the distinction between pleading in common law and in equity cases, and laid down rules of pleading which were to a great extent those which had prevailed in equity. He abolished the common law writ of error, and provided that the review of the proceedings in the court of first instance should take place by the equity method of appeal. The function of an appeal up to that time had always been to bring up the whole record, and accordingly the Field Code of Procedure of the State of New York provided (section 330):—

> Upon an appeal from a judgment or order, the Appellate Court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, *if necessary or proper*, order a new trial.

When this Code of Procedure came to be administered, it was unfortunately construed by judges who did not sympathize with the codifier. It must be admitted that its provisions were construed in a very narrow spirit. The result in the State of New York has not been, as Field intended, to apply as far as possible the rules which prevailed in the courts of equity to the trial and disposition of common law cases, but to apply to equity cases the rules that had prevailed under the modified common law practice to which reference has been had. Probably that is true to a large extent in most of the states where the Code practice prevails.

In *Astor* v. *L'Amoreux*,* the New York Supreme Court had taken advantage of the section just quoted, to render final judgment upon appeal. Unfortunately the Court of Appeals reversed this reasonable judgment, and in spite of the express provision of the Code held that all the Supreme Court was authorized to do was to order a new trial.

In *Griffin* v. *Marquardt*,† this decision was followed in an equity action, and the Court of Appeals held that the Supreme Court on reversing the judgment was bound to grant a new trial "unless it is entirely plain, either from the pleadings or from the very nature of the controversy, that the party against whom the reversal is pronounced, cannot prevail in the suit."

In such cases the court has not only applied to the rendering of judgment for a new trial instead of final judgment the rule which had come to be adopted

* 8 N. Y. 107.
† 17 N. Y. 28.

in actions tried before a jury, but has applied the rule dealing with questions of evidence. For example, in *Bank of British North America* v. *Delafield*, 120 N. Y. 410, the case had been tried at special term. The judgment was affirmed at the general term, but the Court of Appeals reversed the judgment upon an exception to the admission of a document which the Court had received, giving the following reason (p. 419): "The question is so close, we cannot say the defendant suffered no harm from the erroneous admission of the letter." What the Court would say if the proposed amendment should be adopted would be just the reverse— "It does not appear that the defendant suffered harm from the admission of the letter. On the whole case we are of opinion that the judgment for the plaintiff was right upon the merits, and we therefore affirm it."

In equity cases, where the trial is before a judge without a jury, there can be no possible good reason for the rule which prevails in this state. Experience in federal courts shows that ample justice is done to the parties by the method of procedure which prevails in admiralty and in equity. It is true that in the federal courts in equity the testimony is taken before a master or commissioner, and this no doubt is a disadvantage. But in some of the states where equity practice still prevails in the state courts, as, for example, in New Jersey, the issues of the case are tried before a vice-chancellor, the witnesses testify orally before him, and he decides the case with the great advantage of having seen them and heard their testimony. This reform Field introduced into the trial of equity cases in New York.

Experience shows that the granting of new trials upon issues of fact is generally a source of injustice. The lapse of time obscures the memory of the witnesses who remain. It often happens that an important witness has died, and the reading of his testimony on the first trial is no substitute for the benefit which was derived from his personal appearance. It often happens, also, that a defendant against whom a judgment has been recovered becomes insolvent before the new trial, and the security which he gave upon the first appeal has become of no avail, owing to the reversal of the first judgment. And beside all these objections, the radical objection to the new trial is that both parties have already had a hearing; they have been put to the expense of employing counsel upon that hearing; the whole machinery of the courts has been employed to administer justice between them. What possible reason can be given for granting a new trial in such cases? Why should not the Appellate Court proceed to render final judgment in all cases, subject to the right to move for a rehearing on the ground of newly discovered evidence, or for some similar reason? Such motions have always been admissible in courts of equity, and I would not deprive litigants of the right to make applications of that sort. In short, I would reverse the rule in *Griffin* v. *Marquardt*, and would never permit a new trial unless it appears affirmatively that the interests of justice demand a rehearing. *Nemo debet bis vexari pro una et eadem causa.*

The reason for the disposition of courts to grant new trials in cases tried before a jury probably rests upon the impression that under the Constitution of the United States and the constitutions of most of the states, there is some peculiar sacredness in a trial by jury. No doubt the right of trial by jury is guaranteed by these constitutions. But

where is there any constitutional guarantee of the right to several trials by jury?

The injustice that attends the present system of granting new trials when a judgment is reversed upon appeal, is well stated in a recent decision of the Court of Appeals of the state of New York.* At page 53 the Court says:—

> Moreover, it *frequently* happens that cases appear and in this Court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal. It often happens that his testimony upon the second trial is directly contrary to his testimony on the first trial, and, when it is apparent that it was done to meet the decision on appeal the temptation to hold that the second story was false is almost irresistible. Yet, in just such cases this Court has held that the changes and contradictions in the plaintiff's testimony, the motives for the same, and the truth of the last version, is a matter for the consideration of the jury. (*Williams* v. *Del. L. & W. R. R. Co.*, 155 N. Y. 158.)

In this latter case the judgment rendered on the first trial had been reversed because the plaintiff in the judgment of the Appellate Court had not established his cause of action. It considered that the merits of the case were with the defendant. On any just theory of judicial administration the Appellate Court should have rendered final judgment, dismissing the plaintiff's complaint. But it felt bound by the existing practice to order a new trial. On this new trial the plaintiff changed his testimony so as to meet the objection to his recovery stated by the court on the first hearing. The subsequent history of the Williams case can best be stated in the language of the Court of Appeals (p. 161):—

> In other words the Court, believing that the plaintiff had changed his testimony falsely, with a view of avoiding the effect of the decision of this Court, concluded to disregard his testimony on this trial, and held that what he testified to on the former trial was true.
>
> There can be no doubt but the learned Courts below, both at Trial and General Term, were actuated in their course by most praiseworthy motives, fully believing that they were promoting good morals, honesty and justice, but the question is, Was their holding in accordance with law?

In this case it is obvious that the Appellate Court saw that great injustice had been done, and that the plaintiff was trying to obtain a verdict by false swearing; yet it held that it had no power to correct this evil, and that the Trial Judge had erred in holding that he had the power to correct it. In short, it held not only that the right of trial by jury is sacred, but that the right to successive trials by jury is sacred, and that when once a verdict is set aside it should be taken as if it had never been.

A notable case, in which the litigation lasted ten years, and there were four appeals in the Supreme Court, is *Springer* v. *Westcott*, 166 N. Y. 117. The recovery was $900 for the contents of a trunk. Obviously the expense of the litigation much more than consumed the amount of the recovery. Similar cases are within the knowledge of us all. Another case where the injustice is perhaps still more glaring is *Nathan* v. *Uhlmann*, 101 App. Div. 388. That was a suit brought originally by a depositor against the dierctors of a bank, who had received his deposit after they knew the bank was insolvent. It is perfectly clear from the report that the directors knew this. It was equally clear that there was no actual fraudulent intent on their part. If the case had been submitted to the jury upon these two points on the first trial, and

*Walters v. Syracuse Rapid Transit R. Co., 178 N. Y. 50.

they had been found upon the record in accordance with the common law practice, which is preserved by sections 1187 and 1188 of the Code, the questions of law arising upon the merits could have been disposed of by the Appellate Division upon the first appeal, and final judgment rendered. This would have been a benefit to the plaintiff, who died before the final judgment in his favor was recorded. It would really have been a benefit to the defendants. The procedure adopted put them to great and unnecessary expense.

Let me illustrate further by a quotation from an opinion of Judge Martin, delivering the judgment of the Court of Appeals*:—

> After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial, we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge, and the almost unerring correctness of his rulings.
>
> When the number and variety of the questions raised are considered, we are surprised, not that a single error was committed, but that there were not many more.

In other words, our procedure is such that it is impossible, even with a judge of "almost unerring correctness," to get a verdict on the first trial of an intricate cause that will stand the test of an appeal. It needs no argument to show that such *procedure* needs revision.

In opposition to all the rules of technicality, which work such injustice and cause such delay, I urge that laid down by Chief Justice Marshall in *Church* v. *Hubbart*, 2 Cranch 232: "It is desirable to terminate every cause upon its real merits if those merits are fairly before the Court, and to put an end to litigation where it is in the power of the Court to do so."

In dealing with this important subject I ask you to put yourselves in the attitude of a lawyer who has a righteous cause, and who naturally desires to bring it to trial and obtain final judgment for his client as soon as possible. Is not this the attitude you always want to occupy? Doubtless we are sometimes called upon to defend a client who has no defense upon the merits. What the lawyer's duty in such a case may be I do not stop to consider. But one thing is clear. As long as the law gives him a right to interpose a technical defense and prolong the litigation in the hope of wearing out his adversary, the lawyer is blamed by many if he does not exert his skill to the uttermost for that purpose. After all, when we look at our profession from the standpoint of the Commonwealth; when we remember that we are not only attorneys for a client, but officers of the court, and charged with an important part in the administration of justice, we must admit that we occupy a humiliating position whenever we undertake to defeat it. It may be a lawyer's duty to occupy this position under the existing system. All the more, therefore, is it our duty as citizens to endeavor to reform the system, so that these means of procrastination shall no longer be available.

We hear sometimes that such complicated and technical rules as those which now prevail benefit the profession by increasing the counsel fee. You are all too high-minded to be influenced by this consideration, but if any of your friends should bring it forward when this subject is under discussion, let me assure you that my experience for more than forty years in the trial of causes convinces me that the assumption is errone-

*Lewis v. Long Island R. R., 162 N. Y. 52, 67.

ous. Cases in which a lawyer is adequately paid as a rule are those in which he succeeds in winning a just cause, and in winning it promptly. When a case has been tried two or three times the client becomes very sick of it and does not as a rule lend a ready ear to the suggestion of a suitable fee. If we were to be guided only by our own interests, we should still advocate such improvements in the administration of justice as would dispose of controversies speedily, and upon the merits. If that were the case, there would be more law suits and fewer arbitrations.

In conclusion let me say that the precise language of the Act recommended by the American Bar Association was criticised when the subject was before this Association in 1907. The language used is taken from order 39, rule 6, of the Rules of the English Supreme Court of Judicature*; which has been in force, with entire success, for twenty-six years. The language lately proposed by the President-elect is this: "No judgment of the court below should be reversed except for an error which the court, after reading the entire evidence, can affirmatively say would have led to a different verdict."†

I hope sincerely that we may not spend our time in discussing the exact language which should be adopted. That is a matter which can better be dealt with in committee. The essential point is to provide that the judgment shall be affirmed unless the appellant shall make it affirmatively appear that the error complained of has prejudiced him upon the merits. In other words, the American Bar Association was distinctly of the opinion that there is no absolute right to the observance of any technicalities of procedure or of evidence.

The objection that is commonly taken to this doctrine, so far as it applies to the review of cases that have been tried before a jury, is thus expressed in a letter that I have received from one of the federal judges, to whom I submitted the proposed bill. He puts it thus: "If an Appellate Court either affirms or reverses because of its own opinion as to the merits, it substitutes a trial by judges for a trial by jury." My reply to this is that it misconceives the scope of the proposed reform. So far from depriving the verdict of the jury of its value, it tends to establish the verdict.

Long experience in the trial of cases before a jury, and conversation with intelligent jurors of my acquaintance, has convinced me that jurors pay much less attention to the fine points of evidence, or to nice distinctions in the charge, than the judges generally seem to suppose. I am satisfied that in more than half the cases in my own practice, where judgments have been reversed on questions of evidence, the ruling in the court below did not affect the verdict in the slightest degree. This being the case, it seems to me in the highest degree unjust that the parties should be put to the expense and delay of a new trial.

Therefore, as a practising lawyer, it is clear to me that the presumption of the Appellate Court should be that a ruling on the evidence, which it deems erroneous, did not affect the result. It should be for the defeated party to satisfy the Appellate Court that the ruling was actually prejudicial to him upon the merits.

The rule which the committee has endeavored to express in the proposed legislation is actually in force in New Hampshire and in other jurisdictions.

*Wilson's Practice, p. 331.

†15 Yale Law Journal 1.

There, for example, the verdict of the jury as to the *quantum* of damages is final in most cases, and if a new trial is ordered, it is ordered on the other issues, leaving the amount originally fixed by the jury to stand as the measure of damages, unless some erroneous ruling on the law has been made which, in the opinion of the Appellate Court should change the verdict on this point.

All we ask the Appellate Court to presume is that the jurors are rational men, who render a verdict according to their judgment of the merits without regard to the technical points of evidence, or nice legal distinctions embodied in requests to charge, to which counsel have come to attach undue importance.

If the practice which has already been referred to of submitting special questions of fact to the jury were more generally adopted, the Appellate Court would be enabled to order final judgment according to its judgment upon the law, without putting the parties to the expense and delay of a new trial. This again would enable an immediate review to be had in the Court of Appeals. Under our present constitution, that court can deal only with questions of law. To raise these upon the record, separated from questions of fact, is, under the common practice, a very difficult matter. The conditions under which the Court of Appeals must examine the record tend in most cases to disable that Court from considering upon the merits the controversy between the parties. I believe that it is in the interest of the judges themselves, as well as of counsel and litigants, that this practice should be changed. The constant limitation of the judicial mind to the consideration of the solitary question whether or not reversible error has been committed, must necessarily tend to narrow the mind and make it more technical. It puts a burden upon the judges which no man should have to bear. The whole training of a lawyer in this state at present tends to make him more technical and to distract his attention from the merits of causes. The little pocket code of 473 sections, which was in force when I came to the bar in 1861, has swollen to a big volume of 3441 sections. I am persuaded that the reform which is recommended by the American Bar Association, and which I sincerely trust will have the approval of this Association, and will finally become embodied not only in the statutes of the United States, but in those of the state of New York, will make a radical change in this respect. When technicalities cease to affect the result they will no longer be resorted to, and the time will come when the public confidence in the administration of justice, which has been rudely shaken many times by the decision of important cases upon technical points, and not upon the merits, will be restored, to the benefit alike of the citizen and the lawyer.

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New York, N. Y.

The Meeting of the New York State Bar Association

THE thirty-second annual meeting of the New York State Bar Association, held at Buffalo January 28 and 29, was marked by the live interest shown in the subject of criminal procedure and by the actual steps taken in the direction of legal reform. The paper of Mr. Everett P. Wheeler, of the New York bar, discussing the American Bar Asso-tion's recommendations as to reforms in civil and criminal procedure and that presented by Judge A. T. Clearwater of Kingston, N. Y., on behalf of the committee appointed to consider the question of medical expert testimony, perhaps furnished the keynote of the deliberations.

Papers by Dr. R. B. Lamb, superintendent of the Matteawan State Hospital, and State Commissioner in Lunacy Sheldon T. Viele of Buffalo, on "The Commitment and Discharge of the Criminal Insane," likewise created a profound impression.

The reports of the Committee on Legal Ethics and of the Committee on Law Reform both gave rise to some discussion. In addition, able addresses were given by former Senator John C. Spooner of New York on "The Power of Congress under the Commerce Clause over State Corporations Engaged in Interstate or Foreign Commerce," and of Hon. Wallace Nesbitt, K. C., of Toronto, who described "The Judicial Committee of the Privy Council." Mr. Charles A. Collin, of New York, was unable to be present to read his paper on the topic, "From the Revised Statutes of 1829 to the Proposed Consolidated Laws of 1909," and it was presented by proxy.

ACTION ON LEGAL ETHICS

The Code of Legal Ethics approved by the American Bar Association at Seattle last August was adopted with only a slight change. After much discussion, and only on an appeal from the retiring President, Mr. Francis Lynde Stetson, who reconciled the opposing factions by his suggestion that if the canon in question should prove insufficient different action could be taken a year later, canon 13, which governs contingent fees, was adopted:—

> Contingent fees, where sanctioned by law, should be under the supervision of the court in order that clients may be protected from unjust charges.

The provision which an earnest effort had been made to substitute, to no avail, was

identical with that which a sub-committee of the New York County Bar Association's Committee on Legal Ethics will shortly report to that body, namely:—

The lawyer is entitled to reasonable compensation. This may be contracted for with his client, but under no circumstances should advantage be taken of his ignorance or necessity. Contingent fees are permissible if the client desires such form of compensation, but they should always be reasonable in amount.

Canon 5, paragraph 1, of the American Bar Association's Code was adopted only after the defeat of an amendment for which Mr. Everett P. Wheeler was mainly responsible, as follows:—

It is the right of a lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

Mr. Wheeler had desired to add to the above the words:—

But if the accused person be convicted, after a fair trial, and the lawyer is convinced of his guilt, the lawyer should not attempt further to save from proper punishment the guilty person except by the authority or direction of the court.

Paragraph 2 of this canon was adopted with the addition of the following words: "He should avoid oppression and injustice of any kind whatsoever."

The New York State Bar Association thus added its name to the list of seventeen or more state bar associations which have adopted codes practically conforming, in most cases, to the Code of the American Bar Association, virtually the only changes being the slight ones recommended by the committee.

The moral effect of the adoption of the Code was powerfully reinforced by the thoughtful and inspiring observations made by the retiring President, Mr. Stetson, in his annual address. In his discussion of "The Lawyer's Livelihood," this eminent and respected lawyer, whose leadership at the bar and experience in corporation practice on an extensive scale lent such weight to his words, brought to the subject a sanity and discrimination that produced a radically different impression from that of commonplace or dull moralizing. He indicated with helpful perspicacity and good sense where the duty of the lawyer lies in those moments when he is perplexed by conflicting obligations.

REFORMS IN CRIMINAL PROCEDURE

Mr. Everett P. Wheeler's strong plea for reform in judicial procedure did not stand alone as an expression of private opinion, for after a general discussion it was referred to the Committee on Law Reform.

The subject of "The Regulation of the Introduction of Medical Expert Testimony" was referred a year ago to the consideration of a committee consisting of one member from each judicial district in conference with a similar committee of the State Medical Society. Judge Clearwater, chairman of the committee, laid stress on the fact that eighteen physicians, representing the allopathic, homœopathic and eclectic schools, agreed with nine of the lawyers on the report as presented. "Recent excavations," he said, "unearthed an ancient scroll which showed that the doctors of Chaldea disagreed over the disease of their monarch. They have disagreed ever since, and I am presenting the first instance of an agreement by them on anything." What these doctors had agreed to was the presentation of recommendations by the committee in favor of the passage of a bill designed to check some of the more glaring evils flowing from the abuse of expert testimony.

PROPOSED EXPERT TESTIMONY ACT

The draft of the bill indorsed by the committee provides that no expert medical witness shall be paid or receive as compensation in any given case a sum in excess of the ordinary witness fees unless the court awards a larger sum, nor shall more than three experts be allowed to testify on either side as to the same issue in any given case, except in criminal prosecutions for homicide, or by express permission of the trial court.

In criminal cases for homicide where the issues involve expert knowledge or opinion the court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be fixed by the court and paid by the county where indictment was found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury. This provision shall not preclude either prosecution or defense from using other expert witness at the trial.

It was specified that the bill is not intended to apply to "witnesses testifying to the established facts or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion."

The measure favored by the committee also favored the designation, by the Supreme

Court Justices assigned to the Appellate Divisions, of from ten to sixty physicians in each judicial district who may be called as medical expert witnesses, receiving such compensation as the court may allow, the right of parties to call other expert witnesses, as heretofore, being in no wise limited.

The venerable Judge John M. Davy of Rochester, a member of the committee, opposed the adoption of the report, on the ground that it would put an unnecessary burden upon the courts and could conceivably lead to injustice, since juries, and also judges in refusing applications for new trials, might be disposed to give undue weight to the testimony of the officially unapproved experts, and Mr. Simon Fleischmann of Buffalo declared that he could not see how the bill could be of any possible benefit. Judge Clearwater, however, when the tide seemed to be going against the committee, saved the day for it in a speech that marked the eloquent and able advocate.

The report of this committee was an able paper in which the degradation of scientific testimony by its use for improper purposes was discountenanced, and the need of remedies was pointed out.

INSANE CRIMINAL'S HABEAS CORPUS WRIT

Mr. Wheeler's paper and the report of the Committee on Medical Testimony were not the only documents dealing with criminal procedure, for Dr. R. B. Lamb's discussion of "The Commitment and Discharge of the Insane Criminal" suggested the need of reform in similar directions, particularly when he spoke of the abuse of *habeas corpus* proceedings. Such proceedings had been more numerous at Matteawan the past year than ever before, and had resulted in the release, on orders of the court, of thirty-four patients, of which number twenty-seven were found by Dr. Lamb, who traced their subsequent history, to have since committed criminal acts, twelve of them being charged with the crime of murder. "It seems to me," said Dr. Lamb, "that such a record as this should gain some modification of the present law, whereby lunatics, and especially those committing murder, should be dealt with by a tribunal having individual responsibility."

Dr. Lamb also said that as to the competency of a jury to determine mental disease, to the experienced of both law and medicine it seemed little short of farcical. He thought the whole system of committal would be greatly strengthened if all physicians who act as examiners on orders of courts could be required to have had special training as alienists.

Hon. Sheldon T. Viele, State Commissioner on Lunacy, of Buffalo, who followed Dr. Lamb, quoted Attorney-General Bonaparte's remark about the original purpose of the criminal law being in danger of defeat by means of refinements and subtleties of procedure which afford little risk that justice will be enforced. Referring to Dr. Lamb's remarks about *habeas corpus* proceedings as an illustration of that specific danger, he dwelt upon the unsatisfactory progress in the law of insanity, as compared with the progress of science in the last thirty years, and urged the appointment of a committee of one member from each judicial district to take up the question. The motion was unanimously carried.

THE CIVIL CODE AND BILL DRAFTING

J. Newton Fiero, Supreme Court Reporter, Dean of the Albany Law School and expert in procedure, presented the report of the Committee on Legal Reform. Dean Fiero, his friends say, does not think so highly of the present Code of Civil Procedure as of the David Dudley Field Code of 1848. A newspaper accredits to him a remark once made that the drafters of the present Code, besides filling with purely substantive law an instrument purporting to define procedure, impressed upon it a literary style beneath criticism.

Speaking of the desirability of making the bill drafting department at Albany hold office permanently, and of defects believed to exist in the present Code of Civil Procedure, as for example sections 829 *et seq.*, belonging properly to the law of evidence, and provisions which he considered inordinately lengthy and cumbersome, he offered the following recommendations of the Committee:—

First—That notice of all special, local and private bills should be given by advertisement or otherwise to interested parties before introduction, or, at least, before consideration by the Legislature either in committee or otherwise.

Second—That thereafter such bills should be considered by committees akin to those of the British Parliament as nearly as may be, whose action thereon should be of a quasi-judicial character.

Third—That public opinion should be educated here, as in Great Britain, so that the same principles of ethics shall prevail in such legislation as now exist in our judicial affairs, whereby all arguments to committees must be submitted at public hearings, and all

attempts at personal persuasion and logrolling be frowned upon as an act of gross impropriety.

Fourth—That we recommend to the Legislature the establishment of a permanent position, to be known as the Legislative Counsel, with large and comprehensive powers in the formulation, criticism and review of all bills, either pending or prospective.

Fifth—The designation by this Association of some suitable person as an Examiner of Legislation, whose duties and prerogatives shall be of the character and scope hereinbefore outlined.

After the report was offered, the meeting unanimously adopted all the Committee's recommendations, together with that that the Legislature be requested to provide for an investigation of the present Code of Civil Procedure, and a resolution that the Legislature make a consolidation of the special statutes upon the same lines as those adopted with reference to the general laws.

THE GENERAL STATUTES OF NEW YORK

The importance of this work of statute consolidation was signalized in the remarks of Mr. John G. Milburn at the banquet:—

There has been brought together and consolidated every section of the living statute law of the state, and all this within the compass of five or six volumes. For over a hundred years they had been piling up, some repealed, some gone to their death without repeal, covering scores and scores of volumes. Every one of these statutes has been examined, collated and submitted to the Legislature. The day after the Legislature acts on this measure all the statute law of the state, which governs our conduct, which regulates our affairs, will be found in these volumes. In thus rescuing our statute law, in bringing order out of chaos, the State Bar Association, whose child this in a sense is, has rendered an enormous public service, and associated itself with one of the most considerable achievements in all jurisprudence. [Applause.]

CORPORATION MATTERS

Corporation subjects also received some attention. The Committee on Corporation Law, of which Mr. Stetson is chairman, reported that it had prepared and caused to be submitted to the Legislature amendments to the corporation laws permitting the formation of companies having capital stock divided into shares without assignment thereto of any value in money, and the issue of stock certificates representing merely proportionate interests in the entire capital stock without the indication of any nominal or par value.

"The abolition of the money denomination of shares," the report said, "would, we believe, deprive those who promote corporations of the advantages, real or seeming, of that exaggerated capitalization which undoubtedly is possible under existing laws, and at the same time it would compel investors to fix their attention upon actual value."

Former Senator Spooner in his address on the corporation question said:—

The idea that one government may create a state corporation and another government may regulate the issue of its stocks and bonds would be amusing if it were not repellent.

It has always been within the recognized power of the state which creates a corporation to determine what corporate powers it shall possess.

It is an astounding proposition that while a state may create a stock corporation, another government shall regulate the issue of its stock and bonds.

The election of officers resulted:—

President—Adelbert Moot, Buffalo. Vice-Presidents—First District, Lewis Delafield; Second District, William C. DeWitt; Third District, Charles J. Buchanan; Fourth District, Edward C. Whitmyer; Fifth District, William Nottingham; Sixth District, Harvey D. Hinman; Seventh District, Eugene Van Voorhis; Eighth District, Lewis L. Babcock; Ninth District, James M. Hunt. Secretary—Frederick E. Wadhams, Albany. Treasurer—Robert Hessberg, Albany.

Other business transacted included the adoption of a new article of the constitution providing for a committee consisting of three members from each judicial district to prevent the nomination of incompetent candidates for the bench, the unanimous passage of a resolution favoring the increase in salaries of federal judges proposed by a bill that had passed the United States Senate, and the appointment of a committee of five to investigate the administration of the Bankruptcy Act. Rochester was selected as the place of meeting for next year.

THE NEW PRESIDENT

Adelbert Moot of Buffalo, the newly elected president, was born in Allen, Allegany County, New York, Nov. 22, 1854, the son of Charles D. and Mary Rutherford Moot. He was educated in the common, high, and State Normal schools, and attended the Albany Law School 1875–6. He married C. A. Van Ness at Cuba, N. Y., July 22, 1882. He has practiced law in Nunda, N. Y., and in Buffalo since 1879. He has been a member of the board of Commissioners of Statutory Consolidation engaged in examining and consolidating all general statutes of New York since 1777, and has also served as president of the Unitarian Conference for the Middle States and Canada. He is an independent Republican in politics.

Mr. Moot, like Mr. Stetson, has engaged in corporation practice on an extensive scale. His clients have included prominent railroad and industrial interests, and the Buffalo law firm of Moot, Sprague, Brownell & Marcy, of which he is the head, has handled many important cases in both federal and state courts. Mr. Moot is a deep student of the law and an able advocate, and his leadership at the bar, earned by hard work and fidelity to the highest standards, has easily and naturally led to his election as president of the New York State Bar Association.

An Informal Code of Legal Ethics

By JUDGE EDWARD S. DOOLITTLE

Of the Sixth Judicial Circuit of West Virginia

[EDITOR'S NOTE.—The following suggestions with regard to professional conduct may prove helpful to lawyers just beginning the study of legal ethics, who have mastered but a small part of the subject. They were originally published as a humorous *addendum* to a compilation of the rules of practice of the Circuit Court of Cabell County, West Virginia.]

THE foregoing forty rules of practice for the Circuit Court of Cabell county have been compiled and adopted by the present judge thereof, with an eye to the useful and practical, and with the idea that it is not necessary to formulate in the shape of written rules what is only a matter of professional ethics. Legal ethics are generally axiomatic and well known to the profession; and it is assumed that every lawyer, whether a judge or an attorney-at-law, will not deliberately violate the ethics of his profession.

Every lawyer knows that it is unprofessional to borrow law books and not return them; to fail to pay over money collected for his client; to accept retainers on both sides of a contested case; to accept a retainer on one side and then neglect his client's case through forgetfulness, because of drunkenness or otherwise; or to enter a courtroom when he is so intoxicated that the sober members of the bar wonder what the sweet Psalmist meant when he so eloquently exclaimed: "What is man, that thou art mindful of him? And the son of man that thou visitest him? For thou hast made him a little lower than the angels, and hast crowned him with glory and honor."

Every lawyer, when arguing his case before a jury, knows that it is unprofessional to inject his personality into the case by expressing his own private opinion whether a witness has told the truth or a falsehood; to base his argument upon information which he volunteers while addressing the jury, and thus take advantage of his position to testify without having been sworn as a witness; or to wink at a juror and make the sign of distress, if they happen to belong to the same secret society. Every lawyer knows without being informed by a rule of court, that any attorney-at-law who accepts a retainer to cheat and defraud the other side, though it be the national government itself, is a rascal; and that any attorney-at-law who enlists on the other side and discloses the confidential and professional secrets of his former client, although summarily dismissed from further employment, is a grand rascal.

He knows all this and many other things which are unbecoming to the good lawyer. In fine, the lawyer knows that the shyster's motto: "Win your case honestly if you can—but win your case," is open to righteous criticism.

It should not be necessary to print, bind and publish the Code of Ethics and put a copy in the hands of an attorney-at-law, to inform him that it is not polite to smoke in the courtroom in the presence of the judge, a lady, or a gentleman, when the court is in session, although the attorney may thereby better collect his scattered thoughts and assume the appearance of being at his

ease; and that it should not be necessary to placard on the walls of the room a rule in large letters that an attorney, when taking a seat inside the bar, shall not pile his feet upon the table in front of him and expose his manners and person.

We assume that a printed rule of practice is not necessary to inform the judge and lawyer after a case has been argued and submitted in open court that it is improper for them on the outside and not in the presence of the opposition to have a confidential talk about the subject-matter in controversy, because, in fact, each one knows intuitively, although as a matter of courtesy he may refrain from saying so, that the other, outwardly appearing righteous unto men, is playing the rôle of the hypocrite.

A rule of court is not necessary to inform the judge and lawyers that they should imitate the example of other people in other walks of life and be polite in their professional intercourse with each other; and that although they are not what might be termed a mutual admiration society, still for the sake of example, *pro bono publico*, and for the more convenient dispatch of business, they should each at all times try to be a Chesterfield and never at any time in open court express their real feelings about each other.

The lawyer in the courtroom can assume a supercilious and contemptuous manner that will be embarrassing to his Honor and make him feel lonesome and uncomfortable; and, on the other hand, when the attorney has clearly crossed the Rubicon and is wantonly trespassing on the dignity of the Court, the judge can by summary proceedings at once institute his own action, become judge in his own case, and send the attorney where he will naturally feel homesick.

The good judge, in order to avoid any unseemly wrangle in the courtroom, will not talk too much nor give too many reasons for his rulings. In cases of grave doubt he will simply look wise and say nothing. He knows that "a fool uttereth all his mind; but a wise man keepeth it in till afterwards"—till after the Court of Appeals has enunciated the correct rule and reasoning in the case.

Again, we are not unmindful that a judge afflicted with an overbearing disposition, forgetting his own dignity and ignoring the ethics of the judiciary, is liable at times to make trouble for himself and others by losing his patience and temper, and becoming rough, if not tough, in his manners; and may thus grieve the lawyers and make them think with Shakspere's "Isabella":—

> O, but man, proud man!
> Dressed in a little brief authority;
> Most ignorant of what he is most assured,
> His glassy essence—like an angry ape,
> Plays such fantastic tricks before high heaven,
> As make the angels weep.

Let us hear the conclusion of the whole matter. The West Virginia code and the Code of Ethics should go hand in hand with every judge and lawyer. If he is not familiar with the latter code, the one adopted by the West Virginia Bar Association, at their meeting held at Elkins in December, 1906, should speedily become his *vade mecum*. And if this code of ethics does not furnish the necessary information, let him faithfully follow the Golden Rule: "All things whatsoever ye would that men should do to you, do ye even so to them; for this is the law and the prophets."

Huntington, West Virginia.

Review of Periodicals

CONSTITUTIONAL LAW is the subject of several articles in the recent magazines, and special attention is called to those in regard to the rule of *stare decisis* giving contractual rights protected by the Constitution and the right of the national government to regulate intra-state traffic of interstate railroads. An interesting discussion of a question of patent rights is briefly reviewed below. Two articles on water law are also likely to attract many readers.

Admiralty (Torts). "Jurisdiction of the Admiralty in Cases of Tort," by Henry Billings Brown. *Columbia Law Review* (v. ix, p. 1).

Discussing some disputed and some undecided questions of admiralty jurisdiction in the United States, especially that as to aids to navigation attached to the land.

Comparative Jurisprudence. "English Law in Scots Practice. I. Consideration in Contract," by Hector Burn Murdoch. *The Juridical Review* (v. xx, p. 346).

Comparison of English and Scotch law to aid Scotch lawyers when consulting English authorities.

Constitutional Law (Obligation of Contracts). "*Stare Decisis* and Contractual Rights," by Wilbur Larremore. *Harvard Law Review* (vol. xxii, p. 182).

The recent decision in *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, while not the first recognition by the Supreme Court of contractual or vested rights in the observance of the doctrine of *stare decisis*, does, however, according to this article, extend such recognition into a new field. In the case in question the raising, pursuant to a state statute so directing, of a railroad structure in Park Avenue, New York City, which formerly was on, or partially below, the level of the street, to an elevated viaduct, whereby the easements of light and air of abutting owners were substantially curtailed, was held to deprive owners who had purchased since the decisions of the New York Court of Appeals, in the elevated railroad cases, of contractual rights in contravention of the Constitution of the United States.

The case of *Gelpcke* v. *Dubuque*, 1 Wall. (U. S.) 175, held that decisions of the Supreme Court of Iowa, interpreting the constitution and statutes of that state, afforded legal rules to govern transactions which occurred before such decisions were overruled by a later decision of the state Supreme Court.

"The Muhlker case . . . goes further than any previous authority, because it is held that an attempted change in the law by a state court in a suit between its own citizens raises a question under the Constitution of the United States, which may be taken advantage of on appeal from the highest court of the state. The actual decision in the Muhlker case, in like manner with that in the Gelpcke case, is a substantial aid to stability of contractual obligations and to justice. It would be exceedingly difficult, however, to answer the theoretical argument of Justice Holmes, with whom three of his associates concur in dissent. The gist of his reasoning is that the federal court is bound by local decisions as to local rights in real estate, and equally bound by the distinctions and limitations of those rights declared by the local courts. As general propositions, these statements are, of course, true; but the majority of the court recognize a vested right in the maintenance of a former decision if the highest federal court, itself determining the existence and extent of the contract, holds that an attempted distinction is not legitimate or substantial. . . .

"The Gelpcke and Muhlker cases are sufficient authority for the general proposition that a judicial decision relied upon by an investor is such a contractual element as would constitute a property right. If it violate the guarantee of due process of law to take private property for a public use without compensation, *a fortiori* it would do so to take it for private use or enrichment. Indeed, there is no valid process of law by which private property may compulsorily be acquired for private use.

"On the whole, there appears to be ade-

quate theoretical justification for upholding the obligation of *stare decisis* under the federal Constitution in almost any case where a citizen has reposed trust in a court's formulation of the law and pecuniary loss would result from judicial instability. . .

"The real key to these decisions lies in the fact Mr. Bryce lucidly expounds, taking *Munn* v. *Illinois* as his principal illustration, that the Supreme Court feels the touch of public opinion. In his work, 'The Government of England,' Mr. A. Lawrence Lowell states that the reason why the spoils system never obtained foothold in England was the prevalence of the 'sentiment that a man has a vested interest in the office he holds.' While this absurdly exaggerated conception never has been entertained here, American public opinion does demand, along with police protection of the peace, civil protection of vested rights asserted under private contract. The masses of the people are firmly persuaded that bad laws that are certain are better than good laws that are changeable. Continuity and consistency of judicial exposition are indispensable for faith to embark in enterprises extending into the future. Such decisions as that by the Supreme Court of Iowa disregarded in the Gelpcke case and that by the New York Court of Appeals in the Muhlker case would introduce an element of South American insecurity into commercial life. General relaxation of the obligation of *stare decisis* would foster commercial anarchy."

Constitutional Law (Power of the Courts). "The Constitutional Power and Relation of the State and Federal Courts," by J. C. Pritchard. *Yale Law Journal* (vol. xviii, p. 165).

A historical review of the services of our courts in developing constitutional law. Their power to nullify acts of the legislative branch as unconstitutional is considered as undoubted and of the greatest service to the nation. Those who insist that this power does not exist are declared to proclaim "a doctrine no less dangerous to the public welfare than the conduct of him who by corrupt means seeks to pollute the fountains of justice . . ."

Constitutional Law (Railroad Regulation). "An Inquiry into the Power of Congress to Regulate the Intra-State Business of Interstate Railroads," by David W. Fairleigh. *Columbia Law Review* (vol. ix, p. 38).

Arguing "that Congress has the constitutional power to regulate interstate railroads not only with respect to their interstate business, but with respect to their intra-state business as well, and thus to bring such railroads wholly and exclusively under the regulation of the national government." The line of argument is as follows:—

"Having determined that the United States is an independent and sovereign government, with respect to the powers confided to it by the Constitution; that the Constitution granted to the Congress of the United States the power to regulate commerce among the states, which includes the power to regulate the agencies carrying on such commerce; that a railroad company is a public agency —an arm of government; that the Congress of the United States may create a railroad company to engage in interstate commerce, and grant to it the power of condemning private property for its use, we are prepared to proceed with the inquiry whether the *public* agency engaged in both interstate and intra-state commerce is in any wise different from the *private* agency, similarly engaged, and whether both alike must remain subject to regulation in part by the United States, and in part by the government of each state in which they may, respectively, carry on their business. That the private agency of interstate commerce must remain under such dual control, there can be no doubt. But that is not true of the *public* agency, because the public agency is a *functionary of government*. Of what government is the interstate railroad company a functionary? Manifestly, it is a functionary of the independent sovereign National State—the government of the United States.

"Whenever a public agency falls within the sovereignty of a state government, it is an agency of that government, and the power of regulation rests wholly with the state government, without the possibility of the slightest interference from the government of the United States, unless the exercise of the power of regulation by the state violates, in practice, some right guaranteed by the federal Constitution.

"On the other hand, whenever a public agency falls within the sovereignty of the United States, Congress has plenary power of regulation without the possibility of the slightest interference by any state government."

A railroad wholly within a single state and not engaged in interstate commerce is under the exclusive regulation of that state; but

the moment the railroad crosses the state line into another state the sovereignty with respect to governmental regulation instantly shifts to the government of the United States, which has the full power of regulation of all nations, whether interstate or intra-state. "In other words, in the one case the carrier is a functionary of the state government . . . in the other case the carrier is a functionary of the government of the United States and, as such, subject potentially to exclusive regulation by the government of the United States.

"Up to this time, except in the case of the original Employers' Liability Act, Congress has enacted no legislation regulating interstate carriers with respect to their intra-state business. The Interstate Commerce Act in its terms excluded from its operation the business of interstate carriers done wholly within a state, and, likewise, all other legislation of Congress relating to this subject, except in the instance above referred to, expressly related only to the interstate business of interstate carriers. Under these conditions the Supreme Court has held that the states, respectively, have the power to regulate interstate carriers as to their intra-state business, not at all because Congress has not power to regulate them in that regard, but solely because Congress has not undertaken to do so. While the federal power lies dormant, the states have the power, but this power is instantly suspended the moment Congress acts.

"I apprehend that there may be interstate common carriers who are not in the sense I have pointed out public agents, carriers in whose interest government may not constitutionally exercise any of its prime functions, such as the power of eminent domain, or the taxing power. The law of common carriers had its origin at a time when railroads were unknown and undreamt of. Such carriers, although in some measure subject to governmental regulation, may not be *public agents* in the sense in which the railroad company is a public agent. They may not be a part of the government, as are railroad companies. . . .

"The act of Congress of June 11, 1906, commonly called the Employers' Liability Act, was not confined in its operation to railroad companies, but, broadly, to all common carriers engaged in interstate commerce. Thus, the act embraced all persons and corporations engaged in interstate commerce, howsoever the business may be carried on. Its provisions seemed to apply not only to employees engaged in the interstate business of the carrier, but also to employees engaged strictly in the intra-state business of the carrier: that is to say, to all employees of the carrier, indiscriminately."

In the Employers' Liability Cases (1908), 207 U. S. 463, the Supreme Court held this law unconstitutional by a five to four decision.

"This case can hardly be said to be an authority against the proposition that Congress has power to regulate interstate railroad companies, in every respect in which they may be regulated by government, both with regard to their interstate and intra-state business. It is true that Mr. Justice Moody made the following statement in the dissenting opinion delivered by him:—

"'At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the states, and that I understand that to be the opinion of every member of the Court.'

"This must be regarded as a broad statement of a general rule applicable to commerce carried on by private agencies. It cannot be regarded as denying to the government of the United States the exclusive power to regulate its own governmental functionaries."

Constitutional Law (Right to Jury). "The Constitutional Right to a Trial by a Jury of the Vicinage," by Henry G. Connor. *University of Pennsylvania Law Review and American Law Register* (vol. lxvii, p. 197).

Largely a historical article showing the jealousy and care with which the original states insisted on safeguarding the right to a jury as understood in the English common law.

Contracts. *See* Constitutional Law.

Contracts. *See* Corporations.

Corporations (Charters as Contracts). "An Historical Development of the Contract Theory in the Dartmouth College Case," by R. N. Denham, Jr. *Michigan Law Review* (vol. vii, p. 201).

Arguing from the history of corporations that the Dartmouth College decision that the granting and acceptance of a charter constituted a contract is correct, the author further thinks it wise and just and that most

of the attacks on it have been of a political nature.

Corporations (Nature). "The Juristic Person—II," by George F. Deiser. *University of Pennsylvania Law Review and American Law Register* (vol. lxvii, p. 216).

Largely devoted to the exposition and dismissing as inadequate of two theories of the nature of a corporation: (1) The corporation is not, as such, the subject of rights and object of duties, but is a peculiar method of coownership of property; (2) Property exists in two states, the individual and the collective. The corporation is a form of collective property.

A third formula is put forward for discussion in another instalment. (3) The corporation is a right and duty-bearing unit which belongs to the class of persons.

Criminal Law. "The Punishment of Crime," by Christopher N. Johnston. *The Juridical Review* (vol. xx, p. 316).

Practical suggestions on the subject, with reference to the experience of Scotland.

Dartmouth College Case. *See* Corporations.

International Law (History). "The Evolution of International Law," by John W. Foster. *Yale Law Journal* (vol. xviii, p. 149).

This address, delivered at the Yale Law School commencement in 1908, traces the history of international law from the Congress of Westphalia, which Mr. Foster regards as marking its real beginning.

Legal Education. "Introductory Observations on the Study of Law with a View to its Practice and Administration," by the Right Hon. Lord Collins. *The Juridical Review* (vol. xx, p. 291).

An inaugural address to the Scots Law Society of the University of Edinburgh, delivered Nov. 2, 1908.

Literary Property (Alleged Case of Plagiarism). "Plagiarism—A Fine Art," by Henry Goudy. *The Juridical Review* (vol. xx, p. 302).

The author is editor of the second edition, published in 1899, of Professor Muirhead's Historical Introduction to the Law of Rome. He accuses Dr. Hannis Taylor, author of the Science of Jurisprudence, recently published, of plagiarism from Muirhead, Ledlie's Translation of Sohn's Institutes, Greenidge's Roman Public Life, and Bryce's Studies in History and Jurisprudence, and cites a number of extracts in parallel columns to substantiate his charge.

Literary Property (Right to Publish Lectures). "Professor Edward Caird's Experience in the Law Courts," by J. Campbell Lorimer. *The Juridical Review* (vol. xx, p. 346).

The death of the late Master of Balliol leads the author to review the House of Lords case, wherein two law peers decided that a professor in a Scottish university has a legal right to prevent the publication of the lectures delivered to his class in the ordinary course of instruction. One judge dissented.

Patent Law. "Right of a Traveler to Use Here Articles Made and Purchased Abroad but Patented Here," by Dwight B. Cheever. *Michigan Law Review* (vol. vii, p. 226).

It is settled that a purchaser of goods of a foreign manufacture cannot bring them to this country and resell them here contrary to the rights of the American patentee. On principle and on statute it seems to the author that these cases should also control the question of use The recent case of *Daimber Mfg. Co.* v. *Conklin*, decided in the United States Circuit Court for New York in April, 1908, held that a purchaser from the company in which the patentee is a stockholder (he being also a stockholder in the American company) may use the article here. This case the author considers wrongly decided, and he expects its reversal on appeal.

Remedies (German Law). "Specific Performance, Injunctions and Damages in the German Law," by Walter Neitzel. *Harvard Law Review* (vol. xxii, p. 161).

A learned exposition of the rules of the modern German law in regard to rights and claims, the enforcement of claims and the execution of judgments, with a view to pointing out the distinctions from our law. Older systems of law, the author says, developed two maxims: (1) Not every right as such is entitled to be enforced by the courts, but the courts give their assistance in cases only where the right may be brought under one of the prescribed forms of procedure. This idea that a right may not be enforced unless it fits in one of the legal forms, is the basis of the old division of actions into assumpsit, replevin, detinue and the like. (2) The enforcement of a right by the court does not mean that the plaintiff is entitled to obtain the object of his right specifically, but as a rule his compensation in money is sufficient to do justice.

The conception of the modern German law

is quite different. The two leading principles of it are that every right may be enforced by the courts, and that the purpose of such enforcement is the creation of the condition which would exist if the right was complied with voluntarily and without judicial help. Therefore specific performance is in much greater degree than with us a feature of the German law. The resulting rules of law are described at length.

Torts. *See* Admiralty.

Torts ("Legal Cause"). "Some Suggestions Concerning 'Legal Cause' at Common Law," by Joseph W. Bingham. *Columbia Law Review* (vol. ix, p. 16).

Attempting to throw light on a subject which is "in a chaos of confusion and uncertainty." The author divides the problem of legal cause into two branches:

"(1) For what consequences of an act or omission which constituted a breach of a legal duty owed *plaintiff* is defendant responsible to plaintiff?

"(2) For what consequences of an act or omission which constituted a 'legal' default towards *some other person* is defendant responsible to plaintiff?"

An examination of cases on the first branch of the problem leads to the induction "that a wrong is not the 'legally blamable' cause of a concrete sequence if the prevention of that sequence did not fall within the purposes of the infringed duty; and that if it is not the 'legally blamable' cause of the sequence, it cannot be the 'legal' cause of any consequence of the sequence. This sounds reasonable. Why should a defendant be responsible for occurrences entirely extraneous to the purposes of his duty? To hold him responsible would be to exact an arbitrary penalty beyond compensation for his wrong in the form of involuntary insurance. . . . Will the opposite induction hold true within the limits of our problem? Is a defendant responsible for any concrete sequence if the prevention of that sequence was within the purposes of his duty? Obviously, the answer *prima facie* should be 'Yes.'" The article is to be concluded in another number.

Water Law (Appropriation). "Priority in Western Water Law," by Samuel C. Wiel. *Yale Law Journal* (vol. xviii, p. 189).

"Beginning with *Irwin* v. *Phillips*, 5 Cal. 140, decided in 1855, a series of decisions, and thereafter of statutes, established in all Western jurisdictions the system of appropriation of waters as distinguished from the common law of riparian rights. The generally accepted idea, supported by most authority, is that an appropriator's rights are governed only by priority and beneficial use; that a prior appropriator, so long as he (without change) devotes the water to a beneficial use, has an exclusive right, independent of and paramount to any subsequent appropriator on the same stream.

"Yet there has always been a minority current of authority contending that the exclusiveness of a prior right should be recognized only to a certain degree and that priorities should not be enforced when to do so would be 'unreasonable' to water users upon the same stream, though subsequent in time of use."

This, with the changed conditions of the present day, is likely to be a growing doctrine. The decisions, which as a whole so firmly hold to the exclusiveness of priority, were given while the public domain was a vast unsettled region, and rights were to be adjusted between a few individuals rather than whole communities. "Today the lands have been far more fully settled, the water users on many streams are beginning to crowd each other, and the 'exclusiveness' rule of priority comes more and more in conflict with the community idea. Justice is coming more and more to demand an equitable co-relation of the users for the common good, and these changed conditions have caused here and there revivals of the idea that the priority must be reasonable, all things and evidence being considered, or it will not be fully enforced."

The author briefly reviews the cases which reveal this growing tendency.

Water Law. "Running Water," by Samuel C. Wiel. *Harvard Law Review* (vol. xxii, p. 161).

"The law of running water (watercourses) is a development of the rules under which one may take into his own possession and make his private property a portion of a flowing mass which in its natural course and wandering is uncontrolled by man and belongs to no one. There is a large body of law specifying *who* may make this transition and to what limitations they are subject, forming in the common law 'the law of riparian rights', and in the West, 'the law of appropriation.' It is our object here, by presentation of

authorities, to show that this transition forms the framework of the law of watercourses, but not at all to enter into the rules of 'riparian rights' or 'appropriation' that have been built around it."

With many citations the author attempts to show the truth of the following three "first principles" of the law of running waters. "(1) Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general. (2) With respect to this substance the law recognizes a right to take and use of it, and to have it flow to the taker so that it may be taken and used,—a usufructuary right. (3) When taken from its natural stream, so much of the substance as is actually taken is captured, and, passing under private possession and control, becomes private property during the period of possession."

Wills. "Does the Court Ever Write a Will for the Testator?" by Frank Warren Hackett. *Columbia Law Review* (vol. ix, p. 51).

The author is of the opinion that, although courts disclaim the power or wish to make a will, they do so now and then by their "interpretations." He thinks this most often occurs when a testator undertakes to give money to a public charity. "That a bias, more or less strong, exists in favor of sustaining, if possible, a public charity to the exclusion of the heir-at-law, few practitioners of experience will deny. . . . Indeed the English doctrine of *cy près* when applied with a free hand comes very near answering in the affirmative the title-question of this article." Some very remarkable cases of the application of the doctrine of *cy près* so as to provide a new clause in the will instead of that written by the testator, are given.

BOOKS RECEIVED

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

Ideals of the Republic. By James Schouler. Little, Brown & Co.

Recollections of a Varied Career. By William F. Draper. Little, Brown & Co.

Proceedings of the Illinois State Bar Association, Chicago, June 25 and 26, 1908.

The Philosophy of the Federal Constitution. By Henry C. Hughes. Neale Publishing Co.

Handbook on American Mining Law. By George P. Costigan, Jr. West Publishing Co.

The Making of the English Constitution, 449–1485. By Albert Beebe White. G. P. Putnam's Sons.

The American Executive and Executive Methods. By John H. Finley and John F. Sanderson. The Century Co.

The Trial of Jesus. By Walter M. Chandler. V. 1, The Hebrew Trial; v. 2, The Roman Trial. Empire Publishing Co.

The Law of War between Belligerents; a History and Commentary. By Percy Bordwell, Ph.D., LL.B. Callaghan & Co.

International Law. By John Westlake, K. C., LL.D Part 1, Peace, 1904; Part 2, War, 1907. Cambridge University Press.

Report of the Twentieth Century Meeting of the Virginia State Bar Association, Hot Springs, Va., August 4, 5 and 6, 1908. Volume xxi.

The Control of Public Utilities. In the form of an Annotation of the Public Service Commissions Law of the State of New York, and Covering all Important American Cases, together with the text of the Federal Interstate Commerce Act and the Rapid Transit Act of New York. By William M. Ivins and Herbert Delavan Mason. Baker, Voorhis & Co.

The Reason

BY HARRY R. BLYTHE

Within a court not long ago
A stupid case I saw,
I thought my counsel whipped his foe,
I know we had the law;
I deemed of course that we would win
Our little case of tort,
But lo! the judge put on a grin
And threw us out of court.

I asked a person by my side
If this he could explain;
Such cases better not be tried
If common-sense is vain;
He said, "You'd know the reason why
If this were your abode,
Remember, stranger, in N. Y.
You've got to mind the Code."

Notes of Cases*

ANIMALS. (Liability of rabid dog's owner.) N. Y.—A dog afflicted with rabies caused the death of a cow. The cow's owner sued the dog's owner for the value of the bitten animal. In *Van Etten* v. *Noyes*, 112 New York Suppl. 888, the Supreme Court of New York held that as no evidence was adduced to show the owner's knowledge of the dog's vicious disposition no recovery could be had. While it is true that the owner of domestic animals, such as cattle, is generally liable for their entry upon the land of another, the owner of a dog is not liable in trespass every time it goes upon another's premises. Injury from the bite of a rabid dog must be classed with those forms of inevitable accident which the law always leaves where they chance to fall, because, as no one was in default, there is no basis for assessment of damages against any one.

ARSON. (Burning of dwelling-house of wife by husband.) Wis.—The common law offense of arson, which is much like that of Wisconsin, consists of feloniously burning the dwelling-house of another. The wife of the accused began a divorce action, secured a deed from him to the house, and dwelt alone therein. Thereafter he applied a brand to the structure. In *Kopcyznski* v. *State*, 118 N. W. Rep. 863, it was insisted that a husband, living with his wife in a dwelling-house which she owns and they both occupy, is not capable of committing the crime of arson by burning it. The Supreme Court of Wisconsin held that a married man can commit the crime by burning the home of his wife with whom he is not living and from which he had been excluded, or had excluded himself, and the question of in whom the title to the property rests is immaterial.

BANKRUPTCY. (Attorney who collected money before he was engaged for bankrupt estate.)—In *Matter of Martin & Co.*, 20 Am. B. R. 705, it has been held that where an attorney-at-law collects a sum of money on a claim placed in his hands before he is engaged for a bankrupt estate, he is required, in the absence of fraud, to pay it to the client for whom he made the collection, notwithstanding he received it during the time he is employed for the estate.

BANKRUPTCY. (Jurisdiction when corporations are organized in different states.)—A California corporation was organized with the object of becoming the successor of a Washington corporation, taking over its property and assuming its obligations; had its home office in Oakland, Cal., but the business was conducted by a manager at Tacoma, who was also the manager of the Washington corporation; the business transactions of both corporations were so intermingled that a separation of the two concerns in bankruptcy would be impossible. It was held, *In re Alaska-American Fish Co.*, 20 Am. B. R. 712, that the bankruptcy court in Washington, having first acquired jurisdiction of both corporations, had the right to deal with them as joint parties.

BOYCOTTS. (If enforced by legal means courts will not interfere.) Mont.—In *Lindsay & Co.* v. *Montana Federation of Labor*, recently decided, the Supreme Court of Montana holds that the distribution of a circular urging all laboring men and persons in sympathy with organized labor to withhold patronage from the plaintiffs, is not illegal, for the plaintiffs had no property right in the trade of any particular person, and "although decisions exist which make the same act lawful when done by one person unlawful when done by several, on the theory that concerted action amounts to a conspiracy," an individual clothed with a right when acting alone "does not lose such right merely by acting with others, each of whom has the same right. . . If a labor organization employs a boycott, the means of its enforcement being legal, the courts cannot assist the persons boycotted."

CIVIL SERVICE LAW. (Quo warranto proceedings of attorney-general necessary to show breach.) Mass.—In a petition to the Supreme Judicial Court, George H. Foster,

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

who had taken a civil service examination for the police force, stated that he was on the eligible list in March, 1907, and asked that the Selectmen of Hyde Park, Mass., be ordered to make requisition on the civil service commission for four eligibles to take the places of four policemen appointed without such requisition. The respondents, the Selectmen of Hyde Park, claimed that it did not appear by the petition that there was any vacancy on the police force, and that his proper remedy was by an information in the nature of *quo warranto* by the Attorney-General to oust the four patrolmen claimed to have been illegally appointed. The Court, per Mr. Justice Sheldon, Jan. 28, 1909, sustained the respondents' demurrer.

CONTEMPT. (When order defied is beyond Court's authority.) **Miss.**—A person who refuses to obey an order which the Court has no power to make is held, in *Mc Henry* v. *State*, 44 So. Rep. 831, 16 L. R. A. (N. S.) 1062, not to be guilty of contempt, even though the court has general jurisdiction over the proceedings in which the order is made.

CONTRACTS. (Full liability devolves on surviving party to improper joint traffic agreement.) **Ky.**—One of several railroad companies which entered into a contract for the joint use of a bridge, which, through its officers, controls the bridge company, and agrees to the exaction of excessive tolls for the use of the bridge, and the secret division among certain contracting parties of the surplus thus accumulated, in consequence of which a judgment is recovered against the bridge company by the excluded road for its share of such surplus, is held, in *Dodd* v. *Pittsburg, C. C. & St. L. R. Co.*, 106 S. W. 787, 16 L. R. A. (N. S.) 898, to be bound, because of its wrongful diversion of the fund, to make good to the bridge company the whole amount of the judgment, where the other roads which shared in the division have become insolvent.

CONTRACTS. (Defect in machine which defendant has promised without consideration to keep in proper repair.) **U. S. C. C. A.**—Liability arising from a defect in a machine leased by the United Shoe Machinery Company was discussed in a decision sent down Jan. 19 by the United States Circuit Court of Appeals in the suits of *McClaren* v. *United Shoe Machinery Co.* and *McClaren* v. *Weber Brothers' Shoe Company*. The plaintiff was employed by the Weber company at its factory in North Adams, Mass. He was hurt by reason of a defect in a stitching machine, June 14, 1906. He brought two actions, one against his employer, in which suit no new question of law is decided by the Court of Appeals; the other against the Shoe Machinery Co. for breach of an alleged promise made by the defendant to the plaintiff directly, without stated consideration, to repair and keep the machine in suitable condition, with the further representation of the defendant that this had been accomplished. In the latter action, the Court of Appeals affirms the decree of the Circuit Court, and says:

"If, contrary to what is shown by the contract to which we have referred, the defendant had in fact agreed with the plaintiff's employer to have or maintain the machine in proper repair and if, in consequence of that obligation on the part of the defendant and as flowing out of it, had repeated this promise to the plaintiff and had represented to him that such repairs had been made, the law, which always favors short cuts, so to speak, might well have said that there was a novation by virtue of which the defendant was bound to the plaintiff; but under the circumstances and as apparently determined by the Circuit Court, the alleged promise and the alleged representation growing out of it were purely voluntary, wholly without consideration, and not enforceable in law."

CRIMINAL LAW. (Right of accused to be present at rendition of verdict.) **Miss.**—During his trial for a capital offense accused was on bail. When the jury brought in its verdict of manslaughter he was out in the country for the night. In *Sherrod* v. *State*, 47 So. Rep. 554, the Supreme Court of Mississippi held that wherever the charge is capital, the defendant cannot waive his right to be present, and whether he be in jail, subject to the power of the court to produce him, or on bond, it is fatal error to receive the verdict in his absence. This, although not a constitutional right, is one secured by statute and the common law. The conviction of manslaughter having been reversed, accused was discharged, as any further prosecution would have resulted in placing him twice in jeopardy for the same offense.

DURESS. (Marriage to stop a prosecution not voidable.) **Ga.**—A man who elects to stop a prosecution for seduction by marrying the woman alleged to have been seduced, and

giving bond for her support, is held in *Griffin* v. *Griffin*, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, not to be able to have the marriage declared void as procured by duress.

DURESS. (Resignation of public officer voidable.) Minn.—A resignation of public office, procured by coercion and duress, is held, in *State ex rel. Young* v. *Ladeen*, 104 Minn. 252, 116 N. W. 486, 16 L. R. A. (N. S.) 1058, to be voidable, and subject to repudiation.

EMINENT DOMAIN. (Second trial as subversive of justice.) Wash.—A municipality instituted condemnation proceedings against a railroad corporation to enable it to extend an avenue across the right of way. The judgment for the railway was so large that the municipality abandoned the proceeding. Shortly thereafter, it sought to extend another avenue just six inches south of the first one across the track and to have damages adjudicated by the court, and thus to obtain a new trial on substantially the same issues. In *Northern Pac. Ry. Co. et al.* v. *City of Georgetown*, 97 Pac. Rep. 659, the Supreme Court of Washington held that to permit the second trial would not only be subversive of justice, but would be making a farce of judicial proceedings, by allowing a litigant to play hide and seek with the judgment of a court by accepting such judgment if it suited him, by rejecting it if it did not, and commencing another action involving the same issues, and so on *ad infinitum*, until he was satisfied with the result.

GARNISHMENT. (Remarried man's wages may be garnished for alimony.) Mo.—The wife of one Anderson secured a divorce from him and alimony of $25 a month. Anderson afterward took another wife, and upon his failure to pay the alimony his former wife garnished his wages, which amounted to $75 a month. In *Anderson* v. *Norvell-Shapleigh Hardware Co. et al.*, 113 S. W. Rep. 733, the St. Louis Court of Appeals held that the wages were not exempt. The hardship, if any, was not created by the law, but was brought upon defendant by his own voluntary acts and wrongful conduct. His marital pledge to his wife was that he would support and maintain her as long as they both should live. He avers his inability to support two families. Why assume the burden of supporting two families if he is not able or willing to discharge it?

INTERSTATE COMMERCE COMMISSION. (Investigations.) U. S. Sup. Ct.—In *Harriman* v. *Interstate Commerce Commission*, decided by the Supreme Court of the United States (December, 1908, 29 Sup. Ct. R. 115), it was held that witnesses cannot be required to testify before the Interstate Commerce Commission except in connection with complaints for violation of the Interstate Commerce Act (Act February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) or in the investigation by the commission of subjects that might have been made the object of complaint, these being the only matters contemplated by the provision of section 12 of that act, giving the commission power to require testimony "for the purposes of this act." This power cannot be exercised by the commission in performing its duty under that section to keep itself informed as to the manner and method in which the business of common carriers is conducted, nor in connection with the enforcement of the requirement of section 20 respecting reports by carriers, nor to aid the commission in recommending, pursuant to section 21, additional legislation to Congress.

JUDGES. (Compensation for extra time.) Wis.—A Wisconsin statute provides that a county judge shall receive $5 per day for each day actually engaged in matters not appertaining to probate business. In *Hoffman* v. *Lincoln County*, 118 N. W. Rep. 850, it appeared that respondent had taken six hours as the basis of a day, and sought to recover one sixth of $5, or 83 cents, for each hour in excess of that time. On one day he worked 7½ hours, and on another 13½. The Supreme Court of Wisconsin held that no amount in excess of $5 per day could be recovered, remarking that the word "day," as used in the statute, meant a calendar day, and that a judge is not entitled to recover more than the allowance for one day.

LANDLORD AND TENANT. (Non-liability of lessor when there is no covenant to repair.) Mo.—The owner of a building leased for a boarding house, without covenant to repair, who undertakes to put new furnaces in the building, and who removes the old ones, is held, in *Glenn* v. *Hill*, 210 Mo. 291, 109 S. W. 27, 16 L. R. A. (N. S.) 699, not to be liable to occupants of rooms in the building for injuries caused by the cold, merely because he fails to put in the new

ones in time to protect them from inclement weather.

LARCENY. (Felonious taking by one who employs legal process.) **Ill.**—An attorney, having secured judgments against a debtor, directed a constable to levy on furniture at his residence. No one was at home at the time of the constable's visit. He rang up the attorney and was told to take the furniture to a certain warehouse, to conceal the name on the van, and to deliver the warehouse receipts to him. After the judgments were satisfied it was disclosed that the attorney had converted the goods, and some of them were discovered in his possession. In *People* v. *Frankenberg*, 86 N. E. Rep. 128, it was insisted that there was no proof of a felonious taking, necessary to support a conviction of larceny under a common law indictment for that offense, as the taking under the execution was legal or at least not criminal. The Supreme Court of Illinois affirmed the conviction of larceny of plaintiff in error, holding that the crime may be committed where legal process is fraudulently and feloniously used for the purpose of securing possession of the goods by the thief.

MASTER AND SERVANT. (Liability of father for reckless driving of automobile by daughter.) **N. J.**—While the daughter of one possessed of an automobile was driving it without her father's knowledge she ran into plaintiff, injured him and furnished an incentive for the action in *Doran* v. *Thomsen* (November, 1908), 71 Atl. Rep. 296. It appeared that the father had purchased the machine for the enjoyment of himself and his family. The plaintiff contended that the daughter was the servant or the agent of the father and that he was liable for her torts. At the time of the accident she was using the machine for the recreation of herself and her own friends. The Court of Errors and Appeals of New Jersey held that even had the relation of master and servant existed generally between the father and daughter, yet it does not appear in this case that she was acting as such servant within the scope of her employment, so as to render him liable for her torts. Undoubtedly liability might have been visited upon the father had the machine been bought solely for his children's use and been a menace to the safety of others, but his liability in that case would arise by reason of his negligence in intrusting a dangerous machine to the hands of an inexperienced or incompetent person.

MEASURE OF DAMAGES. (Executory contract for sale of real estate.) **Neb.**—The measure of damages for the breach by the vendor of an executory contract for the conveyance of real estate, where the breach is caused from either the refusal or the inability of the vendor acting in good faith, is held, in *Beck* v. *Staats* (Neb.), 114 N. W. 633, 16 L. R. A. (N. S.) 768, to be the difference between the value of the land at the time of the breach and the price he contracted to receive; and it is held that, in addition thereto, the vendee may recover the amount advanced upon the purchase price.

MEASURE OF DAMAGES. (Loss of services through death of wife.) **Ind.**—While on appellant's train, the wife of appellee in *Indianapolis & M. Rapid Transit Co.* v. *Reeder*, 85 N. E. Rep. 1042, received injuries which caused her death in about a year. The action was brought not for the death, but for the deprivation of services, society, and companionship, and the sums expended in an effort to cure her. In the lower court plaintiff recovered $5000. The Appellate Court of Indiana reversed the cause, holding that as the action was brought for various items incapable of exact measurement, the verdict was excessive and must have been rendered because the jury considered the loss to the appellee of his wife, and not the mere loss of her services and companionship for the brief period of one year.

MEASURE OF DAMAGES. (Mental suffering in case of criminal conversation.) **Colo.**—Damages for criminal conversation are held, in *Stark* v. *Johnson* (Colo.), 95 Pac. 930, 16 L. R. A. (N. S.) 674, properly to include compensation for the mental suffering of the husband.

MUNICIPAL CORPORATIONS. (Statute restricting taxation of one another's property.) **Vt.**—The procuring and furnishing of electric light by a village, under legislative authority, is held, in *Swanton* v. *Highgate*, 69 Atl. 667, 16 L. R. A. (N. S.) 867, to be a public purpose within the meaning of a statute exempting property used for public purposes from taxation, so that property owned and used for that purpose by a village cannot be taxed by the adjoining town.

NEGLIGENCE. (Absence of headlight.) **N. C.**—Absence of a headlight on a dark night is held, in *Morrow* v. *Southern R. Co.*, 61 S. E. 621, 16 L. R. A. (N. S.) 642, not to render negligent *per se* a failure to give signals for highway crossings with respect to the rights of a person walking on the track, near the crossing; although, if he was where people are accustomed to walk, absence of headlight and signals may be considered by the jury as some evidence that the train was not carefully operated or proper warning given of its approach.

NEGLIGENCE. (Contributory negligence may not exonerate defendant.) **Okla.**—Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, it is held, in *Atchison, T. & S. F. R. Co.* v. *Baker*, 95 Pac. 433, 16 L. R. A. (N. S.) 825, that the contributory negligence will not exonerate the defendant and disentitle the plaintiff from recovering if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence.

NEGLIGENCE. (Damage by rear end of street car rounding curve.) **Ky.**—A street car company is held, in *South Covington & C. Street R. Co.* v. *Besse*, 33 Ky. L. Rep. 52, 108 S. W. 848, 16 L. R. A. (N. S.) 890, not to be liable for injury to a person whose wagon is struck by the hind end of a car swinging away from the track in a natural manner when passing around a curve, since it is the duty of persons driving on the street to avoid such collisions.

NEGOTIABLE INSTRUMENTS. (Maker may bring trover against payee.) **Ga.**—The right of the maker of a negotiable promissory note to maintain trover against the payee after the note is fully paid, if the latter, having the note in his possession, refuses to deliver it to the maker upon demand, or if, after payment, the payee disposes of the note, is sustained in *Long* v. *McIntosh*, 129 Ga. 660, 59 S. E. 779, 16 L. R. A. (N. S.) 1043.

PUBLIC SERVICE CORPORATIONS. (Ordinance to compel stopping of interurban cars.) **O.**—The power of a municipality to require by penal ordinance the stopping of interurban cars to take on and to discharge passengers is denied in *Townsend* v. *Circleville*, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. (N. S.) 914, although its power to regulate the speed of such cars within its territory is admitted.

RIPARIAN OWNERS. (Damages due to extraordinary conditions.) **Vt.**—A railway company is held, in *Eagan* v. *Central Vermont R. Co.*, 69 Atl. 732, 16 L. R. A. (N. S.) 928, not to be liable for injuries to the property of a riparian owner by water thrown thereon by the overflow of the stream, the water of which cannot, because of a storm so extraordinary in character that it has had but one precedent in forty years, escape through its culvert.

TRESPASS. (No injury when needed to preserve life.) **Vt.**—While plaintiff with his wife and small children was on Lake Champlain in a loaded sloop, a violent storm arose. Desiring to escape the hazard of the open water, plaintiff moored his boat to defendant's dock. Thereupon defendant's servant cast the boat off. It was caught in the tempest and driven ashore. The occupants were thrown into the water or on to the shore and injured. The cargo was lost. The Supreme Court of Vermont in *Ploof* v. *Putnam*, 71 Atl. Rep. 188, decided that even had the act of mooring the boat been a trespass it was the duty of defendant to refrain from casting it off until the fury of the gale had abated, as the preservation of human life was of paramount importance.

WILLS. (Dying declaration for the jury.) **Ore.**—Whether or not a dying declaration which has been admitted in evidence was made under such belief of impending death as to entitle it to the credit usually given to statements of one *in extremis* who has no hope of recovery is held, in *State* v. *Doris* (Ore.), 94 Pac. 44, 16 L. R. A. (N. S.) 660, to be for the jury where the evidence must be weighed.

The Editor's Bag

MEDICAL EXPERT TESTIMONY

THE meeting of the New York State Bar Association served a good purpose in drawing the attention of lawyers to three evils which are by no means confined to the case of one state. They are the abuse of the right of appeal in criminal cases, by means of technicalities subversive of justice, the abuse of the writ of *habeas corpus* in the case of criminals improperly released from institutions for the insane, and the grave evil that has arisen with reference to medical expert testimony.

The committee in charge of this last subject made an important contribution to the fruitful work of the meeting, and while the results attained may not have been more important than some other matters, probably no subject discussed can be said to possess a livelier interest for the profession.

The bill proposed by the committee as a means of restricting the introduction of expert testimony without invading any constitutional rights, and adopted by vote of the meeting for presentation to the Legislature, is not ostensibly anything more than an attempt at the initiation of reform. The committee was careful to explain that the regulation of expert testimony was not a matter in which the Legislature could interfere by means of severe restrictions. Instead, it was a matter primarily for the bench and bar to deal with. The suggestions were that the bench should seek to remedy matters by clear definitions to juries of the distinction between an expert proved to be such, and an expert whose claim to be one is predicated solely upon the fact that he is paid for his testimony, while the bar could greatly help by maintaining so high a standard of ethics as should prevent employment of corrupt or incompetent "experts" and improper methods of cross-examination. These suggestions seem to us worth something at least.

The actual amount of good which could come from the adoption of the proposed statute is uncertain. Any one who has wrestled with the problem of selecting a family physician, so skillful as to be safely relied upon in any emergency, knows the extreme difficulty of selecting a real expert from a number of reputable persons of high rank in the community. The proposed statute places upon the Appellate Division justices a similar task. It would be no easy matter for them to designate the leading experts of the district, in the sense of real scientific capacity as opposed to a mere reputation for skill, and that is the duty which they would have to perform if the statute were to accomlish positive benefit. Moreover, medical science has not attained to so high and orderly a development as other sciences and for this reason the task would be doubly difficult.

Dr. Lamb's remark about the farce of leaving the determination of insanity

to juries might be analyzed. Did he refer to the case of a murder trial, for example, in which expert witnesses of proved skill and disinterestedness testify on opposite sides of the question of insanity, it being an example of doctors disagreeing without being hired to disagree? Or did he refer to the entirely different case of so-called "expert" evidence being adduced by charlatans who impose upon the jury the actual determination of the medical problem of insanity? In the latter of these cases, the determination of insanity by a jury is farcical. In the former case it suggests farce less than comedy, for there the humor of the situation arises from the disagreement of the experts rather than from the incongruity of the task forced on the jury. The evil is to be found in the farcical, not in the comic situation, for an honest disagreement of able experts is not a condition calling for resistance or intervention. We conclude, therefore, that Dr. Lamb referred to the inability of juries to detect the incompetent or tricky witness. If so, is not the jury itself no less responsible than the system which permits that sort of witness to appear before it?

We live in an age which is gradually awakening to the value of expert opinion in every department of life. Jurisprudence cannot help share this tendency, and expert evidence must come to play a part of growing importance in the trial of causes of every description. A higher, or if you prefer, a modified standard of intelligence will be demanded of the future citizen, to enable him to meet everyday responsibilities thrust upon him. Hence we must in time look not simply to the bench and bar for a solution of the problem of the abuse of expert evidence, but we are to look also to the jury. We must have upon our juries intelligent men who are able in some degree to estimate the weight of expert evidence and who are able to distinguish between real experts and charlatans. In capital cases in which the defense of insanity is likely to be interposed, we must exact greater intelligence from the jury, and in most other cases great care must be taken, and perhaps additional legislative measures must be adopted, to impanel juries with this object more clearly in view than it has been ever before. Bench and bar can do much as representative of public opinion; but the jury has a function of great importance to perform in making our criminal procedure more dignified, and if we could only establish a higher standard for juries, many evils of which the abuse of medical testimony is only one might soon disappear before the advance of more enlightened and elevated sentiment.

LINCOLN THE LAWYER

Current magazines are flooded with Lincolniana, and the public appetite is surfeited with stories of the Martyr President. A law magazine perhaps has a better right than some others to refer to Lincoln, but we have recognized, with suitable humility, the impossibility of favoring readers with any legal stories which are to be described as recent, even in the sense in which the word is properly used in speaking of the last issues of English newspapers to arrive, or notes of the latest decided cases published in the law journals. Lincoln's memory, however, should be particularly honored by lawyers, than whom there is no class of men more admiring of his upright sense of justice and forbearing patience and wisdom in administering it.

While Lincoln, as Mr. Frederick Trevor Hill remarks, "was not only not a profound student of the law, he was

not, in an scholarly sense, a student at all," yet as an advocate he rose far above mediocrity and could be considered successful. As an example to his colleagues, he anticipated, perhaps foresaw, the general adoption of a better code of ethics, as when he advised:—

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time. Never stir up litigation. A worse man can scarcely be found than one who does this. A moral tone ought to be infused into the profession which should drive such men out of it.

MR. ROOT'S PREPARATION FOR THE SENATE

A distinguished writer upon jurisprudence has somewhere remarked that a lawyer learned in the common law may be totally unfit to grapple with the problems of statute law, as a member of a legislative body. Senator-Elect Elihu Root, in his speech to the New York Legislature January 28, said that he did not think that "as a rule lawyers who have been many years at the bar and whose habits have become fixed, ordinarily make very good legislators, when they are not caught young."

But if we are not much mistaken, Mr. Root's assumption and that of the learned writer are incorrect. In view of the intimate and vital relation between unwritten and written law, and the dependence of the latter upon the former, it at least ought to be true that a man is the better legislator for being a sound lawyer. At all events, in Mr. Root's own case, no one can doubt for a moment that he will be better fitted than the majority of his colleagues in the Senate to face those new problems, which, as he says, "continually presenting themselves, are taxing the best thought of the most experienced public servants." For few of our national legislators have united in so rare a combination the wisdom of the statesman and of the lawyer, as has "this convinced and uncompromising nationalist of the school of Alexander Hamilton." Few have brought to their duties the same profound insight into constitutional law as that of this rare man, who declares:—

> I believe in the exercise of the executive, the legislative, and the judicial powers of the national government to the full limit of the constitutional grants as those grants were construed by John Marshall and would be construed by him today. But I believe that the founders of the Republic builded more wisely than they knew when they set the limits between the exercise of that national power and the exercise of the local powers by the states.

The retirement of Mr. Root from the Cabinet and his entrance into the Senate will by no means result in a lessening of his influence and usefulness. On the contrary, there is already some indication of greater frankness in his discussion of public matters upon which a cabinet officer might hesitate to pronounce his opinion. He does not hesitate to declare himself in favor of a parcels post, or to discuss numerous problems of public interest. His outspoken but delicate reference to a somewhat sore subject lately vexing some citizens, that of the interference of one particular state in our international relations, as subsequent events have proved, was not less timely than forceful. He said:—

> The men who are found opposing the maintenance of the authority of the treaty provisions of the United States made under the express grant of power in the Constitution are apt to be the very men who are anxious to have the Government come into their states and spend no end of money in doing the things that the states ought to do themselves in the exercise of their own powers. But the invitation of the national government to as-

sume this and that duty within the limits of a state is an invitation to set up a national power to the exclusion, the ultimate exclusion, of state power.

The idea that we require differing qualities of our statesmen, our executive officials, our legislators, and our judges, is to a certain extent, perhaps, old-fashioned. Mr. Root is himself a living object-lesson of the good to be attained by selecting for one of these high positions a complete, versatile, sagacious lawyer, who with almost equal distinction, probably, would apply the force of his intellect to the duties of any public position which he might be called upon to fill.

MR. KEIR HARDIE'S RETORT

Mr. Keir Hardie, M. P., the Scotchman who went to Parliament in a flannel shirt, who differs from John Burns in working for reforms through the Labor party, of which he is chairman, instead of the Liberal party, and who shocked the London *Times* by his speeches in which he said he would do his best to help India become self-governing like Canada, got into a slight dispute about a question of labor law with Hon. Charles E. Littlefield, ex-Congressman from Maine, at a dinner of the Economic Club given in New York January 18. The *Green Bag* is indebted to a friendly correspondent who attended the dinner for an account of the episode, which seems to have been due to a misunderstanding with regard to the meaning of the Trade Disputes Act of 1906.

Mr. Littlefield had delivered an eloquent as well as well-informed speech on what he understood the labor organization could and could not do, especially pointing out that the boycott and black list, two methods formerly used by the American Federation of Labor, had been specifically declared illegal.

Then Mr. Hardie started out to say that in England matters had progressed much further, and that by a recent statute, labor organizations had been taken out of the purview of the common law. Mr. Littlefield interrupted with the inquiry whether Mr. Hardie referred to the statute of 1906.

Mr. Hardie—"Yes, I refer to that."

Mr. Littlefield—"Well, it is my understanding, Mr. Hardie, that that statute applies simply to the question of damages, and does not affect in any way the criminal law in relation to labor organizations."

Mr. Hardie (*turning his back on Mr. Littlefield*)—"As an English M. P., I might be permitted to say that I know the law of Great Britain."

Mr. Littlefield—"I know to the contrary."

Mr. Hardie—"You may know the contrary, but you don't know the Act!"

MENDING THE SHERMAN LAW

It is perhaps just as well that the Warner or Civic Federation Bill to amend the Sherman anti-trust law by a system of voluntary registration was adversely reported upon by the Senate Committee on the Judiciary. It proposed giving the executive a discretion, in determining what combinations are consistent with public policy, and what are opposed to it, which is properly vested in courts of law rather than in the executive branch of the government.

Nevertheless, Senator Nelson of the committee, though right in his opposition to granting the head of a bureau the "dispensing power" once exercised by the British crown, went too far when he declared that all combinations in restraint of trade, whether reasonable or unreasonable, should be prohibited. He made bold to assert that the injec-

tion of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the Sherman law. We would have, he said, this situation: "A court or jury in Ohio might find a common agreement or combination reasonable, while a court or jury in Wisconsin might find the same agreement or combination unreasonable."

As a matter of fact, the courts of our various states pay great respect and deference to one another's decisions, and a system of case law, generally speaking, tends toward uniformity rather than toward inconsistency. The determination whether a restraint of trade is reasonable or unreasonable is one which should be left to the courts of the United States, and the principal fault with the tinkerings of the critics of the Sherman law is their failure to realize that the defects of that statute are to be remedied by other means than by investing administrative officials with judicial duties.

A PROBLEM OF INTERSTATE COMMERCE

The New York, New Haven & Hartford Railroad Company of Connecticut is said to own and operate under its Massachusetts charter only about seven miles of railroad in that state, yet it conducts a large railroad business there by means of the New York & New England, Old Colony, and other corporations with which it has merged at different times. A peculiar situation now confronts the Massachusetts Legislature in view of the report of the Attorney-General that the charter and franchise are subject to forfeiture.

Attorney-General Malone found that the company had increased its capital stock between 1898 and 1907 from $47,500,000 to $121,728,000 without the authority of the state and in violation of its statutes. Two alternatives were open to him: to proceed by means of injunction, or to declare the possibility of the forfeiture of the charter and leave the matter in the hands of the Legislature. He chose the second of these alternatives. The matter has been referred to the joint Judiciary Committee and the Railroads Committee.

Obviously the dissolution of the corporation by means of a receivership is a practical impossibility in view of the injury to innocent holders of stock. That legislator realized the truth of this, with more or less distinctness, who asserted: "We could say: 'Now we've got the New Haven at a disadvantage. We can raise the devil with it if we see fit. We can smite it hip and thigh.' But it won't do. The results to investors and others would be too serious."

Were the recommendations of the Attorney-General, who believes that hereafter the law should provide some specific penalty less onerous than that of legal extinction, and more speedy than redress by means of a hard-contested injunction, to be adopted by the Legislature, such a penalty for violation of the statutes would of course not meet the particular situation, as such legislation would be *ex post facto*. It is difficult to see, therefore, just what the Legislature can do beyond supplying a signal illustration of the incapacity of separate states to deal with interstate questions.

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

According to statistics compiled by the Chicago Tribune, 8952 homicides were committed in the United States in 1908, an increase of 240 over the record of the previous year.

The Vermont Legislature reached final adjournment January 29th, after the longest session in the history of Vremont by nearly three weeks. The total cost of the session was $135,000 as compared with $82,000 for 1906, part of this increase being due to the "raise" voted by the members in their own salaries from $3 to $4 a day. Seven legislators, however, refused to accept the increase of salary.

According to a statement given out January 20 by Harry K. Thaw, on whose behalf a writ of *habeas corpus* had been obtained, the writ was withdrawn because he and his mother did not wish to allow the transfer "to be put practically into Mr. Jerome's hands. I am not seeking to avoid a hearing in New York, and if assured a jury trial there, my counsel would gladly suffer the inconvenience of trying my case so far from his home."

The Solicitor-General of the United Kingdom extended the felicitations of the bar at the inaugural dinner of the new City of London Solicitors' Company January 21, and in wishing the new society a successful career, said that there was no body of men, in commerce, literature, philosophy, or any other walk of life, more honorable than the body of men that made up the legal profession.

January 16 was the one hundredth anniversary of the birth of John H. Clifford, a prominent lawyer, statesman and patriot, who was at one time Governor of Massachusetts. In the famous trial of Professor John W. Webster for the murder of Dr. George Parkman in 1850, he handled the prosecution, being Attorney-General at the time. Mr. Clifford's argument for the government was perhaps the most consummate summing up of circumstantial evidence against a prisoner that has ever been presented in any capital case in this country.

In a libel suit brought by Governor Comer of Alabama against the Montgomery *Advertiser*, the jury last month rendered a verdict of one cent damages.

The Justices of the Supreme Court of the United States were entertained by the President and Mrs. Roosevelt, when the latter gave their last state dinner on the evening of January 28. Justice Day was the only absentee from the ranks of the Justices.

Ex-Governor John D. Long of Massachusetts, Secretary of the Navy during the War with Spain, has given up the practice of law and will in future devote his attention to the care of trust funds and estates. Mr. Long has had an active and honorable career of half a century at the bar, during which he has handled some celebrated cases.

Calcutta Weekly Notes finds two Indian cases on the subject of alluvial accretions recognized in the treatment of "Evidence of Boundaries," in the third volume of Lord Halsbury's Laws of England, and concludes that "India does contribute to the development of the law of England, and the indebtedness in the matter is not entirely one-sided."

Edward Henry Strobel, formerly Bemis Professor of International Law at Harvard University, who resigned from this position in 1906 to take a post as general adviser to the government at Siam, died at Bangkok, Siam, January 15. Mr. Strobel's studies won him eminence as a scholar, and the news of his death has been received with sorrow in America.

It has been discovered that through an oversight the Governor of the state overlooked the appointment of Massachusetts Commissioners on Uniform State Laws a year ago, consequently their term expired by limitation. It is anticipated that the Legislature will do what it can to correct this strange oversight, as the importance of the work of the Commission is not underrated in a state which has taken a prominent part, through the able Commissioners that have represented it in the past, in the work for uniformity.

GEORGE W. WICKERSHAM, ESQ., OF NEW YORK

ATTORNEY-GENERAL OF THE UNITED STATES

[*See page* 113

The Green Bag

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Conservatism in Legal Procedure*

By Frederick W. Lehmann

President of the American Bar Association

It is fundamental in our jurisprudence that every man is presumed to know the law and that ignorance of the law excuses no one. If it were otherwise, the rule of judgment must vary with each case, depending not upon the law itself, but upon the measure of knowledge of the law shown to be possessed by the persons involved. Such an issue would present as many difficulties as an inquest of sanity, and if it were a necessary incident to the trial of cases, would make the administration of justice impossible to human powers.

What everybody is presumed to know, everybody should have reasonable opportunity to learn. We condemn as inhuman the tyrant of olden days who wrote his mandates in letters so small and upon tablets posted so high that his people could not read them. Have we done much better? 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. If he has time for research in this large library he will find doubt expressed as to the meaning of statutes, adjudicated cases in direct conflict, and text writers in marked disagreement, 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.

The practical result of it all is not so bad as might be apprehended. So far as concerns the great mass of human actions, the law is in accord with the common opinion of what is right, and men go in and out in the daily course of life, walking in the ways of the law simply because they follow the dictates of their own consciences. This is not, however, and cannot be, universally true. In the complexity of modern society there are many relations governed necessarily by conventional rules. What is lawful in these relations is not always obvious, and a man may err in them without impeachment either of his integrity or intelligence. He may, for

*An address delivered before the Oklahoma State Bar Association at Oklahoma City, Jan. 4, 1909.

example, lose rights or incur liabilities with respect to commercial paper by acts or omissions that have in them no moral quality and that in the particular case have worked injury to no one; none the less if he has disregarded the law he must suffer the penalty it imposes. This conventional law should then be made to conform as closely as possible to the habits and usages of those affected by it so that a knowledge of it sufficient for everyday purposes may be acquired in the mere routine of life.

The presumption of knowledge by everybody applies not alone to the substantive law which declares the rules of human conduct, but as well to the formal law which governs the practice and procedure in cases when that conduct is brought before the courts for judgment. Everybody is presumed to know how a suit should be instituted, how prosecuted and how defended, and how taken to and through the various appellate tribunals which may have cognizance of it—that is, everybody is presumed to know these things except those who are specially learned therein, the lawyers who try the cases and the judges who decide them. The lawyer must be faithful to his client in the conduct of the cause and beyond this must have, not a perfect, but just a reasonable knowledge of the law and must show a reasonable measure of skill in the use he makes of it. He is responsible if he is disloyal, incompetent or negligent, but not if simply mistaken. The requirement as to the judge is only that he be honest. However he may err, he cannot be held individually responsible for the consequences.

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. For the mistakes of the court he may have a costly and partial redress by appeal to a higher tribunal, while for the mistake of counsel he has, in the case itself, no redress at all, and outside of the case none that is greatly worth while. In *State* v. *Jones*, 12 Mo. App. 93, the St. Louis Court of Appeals did indeed hold that the gross ignorance, incompetence and imbecility of counsel for a defendant accused of murder, by reason of which the defendant was deprived of essential rights and advantages guaranteed to him by law, necessary to his proper defense and inseparable from a fair trial, constituted sufficient cause for setting aside a conviction and granting a new trial. But in a later case—*State* v. *Dreher*, 137 Mo. 11—of conviction of murder and sentence to death, the Supreme Court denied this, saying:—

> The neglect of an attorney is the neglect of his client in respect to the court and his adversary. The decisions are too numerous to cite; but their uniform tenor is to the effect that neither ignorance, blunders nor misapprehension of counsel not occasioned by his adversary is ground for setting aside a judgment or awarding a new trial. The rule is founded upon the wisest public policy. To permit clients to seek relief against their adversaries upon the alleged negligence or blunders of their own attorneys would open the door to collusions and would lead to endless confusion in the administration of justice. The business of the courts cannot be conducted on any other terms than that parties must be held by the acts of their attorneys in their behalf in causes in which they are authorized to appear, and in the absence of fraud, leaving the client to his remedy against the attorney for his negligence.

The court said that *State* v. *Jones* was an instance of a hard case making bad law, and while they doubted not that justice had been done there, they could not give it sanction as a precedent in practice and procedure, and it was accordingly disapproved.

Just how the defendant who has been hung because of the negligence of his

counsel is to enforce his remedy against counsel for that negligence is not apparent, for it would seem that his cause of action must abate at the moment it fully matured. It is interesting to note, however, that a right of action exists and is based, not upon the mistake of counsel, but upon his negligence.

The law which a man is held to know should be within the reach of his understanding. The procedure to be followed in the assertion and vindication of his rights should be plainly marked out and easy to be pursued, if not by himself, at least by those who are accredited as competent to guide him. There should be in it nothing savoring of the mystery of a craft.

The substantive law is fairly free from this reproach. On its ethical side it is brought into accord with the expanding sense of justice and the growing spirit of humanity of the people, and upon its conventional side it is made to harmonize with the needs and conveniences of business as these are developed by industrial and commercial progress, and in this work of adaptation to new standards and new conditions the bench and bar have borne an important part. But so much cannot be said for the formal law, and it is for this the lawyers are especially responsible. Here reform has moved always with a laggard step. Against every proposal of change has sounded the cry, "*Nolumus mutare leges Angliæ.*" From the beginning there has been strenuous insistence upon the existing methods, and even when the old order changed, giving way to the new, the spirit of the old seemed yet to pervade the new.

It is not strange that with the Norman conquest the Norman language should come into use in the English courts, but it is passing strange, when we consider the nature of that conquest, and how soon the alien race was absorbed by the native, that this should have continued so long. For three hundred years, long after English was the language of everyday life among all classes of people, French remained the language of the profession, and when it was discontinued it was not for the convenience of litigants, but, if we may credit Blackstone, for the vainglorious reason that Edward the Third, having subdued the crown of France, it was "unbeseeming the dignity of the victors to use any longer the language of a vanquished country." And the change made was but a limited one. The language spoken in the courts was English, but the pleading, whatever was put in writing and placed on record, was done in bad Latin, while the reports of adjudicated cases made by the lawyers for the use of the profession continued to be in Norman French. And so it was until the time of the Commonwealth, when the Latin was banished from the records and the French from the reports, not, however, without great regret on the part of many lawyers. Styles, in his preface, says:—

> I have made these reports speak English, not that I believe they will be thereby more generally useful, for I have been always and yet am of opinion, that that part of the common law which is in English, hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others, than to defend themselves; but I have done it in obedience to authority and to stop the mouths of such of this English age, who, though they be confessedly different in their minds and judgments as the builders of Babel were in their language, yet do think it vain, if not impious, to speak and understand more than their mother tongue.

He thought it dangerous that men should really know what they were presumed to know, and so many were of his opinion that with the Restoration of the Stuarts the Latin was restored to the courts and continued in use for the

pleadings and records in all cases, civil and criminal, until the year 1730, when by act of Parliament English was again made the language of the courts for every purpose and for the sensible reason "that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and the pleadings, the judgments and entries in a cause." Even at that day so simple a reform could not be effected without opposition. Raymond, Chief Justice of the King's Bench, led in the fight against it and could see nothing but evil to result from the innovation. A generation after, Blackstone, in his Commentaries, regretted the change, and Ellenborough, in a still later day, preferred the use of a language which had never been the vernacular of any people to his own English, dignified as it had been in verse and in prose by the genius of Spenser, Shakspere, Milton, Dryden, Pope, Addison and Swift.

An alien tongue thus persisted in the English courts for nearly seven hundred years and alien forms persisted for more than a century longer. What we know as the common law system of pleading exhibits the genius of the Norman rather than of the Saxon element in the English nation, but it held its place with astonishing tenacity, succeeding in what the Latin of the court records had not done, establishing itself in the English colonies and hindering there the administration of justice as much as at home. As it developed, it was formalism run mad. There was a form of action for each particular species of injury, and the form was essential. The three general classes of action, real, personal and mixed, were further subdivided until, according to some enumerations, there were fifty-nine distinct forms, and around them grew up a vast amount of learning, the possession of which was the chief equipment of the lawyer. If suit was brought in the wrong form there could be no change, but it must fail altogether and the unfortunate litigant was not even advised how to bring his new suit, for the judgment against him told him only that he could not recover in the particular form he had adopted. Even where more than one form was open to use great care must be exercised, for the books taught that "by a judicious choice of the remedy, the defendant may be frequently precluded from availing himself of a defense which he might otherwise establish." The injustice of precluding a proper defense or permitting an improper one in any form of action does not seem to have received much consideration. The subtleties and intricacies of real actions became so great as to baffle the skill of the most experienced practitioners, and trial in these forms was so tedious, difficult and expensive that when it was permitted finally to try title in ejectment they became nearly all of them obsolete, and with them, says Reeve in his History of English Law, "was consigned to oblivion one third of the learning of the ancient law."

The substituted action of ejectment was far from being a simple one. Instead of a plain statement of the case, each party setting out the facts as he held them to be, there must be introduced the fiction of a lease and a lessee, and of an ejector and an ejectment, encumbering the pleadings with false issues. Fictions of other kinds were employed to confer jurisdiction upon particular courts. And the peculiarly sacred features of those old pleadings, which might not be questioned in any way, were the statements in them that everybody knew to be false.

It was claimed as a merit for the system that it brought the controversy to a single issue and so was peculiarly adapted to the institution of trial by jury. But the single issue often prevented a party from making a full presentation of his case, and he was defeated upon the issue which had been framed when upon another he was plainly entitled to succeed. To remedy this evil the cause of action was permitted to be stated in various forms in different courts and to each of these counts the defendant was permitted to interpose as many pleas as the ingenuity of counsel could devise. In a case reported in the 23d Wendell there are thirty replications to one plea. Instead of a single issue there came to be so many that for the practical purposes of the case there was none at all. Everything was done except to make a plain statement of the contention of each of the suitors. Burke fairly describes the legal procedure of his day in his "Vindication of Natural Society":—

> The worst cause cannot be so prejudicial to the litigant as his advocate's or attorney's ignorance or neglect of the forms. A law suit is like an ill-managed dispute, in which the first object is soon out of sight and the parties end upon a matter wholly foreign to that on which they begun. In a law suit the question is, who has a right to a certain house or farm, and this question is daily determined, not upon the evidence of the right, but upon the observance or neglect of some forms of words in use among the gentlemen of the robe, about which there is even amongst themselves such a disagreement that the most experienced veterans in the profession can never be positively assured that they are not mistaken. . . .
>
> I remove my suit; I shift from court to court; I fly from equity to law and from law to equity; equal uncertainty attends me everywhere; and a mistake in which I had no share decides at once upon my liberty and property, sending me from the courts to a prison, and adjudging my family to beggary and famine. I am innocent, gentlemen, of the darkness and uncertainty of your science; I never darkened it with absurd and contradictory notions, nor confounded it with chicane and sophistry. You have excluded me from any share in the conduct of my own cause; the science was too deep for me; I acknowledged it; *but it was even too deep for yourselves; you have made the way so intricate that you are yourselves lost in it: you err, and you punish me for your errors.*

Until the middle of the last century, within the memory of living men, this archaic procedure held its place wherever the jurisprudence of Westminster had sway, and it may be found still in force in one of the leading states of the Union, relieved, it may be, of some of its worst features. Take up Chitty's Pleading and Tidd's Practice, read the dreary casuistry you find in their pages and bear in mind that it remained until our day as an obstruction in the way of justice. The niceties and subtleties of the law of pleading were all settled at the expense of some suitor who cared nothing and should be held to care nothing for the forms employed, but who had a grievance and was entitled to a remedy, and as at the trial he could tell his case from the witness stand in plain English, so it should have been formulated by his counsel for trial in plain English in the pleadings. The steam engine was invented and improved and became the motive power of manufactures, and of transportation on the water and on the land, the lightning was subdued and made to serve as an instantaneous messenger between the remotest parts of the earth, sinews of iron and steel in every field of labor were doing the work of human brawn, industry and commerce were revolutionized in all their methods, before the profession was brought to recognize the truth that the best way for the purposes of justice, of stating a cause of action, or the defense to it,

was to state its constituent facts in language such as the people concerned with it use in the every-day relations of life; in other words, to perfect the statute of the fourth year of George the Second and make the pleadings in English courts speak plain English.

For his constant and untiring efforts to this end, and for the large measure of success achieved, the country and the profession are greatly indebted to David Dudley Field. But Field himself felt that his work was far from completed. The changes he introduced were not heartily received, and, as before, the old wine was poured into the new bottles. The code, it was held, was in derogation of the common law, and it must be strictly construed; and this in face of the fact that the purpose of the code was to cut up the common law of pleading, root and branch. It was not sufficient to state facts, as the code contemplated, but there must be a theory of the case, and a mistake as to this was fatal. The spirit of the old formalism survived, and the shades of debt and detinue, trover and trespass were constantly invoked and haunted the courts with their ghostly presence. Students in our law schools are still taught that they cannot plead properly in the new way if they have not mastered the old, and so to fit them for making a concise statement of facts in plain English they are commended to the fantastic forms and tragic absurdities of Chitty and Tidd rather than to the rudiments of English grammar and the simple diction of the English Bible.

The purpose in pleading should not be to display expertness in the art, but to advise the court and the opposing party of the contention made. The controversy in the interest of justice should be narrowed as much as may be, but not necessarily to a single issue, for there may be more than one matter really at issue between the parties. Falsehood should be eliminated as well as formalism. We require the sanction of an oath or affirmation in behalf of testimony, and we should require the same solemn sanction for the pleadings. As the practice now stands in many of the states, litigants are put to the burden and expense of proving facts which would not be denied if the denial were required to be under oath. In nearly every case where a general denial is interposed it is in greatest part untrue. Under the Missouri code it does not put in issue the execution of a written instrument or the existence of a partnership or corporation, unless it is supported by an oath. But these facts are not more sacred than other facts and a party should no more be permitted to deny by his pleading than by his testimony anything which he knows to be true. Justice should be speedy and inexpensive, and truthful pleading and simple procedure are most effective means to that end.

Where the appeal of a case is allowed it should be facilitated in every possible way, but in nearly every state we find an accumulating body of law upon the subject of appellate procedure. At the same time complaint is made by the judges that the records presented are largely encumbered with useless matter. But the fact should occasion no surprise. Elaborate records are a necessary consequence of intricate procedure. When there is doubt whether something shall be done in one way or another, it is, if possible, done in both ways. If there is any question whether something should be included in the record or may be excluded, it is included. With us appeals are sometimes dismissed because it does not appear from the record in the appellate court that something was done

in the trial court, notwithstanding it was in fact done. Refining beyond this, it is held that some things done in the lower court are matters of record and that others are matters of exception, and if in the transcript or abstract filed in the appellate court that appears in the record proper which belongs in the bill of exceptions, or *vice versa*, it will not be considered. Lawyers are advised to make themselves familiar with the learning of the law on this subject, but why should there be any learning on the subject? Everything done in the course of a case is now, in fact, made a matter of record, motions as well as pleadings; and the evidence being taken in shorthand and transcribed by an official reporter, this when approved as correct can be filed and the bill of exceptions dispensed with altogether. But the habit of technicality is strong with us, and holds us to the neglect of substance. The short form of appeal in Missouri requires that a certified copy of the judgment shall be filed in the appellate court and later there must be filed a printed abstract of record of the court below. A case was recently dismissed by the Kansas City Court of Appeals because the printed abstract did not set out that the certified copy of the judgment had been filed. It had been filed in fact, and by predicating a dismissal upon this ground, the court refused to take notice of its own record of the case. Our practice is too much beset with requirements which, complied with, serve no good purpose whatever, but the omission of which is fatal to the case, and as long as this continues there will be much useless labor imposed alike upon counsel and the court. If records are to be reduced in volume, the process of elimination must not be a dangerous one, and form must be dealt with as form, and the punishment in case of offense against it should be made to fit the crime. It is a worse than Draconian code which punishes the client capitally for the misdemeanor of his counsel.

When a case has been safely conducted through the devious course of appellate procedure, the old spirit asserts itself in the manner in which it is reviewed. It is not sufficient to sustain the judgment that it is right, but there may be no error in any of the proceedings leading up to it. We profess great respect for the verdicts of juries, and under guise of this respect set them aside for the most trivial causes. The statute provides that a case shall not be reversed except for some cause affecting the merits, but we emasculate the statute by the rule of administration that error is presumptively prejudicial. The appellate judges may be sure that the evidence improperly admitted or excluded, or the instruction given or withheld, would not have affected the result with them, but they cannot say as to the jury, and so the verdict is set aside. And yet they do in many cases put themselves in the place of the jury and say what should or should not be done respecting a question of fact. Negligence is a question of fact, but if upon the evidence presented in any case all reasonable men must draw the same conclusion respecting it, the question is held to be one for the court. The trial judge may think in a particular case that reasonable men might differ as to the matter and so submit the case to the jury; the jury may find that there was negligence, and the appellate court may set aside that verdict, the judges substituting their judgment of what all reasonable men should conclude for that of the jury. A motion for new trial is made on the ground of newly discovered evidence, and the court refuses the

motion unless it believes that the new evidence would probably produce a different result. In these cases the courts deal with facts and determine according to their judgment of what the facts require. In every case the presumption should be in favor of the verdict and no error of ruling made in the haste and pressure of a trial should occasion a reversal upon a mere speculation as to what the jury might have done had the ruling been otherwise. The case should be considered in its entirety, and unless it appears affirmatively that harm has resulted, the error should be disregarded. If the appellant has a grievance it is not because of any ruling in the course of the trial, but only because that ruling was a hurtful one, probably affecting the result of the case. As it is, we all know that cases are sometimes tried with a view to making a record containing reversible error, and the trial becomes a mere contest of skill between counsel, with the advantage on the side of him who best understands the rules of the game. The respect for the verdict of a jury should be more genuine and substantial, and when this is so cases will be tried more upon their merits and the result will not often be in conflict with the justice of the cause. Every case denied a hearing because of fault of form, and every case decided upon grounds not involving its merits, is a reproach to our profession.

They have advanced far beyond us in England. In 1873 the different courts of common law and chancery were made one court, consisting of two divisions, the High Court of Justice, which had original jurisdiction, and the Court of Appeal, which had appellate jurisdiction. All mere details of practice were left to be governed by rules of court, and violation or neglect of these was subject to discipline in any case as the court thought appropriate. There is therefore an elasticity and adaptability in the procedure to the requirements of each case which is entirely wanting when the rules are prescribed by inflexible legislative enactments, failure to observe which is fatal to the case itself. For being subordinated to substance, the tendency is continually toward greater simplicity. Pleadings are short and to the point, and in many cases are dispensed with altogether. Preliminary hearings determine whether there is a *bona fide* controversy, eliminate all questions of form, settle the issues, whether of law or fact, fix the time and mode of trial, and the case when tried is tried entirely upon its merits. Dilatory tactics and sham defenses are well-nigh impossible under this system, and real controversies are disposed of without unnecessary delay and without unnecessary expense.

The procedure on appeal is as simple. There is no transfer of the case from one court to another, for the trial division and the appellate division are constituent parts of one and the same tribunal. All appeals are in the nature of rehearings, and are brought by notice of motion in a summary way, and no petition, case or formal proceeding other than the notice of motion is necessary. This notice may be amended at any time as the Court of Appeal may see fit. So much of the record is used as the questions involved in the appeal may require. The evidence, if questions of fact are to be reviewed, may be adduced by copy, or if the expense of this is heavy, the original is resorted to. The appellate division may allow amendments and may receive further evidence upon questions of fact. It may order a new trial, or it may give any judgment or make any order which should

have been made, and it may make such further or other order as the case may require. In brief, an appeal is a rehearing without intricacy of method, is freed from all our formal labor and a great deal of our expense and is disposed of in a substantial way and upon substantial grounds.

Mr. Odgers, speaking at the beginning of this century of reforms in the law accomplished in England during the last century, says:—

> The changes which I have sketched are not final or unalterable. We have not attained perfection yet, other modifications may be deemed expedient hereafter. But the reforms to which I have referred tonight have all been made with the object and have all had the effect of simplifying the procedure and improving the administration of our law. They have benefited our increasing population; they have removed obstacles from the path of commerce, and promoted the general prosperity of the realm. Justice is, in fact, done in our law courts. *No honest litigant of ordinary sagacity can now be defeated in an action by any mere technicality, or lose his case through any mistaken step or accidental slip.* Litigation in 1800 was dilatory and costly; now it is cheap and expeditious. To borrow the language of Lord Brougham, the procedure of our courts was in 1800 "a two-edged sword in the hands of craft and oppression; it is now the staff of honesty and the shield of innocence."

We, too, have made changes in our legal procedure since the year 1800, and the object and the effect have been to simplify it and to greatly improve the administration of our law. But we have not yet made such progress as to justify us in saying that "no honest litigant of ordinary sagacity can now be defeated in an action by any mere technicality, or lose his case through any mistaken step or accidental slip."

Our criminal procedure is in a worse state than the civil. We read Hale's Pleas of the Crown and wonder at the refinements of legal reasoning in times otherwise not overmuch refined. A bill of indictment was a marvel of legal craft. It was specific to a degree suggesting great delight on the part of the draftsman in the horrible details of the crime he was describing. If it was murder, he described the defendant and his victim, the time and place, the manner of committing the offense, with what sort of weapon, the value of the weapon, in which hand it was held, the number of wounds inflicted, upon what portion of the body, how long, how wide and how deep, and much more of the same sort. As the more detailed his description the greater the liability to mistake, to avoid the objection of variance he multiplied his counts, the differences in them being as to the kind of weapon used, or as to the hand in which it was held or the portion of the body upon which the wound was inflicted, and so on, until the indictment was expanded into thirty or forty counts, and all in Latin, which the defendant did not understand, and almost as offensive as the crime it described.

Sometimes the pleader, not knowing an appropriate Latin word, would use an English one, and if there was a recognized Latin equivalent for the English word used, the indictment was bad. "Regularly," says Hale, "false Latin doth not vitiate an indictment, if yet the indictment be reasonably intelligible." But some words were so essential in their precise form that the omission or misplacing of letters in them rendered the indictment fatally defective. "*Feloniter*" would not serve for "*felonice*," "*burgariter*" for "*burglariter*." Hale gives us the reason in case of the word used to charge the crime of murder: "This word, '*murdravit*,' *is a word of art*, and cannot be otherwise exprest; therefore '*murderavit*,' instead of '*mur-*

dravit' vitiates an indictment for murder."

The extreme technicality of the judges of the early days is often attributed to the severity of the criminal law which punished with death many offenses now dealt with as petty misdemeanors. Prisoners were also denied the right to counsel and were not permitted to call witnesses in their own behalf. But the sympathy of the judge does not fully explain this technicality. Something was due to that same love of casuistry which displayed itself in the forms of civil pleading. No indictments were more technically considered than those for murder. "*Murdravit* is a word of art and cannot be otherwise exprest." This is not an expression of sympathy, but of subtlety. Punishments are now apportioned to the nature of the offense; counsel is not only permitted to the defendant, but is provided for him, and he may not only call witnesses in his own behalf, but is granted compulsory process for them.

While humanity no longer calls for these refinements, formalism does, and so we abandon the old precedents grudgingly and reluctantly and indeed hold on to as much of them as we can in spite of statutes which provide that indictments shall not be held invalid for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

In *Lester* v. *State*, 9 Mo. 666, the prosecutor, following the old precedents, charged that the defendant made an assault upon one Scott with a large stick *of no value*, which he held in both hands. In the olden days the value of the weapon with which murder was committed must be stated, because the weapon itself was forfeited as a deodand to the king, a reason which had no application in Missouri, but forms persist long after the reason for them has ceased. The prosecutor further charged that the defendant struck and beat Scott and inflicted mortal wounds upon him, and stated with precision the time when and the place where this was done. Instead of adding that of these wounds the said Scott did "then and there" die, he added more graphically that of these mortal wounds Scott "instantly" died. The indictment was assailed as not setting forth the time and place of death. In vain the Attorney-General argued that "instantly," in the conjunction in which it was used, was the exact equivalent of "then and there"; it was, however, not a word of art, but was rather a word of general, popular use, and so could not be admitted, the court saying that "it would be difficult to foresee to what extent innovations would go if we lose sight of the established precedents, so far as they fix the *form* of material averments." This was in 1846, a long time ago, but the ruling was repeated in 1877, the cases were cited approvingly in 1887, and they have never been overruled and may be said to be the law today.

In *State* v. *Jones*, 20 Mo. 58, the adjectives "deliberate" and "premeditated" were used instead of the corresponding adverbs in describing an assault which resulted in murder, and for this fault of grammar the indictment was held to be bad and the conviction set aside. This again is an old case, but modern cases hold as strict a rule. The Constitution of Missouri provides that all indictments shall conclude "against the peace and dignity of the state." In *State* v. *Campbell*, 210 Mo. 202, decided last year, the indictment, which was for rape, concluded, "against the peace and dignity of state," omitting the article "the," and for this

omission the indictment was held bad, as not "indicating the power or authority against which the facts charged in the body of the indictment constitute an offense." And yet the indictment showed upon its face that it was returned in the Criminal Court of Greene County, Missouri, by the "grand jurors of the State of Missouri, impaneled, sworn and charged to inquire within and for the body of Greene County," and it charged the crime to have been committed in the County of Greene and State of Missouri, contrary to the form of the statute in such cases made and provided, and it was signed by the Prosecuting Attorney, endorsed by the foreman of the grand jury, and filed by the clerk of the court. The court cited adjudicated cases and text writers in support of its opinion, but the lay mind, which is presumed to know the law, will inquire if the state of Missouri was not plainly indicated as the power and authority against which the offense was committed, what power and authority was indicated?

In these cases what was intended was perfectly plain from the indictment. In the first case the language used was better fitted for its purpose than the formal phrase; where the adjective was employed instead of the adverb the fault could not have been detected by one who did not know what was meant, and in the last case the omission of the article "the" was plainly an omission of the pen of no more significance than if there had been a failure to cross a "t" or dot an "i."

In the neighboring state of Texas there is a list of cases displaying a like precision with respect to verdicts.

In *Taylor* v. *State*, 5 Texas App. 569, decided in 1879, the jury found the defendant "guity" and fixed his punishment at imprisonment in the penitentiary for three years. The court said that as a general rule "neither bad spelling or ungrammatical findings of a jury will vitiate a verdict when the sense is clear." And after declaring this common sense rule they hold the verdict bad because "guity" is neither synonymous nor *idem sonans* with "guilty."

In *Curry* v. *State*, 7 Texas App. 91, also decided in 1879, the jury found the defendant "guily" as charged in the indictment and assessed his punishment at five years' imprisonment, and this verdict was held to be good because followed by the words "as charged in the indictment," and also because "by separating the syllables so as to place the first four letters in one syllable and having the 'y' alone in the second, and giving the letter 'i' the short sound, the sound would be, if not identical, at any rate nearly so, with the ordinary pronunciation of the word if written 'guilty.' "

Now, it is plain as a pike-staff that in each case the jury meant "guilty," and in neither case if the word as written is to be dealt with as a distinct word is it either synonymous or *idem sonans* with guilty. Neither "guity" nor "guily" is known to the English language, and the omission of the "t" affects the identity of the sound quite as much as does the omission of the "l."

In *Woolridge* v. *State*, 13 Texas App. 443, decided in 1883, the verdict was, "We the jury find the defendant, Ben Woolridge, guilty of murder in *fist* degree and assess the punishment at death."

The learned court said: "Instead of the word 'first' the jury has used the word 'fist,' or, in spelling the word 'first' has omitted the letter 'r.' " Considering all the circumstances, the defendant being on trial for murder, and

there being different degrees of this offense, and these degrees being numerically designated, and it being the function of the jury to find the defendant guilty or innocent, and if guilty to determine whether in the first or second degree, the case would not seem to be a difficult one. The first man called in from the street would have said the jury inadvertently omitted the letter "r" from the word "first." And so the second and every other man called in from the street would have said. Among all those conclusively presumed to know the law there would have been no difference of opinion. And the judges of the court, in their capacity as individuals, in which capacity they, too, are presumed to know the law, had no doubt that it was simply a case of misspelling. But as judges, and having regard to the sanctity of trial by jury, it was otherwise, and in six or seven pages of legal learning they solemnly conclude that the jury had found the defendant guilty of murder in the "fist" degree, which was a degree not known to the law, and so the verdict was set aside. The pith of their reasoning, if there be pith in such reasoning, is:—

> . . . It is to be particularly noted that here we have no case of misspelling a word; the word used is "fist," as well known to the English language as any other word in daily common use. It is further to be noted that this word "fist" is not pronounced, and cannot by any contortion of pronunciation be made to sound like the word "first"; and consequently the doctrine of *idem sonans* is not applicable and must be eliminated from the discussion. . . .
>
> Have the jury found the defendant guilty of murder in the *first* degree? To enable us to so hold, we must strike from the verdict a word which they have plainly spelled—a word in everyday use in our language—and substitute in its place another and entirely different word which we only infer they must have intended instead of the one they have used. Can we do this? If so, . . . then why have the inestimable right of trial by jury at all? If the court can substitute a verdict which the jury has not found, or find one where they have found none at all, then why have a jury? Why not let the court find the entire verdict without the intervention of a jury? . .

In *Walker* v. *State*, p. 618, of the same report containing the Woolridge case, the verdict was "*wee* the jurors *finde* the defendant *gilty* and of *mrder* in the first degree and assess his confinement in the *penetentery* for life." "We" and "find" are both encumbered with a superfluous "e," "guilty" and "murder" are both guiltless of the "u" and the penitentiary has lost both of its "i's." Surely such deformities must invalidate the verdict. But no! None of them is even seriously considered except the omission of the "u" from "murder," and the verdict is held to be good upon the ground that the word as contained in the verdict is *idem sonans* with the word as properly spelled. The conclusion is a sensible one, but the reasoning is absurd, for a syllable without a vowel is unknown to the English language.

In 1886 "guity" was again held to vitiate the verdict, while in 1892 an additional "t", although the "l" was still wanting, was held to make a good verdict. In 1896 a verdict of "gilly" was sustained, and it had been held so early as 1886 that a failure to cross the "t" in "guilty" might be overlooked.

The decisions of the court are as eccentric as the orthography of the jury. Why should the omission of one letter confer the boon of a new trial, when the omission of another letter just as essential to correct form will not do so? Such discrimination in favor of the "l" and the "r," holding them essential, and against the "t" and the "u," holding them to be non-essential, has apparently no better warrant than the order of precedence in the alphabet.

The evils of this adherence to ancient usages which have long survived their reason for being are not fully disclosed by the reports of the appellate courts. The rules declared in such cases as I have cited govern the action of the trial courts in many other cases. Indictments are quashed, judgments arrested, new trials are granted and guilty men are absolved in cases that never reach the Supreme Court. As a consequence the administration of our criminal law is expensive, dilatory and uncertain. Better it is that ninety and nine guilty men escape than that one innocent man should suffer. For this reason we have provided full means of defense for every man charged with crime, and hold him to be innocent until he is proven guilty beyond a reasonable doubt. In these substantial and humane provisions of the law the protection of the man wrongfully accused is found, while its extreme subtleties are but means of escape for the guilty.

The provisions of our Constitution securing a fair trial to the accused do none of them sanction the technicalities of the ancient law. Prosecution must be by indictment or information, and as to the form of these, the sole provision is that the accused may "demand the nature and cause of the accusation." The trial must be speedy and public and by an impartial jury of the county. The accused may appear and defend in person and by counsel, have process for witnesses, cannot be compelled to testify against himself and may not twice be put in jeopardy for the same offense, and he must be admitted to bail except in capital cases, where the proof is evident or the presumption great. In all other respects the pleading and procedure are left within legislative control.

In every other field of human endeavor the fault which is obviously a mere slip of the pen may be corrected by a stroke of the pen. In the law, and especially in the criminal law, the fault is fatal, everything is vitiated and we must begin at the beginning, unless indeed, as sometimes happens, even that cumbersome remedy is precluded. Legislative attempts to remedy this condition have not been wanting. Statutes of jeofails have been enacted providing that mere technical or formal defects in pleadings and proceedings shall be disregarded. But we flout the legislative attempt at reform and render it nugatory by construction. We hark back to the ancient use and hold everything to be material which it held to be so.

In *State* v. *Sides*, 64 Mo. 383, the court says:—

> In a pleading which undertakes to charge the high crime of murder, it is always best to follow precedents which have been long adhered to, and which have received the sanction of the highest courts both of this country and England. *It is hazardous to make experiments in departing from them, under the impression that our statute of jeofails will cure an omission to state material facts.*

And in another case prosecutors are warned that departures from the old precedents are dangerous "*and technical rules still obtain, for which it is frequently difficult to assign a reason.*"

We are commended for guidance to the old precedents rather than to the new statutes. The formal learning of centuries ago is held up to us as the highest wisdom. For the spirit of the old law we have but to read the reports of state trials. Even men so eminent as Lord Coke could resort to torture for the purpose of procuring testimony and exhibit a brutality in prosecution which was hardly surpassed by the brutality of Jeffries on the bench. Men were pressed to death if they refused to plead. With Sir Matthew Hale presiding, helpless old women were condemned

to death for the impossible crime of witchcraft, and long after his day men, women and children were hung for the theft of a shilling, and to those accused this savage law denied the aid of counsel and even refused them the right of calling witnesses to attest their innocence. Little respect is due to the forms in which such a law expressed itself. We have certainly made progress in humanity since that time, and humanity in the law is its highest wisdom. Modern legislation has freed the law of its ancient barbarities, and with these should be permitted to free it of its ancient crudities and absurdities. The rule that statutes in derogation of the common law are to be strictly construed has no place where the legislative intent is clear. There is no sanctity in any rule of the common law. It may be, as Lord Denman says, that it is not an expression of the wisdom of former ages, but "the neglected growth of time and accident; circumstances having prevented the revision that is now taking place, and the existing defect is only left uncured because no deliberation has ever been had upon it." Legislative enactments are not always wise, but who would recall their innovations upon the common law where human interests are concerned?

The old criminal procedure was cruel in its orderly operation; it was merciful only by caprice. It is the purpose of the modern procedure to avoid alike the cruelty and the caprice and to ordain a mode of trial in which inquiry shall be as full and free as the wisdom of man can make it and in which condemnation shall follow only when all reasonable doubt of guilt has been dispelled. The new way has nothing in common with the old, and its efficency is impaired when we cramp and confine it within the forms of the old.

It is the vice of the old systems of procedure that their rules are paramount to the human interests affected by them. The means became exalted above the ends they were intended to serve. Some form and some order we must have, but these must be suited to the case and not the case to them. The justice of the law should be manifest in all its judgments, and for this its ways must be plain to the general intelligence. We resent criticism of legal methods from the outside, but there are manifestations of discontent with our procedure more significant than any mere criticism, whether temperate or intemperate. People are disposed to hold themselves aloof from the courts, settling their controversies otherwise, and too often when grave crimes have been committed they take upon themselves the function of vindictive justice and in hot blood and blind passion inflict the punishment, which should be inflicted, if at all, only after deliberate and dispassionate inquiry.

Compromise is becoming the order of the day, or, if compromise fails, arbitration. Institutions like Boards of Trade have their committees of arbitration; important contracts provide for it in case of differences between the parties. Compromise and arbitration may be improvements upon the methods of the law as they are, but not upon its methods as they should be. Compromise is commendable when it means the recognition of another's right, but not when it means the surrender of one's own right. The business man of today feels that he cannot afford to litigate. It takes too much time, it costs too much money, it fails often to settle the matter in dispute. So a compromise is made, not from moral but from mere pecuniary motives. Wrongful demands are conceded if the measure of extortion does

not too far exceed the expense of a law suit. Arbitration has its limitations and they are soon reached. In some cases involving expert knowledge or an expedition not possible to courts under any circumstances, it may serve a good use, but for the controversies usually arising among men, far better is a tribunal appointed for the purpose by the public law and disciplined by the responsibility which the function of judgment imposes upon those who exercise it. Baneful influences of every kind will find more scope in arbitration than in judicial decision.

The sphere of our courts should be broadened rather than narrowed, but lawyers themselves recognize a different tendency. The trial lawyer, it is said, even in the profession is losing his significance, supplanted by the counsellor who is skilled rather to keep his client out of court than to guide him successfully through. And how many members of the profession are there who would not be quick to disclaim that they are criminal lawyers, and are there not some even to resent the designation as a term of reproach? And yet what higher or nobler part can the lawyer perform than to ascertain and bring to justice those guilty of crime and to vindicate those who are wrongfully accused? In some measure at least the loss of caste is due to the archaic methods of criminal procedure, which too often direct the endeavors of counsel to matters which have no relation to the justice of the cause and promise success not because of proof or presumption of innocence, but because of the slip of a pen or the oversight of a copyreader.

Ours is a government of law, administered largely by lawyers. They have not only engrossed the judiciary, but have dominated in the legislative halls and in the higher executive offices. They have been the leaders of public opinion and foremost in shaping public action. The constitutions of the states and the United States, the enactments of Congress and the legislatures are their handiwork. Of their record in the political history of the country they have no occasion to be ashamed. But they, like all others, find self-discipline a difficult task and are reluctant to attempt a reform of their own methods. They very naturally cherish the knowledge of their craft and the methods which they have acquired the skill to use. But change must come, and lawyers are best fitted by their experience to bring it about. They see the defects and know the remedy. They inaugurated the work sixty years ago, and they should lead in the efforts for its completion. The American Bar Association at its last session committed itself to the task. The state of Oklahoma, as the newest state of the Union, is least hampered by the old traditions. The lawyers of this state, drawn as they are from every state of the Union, and from the original sons of the soil, in developing their jurisprudence should make its methods so simple that the way to the temple of justice will be a straight and a plain path, in which there are no snares for the unwary and from which no suitor is turned back, save from the altar itself after he has been fully heard and his cause has been decided according to the Truth and the Right.

St. Louis, Mo.

America's Greatest Institutional Treatise

By Lucien Hugh Alexander

Of the Philadelphia Bar

ANDREWS' American Law* marks an epoch in American jurisprudence. As said by the *Columbia Law Review*: —

> It is the first serious attempt which has been made on this side of the Atlantic at the complete classification of our legal system, and this attempt must be conceded to rank as a real achievement. It is an extraordinary example of analysis and criticism, reminding one of Austin in the refinement of its reasoning, and the minuteness of its observations.

This work deserves and is entitled to receive more than passing comment. Trained in the art of editing law books, the author has brought to the task that experience which one would expect to find in the editor of Cooley's Blackstone, of two editions of Stephen's Pleading, and of the modern edition of the Works of James Wilson. In the front rank of practitioners at the Chicago bar, and later in New York, a man of philosophical temperament and unusual powers of condensation and expression, long the Chairman of the American Bar Association's Committee on Classification of the Law and the author of the noteworthy report on that subject presented at the 1902 Meeting (25 A. B. A. Reports, 425–475), his training and equipment for the work were all that could be desired.

Law has by some one been described as a lawless science, and American institutional law has undoubtedly lacked both co-ordination and perspective. As heretofore practised in America law writing has been mainly an art; but Andrews, following the lines laid down by James Wilson, America's first great jurist, has made it a science, and forced it for the first time to bow to the inexorable domination of scientific methods.

Andrews' American Law is a direct result of the classification advised by Wilson more than a century ago, and it bears the impress of his creative genius. He planned it in outline and began the work. Dane, in 1823, pointed out both its necessity and its utility. Walker (p. xii of Preface) spoke of it as a *desideratum*, and a communication from Henry T. Terry to the American Bar Association in 1889 constituted so strong an appeal that a Committee on Classification of the Law was created. James C. Carter in 1889 and Judge Dillon as late as 1897 emphasized the need of such a work as that before us, and Austin Abbott strongly stated the necessity. Other names could be added, but these suffice to show that what our author attempted has by our ablest practical jurists been regarded as a work of great public interest and of practical utility to the profession.

For upwards of a century, indeed since the days of Chancellor Kent, there has been a demand on the part of the profession for some logical plan of arrangement, under which the principles, doctrines and rules which make up the body of our law could be arranged with cases illustrating their application, for a work which, while a practical aid

*ANDREWS' AMERICAN LAW. A Commentary on the Jurisprudence, Constitution and Laws of the United States. By James DeWitt Andrews, LL.D. Second edition. Callahan & Co., Chicago, 1908. 2 v., pp. xxii, 2026; index.

to lawyers, both on the bench and at the bar, would prove a conserving force in the development of our law and legislation, in short, of our juridical system.

Terry, perhaps better than any one, stated the case:—

> 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 marshaling 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 arrangement must be even severely and inexorably logical. American Bar Association Reports.

That Andrews' American Law is an attempt to accomplish this great work is plainly stated by the author in his Preface and in many parts of the book; and that the work, in this its second edition, accomplishes this great design in a highly satisfactory manner, is patent to all who have examined it carefully. Mr. Justice Brewer declares:—

> The thought with which the author has started, of developing the elements of American law, is worthy of all praise. It is distinctly a book for the United States, for the lawyer and the student of law in this country. His arrangement is admirable; his work is well done.

Chief Justice Simeon E. Baldwin says of it:—

> Superior to anything published since the first edition of Kent's Commentaries for giving Americans a succinct view of American law.

Accord, Mr. Justice Brown: —

> I know of no other work which covers the same field.

So also United States Circuit Judge Seaman, who asserts:—

> For succinctness and accuracy in expression it is unrivaled; and a feature of special value is the clearness of the definitions evolved.

United States Circuit Judge Townsend, also Professor in the Yale Law School, declares:—

> It is analytical, scholarly, logical, and accurate.

The late Judge John W. Simonton, the Pennsylvania Bar Association's first President, paid the author this tribute:—

> Andrews has greatly overpaid his debt to our noble profession, and has richly earned the thanks of its members.

Such praise from such quarters is a distinct recognition of the epoch-making character of the work. Indeed, it may be soberly and conservatively affirmed that in comparison with all other attempts at creating a scientific, comprehensive and complete classification, and fitting into this necessary framework the rules and principles of our law, supported and illustrated by adequate authority, this book stands unrivaled. It is more logical in arrangement, more symmetrical and complete in treatment, more powerful in the handling of mooted points of debatable law; and in strength and wealth of citation to vital authorities, it is incomparably superior to any book of the kind heretofore produced on either side of the Atlantic. This is strong language, but when we consider what was said of the first edition, even by those who criticised some special

points, and the opinions concerning it expressed by some of our greatest living jurists, and then notice the improvement in the present edition, we feel it is but justice that to accord it at least as full praise as the late Seymour D. Thompson, in the *American Law Review*, bestowed upon the first edition, when he declared:—

> A great effort has been made to reduce the heterogeny we call American Law to an accurate analysis—and the filling in of this great scheme of classification, so as to state in outline what the American Law is under every subdivision, is indeed a higher argument than the classication itself. *It is in this that the work of the author challenges admiration. It is at once compact, clear and elegant.*
>
> *Neither Blackstone, nor Kent, nor Story, nor Greenleaf, excels it.* . . . Everything on which our eye has fallen, in a vain search to find something wrong, has been stated with the greatest accuracy and with consummate skill in the choice of words.

So also Judge M. F. Morris, Justice of the Court of Appeals, Washington, D.C., declares concerning it:—

> A great work undoubtedly placed on true philosophical foundations.

We of the profession owe it to the author to acknowledge that he has produced the greatest Commentary on our law, both national and state, that has yet appeared, not only in matter of style but in completeness, depth, and the intrinsic strength of the treatment of specific topics.

In accomplishing this result, the author enunciates a principle of classification, and creates a logical synthetic plan governing all the processes of compilation, statement and citation. The fundamental system followed is to state all rules according to the objects to which they relate, on which point see the author's clear-cut views (pp. 36 to 41).

One point of special significance (see pp. 39–40) is the author's affirmation that there is an understructure of arrangement, *identical in all systems of law*, and he demonstrates it by illustrations from various systems, supported by the opinions of eminent jurists.

The structural arrangement of the work is very simple.

First there is an Introduction or general part, followed by the Commentaries on American Law. This is divided into four great sub-divisions: (1) The law concerning personal relations, or in one word, *Persons*. (2) The law of property, in a word, *Things*. (3) The law of judicial protection and reparation, or *Actions*. (4) The law concerning the prevention, detection, and punishment of *Crimes*.

The portion treating of general jurisprudence shows the nature of Law, Right, and Government, with clear definitions of leading words, and an explanation of the origin and theory of the ideas which are necessarily constantly used throughout the discourse. This part is deserving of a commendation which cannot generally be accorded the writer on jurisprudence, for the author presents not abstract jurisprudence but applied jurisprudence. He shows by practical illustration and citation of cases the application of these theories in the everyday law of the country, as for example that jural rights, as asserted by Wilson and Locke, arise by consent (see p. 5); that equality, and the right to life, liberty, and pursuit of happiness, as declared in the Declaration of Independence, are practical and positive limitations on legislative power (pp. 22–23).

No American jurist other than James Wilson has heretofore combined the historical acumen and metaphysical reasoning with the immediate practical

application in the manner displayed throughout our author's discourse on jurisprudence.

Under Andrews' masterful hand, the philosophy of the law loses its mystery and becomes simply the reason why we adopt the rule, and how and when it should be applied. Theory and practice are not distinct; theory is the guiding force, practice the application of it.

Jurisprudence is demonstrated to be a science, and in the hands of this author its vocation is to classify, arrange and apply the great immutable body of principles, doctrines and rules of law as they exist and are used in this country (see pp. 28–30).

The next part, in reality Part One of the treatise proper (commencing p. 118), embraces the right and law governing our personal social relations, commonly called Constitutional Law, Corporate Relations, Domestic Relations, and Personal Liberty. Here is exhibited our great Constitutional scheme of national and state governments, seemingly so complex, reduced to a simple and harmonious system, and here again we see the influence of Wilson's great fundamental work upon our author's treatise, and it is well at this point to recall Wilson's words of solemn warning as to the necessity of maintaining the distinction between the national and state governments, when he declared in 1791:—

> The people of the United States must be considered attentively in two very different views—as forming one nation, great and united; and as forming, at the same time, a number of separate states, to that nation subordinate, but independent as to their own interior government. This very important distinction must be continually before our eyes. *If it be properly observed, everything will appear regular and proportioned: if it be neglected, endless confusion and intricacy will unavoidably ensue.*

The striking features of this portion of Andrews' work are his grasp of this fundamental distinction in his treatment of national and state powers, the effect of the *post bellum* amendments, the explanation of the Bill of Rights, and the examination of local self-government, supported and illustrated by citations showing the latest developments. This portion, embracing some six hundred pages, is easily the strongest treatment of our Constitutional Law yet given to the world, and in itself constitutes a classic.

Turning now to Part Two, the Law of Property (p. 671), we find about five hundred pages taken up with the subject of contracts in general and the sub-contracts, or topics of agency, partnership, sales, etc., making up the general subject of Commercial Law, Master and Servant, and Real Property. This part of the work is very strong in treatment, with a citation of great scope and consequently of real practical value to the practising lawyer. Of particular value are the expositions of our modern law concerning restraint of trade, trusts, conspiracies, combinations, with the cognate subjects of strikes, boycotts and malicious interference. The effects of illegality are made more clear and definite by the formulation of specific rules adapted to the various situations and conditions.

Real Property is treated from the modern American point of view, divested of the confusing ideas of tenure and the other incidents of the feudal system. It is a brief and concise outline, but is clear and particularly strong in the fundamentals—the idea and classification of estates. Restraint on Alienation, Trusts and Charities are perhaps more clearly set forth than in the larger book, certainly they are seen in better perspective.

Part Three. From the standpoint of pure science, the treatment of Actions, or Judicial Jurisdiction and Procedure, is clearly a great step in advance of other works on the subject. The strength and beauty of the American system of jurisprudence is often obscured by the treatment of parts only of what in reality is one whole, and the use in different jurisdictions of diverse names for what are but equivalents. In this work, all are shown as parts of one grand scheme of remedial justice. The close analogy or even identity of the rule of pleading at common law and under codes in equity, and even in criminal procedure, is made clear in a way to be of practical utility.

The author's treatise on pleading (Andrews' Stephen's Pleading), of which he has brought out two editions, has placed him in the front rank as an authority on procedure, but not until he took advantage of the opportunity to display the whole system of procedure as an organized system was the real strength and beauty of the subject appreciable at its true value.

The rules as to Parties have perhaps never been so clearly stated and explained by any author. The rationale of evidence appears clearer, the reason for forms of action is made apparent,—in fact it is plain on every page that a practical man is giving a practical treatment of a practical subject for the practical purpose of everyday use in the business of practical lawyers; but it is always made manifest—and herein lies the beauty and skill of the author's system—that a reason dominates, a theory underlies and makes plain the meaning and application,—and all is supported by a wealth of citation.

Of Criminal Law but a skeleton is given; but where else is there so brief and comprehensive an outline displayed? It is made clear that these fundamentals apply to all crime. The theory of criminal legislation, the limits of it, the elements of criminal conduct, the apprehension and detention of persons suspected, the accusation or presentation, the pleading, presumption, and evidence, the mode of trial,—these are things difficult to get clearly in mind, and are just the things which the larger books, dealing with the details and minutiæ of the various offenses, generally neglect. In this work for the first time we have well-nigh perfect co-ordination and perspective.

Such is a wholly inadequate view of the general outline of this great institutional treatise. The scheme of classification would probably be regarded by *theoretical* jurists as its transcendent achievement, and in a sense this is true, for without it no such condensation with the completeness and clearness displayed would be possible. On the other hand, *practical* jurists, like the late Austin Abbott, would doubtless see in the condensed style and the exactness of the definitions and the definiteness of the specific rules to be found in all parts of the book, its chief merit.

The practical lawyer who grasps the scheme of citation will be astonished at the wealth of cases it brings to his hand, cases which seem to have been selected and arranged with painstaking care, in order always to indicate the leading and ruling ones, yet with annotated cases to go with them, coupled with illustrative cases of particular value. Such a scheme of citation cannot but prove a great saver of time to the practising lawyer as well as the student, once it is thoroughly understood.

The greatness of this work is not in any one of these features but in the peculiar combination of all, whereby the author attains more closely than any

of his predecessors to that ideal of the German jurist (appropriately quoted on p. 31), "*Completeness, depth or fundamentalness, and order.*"

The first edition of this work was little more than a study for the present one. The latter indicates that the text has been very largely rewritten, and the work expanded from one to two volumes. The second volume is almost wholly new material. The first edition, published eight years ago, contained about 1,160 pages, while the second one has 2,026, besides preface, table of contents, etc. The first edition had an index of some eighty-five pages, this one 230 pages, and the table of cases in the first edition was forty-four, in the second eighty-six.

The plan of classification is not changed, but the reason for it is much fortified. The Introduction has been condensed, and the general part reduced from 152 to 117 pages, mainly by leaving out a long account of the federal system, and substituting a conclusion; nevertheless vital points have been materially amplified. There has also been considerable transposition, but the integrity of the matter is mainly unchanged, though there has been free and thorough revision, bringing the text up to the present development of the law as expressed in the latest cases.

Of particular interest in these days of Rooseveltian effort to co-ordinate the powers of the national and state governments and eliminate "the twilight land" so zealously guarded by those who would thwart the strong arm of the law, is the author's treatment of the Doctrine of Inherent Power (pp. 175–180, 246, 247, 250, 253–257), and those who doubt the Doctrine of Non-Enumerated Powers would do well to read pp. 180 and 181 and pp. 254–259, where it is traced directly to the authority of the Supreme Court of the United States.

We are tempted to make some observations on the mental faculties involved in the execution of the author's prodigious undertaking, and we use the adjective "prodigious" advisedly, for the subject is as broad as our whole law, and from the first page to the last there is evidence of deep research and careful study of a mass of material simply appalling. Everywhere throughout this broad field there appears that perfect mastery of the system of classification which has made possible the construction of the outline, the formulation of the precise and definite rules and explanations presented, while the inductive processes involved in collating and arranging the citations must have involved years of painstaking labor.

Judge Dillon has referred to "*the constructive genius and practical wisdom*" necessary in the achievement of such a work. This, the *intellect-constructive*, has not inaptly been designated *dynamic initiative*, and when applied to any great work it produces thoughts, sentences, form, plans, design, system, and finally a result. It is this constructive faculty of the intellect which makes great books possible, a faculty so rare that we call it genius, a faculty indeed so rare that when, as a result of it, a great institutional work is produced, it becomes a notable event in the world of jurisprudence.

Such a performance in the domain of law involves more than the creative intellect. The achievement requires this faculty in combination with the power and genius of research and study so great as to enable the writer to construct, master, and co-ordinate a great system involving a vast number of details. This is the reason why great comprehensive institutional treatises are

so rare. Those who undertake the execution of such monumental efforts do not combine the analytical faculties with the mental temperament and physical strength necessary to become proficient in all the branches of law involved in a complete induction. If other books in this field are critically examined and compared with this one, the verdict we believe must be that *Andrews' American Law* is, all things considered, the greatest juridical performance that has yet appeared in this country, and that, both directly and through reflex action, it will be of immense aid to the development of an adequate scientific system of American jurisprudence, and thereby prove of especial value to every member of the profession now and hereafter, whatever his field of activity may be.

Its chief fault is, in a sense, a merit; it is the condensation which makes adequate perspective possible. The next step, now that the author has demonstrated his mastery of the subject, should be an elaborate and logical expansion of the present work to proportions which will make it the great "*Edifice of Law*" "at once symmetrical, harmonious *and commodious*" which Judge Dillon has so ardently described and, in common with other lawyers during a century of our history, declared to be an imperative necessity. Its realization alone can prevent ultimate chaos in our judicial system—that chaos which is already "casting its shadow before," ever, year by year, making more difficult the work of both bench and bar. Let us hope for its early realization; and hoping, ponder well these words spoken twenty years ago by that peerless leader of our race, the late James C. Carter, and each do what he can to secure the achievement of this *desideratum* for our nation and profession:—

> 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.

Philadelphia, February, 1909.

The Legal Profession *v.* Professor Hugo Muensterberg

A ROLLICKING report of an imaginary trial is given by Professor John H. Wigmore of Northwestern University Law School in the *Illinois Law Review* for February (vol. 3, p. 399), the plaintiffs being Edward Cokestone and others, styling themselves duly licensed members of the bar of the Supreme Court, and the defendant Hugo Muensterberg. The suit was brought for $1 damages, the action being based on a declaration setting forth that the plaintiffs were persons of good name and credit, and that the defendant had caused to be circulated, in his book "On the Witness Stand," erroneous observations concerning the plaintiffs, to the effect that the latter had neglected

their professional and civic duty by failing to make use of psychological methods of ascertaining how the testimonial certitude of witnesses and the guilty consciousness of accused persons may be tested. The cause was tried by Judge Solon Wiseman, Mr. Simplicissimus Tyro being counsel for the plaintiffs, and Mr. R. E. Search, assisted by Mr. S. I. Kist and Mr. X. Perry Ment, being the defendant's counsel. The defendant pleaded lack of domicile in the state where suit was brought, alleging that at the time of service of the writ upon him, he was staying for one day only in Windyville, Illiana, the place of the trial, which took place, by the way, before the Superior Court of Wundt County, and that—

The sole purpose of his presence was to deliver, before the Ambitious Affratellation of Office Boys, Busy Bunch No. 14, an address entitled "*The Psychology of the Wastebasket*" (in which he urged upon the said office boys an exhaustive daily study of the wastebasket papers, by means of which they were certain to discover the uniform psychological connection between the intellectual personality of their office-chief and the number of times the letter M occurred on the scraps thrown into the basket); that on the succeeding night he was engaged to deliver and had delivered in another state, to wit in Rural town, Indinois, an address before the Honorific Order of Suburban Dames, entitled "*Studies in Domestic Psy-collar-gy; No.* 11, *The Psychology of the Collar-Button*" (in which he reported the results of over 9000 observations of the behavior of the ordinary collar-button, the object being to ascertain whether by the method of association a person could, within a practicable time, discover a lost collar-button by immediately dropping another one under precisely similar circumstances and repeating the same muscular movements of search under the bureau and elsewhere); that the defendant had then returned to his domicile, where he had ever since remained, except when lecturing the people of Philadelphia and other cities.

The Court, however, did not sustain this plea, holding on the authority of *Plato* v. *Kant*, 3 Incog. Rep. 44, that as thought was infinite and universal, the domicile of a philosopher was anywhere and everywhere. The plaintiffs' counsel, having reserved the right to cross-examine, called the attention of the jury to the fact that only nominal damages of $1 were asked for, and stated that the sole object of the plaintiffs was to vindicate the honor and the intelligence of their profession. He proceeded to say that he would divide his case under two general heads: —

First, at the time of the defendant's first publication, namely February, 1907, *was there in print and accessible such information published by psychologists, as should have led the legal profession to believe that there existed, in Germany, France, or the United States, exact methods of experimental psychology available and valuable for practical use in trials to measure testimonial certitude and to diagnose guilt?*

Secondly, Were these methods in fact and in intrinsic merit such that they could be actually now used and relied on in trials as being superior to the methods hitherto in use?

For the purpose of answering these questions, he would have to be obliged to do without other witnesses, because the task of summoning all the psychologists of Europe and America was prohibitive. Hence he would rely upon the cross-examination of the distinguished defendant himself. One of the first questions elicited the reply that the defendant did not read legal journals. "Then why do you expect lawyers to read psychological journals?" was the retort.

Another question brought out the fact that the information in question, with regard to the applicability of experimental psychological methods to legal purposes, was not in existence in the English language, and in a great variety of publications to which a lawyer would first instinctively refer, not even in the Harvard Psychological Studies, of which the defendant himself was editor.

Q. But in these journals and studies he would have found articles on the psychology of conjuring tricks, of tickling, of football, of puzzles, of roosting crows, and other bizarre and unpractical topics? A. He would.

Questions further brought out the fact that the whole subject was recent, the Stern method dating from 1902, the Wertheimer-Jung method from 1904–5, so that the defendant had allowed only about three years for putting the entire legal profession in default. Cross-examination also made it evident that many Continental psychologists and jurists had expressed opinions that these methods were not yet adapted for forensic use, or for practical application to criminal practice.

Q. Well, then, perhaps you can explain to the jury what on earth was the psychological process which led you to break forth with an appeal to the American people to rebuke our legal profession for a supposed obstinate refusal to use a method which its very inventor, a few months before you wrote, had so frankly avowed to be "as yet thoroughly unsuitable for criminal practice"? A. (No answer.)

Q. And to parade before the American people, as genuine and orthodox tools of

justice—something that in your words, ought to be for the court-room "what the microscope is for the student of disease"—methods which the Continental jurists have thus far refused to use in the home of the invention? A. (No answer.)

After a searching review of a great many authorities, the attorney for the plaintiff went on to discuss the second question. From the cross-examination he emerged even more triumphant on the first question, the discussion working up to a climax which left the defendant's case with absolutely nothing to support it.

Here is an example of the treatment of the question whether the Wertheimer-Jung method of detecting guilt by means of the involuntary association of the ideas is exact:—

Now the examples given in your interesting book are too briefly stated to show all the weaknesses of the method as it has been actually tried in Europe. Let us first take, as an example, the detailed report of Loeffler, professor of criminal law at Vienna. His experiment was on an assistant state's attorney, supposed to be arrested in a foreign country on suspicion of crime, and trying to pass himself off there as a bookkeeper. One hundred reactions were taken; let us look at some of them. . . . Now we do not lay stress on the radical lack of scientific method here; I mean that those who boast of testing everything by experiment should not affirm that "no bookkeeper would have reacted thus" without finding by experiment whether bookkeepers *do* thus react. What I desire you to note is the delightful adaptability of this method to a judge's whims, in allowing him to prove whatever he is hoping to prove. For, observe the method as thus used: If the reaction-*word* is one essentially relevant to the accused's supposed occupation, it is a "betrayal"; if the word is colorless, but its reaction-*time* is long, it is also a "betrayal"; if it is colorless and its own reaction-time is normal, but the ensuing reaction-time is long, it is again a betrayal; and if the word indicates some innocent occupation, it is ignored entirely. Now after reckoning these four possibilities, there will remain only a few reactions, so that the zealous magistrate is sure to "get his man"; there is no failure; he can always find guilt—*if he wishes to*. Would you be willing to be convicted on the above interpretations?

A. No.

After the jury had been ordered to retire and consult upon their verdict, they were noticed whispering among themselves, and presently they announced they had no need to retire, being already agreed on a verdict, whereupon they announced that they had found for the plaintiffs. Before the spectators had all left the court-room, however, the Judge declared that before discharging the jury he wished to make a few comments. He said that he regarded the verdict as just, but the plaintiffs owed their escape merely to the circumstance that the defendant had applied the right epithets to the wrong charges. In his chapters on testimony he had erroneously charged the profession with negligence, but in his last chapter, on the prevention of crime, he had failed to blame them for their ignorance of the science of that subject:—

This was just where they deserved the censure which he had elsewhere employed. No country in the civilized world was probably so far behind in the scientific study of the criminal law as affected by the contributory sciences of sociology, anthropology, psychology, and medicine. In no country had the legal profession taken so little interest in finding out or using what those other sciences were doing. The lawyers left it all to the prison officials, the charitable societies, the sociologists, the physicians; but their own help, though indispensable, they withheld as a profession. In the continent of Europe there were not only a dozen monthly journals devoted exclusively to criminal law, but five or six of these were given exclusively to the modern science of Criminology; some of them were twenty years old; one of them was in Russia. In the United States there was not a single journal devoted to criminal law in any aspect. There was not even a standing committee on that subject in the American Bar Association, though there were fifteen on other subjects. . .

He had observed in the press that a National Conference on Criminal Law and Criminology had been called to assemble in Chicago in June, 1909. He hoped that this Conference would regard itself as a missionary conference to convert the profession, and would institute propaganda in every quarter. Then there would be hope of speedily redeeming the profession from the real reproach which it deserved, but did not receive, in the distinguished defendant's interesting and stimulating book.

This brilliant article is very exhaustive in its mode of treatment, and the thoroughness with which Professor Wigmore has worked up the subject is to be explained only by sheer love of the joy of the task. A bibliological appendex is appended to the paper, giving the titles of over one hundred articles, treatises, and other publications, practically all in foreign languages, relating to the experimental psychology of testimony. Professor Wigmore has done important and valuable work in a new department of the science of Evidence.

George W. Wickersham

A FEW weeks ago the newspapers published a report that Mr. Taft had selected Mr. George W. Wickersham of New York for the position of Attorney-General in his Cabinet. The report, often reiterated since, has not been denied. In view of Mr. Wickersham's prominence as a member of the New York bar the facts of his career are of interest.

George Woodward Wickersham was born in Pittsburgh, Pennsylvania, on September 19, 1858. He comes of English Quaker ancestry. His grandfather, Thomas Wickersham, was one of the founders of the Philadelphia Board of Brokers, now the Stock Exchange, and its first president. His father, Samuel Morris Wickersham, served during the Civil War as Lieut.-Colonel of the 169th and Colonel of the 22d Pennsylvania Volunteers. His mother, Elizabeth Cox, daughter of J. J. Woodward, a retired publisher of the city of Philadelphia, died in his infancy. He was her only child.

In 1873, at the age of fifteen, the boy entered the School of Civil Engineering of Lehigh University, where he remained for two years. During the next three years he studied under private tutors and engaged in business. In 1878 he entered the Law Department of the University of Pennsylvania, whence he was graduated in 1880, receiving the degree of LL.B. Some months before his graduation he passed his examinations and was admitted to the Philadelphia bar. He practised in Philadelphia in connection with Hon. Charles B. McMichael, now one of the Judges of the Court of Common Pleas No. 3 of that city, until 1882, when he removed to the city of New York.

While in Philadelphia he was a reporter on the staff of the publication known as *The Weekly Notes of Cases*, for Court of Common Pleas No. 4, and the Supreme Court of the state. In New York on January 1, 1883, he became managing clerk in the old established law firm of Strong & Cadwalader, and four years later was admitted to partnership in this firm, with which he is still connected.

As a member of this firm Mr. Wickersham has had a large and varied practice and has been engaged in much important litigation in the state and federal courts. While acting as counsel for a number of large industrial, financial, and transportation companies, Mr. Wickersham has not identified himself solely with any particular interest, but has had very diversified professional associations.

He was counsel for the New York State Savings Bank Association for upwards of ten years. He was a member of and counsel for the committee which carried through the reorganization of the Chicago Traction lines. He was counsel for the Construction Company which built the subway in the city of New York, and until the spring of 1908 was general counsel for the Interborough Rapid Transit Company, the company operating the subway and elevated lines in the Boroughs of Manhattan and the Bronx. He is also counsel for Messrs. S. Pearson & Son, the contractors who have built the four tunnels under the East River for the Pennsylvania Railroad. He was one of counsel for the readjustment managers in connection with the merger under the auspices of the Mexican Government, of the Mexican Central and National Railroad of Mexico into the Mexican Railways Company, for which he is now counsel.

Mr. Wickersham is active in some of the prominent charitable agencies in New York, being a trustee and vice-president of the New York Association for Improving the Condition of the Poor, and a trustee of the New York Institution for the Blind. He is a member of many clubs and is one of the governors of the City Midday Club and of the Rockaway Hunting Club. While never very active in politics, yet he has always shown much interest in local political affairs, and he was for two years president of the 27th Assembly District Republican Club.

In 1901, the University of Pennsylvania conferred upon him the honorary degree of Master of Arts. At the invitation of the Graduate School of Business Administration of Harvard University, Mr. Wickersham has delivered before it during the present season three lectures on corporate organization.

In 1883 Mr. Wickersham married Mildred Wendell, of Washington, D. C., a daughter of Cornelius Wendell, Esq., who was Public Printer under President Johnson. They have three children, the eldest of whom, Cornelius W., is a member of the graduating class of the Harvard Law School, and one of the editors of the Harvard Law Review.

Review of Periodicals

AMONG all the current magazines there is no article more brilliant or more carefully prepared than Professor John H. Wigmore's crushing reply in the *Illinois Law Review* to the arraignment of the legal profession in Professor Muensterberg's book "On the Witness Stand." An article that should be read by every one interested in theoretical politics and jurisprudence is Mr. James Bryce's recent address as president of the American Political Science Association, printed in the *American Political Science Review*. Sir Frederick Pollock, in the January *Law Quarterly Review*, gives a most illuminating account of the working of the committee system in its manifold phases, in English government and society. When one approaches problems of more direct concern to our American nation, there is no more timely article, possibly, than Congressman A. P. Gardner's paper on "The Rules of the House of Representatives," which is printed in the February *North American Review*.

Admiralty. "Maritime Salvage and Chartered Freight, A Rejoinder." By H. Birch Sharpe. 25 *Law Quarterly Review* 70 (*Jan.*).

Australia. *See* Procedure.

Bill of Rights. "The Decay of Present Rights and Guarantees." By Richard Evelyn Byrd. 18 *Yale Law Journal* 252 (*Feb.*).

This paper reviews decisions of the Supreme Court of the United States in the following cases: *Mitchell* v. *Clark*, 110 U. S. 633, justifying a statute making obedience to an order of the President during the Civil War a defense to any action or prosecution for acts committed under such an order; the case of *Ju Toy*, 198 U. S. 253, marking what the author terms "the advance of administrative usurpation," the decision being that the finding of the immigration officials who ordered deportation was conclusive; the case of *Miller* v. *Horton*, 152 Mass. 540, where the Supreme Court on the contrary reviewed a decision of state commissioners; *Hawaii* v. *Mankichi*, 190 U. S. 197, in which the Court held that Mankichi was not entitled to the constitutional guarantee of jury trial, this case overruling, according to the author, *Webster* v. *Reid* (11 Howard 437), *American Publishing Co.* v. *Fisher* (166 U. S. 464), *Springfield* v. *Thomas* (166 U. S. 707), and *Thompson* v. *Utah* (170 U. S. 243), all of which decided that the constitutional right of jury trial applied to all territories; *Trono* v. *United States*, 199 U. S. 521, denying the benefit of the jeopardy clause to an inhabitant of the Philippines; *Downes* v. *Bidwell*, 182 U. S. 222, holding that the tariff provisions of the Constitution did not apply to Porto Rico; *Dorr* v. *United States*, 195 U. S. 138, following the reasoning of the Mankichi case.

From his review of these cases, the author concludes:—

"If the Constitution can only be carried into territories of the United States by an Act of Congress, then the Constitution has no other sanction than the Act itself, and it is carried not as the Constitution, but as the will of Congress.

"Therefore, an Act of Congress can repeal the rights which the Act created, and the people of such territories can only have a legislative recognition for such rights as they are allowed to possess, and these rights may be taken away by the same power that gave them. . . .

"In five years we have seen Constitutional guarantees for a hundred years deemed impregnable, crumble in the hands of the Court. We are told that the writ of *habeas corpus*, the right to trial by jury, the exemption from prosecution for a felony save by the presentment or indictment of a grand jury, the mandate for uniform tariffs and excises are not of the essence of rights, but in their application to be controlled by policy and convenience.

"It cannot be denied that these insular decisions have opened the door wide to the doctrine of amendment by interpretation, and that since these decisions it cannot be said that the Constitution is inviolate in its written provisions. . . "

Blockade. "Holland *v.* Venezuela." See Editorial note. 34 *Law Magazine and Review* 208 (*Feb.*).

"The Dutch action in Venezuela does not

merit the highest commendation. Whatever might be the grievances of the Netherlands, the embargo of the Venezuelan navy was not the ideal way to set them right. . . . It appears to have been designed to cripple an independent government in its maintenance of a coastguard service, merely because Holland (very likely rightly) thought that it was not treating her commerce fairly."

Blockade. "Pacific Blockade." By Professor John Westlake, K. C. 25 *Law Quarterly Review* 13 (*Jan.*).

The learned Professor of International Law in the University of Cambridge here traces the growth of the comparatively recent doctrine of "Pacific Blockade" and points out the principles on which the leading nations, with the exception of France, have come to concur. The article was suggested by the recently published work on "Pacific Blockade," by Albert E. Hogan. The author sums up as follows:—

"Having now before us the declared policies of the four greatest naval powers of Europe and America, we can sum up. Blockade interfering with third parties, and unaccompanied by a state of war, is admitted by France alone, and is not a part of the law of nations. Blockade not interfering with third parties, and unaccompanied by a state of war, is admitted by all four—for its admission by France is included in her assertion of her own institution, as the less in the greater—and is a part of the law of nations. For this alone the name of Pacific Blockade should henceforth be reserved. Lastly, blockade interfering with third parties, accompanied by a state of war but unaccompanied by a declaration of war, has emerged once from the Land of Shadows, we may hope never to reappear; but one can never feel sure. Discussion on the expediency of admitting pacific blockade has become out of date; discussion on the expediency of admitting blockade against third parties without war may perhaps be postponed until, if ever, another attempt shall be made to establish such a blockade in the teeth of the forces now arrayed against it."

Codification. In a review of the late James C. Carter's "Law, Its Origin, Growth and Function," the *Law Quarterly Review* (v. 25, p. 84, Jan.), while it praises Mr. Carter's acute and profitable observations and skill in presentation, fails to agree with his fundamental proposition, saying:—

"He does not appear to appreciate the distinction between the progressive and the non-progressive societies, but treats all as if they were equally progressive, and of Seeley's distinction between the organic and the inorganic states he knows nothing. Equally inadequate is his conception of the extremely formal character of early law. So, also, he fails to recognize the fixity of law in all the earlier ages, and the fact that, from the close connection between law and religion amongst other causes, it was most difficult to change; that in progressive societies the moral sense of the better part of the community was usually in advance of the existing law, and the great problem was to bring the law into harmony with the altered feelings of the people—a state of things that could not have existed if law had simply been existing custom."

The reviewer also says that Mr. Carter's opposition to codification reveals a one-sided attitude, as if he had never heard of the Negotiable Instruments Act now adopted by more than half of the states of the Union, or of such English experiments in codification as the Bills of Exchange, Partnership, and Sale of Goods Acts, and more remarkable still, the recent German Civil Code.

A recent private attempt at codification is that of George Spencer Bower, K.C., in his "Code of the Law of Actionable Defamation." The *Law Magazine and Review* (34 *L. Mag. and Rev.* 231) says that Mr. Bower's Code "shows throughout great care, acuteness, and labor, and the notes legal learning, literary knowledge, and analytical power."

The German Civil Code should have received the attention of Mr. Dicey in "Digest of the Law of England with Reference to the Conflict of Laws," says the *Law Quarterly Review* in reviewing that work (p. 91):—

"Mr. Dicey does not appear to take any notice whatever of the German Civil Code, although various provisions, both of the Code itself and of the Einführungs-Gesetz, attempt more or less successfully to settle vexed questions in the conflict of laws."

In this connection, it is interesting to note that the French translation of the German Civil Code undertaken with the assistance of the French government has now been completed.

Codification (England). *See* 25 *Law Quarterly Review* 81 (*Jan.*). In the review of Book II, Part III of "A Digest of English Civil Law," a writer whose initials A. V. D. can be taken for those of Professor Dicey pleads eloquently for encouragement for those engaged on this work:—

"They have undertaken a task of immense difficulty; they are trying, as is the way with Englishmen, to accomplish by private effort an end—in this instance the codification of the law of the land—which in most countries has been accomplished, if at all, by experts employed by the state and supported by all the help which the Government can place at

their disposal. Our English codifiers are performing their self-imposed work with marked ability. The one danger to be feared is that they should not give long and ample thought to the drafting of every article in their Digest. It were better that their subscribers should wait a year or two for their expected volumes than that the volumes, when received, should be either imperfect or inaccurate statements of the law."

Codification (New York). "The Progress of Law Reform in New York." By Raymond H. Arnot. 43 *American Law Review* 53 (*Jan.–Feb.*).

A concise summary of the history of law reform in New York since colonial times, covering the activity of David Dudley Field and his colleagues and the work of statutory revision which has come since the adoption of the codes.

Codification (United States). "The Nation's First Penal Code." By Senator George Sutherland of Utah. *North American Review*, *v.* 189, *p.* 107 (*Jan.*).

Discusses a most important bill to codify, revise, and amend the penal laws of the United States, embodying the whole substantive criminal law of the nation. This bill passed the Senate a year ago and is now receiving the careful consideration of the Joint Committee of the two houses.

Constitutional Law. *See* under special topics, *e. g.*, Bill of Rights, Corporations, Status, etc.

Contracts (Illegal). "Hyams *v.* Stuart King." By Professor A. V. Dicey. 25 *Law Quarterly Review* 76 (*Jan.*).

This is a discussion of a decision in a case decided in 1908 by the Court of Appeal (2 K. B. 696, 77 L. J. K. B. 794) involving an evasion of the gaming acts, the plaintiff having won his action for an obligation which, though due on a wager, is not clearly within the terms of 8 and 9 Vict. c. 109. Professor Dicey concludes that this decision has for the time nullified the Gaming Act of 1835 and the Gaming Act of 1845, section 18. He considers that public feeling will soon require legislation freeing courts from the necessity of enforcing the payment of wagers.

Contracts (Public). "Government Contracts—Before the Accounting Officers." By Charles F. Carusi. 43 *American Law Review* 1 (*Jan.–Feb.*).

This is a minute description of the public contracts of the United States and the statute requirements with reference to them. The article is to be followed by another in the same periodical to be entitled "Government Contracts—Before the Court of Claims."

Contracts (Wills Upon Consideration). The Public Policy of Contracts to Will Future Acquired Property." By Joseph H. Drake. 7 *Michigan Law Review* 318 (*Feb.*).

This paper considers the manner in which courts have approached the subject of wills upon consideration, which problem has given them a great deal of trouble not only in England and America, but also in the Continental countries. The Code Napoleon appears in terms actually to prohibit the making of reciprocal or mutual wills in the same instrument. This provision, as adopted into the Louisiana Civil Code, has been construed by the courts of that state as formal only, leaving open the question of the legality of the joint will itself if it has not been made in the same instrument. The author points out that there is much conflict among various jurisdictions and some confusion in the decisions.

Dufour v. *Pereira*, 1 Dickens 419, decided by Lord Camden in 1769, is a leading case upholding the validity of joint instruments, but later cases have by no means adhered to this authority, although its doctrines were followed in *In re Sutton Davis' Will* (1897), 120 N. C. 13, overruling *Clayton* v. *Liverman* (1837), 2 Dev. and Bat. 558.

Conveyances. (Torrens System). "Something New in Torrens' Land Law—The Constructive Spirit in Legislation." By Richard W. Hale. 43 *American Law Review* 97 (*Jan.–Feb.*).

Referring to a revised draft of the Land Court and land registration law prepared by Charles S. Rackemann, Esq., of Boston for presentation to the Massachusetts Legislature this winter. This draft has been prepared by one of the opponents of the Torrens system as it now exists in Massachusetts, and is proposed as a measure by means of which alleged defects in that system may be removed and titles registered in it thus far may be confirmed. The author of the article thinks this draft should receive the careful consideration of the bar on account of the constitutional questions involved.

Corporations. "Regularity of Directors' Meetings Held Outside of the State of Corporate Organization." By Stephen Philbin Anderton. 16 *Bench and Bar* 23 (*Jan.*).

A short, well prepared paper with citations of many state decisions.

Corporations. "The Punishment of a Corporation—The Standard Oil Case." By Professor Charles G. Little. 3 *Illinois Law Review* 446 (*Feb.*).

The writer of this article discusses the fine imposed by Judge Landis in the Standard Oil case, wholly from the point of view of the justice of the punishment meted out and without any reference to the questions of law involved before the verdict.

He plainly disagrees with the spirit of Judge Grosscup's declaration that no one, whether an individual or a corporation, can be punished without having first been duly indicted, tried, and convicted, for he makes a sharp distinction between punishment and conviction. While the corporation, like an individual, may not be convicted without due process of law, punishment is a matter left to the discretion of the Court within certain limits, and the intricacies of modern corporate machinations must not be suffered to make mockery of our criminal jurisprudence.

"True, the corporation is a legal person, an abstraction if you will, responsible for infractions of the criminal laws . . . but the state cannot punish a mere abstraction as such. The abstraction is only the law's method of recognizing the collective action of a group of natural persons, and the punishment is in reality upon those persons. . . .

"The learned Judge who wrote the opinion of the Court of Appeals, confused the idea of conviction with that of punishment. . . . Is it not rather contradictory for the Court to say that the shareholders are all before it in a civil proceeding, but not in a criminal one?"

The author contends that the Court had a perfect right—

"to say that unless there were extenuating circumstances in the record of the trial, he would assume that a large fine should be imposed, unless the stockholders of the Indiana Company could show to him extenuating circumstances outside of the record, or that the punishment would bear too harshly upon the shareholders not only innocent of wrongdoing, but who would be financially unable to bear the consequent loss. Then if it appeared that the New Jersey Company was the real shareholder, that the punishment would be its punishment, the Court could have inquired of it whether there were any reasons why the severest punishment should not be meted out to the Indiana Company, and if it declined to offer any reasons, then without further inquiry, the Court should have imposed the severest punishment which the evidence in the record justified. This would not only have violated no traditions of our Anglo-Saxon jurisprudence, but would on the contrary have been an enlightened method of applying them to conditions never foreseen by our forefathers."

Corporations. "*Ultra Vires* Acts of Corporations." By Nathan Wolfman. 43 *American Law Review* 69 (*Jan.–Feb*).

The author disposes of the rule that "a corporation is an intangible, invisible, artificial being" as no longer useful, and chooses to regard the corporation "an association of men in an organic body, having certain rights as such, distinct from those of its members, the body of men becoming the subject and object of legal rights." (Taylor on Corporations.)

The paper distinguishes between the English and American decisions applying to charters, holding however that in their practical results they come to about the same thing: "All acts or contracts not expressly or incidentally permitted are prohibited and are *ultra vires*." But the application of this rule to *ultra vires* contracts has been most difficult, has worked hardship in many cases, and contradictions and solecisms of reasoning have been multifarious.

There are three views with regard to *ultra vires* contracts. First there is the Federal and English rule, whereby an *ultra vires* act is utterly void because there is no corporate power to make it. Second is what may be called the New York rule, under which "a party to an *ultra vires* contract, who has received the full consideration of his engagement, cannot avail himself of the objection that the contract was *ultra vires* to avoid his obligation under it; and an action is maintainable on the contract."

The third rule is that of those cases decided by an application of the principles of estoppel, whereby "if the act undertaken was in and of itself *ultra vires* of the corporation, no act of the body will have the effect to estop it to allege its want of power to do what is undertaken." The writer declares himself to have assumed the task of offering a solution of the problem and suggests that the following rule of law be established: "The effect of incorporation of an association of individuals is to create a legal person with the powers of every other legal person with respect to contracts and acts, subject to such prohibitions upon the exercise of certain powers as the charter may impose."

The author considers that the application

of this proposition "will work justice without imposing upon the scientific construction of the law," and that it will do away with confusion among the authorities by placing corporations in the position which they ought to occupy with reference to the effect upon public policy of the acts of the individuals composing them. The writer thinks his rule more in harmony with the common law than the existing theories, inasmuch as the American courts, when they adopted the doctrine of *ultra vires*, entirely disregarded the principles of the common law as stated in the case of *Sutton's Hospital*, 10 Coke 30, c, and assumed an attitude which has been opposed to that of English courts.

Corporations. "*Ultra Vires* and Estoppel." By Abraham B. Frey. 43 *American Law Review* 81 (*Jan.–Feb.*).

Discusses the use of the defense of *ultra vires*, shows the proper and improper application of the term, and explains the use of the word "estoppel."

As examples of the improper uses of the term *ultra vires*, the author cites that referring to an act of officers who exceed the powers conferred upon them by the stockholders, that of an act of a majority of the stockholders in violation of the rights of the minority, that of an act not done in conformity with requirements of the charter, and that of an act contrary to public policy.

With regard to the construction of *ultra vires* contracts, the author proposes the following new rules:—

(1) That it would be well to discard the use of the term "void" in connection with *ultra vires* transactions and substitute therefor the term "unenforceable," as these contracts are not really treated as being void.

(2) That the use of the term "estoppel" is incorrect, technically speaking, so long as we concede that the world is chargeable with notice of corporate powers, excepting in these cases where the act is *ultra vires* because of facts peculiarly within the knowledge of the corporate officers.

(3) That the word "estoppel" can be discarded, yet the same results reached by preventing the party from pleading the *ultra vires* on the grounds of public policy, and that this rule is the correct one.

Corporations (Interstate Commerce Clause). "Corporations and the Nation." By Thomas Thacher. 18 *Yale Law Jornal* 263 (*Feb.*).

This paper emphasizes what the author declares to be an obvious principle, but nevertheless one often overlooked, namely, that if corporations created by the state may be regulated by the Federal government it is because of the character of the business and for no other reason. He says:—

"Since the power of the Nation depends in no way upon incorporation, incorporation neither extends nor limits the power. Since it is the character of the business and not the legal character of the agency by which it is done which gives Congress its right of regulation, the legal character of the agency does not limit the power of Congress in its regulation of the business. Nor does it appear that there can be any difference in expediency, whether the agency is incorporated or not. The regulations which seem wise with respect to the business should not, therefore, be limited in their application to incorporated bodies. They should be general—as are the regulations of the Anti-Trust Act and the Interstate Commerce Act—applying to the doings of individuals and unincorporated associations in like manner as to those of corporations. And the propriety of their enactment should be tested by the thought that they must, in reason, be made so to apply."

Crimes. *See* Codification, Corporations.

Evidence (Psychological Tests of Witnesses). "Professor Muensterberg and the Psychology of Testimony." By Professor John H. Wigmore. 3 *Illinois Law Review* 399 (*Feb.*).

Reviewed in a separate article in this issue.

Fifteenth Amendment. *See* Status.

Government (Great Britain). "Government by Committees in England." By Sir Frederick Pollock. 25 *Law Quarterly Review* 53 (*Jan.*).

Various uses of committees which have sprung up, not only in English public affairs, but in every department of activity, are traced in this paper. The functions of the Judicial Committee of the Privy Council, the committees of Parliament, and various semi-political bodies are described.

"There are two great committee-forming authorities in our Constitution, the King's Council and Parliament. It is needless to remind any student of English history that Council and Parliament themselves were formed by processes of specializing and reinforcement from the original Curia Regis. Again, the superior courts of Common Law might fairly be described, in their earliest stage, as expert committees of the Curia. Not till the seventeenth century did the indiscreet ambition of James I provoke a positive declaration that the powers of his

judges, once conferred, were plenary and not merely delegated, and the King could neither sit in judgment in person nor divert the established course of justice according to law. If the Curia Regis can now be said to survive anywhere, it is in the formal sittings of the Privy Council when the King in Council receives the reasoned reports of the Judicial Committee and makes them operative and final judgments by issuing Orders in Council following their Lordship's humble advice. . . . .

"There is some reason to believe that the Court of Chancery was first a committee of the Council. . . . However that may be, the Court of Star Chamber (properly the King's Council sitting in the Star Chamber) was certainly a Committee of the Council. . . It does not appear that the Star Chamber was unpopular, or that its jurisdiction, though exercised through a procedure quite different from that of the common-law courts, gave rise to any serious complaint, until it was employed as an instrument of vindictive prosecutions on merely political grounds. But for this abuse, it might have had a long and useful history; it might well have given us improvements in our criminal procedure for which we have waited till the present day, and have been the parent of an adequate Court of Criminal Appeal. . . . .

"The Judicial Committee, we need hardly say, is a real and active committee; but its habitual working members are only a fraction of its nominal list. Besides the nucleus of regular attendants, now practically identical with the learned persons who make up the judicial House of Lords, there are some persons, such as former Indian judges, who are summoned only when their special kinds of learning and experience are required; some who are available at need, but as a rule, occupied on other judicial or state employments; some who are retired veterans and retain their membership only as an honorary distinction. . . . .

"In modern times a remarkable example of what I have called the atrophy of committees has been afforded by the transformation of certain committees of the Privy Council into separate departments of executive government. Here we find, or might have lately found, a nominal Board including several high officers, such as the Secretaries of State; but 'the Board is a phantom,' not meeting even for ceremonial purposes, and the President of the Board acts just like any Minister in sole charge of a department. Thus the Board of Trade is, in its full official style, though the shorter one has long been authorized, 'the Committee of the Privy Council appointed for the consideration of matters relating to Trade and Plantations.' The Board of Education, now transformed since 1899, was for sixty years the 'Committee of Council on Education.' The Local Government Board was doubtless framed more or less on these models, but it dates only from 1871, and was never a Committee of Council, though all its members are in fact Privy Councilors; it operates not through Orders in Council, but by rules and orders issued under its own seal.

"On the other hand there is a Committee, commonly described as being an informal committee of the Privy Council, whose importance has greatly increased within living memory, and is still increasing, namely, the Cabinet. The description above mentioned is warranted by the usage of eminent writers on the law and practice of our Constitution; and there is no doubt that the Cabinet was in its earliest form a confidential inner circle, though not a regular committee, of the Privy Council. . . . .

"Properly speaking, the Cabinet is a committee of the leading Parliamentary supporters of the Prime Minister's party, being Privy Councilors. It is created in a peculiar manner, as in form, so far as there is any form, it is nominated by the Prime Minister; there is no such thing as an *ex officio* member of the Cabinet, though it is well understood that the holders of certain great offices of state, must, in fact, be included."

As an illustration of the work done by joint committees to enable various bodies to work together, the author cites the way in which the four Inns of Court govern the bar by means of a Council of Legal Education which has charge of regulations of the Inns of Court regarding the qualifications for practice at the bar. A somewhat similar body is the Incorporated Council of Law Reporting for England and Wales. The author has served this body as Editor of the Law Reports since 1895 and describes its work from personal observation.

Government (Philippines). "A Decade of American Rule in the Philippines." By W. Cameron Forbes. *Atlantic Monthly*, *v.* 103, *p.* 200 (*Feb.*).

Describes the methods and institutions of government introduced by the United States, political and party conditions, the character of the Filipino Assembly, and present problems and prospects of the Filipino government.

Injunctions. *See* Procedure.

Insurance (Regulation). "Defective Insurance Legislation." By John P. Ryan. *North American Review*, *v.* 189, *p.* 280 (*Feb.*).

Discusses the topic particularly from the point of view of the New York companies, which appear to be "suffering from too much legislation; some of it at least based upon fear and arbitrary opinion, rather than upon well considered principles of state supervision."

International Arbitration. "Our Controversy with Venezuela." By Robert C. Morris. 18 *Yale Law Journal* 243 (*Feb.*).

The writer considers the basis of the recent controversy of the United States with Venezuela and declares the issue a fit subject for arbitration. The article is chiefly a discussion of the various facts involved in the dispute and is not an essay upon international law. The author points out that the United States has carefully followed the spirit of the Second Hague Conference, as regards the non-employment of force in the collection of debts unless arbitration has failed, and urges that Congress should adopt measures making use of force, if necessary, in compelling an impartial arbitration of the questions which Venezuela has refused to arbitrate. The article was written before the new government of Venezuela had expressed to the United States the wish of President Gomez to settle satisfactorily all international questions.

International Law. *See* under special topics, *e. g.*, Blockade, Status, etc.

German Civil Code. *See* Codification.

Labor Unions (Union Label). *See* a recent Australian case, 6 *Commonwealth Law Review* 83 (*Nov.–Dec.*).

Three judges of the High Court, against two dissenting, held that a union label was not a trade-mark and the members of the union would have no right of property in the use of a label, nor could a trade union assert the right to place a label on goods produced by the employees. Hence the action of the State Attorney-General taken at the instance of certain breweries in refusing registration of a label to a union of brewery employees was upheld by the Court. In handing down this decision, the Court referred to the fact that "the great weight of American opinion was adverse to considering workers' labels as trade-marks." *Attorney-General of N. S. W.* v. *Brewery Employees' Union*, 6 C. L. R.

Law Reform. *See* under special topics, *e. g.*, Codification, Government, Legal Systems, Legislative Procedure, Procedure, etc.

Legal History (Bracton). "The Summa of Gilbert de Thornton." By George E. Woodbine. 25 *Law Quarterly Review* 44 (*Jan.*).

A historical and critical discussion of Thornton's Summa of Bracton's treatise by a Yale scholar. The author considers it probable that the manuscript in the library of Lincoln's Inn is a copy of the Summa, and that it has better claims than any other manuscript to be so considered.

Legal History (Channel Islands). "The Office of Jurat in the Royal Courts of Jersey and Guernsey." By C. E. A. Bedwell. 34 *Law Magazine and Review* 159 (*Feb.*).

A description of the functions of an officer who has been an important part of the machinery of justice in these Islands for hundreds of years.

Legal History (England). "The Date of Separation of Ecclesiastical and Lay Jurisdiction in England." By Walter Lichtenstein. 3 *Illinois Law Review* 347 (*Jan.*).

An article incorporating historical researches made by the Librarian of Northwestern University.

Legal History (England). "The Wapentake of Wirral." By C. E. H. Chadwyck-Healey. 25 *Law Quarterly Review* 72 (*Jan.*).

A review of Ronald Stewart-Brown's work on the Hundred Court of Wirral in Cheshire.

Legal History (Rome). "The Historical Position of the Rhodian Law." By Robert D. Benedict. 18 *Yale Law Journal* 223 (*Feb.*).

The main purpose of this paper is to show that a statement to which many writers have lent their authority, namely that the Romans owed their system of Maritime Law to the Rhodians, is without sound historical foundation. We have here a thorough-going investigation of the historical questions involved. The author exposes the unreliability of the supposition that Rhodes had a Maritime Code which was subsequently included in the digest of Justinian, and asserts that the book entitled "Rhodian Law" first put in print in 1596 is not authentic. By declaring this work spurious, the statements regarding the adoption of the Rhodian Law by the Romans fall to the ground. "I see no reason," says the author,—

"Why we are called upon to look to any other sources than Roman sources for any provision which we find in the maritime law of Rome. The jurisconsults of Rome certainly showed themselves competent to deal with any questions which were presented to them by the increasing maritime commerce of Rome. . . .

"We can say that the principle on which the law as to jettison should rest, as the Rhodian law-giver, or jurisconsult, had stated it, so commended itself to the jurisconsults of Rome that it was taken bodily into Roman jurisprudence, with the label of Rhodes upon it. And this must be conceded to be a great honor. . . .

"We must recognize the wisdom which led to the adoption of that principle into the

jurisprudence of Rome. Aside from that, let us give to the jurisconsults of Rome the credit for the Maritime Law of Rome."

Legal History (United States). "The Influence of French Law in America." By Professor Roscoe Pound. 3 *Illinois Law Review* 354 (*Jan.*).

"Influence of the civil law in America," concludes the writer, "has been chiefly an influence of French law. The great German jurists came too late to have much effect, and the Dutch jurists were too early. The highest development of French juristic writing in the eighteenth century and the first years of the nineteenth century was at an opportune time for American legal growth. Yet . . . . if there was any danger that in some jurisdictions political passion and prejudice growing out of the Revolutionary War and ignorance of the true substance of English law would lead men to reject the common law and to receive another system in its place, it soon passed." . . .

Legal History (United States). "The Lincoln-Douglas Debates and their Application to Present Problems." By Hannis Taylor. *North American Review*, *v.* 189, *p.* 161 (*Feb.*).

A re-statement of the essence of the questions involved in the Lincoln-Douglas debates of 1858.

"Against the contention of Douglas that under the doctrine of 'Popular Sovereignty', even a question so great as human slavery might be localized, stood Lincoln's contention that all local questions that affect all are the common concern of all. . . . Lincoln's contention . . . has become the cornerstone of our new national life."

Legal Systems (Turkey). "The Legal System of Turkey." By Anton Bertram. 25 *Law Quarterly Review* 24 (*Jan.*).

Readers will find this a minute and interesting account of the new system of law which Turkey has established since 1856. The Penal Code of 1858, the two Commercial Codes, the Mejelle, or Civil Code, the Land Code of 1868 and the Codes of Procedure of 1861 and 1879, are all described. The indebtedness of Turkish to French jurisprudence is made clearly evident.

Legislative Procedure (Bill-Drafting). "The Drafting of Federal Statute Law." By F. Granville Munson. 43 *American Law Review* 121 (*Jan.–Feb.*).

The writer gives some concrete examples of the necessity of careful editing of proposed federal laws, and of the employment of the knowledge of trained draftsmen in framing bills.

Legislative Procedure (Parliamentary Rules). "The Rules of the House of Representatives." By A. P. Gardner, M.C. *North American Review*, *v.* 189, *p.* 233 (*Feb.*).

"The United States is entering on a critical period in its legislative history. The next decade will decide the drift of affairs. Either the National House must once more become a deliberative body in the sense in which that term has been used in the past, or else the people of this country must decide between two alternatives. They may leave the power in the Speaker's hands, where it is at present, or they may destroy representative government by adopting the system of Initiative and Referendum."

Medical Jurisprudence (Regulation of Medical Practice). "Characteristics and Constitutionality of Medical Legislation." By H. B. Hutchins. 7 *Michigan Law Review* 295 (*Feb.*).

This article presents a summary of legislation regulating the practice of medicine in England from earliest times up to the latest acts, and also in the United States, the laws of the several states being epitomized at some length. The latter portion of the article considers the constitutionality of statutes on the practice of medicine. Notwithstanding the attacks on medical legislation as abridging the vested rights of citizens, or as unjustly and improperly discriminating against a certain class, or as *ex post facto*, the medical legislation of the different states has on the whole been sustained as a proper and lawful exercise of the police power. On this point the author cites fifty or more decisions. The author recapitulates:—

"In conclusion it may be said that if statute regulations in regard to admission to the practice of medicine, or the continuance in practice, are adopted in good faith, are reasonable and operate equally upon all alike who desire to practice, may be met by reasonable study and application, and are such as will probably accomplish the object in view, namely, the protection of the public, then they will be declared valid by the courts, even though the conditions imposed may be rigorous and, in the opinion of the court, inexpedient and not such as the court would impose if called on to prescribe conditions."

Negotiable Instruments. "Fictitious Payees in Forged Checks or Bills." By Professor Louis M. Greeley. 3 *Illinois Law Review* 331 (*Jan.*).

The writer upholds the principles enunciated in the Illinois case of *First National Bank* v. *Northwestern National Bank*, 152 Ill. 296, and argues for the rule which allows the payor

to recover against a party to the paper collecting it.

Negotiable Instruments (Bills of Exchange). "The International Law Association at Budapesth." By T. H. Baty. 11 *Bombay Law Reporter* 1 (15 *Jan.*).

Discusses the proceedings of the Budapesth conference of last September, incidentally giving the rules relating to bills of exchange in the final form in which they were adopted.

Negligence. *See* 25 *Law Quarterly Review* 109 (*Feb.*).

A writer in this review objects to Melville M. Bigelow's opinion that negligence in law is a state of mind, and observes:—

"We are rather sorry to observe a tendency among able American writers (for Mr. Bigelow is not alone in it) to invent new terms of art without necessity and add gratuitous difficulties to things already hard enough. For many years we have studied the Common Law (and a little of other law too) without ever hearing of an 'inculpable mind'; and, frankly, we do not want to hear of it again. Nor do we think the book is improved for the use of students by the frequent appeals to 'social forces,' 'direction of economic energies,' and the like, which seem to us only to say, with emphatic and rather obscure elaboration, that law and legislation must in the long run follow public opinion, as Professor Dicey has more plainly told us."

Nuisances. "The Government Solves the Smoke Problem." By John Llewellyn Cochrane. *American Review of Reviews*, *v.* 39, *p.* 192 (*Feb.*).

A descriptive article on means for successfully combating the smoke nuisance in large cities.

Old Age Pensions Act. A description of the English Old Age Pensions Act of 1908, described by the Earl of Rosebery as the most significant piece of legislation since the Reform Act of 1832, is given by Horace Secrist in 3 *American Political Science Review* 68 (*Feb.*).

Patent Law. "The Mortgage of Letters Patent." By Kenneth R. Swan. 34 *Law Magazine and Review* 150 (*Feb.*).

Discusses the rights of the mortgagor and the mortgagee, the form of the mortgage, and the mortgagee's remedies under the English law.

Philippines. *See* Government, Immigration, and Status.

Privy Council. *See* Government.

Procedure. "Interested Judges." By K. B. Dastur. 11 *Bombay Law Reporter* 6 (15 *Jan.*).

Discusses the common law rule that a judge should not adjudicate a matter in which he has an interest, and the question how far the presence on the bench of such a judge will vitiate the proceedings.

Procedure. "Relations of Bench and Bar." By Justice Anglin. 29 *Canadian Law Times* 1 (*Jan.*).

A learned and readable article, well worth the attention of the profession.

Procedure (Appeals—Canada). "Appellate Jurisdiction." By E. R. Cameron, K.C. 29 *Canadian Law Times* 29 (*Jan.*).

Treating of a topic suggested by the proposed limitation of appeals in all actions instituted in a Superior Court under consideration by the Legislature of Ontario.

Procedure (Appeals—Canada). "Supreme Court and Privy Council Appeals." By John T. Small, K.C. 29 *Canadian Law Times* 47 (*Jan.*).

One of the papers read before the Ontario Bar Association last December.

Procedure (Injunctions). "Legislative Invasion of Judicial Power." By Charles E. Littlefield. *Phi Delta Phi Brief* (*Jan.*).

This article is part of Mr. Littlefield's speech delivered in the House of Representatives last May on injunctions.

Procedure (Jurisdiction—Australia). "Federal Jurisdiction of State Courts." By Andrew I. Clark. 6 *Commonwealth Law Review* (*of Australia*) 49 (*Nov.–Dec.*).

Showing that the result of the passage of the Judiciary Act of 1907 has been to invest the state courts of Australia with federal jurisdiction with respect to different matters than those which were intended.

Procedure (Misconduct of Jurors). An interesting review of cases of misconduct in the jury box will be found in 18 *Yale Law Journal* 276 (*Feb.*).

Procedure (Writ of Prohibition—Australia). "Some Modern Applications of the Writ of Prohibition." By John A. Ferguson. 6 *Commonwealth Law Review* (*of Australia*) 62 (*Nov.–Dec.*).

The legislature of Australia passed an act early in 1908 making final the decisions of the Arbitration Court of New South Wales having jurisdiction in labor disputes, and

declaring that "the validity of any decision shall not be challenged by prohibition or otherwise." The effect of this provision seems to be to clothe an inferior tribunal with such powers as place it entirely outside the control of higher courts, which cannot review its proceedings even for the purpose of determining whether the court has exceeded its jurisdiction. While it might seem at first that such a statute might be *ultra vires* of the New South Wales Parliament under the constitution, the English statutes have given the Parliament large discretion in the administrtation of justice.

The author says:—

"Even if some slight excess of jurisdiction take place, owing to the honest mistake of the presiding Judge, this may be preferably in the public interest, rather than that the usefulness of the Court should be hampered and perhaps destroyed by repeated applications of the writ of prohibition on highly technical grounds."

Responsibility. "Responsibility in Law." By R. W. Rankine Wilson. 34 *Law Magazine and Review* 167 (*Feb.*).

The concluding paper in a series which has now been issued in book form. The author's purpose is to make an inquiry into the nature of moral responsibility. Some of the conceptions of Professors James and Royce are considered.

Scientific Methods. "The Relation of Political Science to History and to Practice." By the Rt. Hon. James Bryce. 3 *American Political Science Review* 1 (*Feb.*).

In his presidential address at the fifth annual meeting of the American Political Science Association at Washington, D. C., Jan. 28, Mr. Bryce says that the reason why many writers on political science are such hard reading may be because they "keep us too much in the field of abstractions." The best writers are those who bring us closely in contact with human facts. Montesquieu is sometimes wrong in his facts and often wild in his conjectures, but he is always interesting. The same thing may be said of some writings of Tocqueville, Bagehot, Dicey, and Sidgwick.

"That the study is, moreover, more instructive the closer it keeps to facts will appear when we consider the nature of the matter it deals with. Broadly speaking, it treats of Tendencies and of Institutions. The general and permanent tendencies of men in communities are the substratum of all political theory. We learn them from ethics and psychology as well as from history. Considered as general and as permanent they are few, and can be briefly stated. . . . .

"Every institution—say the English parliament or the New England town meeting,—must be studied through its growth and in its environment. Now in examining a political institution there are four things to be regarded.

"The first is its formal and legal character.

"The second is the needs it was meant to meet and the purposes it actually serves.

"The third is the character of the men who work it.

"The fourth is what may be called the traditional color of the institution itself, i.e., the ideas entertained respecting it by the people among whom it lives, the associations they have for it, the respect it inspires.

"Without a comprehension of these three latter the investigation of the institution as a formal legal creation is unprofitable and may be misleading. The essential point is to get hold of the thing in its working. . . .

"The accuracy of the science, its solid value, its usefulness to the world we live in, depend upon the closeness with which it keeps to the data supplied by history. It is not a deductive science any more than it is a branch of speculative philosophy. Some writers have treated it as a set of abstractions. . . . What can be more windy and empty, more dry and frigid and barren than such lucubrations upon sovereignty as we find in John Austin and some still more recent writers? Is this sort of treatment helpful today either to a comprehension of the facts, which is science, or to the service of mankind, which is statesmanship? . . .

"A wide study of politics, like a wide study of literature, tends to correct the excesses of Nationalism. For a political philosopher as well as for a Christian the true spirit is a cosmopolitan spirit, which recognizes the good that there is in all peoples, the contributions each of the civilized peoples has made, the services each may render in the future, the duty to help forward the races that are behind, the gain to each nation from developing the intellectual gifts and material prosperity of the others." . . .

Standard Oil Company. *See* Corporations.

Status. "The Fifteenth Amendment to the Constitution." By M. F. Morris. *North American Review, v.* 189, *p.* 82 (*Jan.*).

The author, who was formerly Associate Justice of the Court of Appeals of the District of Columbia, considers that this amendment "has been the source and cause of untold calamity to our country."

Status (Fifteenth Amendment). "Race Distinctions in American Law." By Gilbert Thomas Stephenson. 43 *American Law Review* 29 (*Jan.–Feb.*).

The first of a series of articles the purpose of which is to show that during the past

forty-eight years all the states "have evolved a body of laws which set the races apart from one another and . . . . the courts, both state and federal, have upheld these laws." The present article discusses the legal definition of Negro and Mulatto, how it is slander to call a white man a Negro, and what the proper name of the black man is.

Status (Filipinos). Professor Jules Valéry writes to the *Law Quarterly Review* (25 *L. Q. R.* 9, *Jan.*) to say:—

"It cannot be assumed that Filipinos have no nationality. By Art. 3 of the treaty of Paris, 'Spain *cedes* to the United States the archipelago known as the Philippine Islands.' Consequently these islands became part of the territory of the United States, and their inhabitants became American subjects. It is true that under Art. 9 their civil rights and political status are to be determined by Congress, and this question is not yet settled. But this is a point of internal, not of international law."

Stock Exchanges (State Regulation). "The Poison of the Street." By Frederick S. Dickson. *Everybody's Magazine*, *v.* 20, *p.* 226 (*Feb.*).

A vivid article on New York Stock Exchange methods, by a Cleveland corporation lawyer. He earnestly advocates the cleansing of Wall street by means of legislation insuring to the state intelligent and just control of the most vital of all public utilities.

Tenement Houses. "The Slum as a National Asset." By Charles Edward Russell. *Everybody's Magazine*, *v.* 20, *p.* 170 (*Feb.*).

Contrasts the methods of tenement housing existing in Germany and the United States, and urges the adoption of German methods in this country, asserting that the German government's labor policy is much more humane and civilized than our own, the principle of working men's insurance being particularly commended.

Torrens System. *See* Conveyances.

Trade (Promotion). "The Extension of American Commerce." By Avard L. Bishop. *Atlantic Monthly*, *v.* 103, *p.* 235 (*Feb.*).

Commends to this country the example of Germany's systematic promotion of foreign commerce by means of the Imperial Consultative Board and other bodies through which close co-operation between the government and business interests is established.

Trade-Marks. *See* Labor-Unions.

Universities. "The Law of the Universities—V, Discipline; VI, Education; VII, Finance." By James Williams. 34 *Law Magazine and Review* 136 (*Feb.*).

Wagers. *See* Contracts (Illegal).

Wills. *See* Contracts.

Miscellaneous Articles of Interest to the Legal Profession

America. "The Future of America." By Gilbert K. Chesterton. *Hampton's Magazine*, *v.* 22, *p.* 273 (*Feb.*).

A satirical article on America and the bad outlook for an Anglo-American *entente*.

Biography. "Cleveland the Man—The First Administration and the Second Campaign." By George F. Parker. *McClure's Magazine*, *v.* 32, *p.* 337 (*Feb.*).

Gives a graphic portrayal of Mr. Cleveland's industrious and painstaking methods during the first administration, from the pen of one who worked with him at the White House for seven weeks, and also throws much light on his attitude toward political and party affairs.

Biography. "Heney: A First Class Fighting Man." *Current Literature*, *v.* 46, *p.* 154 (*Feb.*).

Describing the personality and career of the aggressive San Francisco attorney.

Biography. "Reminiscences of Some of the Dead of the Bench and Bar of Richmond." By Judge George L. Christian. 14 *Virginia Law Register* 657 (*Jan.*) *and* 737 (*Feb.*).

Biography. "The Oratory of Lord Erskine." By J. A. Lovat-Fraser. 34 *Law Magazine and Review* 129 (*Feb.*).

"Whatever his failings in Parliament or as a judge, Lord Erskine was, as Lord Campbell has said, 'without an equal in ancient or modern times, as an advocate in the forum.' "

China. "The China That Is." By David Lambuth. *American Review of Reviews*, *v.* 39, *p.* 209 (*Feb.*).

Throws some light on political conditions in China and prospects of the progress of free institutions.

Currency. "The Banking and Currency Problem in the United States." By M. W. Hazeltine. *North American Review*, *v.* 189, *p.* 242 (*Feb.*).

Sketching the subject-matter of Victor Morawetz's recent work on the above topic and explaining how his plan for a central agency regulating the issue and redemption of national bank notes would work.

Democracy. "The Old Order Changeth—II, Beginnings of the Change." By William Allen White. *American Magazine*, *v.* 67, *p.* 407 (*Feb.*).

Treating of the newer democracy which has arisen particularly in the West, attaching hopeful significance to the adoption of the initiative and referendum and other popular measures.

Immigration (Chinese). "The Problem of the Chinese in the Philippines." By Russell McCulloch Story. 3 *American Political Science Review* 30 (*Feb.*).

The author expresses the opinion that it will be unwise for the United States to invite a conflict between the Chinese and the Filipinos until it is itself willing to open its doors freely to the labor of China. To admit the Chinese to the Philippines now would invite a disturbing social and economic factor.

Kentucky Night Riders. "They That Ride by Night." By Eugene P. Lyle, Jr. *Hampton's Magazine*, *v.* 22, *p.* 175 (*Feb.*).

A realistic story of the Night Riders of Kentucky and their part in the tobacco war.

Labor Problems. "The Industrial Dilemma—I, Labor and the Railroads." By James O. Fagan. *Atlantic Monthly*, *v.* 103, *p.* 145 (*Feb.*).

Presenting some vital information about the relations between railroads and their employees.

Liquor Problem. "The Scientific Solution of the Liquor Problem." By Henry Smith Williams, M.D. *McClure's Magazine*, *v.* 32, *p.* 419 (*Feb.*).

The writer discusses means of scientific elimination of the saloon evil and proposes to substitute the Gothenburg system as a means of reducing the number of saloons, by the establishment of refreshment houses giving equal prominence to the display of non-alcoholic beverages. He thinks this system might well be transplanted from England to America, inasmuch as "it has stood the test of forty years' trial in Sweden and of ten years' trial in England on a small scale."

Moroccan Situation. "The North African Question and Its Relations to European Politics." By George Frederick Andrews. 3 *American Political Science Review* 20 (*Feb.*).

An essay upon the Moroccan situation and the prospects of France in Northern Africa.

Tariff. "Perplexities of Tariff Revision." By Albert H. Washburn. *North American Review*, *v.* 189, *p.* 203 (*Feb.*).

Tariff. "The Future of the Tariff." By Robert P. Porter. *North American Review*, *v.* 189, *p.* 194 (*Feb.*).

Advocates the appointment of a permanent commission to suggest to Congress from time to time needed changes in the tariff law.

University of Wisconsin. "Sending a State to College." By Lincoln Steffens. *American Magazine*, *v.* 67, *p.* 349 (*Feb.*).

Describes the methods of the University of Wisconsin, which President Eliot called the leading state university, and incidentally indicates the part which this University takes in shaping legislation by means of the bill-drafting services performed by Dr. Charles McCarthy, its lecturer on political science.

Reviews of Books

AMERICAN IDEALS

Ideals of the Republic. By James Schouler, LL.D. Little, Brown & Co., Boston. Pp. 304. ($1.50 *net.*)

THE historian James Schouler announces the purpose of this volume to be "to trace out those fundamental ideas, social and political, to which America owes peculiarly her progress and prosperity, and to consider the application of those ideas to present conditions." The book derives its material from lectures given at Johns Hopkins University in 1906–8, to close a connection of seventeen years with its historical department.

The book starts with an enunciation of fundamental rights of the Constitution and traces their general application to modern problems and to modern American life. About the author's observations there is an atmosphere of ripened judgment founded upon close familiarity with the facts of history, and of forbearing kindliness and good humor in the discussion of tendencies with which he is not in sympathy. Because of the broad, human scope of the book and its wealth of reflection, it is one which no lawyer would mind adding to his library shelves, finding

its spirit in many respects admirable and inspiring.

To illustrate these qualities of the author we will quote a typical passage, one showing his breadth of observation, his whole-hearted enthusiasm for the cause of progress, his devotion to what he conceives to be a national ideal. The same passage will illustrate not only characteristic qualities but characteristic defects, as will be evident from his failure to place upon the legislatures that responsibility which they must meet if real progress is to be realized, and to interpret correctly our state constitutions, which clearly impose the direct responsibility for legislation not upon the people but upon their legislative agents:—

"Democracy has done stronger work in our modernized state constitutions. A popular dislike of legislative dominance in affairs—of all caucus and log-rolling methods of government—began to appear early in these instruments; and most of the hampering constraint imposed today upon that department aims to correct abuses which became manifest. State workings are watched and state constitutions remain open to speedy amendment aside from mere statute. Both legislature and administrators enter promptly upon their work after the people have chosen at the polls, and legislatures are mostly urged to hold brief and unfrequent sessions, despatching the public business. Constraints increase of late years rather than diminish; and reform is upheld, not by new states alone, but by many of the oldest and most conservative of the Union. In short, what an eighteenth-century legislature might have chosen to do or leave undone, under its own repealable rule or enactment, the fundamental law in most states now commands peremptorily. If it be objected that all such hampering provisions show an increasing distrust of the people's representatives, their wisdom or honesty, we may reply that distrust is generated among a supervising constituency, confident of its own better understanding how free government should be conducted, and well assured of its own inherent honesty, and its capacity to give instructions. There is scarcely a change, such as I allude to, in legislative power and procedure, which is not on the whole a change for the better." P. 196.

The foregoing may not only be not juridically sound, but imperfect as a statement of facts. Who can say that a great many of the limitations upon legislative action, if indeed they are true *limitations* rather than mere definitions of procedure, have not been virtually self-imposed?

Professor Schouler has not attempted an essay in legal or political science, and it might therefore not be wholly fair to apply scientific tests. Any work intended for general circulation, however, is largely dependent for weight and authoritativeness upon a firm foundation of scientific principle. Because the author yields to a tendency that has dominated many writers both in the past and in the present, he misses something of correctness and perspective. The defect may not be serious, but it is sufficient to deprive the book of the great value that it might otherwise have as an analysis of American institutions, and to place it in the category of unauthoritative lay discussion.

The author's apparent familiarity with more intricate phases of his subject is such as to lead one to look for a skillful handling of the problems of American institutions, but when one has read a little way one finds that he belongs not among the scientific writers but among the dogmatists. He adopts the theory of natural rights and the social contract. Many American writers on jurisprudence may have done the same thing, but in Professor Schouler's case it means that he is inclined to misinterpret democracy, as tantamount, one might almost say, to a repeal of the entire law of status. The doctrine that all men are equal ("men" including of course women and children), if carried to a logical conclusion would mean the wrongfulness of such a thing as a law of persons existing. Professor Schouler does not commit absurdities, but he shares an unscientific tendency.

The ancient division between democrats and aristocrats—using the words to denote differences of political theory—is no longer of much practical use. Temperamentally men fall into one of two classes,—either they try to superimpose some artificial theory of their own upon society, or they are content to accept the facts of human nature as they find them. On one hand we have the political dogmatists, and they may be either democrats or aristocrats, for extreme democracy and extreme aristocracy are alike based on unreasoning prejudice. On the other hand we have those whom we may call political moderates, because they seek to free themselves from prejudice and to view all political theories in the light of common sense. This latter class much better understands the meaning of the complex spirit of modern democracy than does the former. The former, in spite of its good intentions, succeeds only in embarrassing the wise solution of contemporary problems of constitutionality and

public policy, because of its temperamental preference of arbitrary to analytical propositions.

Many American citizens, doubtless, consider that they live under the laws of nature not less than of men, and deduce from the principle of human equality some one of these corrollaries: popular nominations, popular amendments to the Constitution, extension of the initiative and referendum, unrestricted immigration, substitution of state for federal regulation of commerce, popular election of Senators, and woman suffrage. But the science of political institutions has made such progress that modern culture on the whole abandons the theory of a state of nature held by Locke, Rousseau, and the idealists of democracy. Most contemporary political discussion recognizes the intricacy of social and political phenomena, and realizes that the theoretical equality of men, though desirable, may not be wholly practicable in actual life. The various parts of every society act and react upon one another. The strong inevitably influence the weak, hence political equality must to some extent, at least, be a legal fiction. As Mr. James Bryce declared in his president's address before the American Political Science Association:—

"The multitude has neither the knowledge nor the time nor the unflagging interest that are needed to enable it to rule . . . The excellence of a democracy largely depends on the extent to which the number of those who really rule by virtue of their intelligence and their activity can be increased, so whatever stimulates these qualities strengthens a democratic government and raises its quality."

We intend no injustice to Professor Schouler when we say that notwithstanding a moderation of tone that belies a harsh characterization, he belongs among the dogmatists rather than among the moderates. Without taking up an extreme position or assuming an attitude undignified for a scholar, he adopts the unscientific terminology of natural, political, and civil rights, thereby importing a fanciful construction into his definition of the fundamental prerogatives granted citizens by the Constitution. He wrongly reads the Constitution in the light of the Declaration of Independence, which is a legal document only in so far as it asserts the dignity of the English common law. His book illustrates a temperamental tendency to dogmatize, in his endorsement of such principles as those of the popular nomination of Senators and the extension of the initiative and referendum.

Candor demands recognition of the fact, however, that Mr. Schouler is not on the whole extreme in his attitude toward novel phases of democratic idealism. Caution and discretion restrain his pen, and make his discussion of current questions readable and helpful. There is brightness of observation in this book. Note for example what he says regarding the fitness of the Anglo-Saxon race for democratic institutions (p. 262):—

"Some have held . . . that of all men the British-born has ever been strongly reluctant to concede anything like a social equality. But this is exaggeration. It is rather in his strong individuality, in his sturdy personal regard for the independent rights of himself and his household, that the Anglo-Saxon has figured historically, in contrast with the more sympathetic, submissive or emotional types of continental Europe. The Englishman disdains others or remains indifferent to them until a better acquaintance and intercourse has compelled his respect; but he is not impervious to impressions. And he has, withal, a conscience and a profound sense of justice."

COSTIGAN'S MINING LAW

Handbook on American Mining Law. By George P. Costigan, Jr. West Publishing Co., St. Paul. Pp. xiv, 765; appendices, table of cases, index. ($3.75.)

A good work on mining law, such as will meet the joint needs of student and practitioner, has long been somewhat of a *desideratum*, and Mr. George P. Costigan, Jr., Dean of the College of Law of the University of Nebraska, has met this want in an authoritative treatise recently published in the useful Hornbook series. The "Hornbook" plan throws the rules and principles of law into black-letter paragraphs which, taken together, present a skeleton outline of the whole topic. The value of this book can be inferred merely from the qualifications of the author, who has lived in mining camps, has practised law in the mining law states of Colorado and Utah, and has had several years of experience as a teacher of mining law.

Examination of the volume will confirm the impression of its learning and industry. While the author acknowledges his indebtedness to predecessors, in particular to the authors of Morrison's Mining Rights and Lindley's Mines, he has put a vast amount of his own labor into the book, filling 535 compact pages with lucid information and orderly discussion of the various topics. The scope and symmetry of the treatment are indicated by the following list of chapter headings:—

1. The Origin and History of American Mining Law.

2. The Mining Law Status of the States, Territories, and Possessions of the United States.
3. The Land Department and the Public Surveys.
4. The Relation Between Mineral Lands and the Public Land Grants.
5. The Relation Between Mineral Lands and Homestead, Timber and Desert Entries.
6. The Relation Between Mineral Lands and the Various Public Land Reservations.
7. The Relation Between Mineral Lands and Town Sites.
8. Definitions of Practical Mining Terms.
9. Definitions of Mining Law Terms.
10. The Discovery of Lode and Placer Claims.
11. Who May and Who May Not Locate Mining Claims.
12. The Location of Lode Claims.
13. The Location of Mill Sites.
14. The Location of Tunnel Sites and of Blind Lodes Cut by Tunnels.
15. The Location of Placers and of Lodes Within Placers.
16. The Annual Labor or Improvements Requirements.
17. The Abandonment, Forfeiture, and Relocation of Lode and Placer Mining Claims.
18. Uncontested Application to Patent Mining Claims.
19. Adverse Proceedings and Protests Against Patent Applications.
20. Patents.
21. Subsurface Rights.
22. Coal Land and Timber and Stone Land Entries and Patents.
23. Oil and Gas Leases.
24. Other Mining Contracts and Leases.
25. Mining Partnerships and Tenancies in Common.
26. Conveyances and Liens.
27. Mining Remedies.
28. Water Rights and Drainage. Appendices.

In our opinion the author has not only justified the appearance of this book, but has conferred a boon upon the profession by supplying a standard up-to-date treatise, written by a text writer who has both the technical knowledge of mining and the legal learning to render his work valuable.

In the appendices will be found the various federal statutes and departmental rules and regulations governing mineral lands not only in the mining law states but in Alaska and the Philippines. The Texas statutes on mining are also inserted because the author deems them of general interest as constituting, unlike other state statutes, a complete system of laws independent of federal control or interference.

The citations are full and the volume will meet the needs of the practising lawyer as well as of the student. To the profession in general the book will also have an interest, as the author treats his subject in no narrow mechanical spirit, and the historical portions, describing the origin and development of the different rules of mining law, are at times exceedingly interesting.

BOOKS RECEIVED

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

Hubbell's Legal Directory for Lawyers and Business Men. 39th year, 1909. Hubbell Publishing Co., New York. Pp. 1428+400. ($5.35 delivered.)

The Law of Apartments, Flats and Tenements. By William George. Fallon Law Book Co., New York. Pp. 213+index and appendices 276. ($4.)

The American As He Is. By Nicholas Murray Butler, President of Columbia University. The Macmillan Co., New York. Pp. x, 97, index. ($1 *net.*)

The Law of Guaranty Insurance. By Thomas Gold Frost, Ph.D., LL.D. Little, Brown & Co., Boston. 2d edition. Pp. liv, 770, and index. ($6 *net.*)

The Banking and Currency Problem in the United States. By Victor Morawetz. North American Review Publishing Co., New York. Pp. 119. ($1 *net.*)

France and the Alliances—The Struggle for the Balance of Power. By André Tardieu, Honorary First Secretary in the French diplomatic service. The Macmillan Co., New York. Pp. x, 309, index. ($1.50 *net.*)

The Law of Real Property (Based on Minor's Institutes). By Raleigh Colston Minor, M.A., B.L., Professor of Law in the University of Virginia. Anderson Bros., Univ. of Va. 2 v., pp. 1602, and table of cases and index 233. ($11.50.)

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*Notes of Cases**

BANKRUPTCY. (Neglect to file schedules.) D. C.—In *Matter of Schulman & Goldstein*, 20 Am. B. R. 707, 164 Fed. Rep. 440, it has been held that on creditors' motion to punish an involuntary bankrupt, as for contempt, for neglect to file his schedules, he will be fined a sufficient sum to compensate the attorneys for moving party; and if the imposition of such fine does not put a stop to the delay in filing schedules, imprisonment will be imposed.

BANKRUPTCY. (Waiver of exemptions.) U. S. C. C. A. Ga.—The Georgia Constitution forbids the waiver by a debtor of the right to exemption of wearing apparel and $300.00 worth of household and kitchen furniture and provisions. In *Citizens' Bank* v. *Hargraves*, 164 Fed. Rep. 613, petitioner had offered four

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

mules as security for a loan from the bank, which at maturity was not repaid. By consent of all parties the mules were sold free of all liens for $468.00. Thereafter petitioner claimed an exemption of $300.00 therein. From the quandary as to whether those mules were wearing apparel, household or kitchen furniture the U. S. Circuit Court of Appeals delivers us by deciding that the exemption is confined to specific articles and that petitioner, having waived his right to property without the exemption, cannot reclaim it.

BONDS AND MORTGAGES. (Action under foreign statutes.) N. Y.—The parties to a bond and mortgage on real property in New Jersey were residents of that state. Plaintiff in *Hutchinson* v. *Ward*, 85 N. E. Rep. 390, was the assignee of the obligee of the bond. The action was brought in New York to recover an amount remaining due on the bond. 2 Gen. St. N. J. 1895, p. 2111, as amended by Act March 23, 1881 (P. L. 1881, p. 184) provides that where a bond and mortgage are given for the same debt an action may be brought on the bond within six months after foreclosure for any deficiency, and that judgment for the creditor shall open the foreclosure entitling the mortgagor to sue within six months to redeem. On the question of suing in New York, the court asserts that plaintiff was not attempting to enforce some pecuniary liability or remedy created by a foreign statute. He was seeking to enforce a common law obligation, which had not wholly lost its force. The action was transitory and maintainable outside the state where the contract was made.

The provisions of the New Jersey statute, however, were a part of the contract, and regulated the manner of performance. The action was commenced within the statutory period of six months after the sale of the mortgaged premises. As the statute was general as to any suit on the bond and as to the effect of a recovery thereon, such a recovery would open the foreclosure sale and permit the judgment debtor to redeem.

CONSTITUTIONAL LAW. (Validity of bulk sales law.) Ill.—The Bulk Sales Law of Illinois provides that all sales of merchandise not in the usual course of trade will be presumed to be fraudulent unless certain formalities designed to protect creditors are complied with. Without regard to these provisions one who had been unsuccessful in the grocery business sold her stock at a fair price and applied the proceeds on a note which she owed a bank. In *Charles J. Off & Co.* v. *Morehead*, 85 N. E. Rep. 264, it was contended that this sale was void on the sole ground that the formalities required by the Bulk Sales Law had not been observed. The Supreme Court of Illinois held this act unconstitutional as it singled out persons of a particular class, and imposed burdens upon them from which all other classes are exempt, thus depriving them of liberty and property, in that they are not permitted to contract in respect to a particular kind of property subject to the same laws applicable to other classes of property, and hostile to those provisions of the Bill of Rights providing that all men have certain inherent rights, including life, liberty, etc., and that no person shall be deprived of life, liberty, or property without due process of law.

CORPORATIONS. (Agreement between two factions regarding selection of directors.) Ga.—An agreement between two factions of the shareholders of a railroad company incorporated by the secretary of state, to the effect that one of such factions owning half of the corporate stock shall have the right indefinitely to name a majority of the directors of the company, and thus manage and control its affairs, is held, in *Morel* v. *Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, to be against public policy, and void.

CORPORATIONS. (Gross earnings.) Minn.—As to what income or earnings received by a railway company should be included within the term "gross earnings" was the question recently before the Supreme Court of Minnesota in *State* v. *Minnesota & I. Ry.* Co., 118 N. W. Rep. 679. The corporation contended that the term was limited to the receipts and expenditures on account of the operation of the railroad, and that if it were taxed upon its gross earnings received in operating leased portions of the track and the lessor corporation also were taxed, double taxation would result. The court held that earnings received by railway companies while performing work incident to, or connected with, the business of transportation, and which may reasonably be considered within the scope of their corporate powers, constitute "gross earnings." Within the case two minute classifications are made, the amount received for the use of the equipment, such as steam shovels, work trains, etc., falling within the term, and money received from the sale

of old equipment and surplus supplies, and in the repair of cars being excepted.

CORPORATIONS. (Sale of stock at fair value voidable by minority stockholders.) C. C. A.—A sale of corporate property to the owner of a majority of the stock, for its fair value, but for less than might have been obtained for it from another, at a regular meeting of the directors and the stockholders at which the purchaser's stock was voted for the sale, is held, in *Wheeler* v. *Abilene Nat. Bank Building Co.*, 159 Fed. 391, 16 L. R. A. (N. S.) 892, to be voidable at the election of the minority stockholders.

EMPLOYERS' LIABILITY. (Workmen under different employers not fellow servants.) N. Y.—The case of *Stanley Hod Elevator Co., appellant*, v. *John Henry, respondent*, 114 N. Y. Suppl. 38, came before the Appellate Division of the New York Supreme Court in January on appeal from a judgment handed down by the Supreme Court in February, 1908, against the *Stanley Hod Elevator Co.*, the appellant in this action and defendant in the court below.

The plaintiff in the court below was a common laborer in the employ of J. T. Finn & Co., who were engaged in the erection of a six-story building and obtained from the defendant a hoisting elevator with all its appliances, and an engineer to operate it. The plaintiff was seriously injured by an accident which the jury decided to be due to negligence in the operation of the elevator. The Appellate Division unanimously affirmed the decision of the court below, declaring that the liability of the defendant was established within the authority of a number of cases, the principles declared in *Mills* v. *Thomas Elevator Co.* (54 App. Div. 124, 66 N. Y. Suppl. 398, aff. 172 N. Y. 660, 65 N. E. 1119) and other ruling cases. With reference to the contention of counsel for the appellant that this case differed from those on which the Supreme Court had based its decision, in that the engineer operating the elevator was a fellow servant with the plaintiff and the plaintiff's employer had the right to discharge him, on this point the court held that the fact that the engineer reported for work to the foreman and received directions from the employees of Finn & Co. "did not operate to change his relation to the defendant as its servant (*Johnson* v. *Netherlands American Steam Navigation Co.*, 132 N. Y. 576, 30 N. E. 505)," and the appellant's contention for non-liability could not be sustained on the ground that the plaintiff and engineer were engaged in the same employment, for the engineer had no connection with the work for which the plaintiff was employed, and was not, therefore, a fellow servant.

EVIDENCE. (Exhumation of dead body to establish innocence of accused.) Tex.—In *Gray* v. *State*, 114 S. W. Rep. 635, it appeared that Gray and another man had engaged in an altercation which resulted in the death of the latter. The state contended that Gray had shot from behind while he insisted that he had shot in self-defense while deceased was advancing upon him with a drawn knife. There was a ragged bullet hole in the breast of deceased, which accused declared marked the entrance of the bullet but which the state asserted indicated its exit. To settle this question accused endeavored to have the body exhumed and examined. If the bullet was in the body the defense would be greatly strengthened and if it had passed through, the evidence would be advantageous to the state. The exhumation was vigorously opposed by the state. It seems strange that the evidence which would have upheld one theory or the other was so violently opposed by the prosecuting attorney, especially when the life of a possibly innocent man hung in the balance. The Court of Criminal Appeals of Texas decided that every consideration of respect for the dead would suggest that the dust of the deceased should remain undisturbed unless justice required a disinterment, but in this case the examination was considered necessary for the protection of appellant.

EVIDENCE. (Telephone conversation overheard through connecting instrument.) N. Y.—The Supreme Court of New York, Appellate Term, has decided (January, 1909) that a witness may testify as to conversation overheard by means of a connecting telephone. In *Rimes* v. *Carpenter*, 114 N. Y. Suppl. 96, the question being that of conversation between a broker and his customer, the testimony of a witness who had overheard the conversation by the use of another telephone at the broker's place of business had been excluded by the court below, on the ground that since the witness heard the conversation upon another instrument in a room other than that in which the defendant's agent was speaking, the evidence was in its nature incompetent. The Appellate Term,

per Bischoff, J., in ordering a new trial, said:

"Unquestionably a conversation overheard between parties whose voices are recognized by the witness may be proven, and there is no ground for distinction, in principle, between such a case and that of a conversation by telephone, which the witness overhears, where the actual connection between the instruments is shown in such wise as to identify the very conversation, and the persons holding the conversation are known."

INSURANCE. (Loss caused by civil authorities may include any action holding up rents.) Md.—Delay in rebuilding a structure the rents of which are insured, owing to refusal of a permit by the municipal authorities, so that the rents are not re-established as soon as they might otherwise be, is held, in *Palatine Ins. Co.* v. *O'Brien*, 68 Atl. 484, 16 L. R. A. (N. S.) 1055, to be within the provisions of the policy that the company will not be liable for loss caused by order of any civil authority.

INSURANCE. (Parol evidence admissible to show estoppel, without waiver on policy in writing.) Ark.—Parol evidence of acts tending to show an estoppel upon an insurance company to take advantage of false answers in an application is held, in *People's F. Ins. Asso.* v. *Goyne*, 79 Ark. 315, 96 S. W. 365, 16 L.R.A. (N. S.) 1180, to be admissible, notwithstanding provisions in the policy that no waiver shall be effective unless indorsed in writing on the policy at the home office of the insurer. With this case is an elaborate note collating the other authorities on the parol evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel, as applied to insurance policies.

MONOPOLIES. (Contracts co-extensive with patent rights not invalidated by Sherman Act.) U. S. C. C.—In *Blount Manufacturing Co.* v. *Yale & Towne Manufacturing Co.*, Mr. Justice Brown of the United States Circuit Court decided Jan. 19 in favor of the plaintiff, who had asked for an accounting in accordance with the terms of a contract with the defendant concerning the profits arising from the manufacture and sale of liquid door checks. It was held that a contract, though of such a nature as to be in violation of the Sherman anti-trust act if it applied to ordinary articles of trade, does not conflict with that act if it is only co-extensive with the monopoly conferred by letters patent, and creates no additional restraint of trade or monopoly. The Court quoted several decisions in regard to the question, including that of the *National Harrow Company* v. *Hench*, 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299, in the third circuit of the United States Court of Appeals. But the Court added: "When no question of the value of the right of excluding others is involved, I am unable to find in the patent laws any reason for upholding an agreement for the suppression or restraint of trade in patented articles against the provisions of the Sherman act."

MUNICIPAL CORPORATIONS. (Amendment of charters.) Mass.—The Supreme Court of Massachusetts in *Graham* v. *Roberts*, 85 N. E. Rep. 1009, finds new problems in St. 1908, p. 542, c. 574, amending the charter of Haverhill. It declares in the outset that the statute prescribes a very radical departure from the general methods of municipal government, and it is even doubted whether the practical working will be satisfactory to the people who have adopted it. The regulations as to elections are principally assailed. They provide for a preliminary election for nominations for office, prohibit the use on the official ballot of the names of candidates named by nomination papers or by caucus, forbid the use of a statement of the candidate's party, and require that 25 voters shall request that a candidate's name be put on the ballot before it shall be placed there. These are held to be valid regulations of the election of municipal officers and not in conflict with Declaration of Rights, art. 9, pt. 1, providing that all elections ought to be free, and that the inhabitants of the commonwealth have an equal right to elect officers and to be elected for public employments.

MUNICIPAL CORPORATIONS. (Notice as to defects in streets.) Minn.—The Waseca (Minn.) home rule charter restricts liability for injuries on defective streets unless written notice of the defect has been filed with the city clerk ten days previous to the injury. This provision is seemingly unreasonable in its sweeping restrictions. By it the unfortunate individual by some sort of necromancy must ascertain that he is about to be injured on a defective street and then notify the municipal authorities to guard against such an untoward occurrence. The Supreme Court of Minnesota in *Schigley* v.

City of Waseca, 118 N. W. Rep. 259, declares the provision entirely proper. After reviewing similar provisions in numerous charters it concludes that it is clear upon principle and authority that the legislature may grant or deny to individuals a right of action against municipal corporations for injuries resulting from the negligent manner in which streets and highways are maintained. Having this power, it may grant the right of action upon any conditions which it chooses to prescribe. It may therefore provide that the city shall not be liable unless it has had actual notice of the existence of the defect in the street for a designated or reasonable time before the accident.

MUNICIPAL CORPORATIONS. (Power to prescribe skating rink hours.) Miss.—Relying on the power given it by the state to regulate dance halls and skating rinks, a municipality passed an ordinance providing that they should be closed from six p. m. to six a. m., and that any person using such place of amusement within the prohibited time should be liable to fine or imprisonment or both. Johnson, the proprietor of one of these establishments, applied for an injunction, alleging that the ordinance was unreasonable and void and destroyed his business. In *Johnson* v. *Town of Philadelphia*, 47 So. 526, the Supreme Court of Mississippi held that every power given by a state to a municipality to pass ordinances, contained the implied restriction that the ordinance should be reasonable, and not destructive of a lawful occupation. It is manifest that this regulation will destroy Johnson's business. Under pretense of regulation the business attempted to be regulated cannot be destroyed. Rights cannot be stealthily taken away, under a power of municipalities which is defensive and cannot perform the offices of a weapon of destruction.

NEGOTIABLE INSTRUMENTS. (Buyer knowing paper void for usury cannot enforce payment.) N. Y.—A bank which purchased from an individual negotiable paper, knowing it to be void for usury, is held, in *Schlesinger* v. *Lehmaier*, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, not to be able to enforce payment of it from the maker, notwithstanding a statute provides that in case of any usurious loans made only the interest shall be forfeited, with a penalty for exacting it, where the legislature has protected only holders in good faith without notice from defects in title to negotiable paper.

PUBLIC SERVICE CORPORATIONS. (City ordinance fixing rates valid unless clearly confiscatory.) U. S. Sup. Ct.—In *The Mayor and Aldermen of the City of Knoxville, appellant*, v. *Knoxville Water Company*, 29 Sup. Ct. 148, the Supreme Court of the United States, per Mr. Justice Moody, reversed the decree of the United States Circuit Court for the Eastern District of Tennessee, which had given judgment against the city, in a suit in equity which had been brought by the company to restrain the enforcement of an ordinance fixing the maximum rates to be charged (Jan. 4, 1909):—

"It cannot be doubted that in a clear case of confiscation it is the right and duty of the court to annul the law. Thus, in *Reagan* v. *Farmers' Loan & Trust Co.* (154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014), where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one half the interest on the bonded debt; in *Covington, etc., Turnpike Co.* v. *Sandford* (164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560), where the rates prescribed would not even pay operating expenses; in *Smyth* v. *Ames* (169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819), where the rates prescribed left substantially nothing over operating expenses and cost of service, and in *Ex parte Young* (28 Sup. Ct. 441), where on the aspect of the case which was before the court it was not disputed that the rates prescribed were in fact confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. . . .

"Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies to whom the legislative power has been delegated, ought to do their part."

WILLS. (Bequests of personalty.) Del.—The rule in *Shelley's Case* is held, in *Jones* v. *Rees*, 69 Atl. 785, 16 L. R. A. (N. S.) 734, not to extend to bequests of personalty.

The Editor's Bag

JURIES OF ILLITERATES

A TRIAL now in progress illustrates the absurdity of following out to their logical conclusion the stricter rules that have grown up in connection with jury trials. If the jury system is not to perish altogether, a result which some writers have predicted to be inevitable in consequence of its defects, it is to be kept alive not by uncompromising adherence to rules that have outlived their usefulness, but by intelligent interpretation of the purpose of those rules and liberal construction of their letter and spirit.

Were the rule that any juror is incompetent who has read anything whatever in the public press regarding the circumstances of an important case to be interpreted in its narrower and more rigorous sense, the outcome would be simply that in a short time no case of great public interest could be tried by anything but a jury composed entirely of illiterates. The doctrine to which lawyers have always been accustomed is that of the necessity of the jury being influenced by nothing whatever except the evidence adduced in the trial, in arriving at its verdict with regard to the facts in dispute. Are we to construe this principle so narrow-mindedly as to deem it necessary to place upon our juries none but men who, the more ignorant and stupid they are and indifferent to the world's happenings, the better fitted they are to perform the function of a most vital part of the mechanism of justice? Or are we, on the other hand, to consider that men of sound and alert faculties, accustomed to watch contemporary affairs with a live interest, are the most competent to reach a dispassionate judgment with regard to any debatable facts, and are the less likely to be swayed by considerations prejudicial to the just settlement of a controversy? Perhaps in time some such rule as this could be established, a rule seemingly in harmony with the ends for which the jury system exists. *A juror who has read anything bearing upon the facts of a controversy is not thereby disqualified, unless the matter brought to his attention is such as might have led a reasonable man to form a prejudice not easily to be overcome.* There would most surely be serious practical obstacles to the adoption of a rule like this, but it will perhaps serve to illustrate in a general way the sort of thing to be desired some day.

We need for our juries not so much men who simply by accident have never come under the influence of a prejudicial view of facts in dispute, but rather men of the type that could resist that influence and view any question fair-mindedly. As we conceive it, the constitutional phrase "an impartial jury" does not signify an ignorant jury, nor a jury devoid of the power to grasp the common-sense distinction between evi-

dence properly bearing upon the case and evidence irrelevant to the facts and therefore inadmissible. It would not be hard, we fancy, to show that a man's common law right to a trial by his peers signifies that his rights are rather to be upheld by his being tried by men of a higher than of a lower mental type. We spoke in this department last month of the special demands made upon the intelligence of the jury by expert testimony, and we would emphasize at this time the conviction that the whole jury system must stand or fall by the standard of intelligence required of jurors.

THE RIGHTS OF A DOMESTIC ANIMAL

The common law vests in a reputable dog the right of going and coming where he listeth, without charging his master for trespass. *Chunot* v. *Larsen*, 43 Wis. 543.

The English Court of Appeal, in *Higgins* v. *Searle*, decided Feb. 8, seems to have declared a similar principle when it held that the owner of a pig or any other naturally harmless animal is not liable for an accident due to its presence in the highway.

The other day a motor car was proceeding quietly on its way through a New England village, when suddenly a chicken, pursued by a cat, crossed the road, scaring a little pony coming in the opposite direction driven by two little girls, one of whom carried a poodle dog in her lap. The poodle, spying the cat, in a second had jumped out of the pony-cart, and the driver of the automobile, in order to avoid running over the poodle, had to stop the machine in the middle of the road. A collie belonging to a woman in the motor car then leapt out before she could detain it and chased the poodle. The little girls had now lost control of the pony, and the chauffeur, seeing a runaway approaching, was eager to avoid a collision, so he started the machine, turning it sharply toward the gutter, but beholding the two dogs fighting there and the cat bristling on the opposite side of the road, he steered toward a stone wall over which the chicken was trying to escape, at which sight he so lost his nerve as to let the machine crash at full speed into the wall, where it was totally demolished. The owner of the automobile then brought suit for damages against the owner of the chicken, claiming that it was entirely responsible for the accident.

The Court, in giving judgment, said:—

"There can be no possible doubt as to the chicken having been the proximate cause of the accident. For had the chicken not crossed the road, the cat would not have scared the pony; had the pony not been scared, the poodle could not have got out of the pony cart; had the poodle not left the pony cart, the automobile would not have stopped; had the automobile not stopped, the collie and the poodle would not have been in the gutter; had the collie and poodle not been in the gutter, the cat would not have hung round to see things through; had the cat not remained on the scene, the chicken would not have been trying to scale the wall; and had the chicken not been trying to scale the wall, the chauffeur would have kept his nerve and have saved the machine from accident.

"Yet though the chicken caused the accident, the chicken's act was not in itself violent or dangerous. This chicken would doubtless have made a tender broiler; it was gentle and inoffensive, and not being *feræ naturæ* its destruction of the automobile was unconscious and free from malice. Therefore, the chicken not having exceeded its common law rights, this action cannot be maintained, and judgment must be entered for the defendant."

JUDICIAL EFFICIENCY HAS NOT ATTAINED ITS MAXIMUM

Judge William L. Putnam of the United States Circuit Court in an address at Boston a few weeks ago, deplored the unfortunate fact that we do not, as a rule, make our judgeships remunerative enough to attract the best lawyers, and said that ordinarily this country gets for judges and prosecuting officers by no means the best nor the ablest men.

When our Chief Justices receive salaries of only $2000 in Oregon, $2500 in Nebraska, and $3000 in Arizona and twelve other states, is it strange that the administration of justice is no more efficient? Comparatively small salaries

may not have prevented able men in and around New York from accepting appointments to the Federal bench, but the danger of belittling the dignity of courts and of obstructing justice by incapacity is ever present, and one for which the American public needs to be continually on its guard.

JUDICIAL "GRAFT" IN PERSIA

"When I was in the service of his Majesty the Shah of Persia," said Colonel Mesrop Nevton, Khan, in an address in New York last month, "I saw many women coming to the imperial palace, veiled, to ask for justice. The skill which women have obtained in looking after their affairs I saw illustrated one day at the palace of the Archbishop, as I will call him. He was the son-in-law of the Shah. An old woman came, whose husband had taken a young and pretty wife, and died very suddenly soon afterward, when it was found that the young wife had possession of all the property and the old wife was even to be driven from the house.

" 'Yes,' said the Archbishop, 'I will do everything I can for you, but first you must give me $500.'

" 'I will give you more than $500 when I get my property, but now I haven't a cent,' pleaded the woman.

"But she wept and pleaded in vain, and finally went off to try to get the $500, or a present which would be the equivalent.

" 'I had to tell her to give me $500,' said the Archbishop to me in a whisper, 'for I have already taken $500 from the young wife.'

"You talk of 'graft' in New York," interpolated the Colonel, "but you want to go to Persia to see it in its refined condition. All this was done in open court."

A HUNG JURY

A New York lawyer says that not long ago he was engaged to aid in the defense of a man on trial in a small New England town. The New Yorker was anxious to get back to the city, and pushed the case as much as possible, with the happy result that the jury retired by one o'clock. The evidence had been conclusive, and a verdict for the defendant should have been rendered in a few minutes, but the darkness arrived without a sign from the jury-room. There was nothing else for it, after the judge had ascertained that the jury desired no instruction in the law, but to adjourn the court until the next day.

The next morning eleven weary men and one with a dogged look upon his face filed into the jury box. The dogged man was the foreman.

"Have you reached a decision, gentlemen?" the Clerk asked.

"No, we ain't!" the foreman said, glaring at the eleven. "We can't come to no verdict. I have, but there's eleven plumb fools on this 'ere jury!"

Recorder Picquet imposed a fine of $30,000,000 upon each one of seven Negroes at Augusta, Ga., Feb. 12, for violating the health ordinances. When the laughter in the court-room had subsided he suspended sentence on condition that each one of the defendants deposited a dollar with the clerk.

IS THERE A LAW OF FACTS?

In his edition of Best's Principles of the Law of Evidence, Mr. Charles F. Chamberlayne says that "the need for insistence upon a dominating influence for scientific principle in the treatment of evidence was seldom, if ever, greater than at the present time."

Commenting on Mr. Chamberlayne's views, a reviewer of the work named says (7 *Michigan Law Review* 366, *Feb.*):

His indictment charges the confusion of the law of evidence, which is a branch of the adjective law, concerned only with the establishing of facts judicially, with rules of substantive law which themselves are concerned only with the definition of rights and obligations. And it involves further the charge that the judge in our modern practice has become subordinated to the jury in the

sense that for an error of the court in the application of some empirical rule during the progress of the trial the judgment may be overturned, where for a like fault on the part of the jury there is no redress. In other words he objects to the doctrine that a litigant has a right as matter of law "to the observance of a precedent in connection with the administration of the rules of evidence" which an appellate court will protect. His criticism goes still farther and insists that "confusion is worse confounded" through the careless and inaccurate use of terms in the law of evidence itself.

Whether all of us see as clearly these defects as does the editor, most of us are willing to accede to these charges as not wholly groundless. Not all are appreciative of the distinction between a fact to be proven and the proof of that fact. To speak accurately rules of evidence have to do with ways and means of proving a fact. Rules which are concerned with determining whether that fact need be proven, are not rules of evidence, but rather rules of substantive law; rules which determine the essentials of the right or obligation involved; in other words, define the right or obligation. And yet it is true that much of the material which makes up the bulk of many of our treatises on the *law of evidence* deals with questions of what are essential elements of particular rights and obligations.

The reviewers of Moore on Facts do not seem on the whole to have realized the necessary bearing of the foregoing principles upon the methods adopted by this writer. One exception, however, is notable. Professor John H. Wigmore, if one can accept the initials as his in 3 *Illinois Law Review* 478 (Feb.), strongly disapproves of the expression used in the preface to Moore's work, "the rule for measuring probative force of testimony," and Moore's observation that judicial precedents will be "treated with the same consideration by courts in the determination of questions of fact as is accorded to the reasoning or *ex cathedra* statements of judges on questions of law." To quote Professor Wigmore:—

> In other words, *there are rules of law which determine the weight or credibility of a piece of evidence which has been duly admitted to consideration*. Now that proposition we deny. It is not known to the orthodox and traditional common law. So far as any courts nowadays are tending to recognize it, it is a bad tendency, and one that will wreck our whole system of proof. If there is one thing for which the common law system of judge and jury stands, it is that the rules of evidence, as determined and applied by the judge, are rules of admissibility alone, and for the judge alone; the weight or credibility is for the jurors untrammeled by any rules of law.

The *Law Quarterly Review* (Jan.), while it carefully weighs and criticises Mr. Moore's work, does not refer at all to this point, and thinks that in spite of some faults it shows great care, accuracy and industry. It therefore congratulates Mr. Moore on his *magnum opus*.

"Moore on Facts" is a work in a new field, but the idea that it opens up a new department of jurisprudence is one to be discountenanced. It will no doubt serve a useful function to the profession, but there is of course no such thing as a law of facts, in the sense of a law which has to do not with the admissibility of evidence but with its weight, as the weight of evidence is a matter left in the hands of the jury and is outside the purview of the law.

No doubt the substantive law can often be presented in a topical arrangement to great advantage, as has been done, for example, in Oliphant's Law of Horses, but works of this character should not obliterate the fundamental distinction between matters of law and of fact, and should not confuse one into imagining that the virgin territory suggested by Mr. Moore's striking title can exist anywhere in the world of jurisprudence.

LENGTHY COGITATIONS

If Judge Vann, of the New York Court of Appeals, is to be believed, some lawyers in times gone by must have lived to ripe old age. In the case of *Elterman* v. *Hyman*, 192 N. Y., at page 127, the learned justice speaks of "the rules of equity, established after centuries of earnest thought by the most learned lawyers known to jurisprudence."

—*Law Notes.*

CRIME IN BLOOD FOR A CENTURY

An Iowa lawyer claims to have traced the ancestry of an Iowa criminal back through one hundred years with the result that every offshoot of the family has been found guilty of crime.

Through the hundred years there seem to have been no hereditary diseases other than a light scrofula. All have been otherwise healthy and strong. The family history is a record of crime from the worst nature down to petty thieving. From the first is traced an inclination to gain wealth without honest labor, and there is a pessimistic vein mixed in. A certain daring may exist, but there is also an element of cowardice, and fear to finish a fight.

A deed of cowardice and of horror marks one big black blot upon the family's history. Besides murder, there is also suicide. A most daring robbery was committed by another member of the family, and another is serving time in the state penitentiary for burglary. Larceny continuously plays a part through the hundred years.

The record of this depraved family is itself an argument for the eradication of crime by education. In the history of the family there was poor environment accompanying the poor heritage.

WHEN COUNCIL SHOULD WEEP BEFORE THE JURY

In Kentucky it has been formally adjudged that trial counsel may, *in the discretion of the Court*, be permitted to lie down on the floor and halloo at the top of his voice (*Owens* v. *Commonwealth*, 58 S. W. Rep. 422). So also the Supreme Court of Tennessee, through Judge Wilkes, has declared that counsel, in arguing a case to the jury, has the right to shed tears, and if he have tears at his command, it may be counsel's professional duty to shed tears (*Ferguson* v. *Moore*, 98 Tenn. 342).—*Bench and Bar.*

A PREPOSTEROUS SUGGESTION

In a small Southern town an old negro was being tried for theft. The old fellow had made a very complete raid on the smokehouse of a white neighbor.

"Look here, Uncle," the Judge remarked informally. "I hear that you have nine or ten coon dogs around your cabin. Is that correct?"

"Yas sah, Mars Jedge! Ah sho' is got de bes' dawgs in dis state, sah," the old man responded, beaming with pride.

"You keep all those hounds, and yet come here and tell the court that the reason you stole that meat and meal was that your family was starving? What do you mean by that?" the Judge demanded.

The old fellow appeared deeply grieved.

"Now, Mars Jedge," he protested, "yo' sholy don' spect Ah gwine ax my chillun to eat dawgs, do yo', sah?"

A PROFITABLE QUERY

A correspondent, noting the Editor's request for legal antiquities, facetiæ, etc., sends us the following, for the *lighter* side of the *Green Bag*:—

"*Quære:* Can an allegation that a man received goods knowing they were stolen be supported by proving that he ate for breakfast some *poached* eggs?"

The Editor, on examining this contribution for the *lighter* side, feels constrained to express himself with all the tact he can command. The contribution is gratefully received, and is deemed highly appropriate for our pages, etc., etc., with, however, the addition of a gloss to this effect—*let no one suppose that a request for legal antiquities and facetiæ implies a desire for antiquated legal facetiæ!*

Can it be that our esteemed contributor committed an inadvertent slip of the pen and wrote *lighter* in place of *heavier* side? With all due respect we would humbly suggest that he raises a legal question which is to be treated in no spirit of levity.

At common law, a person eating poached eggs, even though he knew them to be poached, was not guilty of receiving stolen goods, neither was a person eating stolen goods, knowing them to be stolen, guilty of eating poached eggs unless the eggs were poached as well as stolen. This rule has nowhere, to our knowledge, been changed by statute. But before we answer our correspondent we would like to ask: Why did he eat the poached eggs, knowing them to be stolen?

OVERBURDENED COURTS

A letter from Chief Justice Lucilius A. Emery was read at the recent annual meeting of the Maine State Bar Association, in which he expressed his own personal views regarding the delay in the decisions upon cases in the law court. He wrote:—

> This delay is not owing to the indolence or incapacity of the members of the law court, but is owing to the insistence of the bar and people that they shall do so much *nisi prius* and equity work. . . .
>
> While the work of the law court is not so harrassing and exhausting as that of the practising lawyer, it is yet work requiring close concentration and often protracted mental application, with consequent "brain fag" at times when no man can work. The justices need not only time for study, but time for rest and recuperation.
>
> Now I am not complaining. I do not ask for anything. I am only justifying, insisting that the justices are doing the best they can under the system.

In the discussion before the Illinois State Bar Association last June of the proposal that appeals from the Appellate Courts of Illinois to the Supreme Court be granted by writ of *certiorari* at the discretion of the latter court, one of the members (Proceedings, pt. I, pp. 204-5), in speaking for the advantages of the writ, looked at the subject of the law's delays from a different angle:—

> Mr. Herrington—. . . . . I do not believe the Supreme Court is overburdened with work. I have known the Supreme Court a long time [laughter]; I want to tell you now that I knew those men a long time ago. I have been at the bar for thirty years in this state; there is only one man alive today that signed my license, and that is Judge Craig in Galesburg. When I was first at Ottawa there were four hundred cases on their docket; there are not that many now. Then these Judges were given a stenographer and typewriter, and when they got down to Springfield they were going to grind out the decisions. . . . . Now, just as soon as they have a recess they make a break for their respective homes, as all good husbands do, and we get the decisions when they get ready to give them to us. That is about the way of it. [Laughter and applause.]
>
> Mr. Page—I would like to wager something that the Justices of the Supreme Court who signed this man's license did not know the effect it was going to have on him or they wouldn't have done it. [Laughter and applause.]

No doubt the bar, without meaning to offer an accusation of indolence or incapacity, sometimes errs in expecting the bench to turn out more work than can reasonably be demanded of it. Chief Justice Emery's statement of the imperfectly comprehended duties which may be imposed upon a court, probably reveals a situation which is typical of many jurisdictions.

A BARRISTER'S ANECDOTES

Mr. Crispe, K.C., who is retiring from active practice, told several stories at a farewell lecture in London recently. The late Mr. Commissioner Kerr, he said, when alluding to the perjury that was daily committed in law courts, had remarked, "David said in his haste that all men are liars. If he had been sitting here in this court he would have said the same thing at his leisure." A little girl, when pressed by a judge as to whether she knew what would become of her if she told lies, said she was sure that she would go to "a naughty place," whereupon the judge said, "Let her be sworn; she knows a great deal more than I do." Sir George Jessel, when Solicitor-General, was having a passage of arms with the late Chief Justice Cockburn, when a "little creature at the bar," leaning over to Serjeant Parry, said, "Why,

Parry, he drops his h's!" Mr. Crispe would never forget the scorn on Parry's face when he turned and said, "Sir, I would rather drop my h's with Jessel in hell than aspirate with you in heaven." Baron Bramwell was noted for his kindness to the younger members of the bar. Mr. Henry Fielding Dickens, when the junior of the "Home" Circuit, was presented to the Baron at Maidstone. He was introduced by Harrison as "the son of the well-known Charles Dickens." "The son of the well-known Charles Dickens!" replied the judge. "You might as well say 'the well-known Julius Cæsar'!"

REPREHENSIBLE CONDUCT

With one prominent attorney accused of helping to lynch another prominent attorney, it would seem that professional etiquette is not being so strictly observed in Tennessee as could be desired. Such proceedings on the part of a sworn officer of the law should be severely condemned.—*Law Notes.*

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 CORRECTION

To the Editor of the Green Bag:—

Dear Sir: Permit me to correct a mistake in my paper before the New York State Bar Association, which you published in your February number.

The difficulty in the law of the state of New York, in reference to certificates of reasonable doubt in criminal cases, and a stay of execution consequent thereon, has been corrected by a recent statute which I overlooked. Chapter 479 of the Laws of 1907 corrects the evil which had existed, by requiring the application for such certificate to be made on notice to the District Attorney at a regular special term in the district in which the commitment was had. This amendment had not been incorporated in my copy of the Code of Criminal Procedure. Hence my mistake, which I cheerfully acknowledge. Mr. Robert C. Taylor, the Assistant District Attorney of New York, informs me that in the County of New York since October 15, 1906, 69 applications for stays have been made in the Supreme Court, of which only nine were granted. This is a great improvement, and creditable to both the Judges and the District Attorney.

This reform, effected in New York, encourages me to hope for success in the reform of such matters proposed in federal procedure.

My mistake emphasizes the importance of the consolidation of the general statutes of the state which has been reported to the Legislature, and in the preparation of which the greatest pains have been taken. This will give us in systematic form the whole body of our general statute law up to date.

And the reform thus effected illustrates the remark of Speaker Wadsworth that the Legislature of New York had been much more alive to the need of reforms, and much more ready to embody them in legislation, than is commonly supposed.

Yours truly,

EVERETT P. WHEELER.

New York, Feb. 20, 1909.

The Legal World

The annual meeting of the New Hampshire State Bar Association is to be held in the first week of May. The president's address will be delivered by Edwin F. Jones, Esq., of Manchester, N. H., and the annual address by William B. Hornblower, Esq., of New York.

The recent annual meeting of the Oklahoma State Bar Association was made interesting by the address on "Conservatism in Legal Procedure" read by Hon. F. W. Lehmann of St. Louis, president of the American Bar Association. Mr. Frank Wells of Oklahoma City read a paper devoted to a review of the legislation of the year 1908. Mr. Charles West, Attorney-General of Oklahoma, was delayed in getting to the meeting by a railroad wreck, and was prevented from making his address by business that compelled him to return to Guthrie.

Of the new Taft Cabinet it is notable that six are lawyers, Senator Knox, Mr. Wickersham, Judge Dickinson, Judge Nagel, Mr. Ballinger and even Mr. Hitchcock, who has been admitted to the bar. Mr. Taft, in his speech at the University of Pennsylvania on Washington's Birthday, said: "In a wide sense the profession of the law is the profession of government, or, at least, it is the profession in the course of which agencies of the government are always used, and in which the principles applied are those which affect either the relations between individuals or the relation between the government and individuals, and all of which are defined by what, for want of a better term, is called 'municipal law.'"

The trial of Col. Duncan Cooper, his son Robert Cooper, and John D. Sharp at Nashville, Tenn., on the charge of killing ex-Senator Edward W. Carmack, has been marked by extraordinary conditions as regards the constitution of the jury. The law prohibited the drawing for the jury of any one who had talked with a witness to the murder or talked with some one who had talked with the witness. The Supreme Court having held that a newspaper printing *verbatim* testimony became a witness who had talked to a witness, every one in the county who had read the newspaper testimony became ineligible to sit as a juror. After calling 3019 names to fill twelve places, a jury was at last impaneled, astonishing from the fact not only that none of the dozen has read a newspaper since before the killing, but that four of the jurors can neither read nor write, and two others understand English only indifferently

Governor Charles N. Haskell, of Oklahoma, was indicted by the United States grand jury Feb. 3 for conspiracy to defraud the Government in connection with the scheduling of Muskogee town site lots.

Henry M. Hoyt, Solicitor-General of the Department of Justice, who, it had been rumored, was to be appointed Under Secretary of State under Mr. Knox, was recently stated to have completed arrangements to go to Philadelphia at the close of the administration to enter the private practice of law. Mr. Hoyt was a classmate at Yale of President Taft.

Indictments against the *New York World* and *Indianapolis News* for alleged libel were returned Feb. 17 by the District of Columbia grand jury. Later, bench warrants were issued for the arrest of the men indicted. The indictments made the Press Publishing Company (the *World*), its president, Joseph Pulitzer, and Editors Caleb M. Van Hamm and Robert H. Lyman, and Delevan Smith and Charles R. Williams, owners of the *Indianapolis News*, defendants.

The late M. Alcide Darras, founder and editor of the *Revue de Droit International Privé* of Paris, who died a few months ago at the age of forty-seven, began his literary career by writing a university thesis for his doctor's degree on the subject, "*De la Représentation Judiciaire en Droit Romain.*" Other early works were a treatise on trade marks, and also one on the subject, "*De la Propriété Littéraire, Artistique et Industrielle dans les Rapports Internationaux,*" a portion of which was later published in his work, "*Du Droit des Auteurs et des Artistes dans les Rapports Internationaux.*" These works were the beginning of labors of which the foundation of the *Revue de Droit International Privé* twenty years later was to be the crown. After getting his doctor's degree he continued to study, in Paris, and wrote steadily, much of his work being anonymously dispersed through the pages of reference-books and reviews. In his contributions to the *Journal de Droit International Privé* and the *Recueil Sirey*, he showed himself a jurist of profound learning. He was secretary of the Society of Comparative Legislation in 1889, secretary-general of the International Literary Artistic Association in 1892, secretary of the Section of Trade Marks at the Industrial Property Congress in 1889, associate of the Institut de Droit International, and a charter member of the Society for Legislative Studies. He was not only a learned but a prolific writer upon subjects of commercial law and private international law.

A hostile conclusion has been reached in England by the Council of the Law Society, on the proposal that the County Courts should be made branches of the High Court of Justice. The London *Law Journal* is of the opinion that this decision does not represent the views of the profession as a whole, which favors the amalgation as a beneficial reform.

A bill to establish a United States Court of Patent Appeals was favorably reported to Congress from the House Judiciary Committee Feb. 13 by Representative Tirrell of Massachusetts. It provides for a court of five members to sit in Washington, the chief justice to be appointed by the President and the four associates to be designated from among the judges of the federal, circuit and district courts by the Chief Justice of the Supreme Court of the United States. This measure has been urged by the American Bar Association and manufacturing associations for ten years.

Hon. Carroll D. Wright, for a score of years United States Labor Commissioner, a statistician of world-wide reputation, and for several years president of Clark College, in Worcester, Mass., died February 20. Mr. Wright's legal career was overshadowed by the public offices which he held. In October, 1865, at the age of twenty-five, he was admitted to the bar of Massachusetts, and practised for several years until elected chief of the Massachusetts Bureau of Labor Statistics in 1873. He made a specialty of patent law and acquired a practice worth approximately $10,000 a year. After entering upon the census work to which his life was largely devoted, and gaining eminence as a statistician and some fame as an economist he gave no more of his time to the practice of his profession. His literary work was practically confined to statistical and economic subjects.

In memory of her father, the late Franklin B. Gowen of Philadelphia, an eminent lawyer and president of the Philadelphia & Reading Railroad, Mrs. Esther Gowen Hood has given the University of Pennsylvania $100,000 to establish graduate fellowships in the Department of Law. The work of the holders of the fellowships is to be prescribed by and executed under the immediate supervision of the Law Faculty. The amount of the income payable to each Fellow is left entirely to the discretion of the University. This gift enables the University from year to year to select three or more of the brighter graduates of the School; remove them from the necessity of immediately taking up the practice of law, and give them the opportunity to make a worthy contribution to legal knowledge and the best preparation for the work of the profession.

Speaking to Oxford undergraduates intending to enter the legal profession, the president of Magdalen College referred recently to the excellent effect of the Rhodes Scholarships, remarking that the Law School at Oxford was becoming an imperial school of law.

The four South African Colonies, through a joint national convention, have put forward the draft of a Constitution which is to be considered by the separate Parliaments and finally submitted to the British Parliament for ratification. The bill contains some remarkable provisions.

The Newfoundland fisheries treaty, signed at Washington Jan. 27, goes to The Hague for adjudication on disputed points. America will be represented there by a formidable array of counsel. The court of arbitration is to consist of five members, of whom Judge George Gray of Delaware may be one.

Former President William Ramsey of the German National Bank of Pittsburgh, who was charged with having bribed members of the City Council to have the bank made one of the city depositories, was found guilty Feb. 18 on the specific count of giving Councilman Klein $17,500 for that purpose. Klein has given the authorities a confession on the basis of which a number of millionaires and political leaders have been summoned before the grand jury.

In excluding from evidence an alleged confession of burglary by a boy, Feb. 23, Judge Foster of the Court of General Sessions in New York characterized the "third degree," or police "sweating" process, as barbarous: "This 'third degree' is a dangerous thing. It borders on the Spanish inquisition. I do not say that this is a fact, but there is that feeling and impression and public policy requires, of course, that no one ought to be forced to give testimony against himself."

Sir Gorell Barnes, who lately resigned from the bench of the High Court and on Feb. 16 took his seat in the House of Lords as Baron Gorell of Brampton, declared recently at Liverpool that the amalgamation of the two branches of the legal profession in America had serious drawbacks, longer and more costly trials resulting from the fact that the men engaged in them were not in touch with each other. In England, it was possible generally to command the services of men particularly acquainted with a particular branch of work before a particular judge, whose touch with one another and with the judge was such that he did not believe that in any country in the world cases were so easily tried and handled as in England.

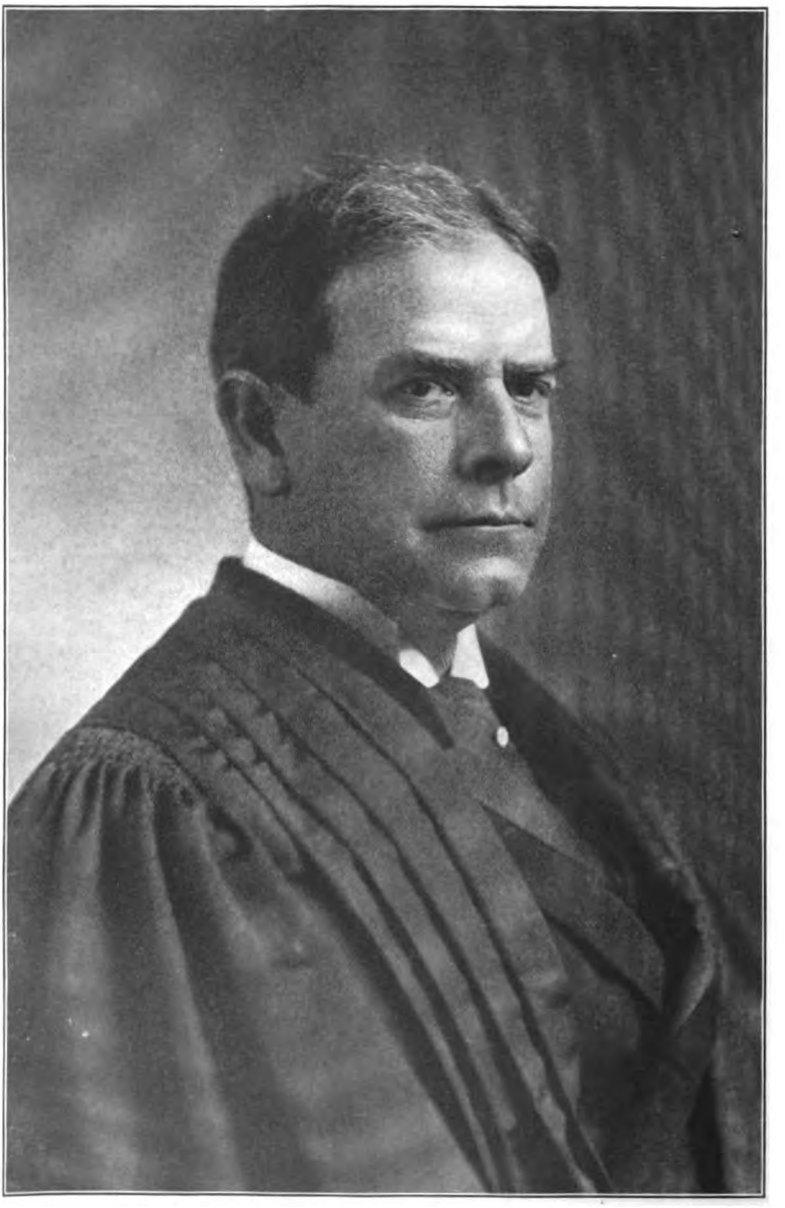
Professor J. H. Beale, Jr., of Harvard Law School has in preparation a collection of "Cases on Municipal Corporations."

The land title registration law, or Torrens system, went into operation in New York state February 1. The law sets apart a special Land Term of the Supreme Court for hearing land registration cases, and provides for the qualification of lawyers, conveyancers, and title companies, as examiners of titles. Whenever such an examiner lays before the court proper evidence of the validity of a title, the court will order the title registered unless at the time appointed for the hearing claimants against the title appear and establish their claims.

The national House of Representatives passed the Tirrell bill Feb. 6 making important changes in the National Bankruptcy Act, after a motion to repeal the Act altogether had been defeated by the comparatively close vote of 111 to 182. The bill as it goes to the Senate fixes the compensation of receivers definitely so as to prevent abuses in particular cases. To facilitate the collection of assets in remoter districts ancillary jurisdiction is conferred upon all district courts. The exact scope of the law is set forth clearly in one paragraph. Trustees get further powers as the representatives of the creditors. Further provisions are made against settlements giving preference to any creditor or set of creditors.

The penal code of federal criminal law was enacted March 4 by the adoption in both houses of Congress of the conference report on the bill drafted by a joint commission. The revision defines more clearly the jurisdiction of the federal courts in cases coming within admiralty law; it enlarges the statutes so as to reach new methods of committing crime and the extension of American territory; it prohibits not only "obscene literature" but "filthy literature" from the mails; it eliminates some of the so-called "Klu-Klux" laws. The code is referred to on page 116 of this number of the *Green Bag*.

Speaking of the censorship of British plays, *apropos* of the prohibition of any burlesque upon the popular success "An Englishman's House," wherein the dangers of invasion are glowingly represented, the London *Law Journal* says that it might be well to attach the censorship to the Home Office, rather than to the office of Lord Chamberlain, so that a cabinet minister might become responsible for its proper working, or to abolish the position altogether. "When a play is blasphemous, seditious, or indecent, the persons concerned in its representation are indictable at Common Law, and the Executive could set the police in motion on a proper occasion. The present system creates intermittently a sense of injustice, which would not arise if the stage, like the Press, were subject only to the ordinary law; or if, at least, some right of appeal were given from the present arbitrary discretion of the Censor."



THE LATE JOHN KELVEY RICHARDS, OF CINCINNATI

JUDGE OF THE UNITED STATES
CIRCUIT COURT OF APPEALS

[*See page* 165

The Green Bag

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The Lake Erie Piracy Case

By Hon. H. B. Brown

Former Justice of the Supreme Court of the United States

THE Civil War, which for four years was waged so fiercely through the states of the South, left but little impress upon the ordinary domestic life of those bordering upon the Great Lakes. Their inhabitants pursued their usual avocations, with no apprehension of danger, feeling safe in the remoteness of the conflict, and in the overpowering strength of the North to resist an invasion. The farmers plowed their fields and reaped their crops without fear of interruption. The manufactories increased rather than diminished their outputs, and the commerce of the Lakes was stimulated by one of its periodical seasons of high freights and abundant passenger traffic. Except for the presence of a prisoners' camp at Chicago, and another for officers at Johnson's Island in Lake Erie, and the frequency of blue uniforms upon the streets, there was little to remind one of the tremendous struggle that was going on within less than a day's journey to the southward.

But on the 20th of September, 1864, the Lake cities were suddenly aroused from their imagined security by the news that a passenger steamer upon Lake Erie had been seized by a squad of Confederates, her crew overpowered, the steamer captured and her course directed to Johnson's Island, with the avowed purpose of rescuing the prisoners confined there and taking them to the Ohio shore, whence it was hoped they might make their way South through the state of Ohio. The plot was carefully planned, and perhaps might have been carried to a successful conclusion had it not been for the abundant precautions taken by the Federal forces. The steamer, the *Philo Parsons*, left Detroit at her usual hour in the morning, and at the request of one Bennett G. Burleigh, who had come on board the night before, stopped at Sandwich in Canada, nearly opposite Detroit, to take on board three friends of Burleigh, one of whom he said was lame and unable to cross the ferry. Proceeding down the river, the steamer stopped at Amherstberg, where sixteen roughish-looking men came aboard with an old trunk tied with a rope. They did not seem to be connected with Burleigh, but were supposed to be refugees from the draft returning home; and little attention was paid to them. Nothing occurred to excite suspicion until the boat was well within American waters, when one Beall, the leader of the gang, while engaged in conversation with the mate in the pilot

house, suddenly drew his revolver, and demanded possession of the boat as a Confederate officer. Recognizing the force of this argument, the mate surrendered the wheel. The crew and passengers were overpowered, driven into the cabin, and the old trunk, which proved to be a small arsenal, opened, hatchets and revolvers distributed among the conspirators, and the course of the boat continued toward Sandusky, near which lay Johnson's Island. But at this point the success of the expedition culminated. Failing to meet a messenger who was to have been sent to meet them at Kelley's Island, on the route of the steamer, or to receive an expected signal, all the conspirators but three mutinied, refused to go farther, and returned at top speed to Amherstberg, where the boat was scuttled and abandoned and the conspirators dispersed. Another steamer was captured and scuttled on the Lake. All of the men were arrested, taken before a Justice of the Peace and discharged, although the officers were sufficiently alert to seize certain property which had been landed and detain it for customs dues.

It was fortunate the steamer turned about when she did. The officers of the *Michigan* had been apprised that the raid would be made that day. The *Michigan*, a man-of-war of fifteen guns, lay off the island, cleared for action, her guns shotted, her anchor hove short, and every preparation made to receive the expected guests. The messenger who was sent to Kelley's Island to join the conspirators had already been arrested and put in custody. There was an available force of nine hundred men at the Island to put down any insurrection. That twenty men, armed only with revolvers and hatchets, should have been able to capture the *Michigan* and release the prisoners was simply preposterous. A single broadside from the *Michigan* would probably have sunk the steamer. The conception was grand, but the end was inglorious.

Of course, the raid created great excitement in the border states. General John A. Dix, already a familiar figure in the war, was sent to Detroit, an investigation made, affidavits procured, warrants sworn out in Windsor, opposite Detroit, for the arrest of the parties, and detectives sent to Toronto to assist the local authorities. Nothing further was heard of the conspirators until November 19th, when a telegram was received from Toronto, announcing the arrest of Burleigh, the second in command of the raiders, with the request for the immediate despatch of an official prosecutor and witnesses.

I was acting as Assistant to the United States District Attorney at the time, and at once bestirred myself to obtain the necessary testimony, but much to my chagrin learned that the crew of the *Parsons* had all left the city, and that a single passenger, a young lady belonging to a well-known Detroit family, was the only witness available. I found her quite willing to go with me for the sake of a lark, and we took the train the next morning. We had scarcely crossed the St. Clair River at Port Huron, when I somehow felt that we were entering a hostile country. Indeed, as I soon found out, the Ohio and the Potomac rivers did not more distinctly separate the loyal from the disloyal states, than did the Detroit and the St. Clair rivers divide the Unionist sentiments of the Northern states from the Southern sympathizing inhabitants of the Canadian province. As our relations with our Canadian neighbors had been perfectly friendly and mutually profitable

for nearly fifty years, since the last war with England, and there could be no suspicion of a sympathy for slavery among the freedom-loving Britons, I found their hostility was probably dictated by the natural jealousy of a smaller for a larger state, a community of feeling with the home government then almost avowedly inimical to us, as well as a sympathy for the "under dog" natural to most of us.

Whatever its origin, the prejudice was unmistakable. The Grand Trunk Railway, which depended largely upon American patronage, had been wise enough to take our depreciated money for passenger fares and incidentals; but off the line it was flouted at, with the remark that the South was sure to be successful, and that in a year the currency would be absolutely worthless. Our mission to Toronto was quickly noised abroad among the Southern refugees who thronged the city, and our entrance into the drawing-room of the Queen's Hotel was greeted with covert glances of curiosity and hatred, while the inevitable young lady at the piano welcomed us with renditions of "Dixie" and "My Maryland." I bore this badinage with good humor, fortified by a secret consciousness that I held the winning card, though my witness, with the innate ardor of her sex, was inclined to resent it. But we were evidently the most unpopular persons in Toronto. I ought to add that this prejudice did not extend to the official class, who treated me with every possible courtesy, and complied with every request I made of them. The natural love of the British for fair play was everywhere manifest, and the courts were eminently just and impartial.

The next morning I put myself in communication with the Crown attorney, and special counsel who had already been engaged by the Government, and learned that a writ of *habeas corpus* had been issued returnable at Osgood Hall, the legal centre of the Province, and that the proceedings were so defective that Burleigh would doubtless be discharged. It was agreed that my counsel should go to Osgood Hall and fight for time, while I went to the Recorder, procured a new warrant and returned to Osgood Hall to await Burleigh's discharge. I was much embarrassed by the illness of the Crown attorney, and was forced to prepare my own papers with no knowledge whatever of Canadian statute law. As the Lakes were not then considered either by the Canadian or American courts as high seas, evidently a charge of piracy could not be sustained. I assumed, however, that a common law complaint for robbery would be good. Acting upon this theory, I charged Burleigh with the robbery of certain small articles of personal property which the raiders had seized. Upon a warrant being issued, I took a cab and drove at a gallop to Osgood Hall, just in time to see Burleigh, who had at that moment been discharged, leaving the court room in the centre of an enthusiastic crowd of his friends, shouting and throwing up their hands at having outwitted us. I simply said with as much coolness as I could muster in the somewhat electric atmosphere about me, "Hold on, gentlemen. Not so fast. We have another warrant against Mr. Burleigh. Mr. Officer, there's your man." The deputy sheriff whom I had taken with me at once advanced and took Burleigh's arm. For a few minutes there was a tremendous excitement. A rescue was proposed, and there were threats of lynching the d—d Yankee; but when it was explained to them that lynching was still a crime in Canada, and that the Canadian courts

were quite as apt to convict the guilty as to acquit the innocent, wiser counsels prevailed. Matthew Crooks Cameron, Burleigh's counsel, who was really one of the ablest lawyers in the Province, put a quietus upon these demonstrations at once by saying, with the inborn respect of an English gentleman for the forms of law, that Burleigh must obey the warrant and go before the Recorder, to whose court room we went at once,—prisoner, counsel and a motley crowd of refugees and other spectators. Burleigh was arraigned, and the examination of the complaining witness adjourned until the following day.

On assembling the next morning, the court room was filled with Southern sympathizers, at the head of whom was Jacob Thompson, formerly Secretary of the Interior in President Buchanan's Cabinet, the political and financial backer of the whole enterprise. I met him twelve years afterwards at a dinner party in Memphis, and found him a somewhat uncouth but genial man, with nothing to justify the charges made in the Northern papers that he bad been instrumental in trying to introduce yellow fever into the Northern cities. In the absence of the Crown attorney, I was courteously permitted to conduct the prosecution, with the aid of Stephen Richards, a famous lawyer of the Province. My witness told her story of the capture in a most convincing way, and bore a long cross-examination with perfect composure and dignity. She identified Burleigh without hesitation, and seemed acquainted with every detail of the case. At the conclusion of the examination an adjournment was taken for a week to enable us to procure additional testimony, as well as to afford Burleigh an opportunity of introducing a commission from Jefferson Davis as an officer of the Confederate navy. Indeed, Burleigh practically admitted the facts, and pleaded that the expedition was an act of war, for which he could not be held liable in a civil court.

We returned to Detroit that night, and my official connection with the affair ceased, my superior, the District Attorney, having returned to the city and taken up the case. Upon final examination the Recorder held that the raid, being against peaceful citizens and involving a violation of neutral territory, was not justifiable as an act of war. His judgment granting the extradition was reviewed upon *habeas corpus* by a bench of four judges, who unanimously affirmed his action. Burleigh was brought to Detroit and placed in the house of correction. I made his acquaintance there and showed him some trifling courtesies. He was an educated gentleman, a Scotchman by nativity, and a born soldier of fortune. It did not strike me that he was especially attached to the Southern cause, but took part in the raid simply from the love of adventure. He exhibited no bitterness toward the North, but seemed glad of companionship. I would have invited him to my house but for fear of the possibility of an escape, and the certainty of adverse criticism.

Good faith requiring that he be tried for the offense for which he was surrendered, he was, after some months detention in Detroit, sent to Ohio, within whose waters the *Parsons* was seized, and tried for robbery after the close of the war. Not only was the trial fair to the defendant, but the law as laid down in the charge was much more favorable to him than the view taken by the Canadian courts. The judge practically held that the seizure of the boat was an act of war, for which Burleigh was not liable, unless money was taken with the

intent to appropriate to the private use of the parties. Some twenty dollars had been "extracted" from the clerk of the boat. Under this charge, it is no wonder that the jury disagreed. Before a new trial could be had the prisoner escaped and fled to Canada. He became subsequently a war correspondent of the London Telegraph, and served in that capacity in the wars with Egypt, the Ashantee and Atbara expeditions, the French War in Madagascar, the Boer War in South Africa, and also in the Russo-Japanese War. He is believed to be still living in London.

Beall, the leader of the expedition, was not so fortunate. After having taken part in several attempts to wreck passenger trains on the Lake Shore Railway near Buffalo, he was finally arrested at Suspension Bridge, sent to New York, tried before a military commission for violation of the laws of war and acting as a spy, convicted and hanged at Governor's Island less than two months before the surrender of Lee.

Washington, D. C.

The Rudowitz Extradition Case

By Edwin Maxey

Professor in the University of Nebraska College of Law

THE final decision by our Department of State in regard to extraditing Christian Rudowitz, is alike pleasing to the majority of American citizens and to expatriated Russians. The case would have attracted far less attention had not Commissioner Foote granted the request of the Russian government for the extradition of Rudowitz. That we may form an intelligent judgment as to which of these decisions is the more nearly in accord with law and justice, it is necessary that we examine the facts.

The acts which the Russian government alleges were committed by Rudowitz before leaving Russia and for which it requested his extradition by the United States are: The killing of three members of the same family, to wit, Christian Leshinsky, Trina Leshinsky, the wife of Christian, and Mrs. Wilhelmina Leshinsky-Kinze, his daughter; the arson of the Leshinsky dwelling; and the forcible taking of thirty rubles, some gold ornaments and a watch from Mrs. Kinze's husband, Mr. Theodore A. Kinze. These acts were committed by a band of twelve or fifteen men. If present at all and having the common purpose of the other members, Rudowitz would be legally chargeable with the acts committed by the others, namely, the homicides, arson and robbery. Or, if he was not present but had counseled the commission of the acts, he would still be chargeable in some degree.

What, then, was the evidence upon which the Russian government relied to connect Rudowitz with the commission of the crimes? The evidence tending to prove his presence during the commission of the crimes consists of the testimony of two witnesses: Christof

Leshinsky, son of Christian and Trina Leshinsky, and one Kugren. Christof, in his first deposition, taken January 29, 1906, swears that the killing of his parents and the burning of their house was done by two men only; that one of them wore blue glasses and had his face covered with a handkerchief, the other was uncovered, wore a moustache, and was about twenty years old, but that in his fright he did not observe his features and could not identify him. This testimony was taken soon after the commission of the crimes.

After calm deliberation, official Russia reached the conclusion that this deposition of Christof did not prove as much as was desirable from the point of view of the government, and hence another deposition was taken, June 27, 1907, or about one year and five months later than the first. In his second deposition, he swears that the acts were committed by five men; that among them he recognized Urban, who wore blue glasses and had his face covered with a handkerchief; a second had his face smeared and covered with a handkerchief; this one he recognized as Rudowitz, by his stature, voice and clothes.

It is impossible to reconcile these two accounts of the same transaction. According to the second, the number of persons making up the band of executioners is more than twice as large as stated in the first account. The one who according to the first deposition would have been Rudowitz no longer has his face "uncovered," but has it smeared and covered with a handkerchief. It is also difficult to understand why the smearing of the face and covering it with a handkerchief should enable one to recognize a person whom he could not recognize in the absence of smear and handkerchief. The average person very rarely resorts to these means in order to make it easier for his friends to recognize him or to establish his identity at a bank.

The second deposition makes it abundantly clear to any one who will take the trouble to read the evidence that, during the interval of seventeen months between the first and second deposition, the boy's recollection had been refreshed from some source. I shall make no attempt to indicate what, in my judgment, is the more probable source, as the reader is as capable of judging in this matter as am I.

The two depositions being contradictory, no one can believe both, nor is it unnatural to conclude that the one taken relatively soon after the occurrence is the more nearly a correct narrative of the events and that the departures from it in the second deposition are mainly a result of suggestion. Recollection does not as a rule become more accurate with lapse of time. Granting that the first deposition is at all accurate as to the age of the one accompanying the person with the blue glasses, it could not have been Rudowitz who was with him; for Rudowitz is thirty-five years old and looks as old as he is. He could therefore not be mistaken for a man of but twenty.

Contradictory as it is, the testimony of Christof is much more convincing in connecting Rudowitz with the commission of the crimes than is that of Kugren. The latter swears that the band, consisting of eight persons, passed through his yard on the way from Benen, that in great fear he looked out through the window and recognized Rudowitz. If this testimony be correct, it would furnish grounds for an inference that Rudowitz might have been one of the two, or five, who did the killing. But there is not wanting evidence that this, in

common with the second deposition of Christof, contained a larger percentage of suggestion than of truthful narrative. It was between twelve and one o'clock at night when the band passed Kugren's house, and although Kugren swears that he was able to recognize Rudowitz because of the bright moonlight, the weather records show that it was a cloudy night, and according to the almanac the moon was only about half full and twenty degrees high at the time of night the event happened of which the witness speaks. We have also the testimony of another of the state's witnesses, Vitol, who swears that "on account of the darkness of the night it was impossible to see very well."

As nearly as we can judge, the evidence connecting Rudowitz with the commission of the crimes is practically valueless. The parts which seem truthful are vague and those which are definite have the earmarks of having been manufactured. Upon the strength of such evidence no conservative man would suspicion his mother-in-law or whip his dog.

The only convincing evidence against Rudowitz is his own admission that as a member of the revolutionary party he voted to have the Leshinskys put to death as spies. The question, then, upon which the case hinges is whether in prosecuting him for this offense, the Russian government would be prosecuting him for an ordinary crime or for a political offense. In answering this question, the character of the party of which he was a member and the motive which prompted the action are controling factors. A mere marauding band cannot successfully defend against prosecution for crime on the ground that their acts were political. Were this the case, the beginning of a revolutionary movement would be the signal for anarchy. All manner of private wrongs, real and fancied, would be redressed and the actors would protect themselves under the cloak of political action, which would be made to cover more sins than the mantle of charity. But the Social Democrats, the party to which Rudowitz belonged, was not a party of mere marauders who were using a political character as a cloak for private crimes; it was made up of many of the best and brainiest patriots in Russia. The same is true of the subordinate divisions of the party at Mitau and Benen, whose councils passed sentence upon the Leshinskys.

The character of the party being such as to raise a presumption in favor of a political as against a criminal motive and a public as against a private character of its acts, what is there in the present case which throws additional light on the intent with which the action was taken? The district in which Benen is located was a centre of the revolutionary movement and was raided, during the month preceding the one in which the revolutionary council took the action in question, by a "punitive expedition" despatched thither by the Russian government for the purpose of overawing the revolutionists. During this expedition the civil authorities were disregarded and the formalities of a trial in the civil courts not observed. Several of the revolutionary leaders were summarily executed and their houses burned. Benen was under martial law in January of 1906 and for some time after. This gave the government the right to resort to summary executions, and the same methods were resorted to by the revolutionists. Force was met by force. The Leshinskys were reported as having given information to the government authorities which resulted in the execution of some of the revolu-

tionary leaders. This was admitted in the testimony of Theodore Kinze, the husband of one of the persons condemned and executed by the revolutionists, and by Christof Leshinsky, the son of the other two. At the time of the killing, the victims were told that they were being executed as spies. Whether the revolutionary council had before it sufficient evidence to warrant the conviction of these persons as spies, however much it may affect their moral responsibility, does not affect their legal liability. They acted as members of a military court and as such cannot be held criminally liable for errors of judgment. If the killing of these three persons in pursuance of a sentence of the revolutionary council is a crime and not a political offense, it would be hard to select any act involving force and performed by revolutionists rather than by representatives of the regular government which would be a political offense and not a crime.

As for the arson of the Leshinsky dwelling and the robbery of T. A. Kinze, from whom a watch, some gold ornaments and thirty rubles were taken, the arson of the dwelling was the usual form of punishment meted out by the governmental authorities to the revolutionists during the "punitive expedition," and the equally usual form of retaliation by the revolutionists; and the robbery need not be considered in connection with the extradition of Rudowitz, as no provision was made for it in the sentence voted by him, and there is absolutely no testimony connecting him with it.

Throughout its national history the United States has adhered to the policy of not extraditing for political crimes, and the term "political crime" is of almost exactly the same age as our national government. So firmly rooted has this practice become that even a century ago in some of our extradition treaties it had not been thought necessary to insert the clause excepting political offenders from the operation of the treaty. This is the case in our treaties of 1794 and 1842 with Great Britain. In commenting on this fact Mr. Fish, the Secretary of State, in a letter to Mr. Hoffman, of May 22, 1876, says: "The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more than by the laws of Solon was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation." (Foreign Rel. 1876, p. 22.)

Nor has the tendency been, either in this country or in England, to construe the term "political crime" strictly, but rather to permit it to include some acts which, viewed from the standpoint of a person not engaged in the revolution, would seem not to be necessary or appropriate to attaining the end sought. Yet, if viewed from the point of view of the actors they could reasonably have been considered necessary or appropriate, they are considered as "political offenses" rather than ordinary crimes. As the Court of Queen's Bench said in the *Castioni* case: "Looking at it as a question of fact, I have come to the conclusion that at the time at which the shot was fired he acted in the unlawful uprising to which he was at that time a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged." In this case, Switzerland sought from the British government the extradition of Castioni for the murder of one Rossi,

whom the former shot during a demonstration against the government of the Canton of Ticino. At the time of the extradition proceedings, it was clear that the killing of Rossi was not necessary to the success of the uprising. But the court chose to look at it from the viewpoint of Castioni at the time of the shooting.

In 1894 the United States had to deal with a case which was in most respects parallel with that of Rudowitz. General Ezeta, who had taken refuge in the United States, was demanded by the Salvadorean government for having ordered the hanging of one Henriquez as a spy, and the robbery of the International Bank of Salvador. This government refused to extradite him, on the ground that his acts were political offenses.

In 1893 the United States refused to extradite one Guerra, demanded by the Mexican government on charges of murder, arson, and robbery. Guerra was a member of a band which raided San Ignacio, and after killing several persons set fire to and looted the town. In refusing to comply with the Mexican request for his extradition, our Secretary of State, Mr. Sherman, said that as the evidence showed "the expedition to have been revolutionary in its origin and purpose," the offense of being "a member thereof" was of "a purely political character, outside of the purview of the extradition treaty between the United States and Mexico." (For. Rel. 1897, p. 406.)

The inherent difficulty in dealing with the question of extradition for political crimes arises from the mixed nature of some political crimes, *i. e.*, "relative political crimes" or *délits complexes*. It is impossible to lay down a rule which will enable us to tell whether these are mainly political or mainly criminal. The *Attentat* is one of the efforts to deal with this difficulty. This was an amendment to the Belgian extradition law providing that the murder of the head of a foreign government or of a member of his family should not be considered a political crime. This was enacted in 1856 and was called forth by the refusal of the Belgian government in 1854 to extradite two persons charged with an attempt to murder Napoleon III.

More rational was the attempt by Switzerland to deal with the difficulty. In her extradition law of 1892, the principle of the non-extradition of persons charged with political crimes is recognized, but it is provided that if the Bundesgericht, the Supreme Court of Switzerland, decides that the dominant feature of the crime partakes more of the nature of an ordinary crime than of a political offense, the crime is an extraditable one.

The most sweeping of the attempts was made by Russia. In 1881, she invited the powers to hold an International Conference at Brussels for the purpose of considering a provision, favored by her, that no murder should be considered a political crime. As Great Britain and France refused to take part in such a conference it never met. Had the Russian idea been adopted, it would have been an arbitrary way of dealing with the difficulty, as some of the most typically political crimes—crimes committed with a political motive and in furtherance of a political purpose—would thus become extraditable.

The United States is impelled by its origin and traditions not to extradite political offenders, even though murder be among the list of their offenses, provided their offense is committed against the oppressions of government and not against government itself.

In summing up the subject of non-extradition of political criminals, M. Oppenheim, author of a recent two-volume work on International Law, says:—

"It is due to the stern attitude of Great Britain, Switzerland, Belgium, France and the United States that the principle has conquered the world. These countries, in which individual liberty is the very basis of all political life, and constitutional government a political dogma of the nation, watched with abhorrence the methods of government of many other states between 1815 and 1860. These governments were more or less absolute and despotic, repressing by force every endeavor of their subjects to obtain individual liberty and a share in the government. Thousands of the most worthy citizens and truest patriots had to leave their country for fear of punishment for political crimes. Great Britain and the other free countries felt in honor bound not to surrender such exiled patriots to the persecution of their governments, but to grant them an asylum."

University of Nebraska.

Whimsical Wills

By John De Morgan

IT is difficult to understand why a whimsical spirit should influence the minds of men and women at that fateful time when they have to decide what shall become of their goods and chattels after they have no further use for them. The records of the surrogates' courts abound with instances of whimsical conditions contained in wills and codicils.

Very often the real intention of a will does not appear on the surface. Bequests are sometimes made to deserving charities which elevate the character of the testator, but those who knew him best realized that the bequest was made solely to annoy some one who had reason to expect remembrance. It is far from pleasant to think of any honest-minded human being performing, in the presence of death, an act of spite or malice, the carrying out of which can only take place after he has shuffled off the mortal coil and is no longer able to know what is going on among those he has left behind.

We frequently hear of a son or daughter being "cut off with a shilling," which is better known in a figurative than in a literal sense. The expression had its origin in the old Roman Law, which held that the omission of a man's natural heir from a will was an accident, and the neglected one was restored to heirship, hence the custom of mentioning the smallest coin as the sum of the inheritance of the son or other expectant heir.

A few years ago a studious and scholarly man passed from the scene of his triumphs leaving a large estate behind. A nephew was his nearest relative and he had been brought up to believe himself the heir. When the will was opened it was found that the bulk of the testator's property had been sunk in annuities, but there was still a considerable balance left. The testator left

large sums to charities, and finally occurred these words: "To my best beloved nephew I bequeath ten thousand which he will find in a package in my safe." It was only natural that the nephew should hasten to search for the package, which was so bulky that it could not be overlooked. On opening it he found ten thousand, not dollars but chess problems, which his uncle had clipped from weekly and monthly papers and magazines. With the problems was a letter which set forth that no better possession could come to a young man than those problems, for by solving them he would strengthen his reasoning powers and so permanently benefit himself.

The "good will" of an established business is a valuable possession, and a curious instance of the bequest of such "good will" has recently attracted attention. In the East End of London is a public house, or saloon as we call it, known as the "Widow's Son." On each recurring Good Friday the owner has a special cross-bun baked and placed with appropriate ceremonies in a bag which hangs from the ceiling of the bar. In this bag are nearly a hundred such buns, some of them dirt-begrimed and dried up. The origin of the custom goes back nearly a hundred years, when the only son of a widow, who then owned the house, ran away to sea, but afterwards sent word that he was returning and would be home on Good Friday. Anticipating the joyful event, the widow made him a special and extra large bun, but he did not come, so she saved it to show him that he was not forgotten. Several years went by, and he still failed to return, but each year another bun was added to the others, and they were finally hung up on a string from the ceiling of the bar. When the widow died over fifty years ago, she bequeathed the good will of the house and all her property to a friend and his descendants forever, providing that on each recurring Good Friday a bun should be baked specially and added to the store. Age made it necessary to place the buns in a fishnet bag, but they are all there and each year sees a new one added.

In the year 1244, a wedded couple went in humble raiment to the convent of Bunmow, in Essex, England, to register a solemn vow that during a year of married life not one angry word had passed between them. The good monk who presided over the convent, highly pleased at the lowly pair, hailed the convent cook, who happened to be passing with a flitch, or side of bacon on his shoulder, and ordered it to be presented to the happy couple, unlimited bacon or pork being the acme of pleasure to the people in that day. On receiving the flitch the peasant threw off his cloak and declared himself to be Robert de Fitzwalter, a powerful feudal chieftain. In return for the kindly gift he bequeathed to the convent —

> Broad lands both far and near
> Which shall to thee and thine produce
> One thousand marks a year.
> But this condition I annex,
> Or else the trust's forsaken,
> That whensoe'er a pair shall come
> And take the vow I've taken,
> They shall from thee and thine receive
> A goodly flitch of bacon.

To quote the exact words of the bequest: "That whatever married couple will go to the priory, and, kneeling on two sharp-pointed stones, will swear that they have not quarreled nor repented of their marriage within a year and a day after its celebration, shall receive a flitch of bacon." It was not until 1445, two hundred years after the trust had been instituted, that the first claim was made, and up to the present time less than than twenty couples have claimed the prize. No claim was made

between 1751 and 1855, though the proclamation was made on each anniversary of the bequest.

The servant-girl problem vexed our forefathers as it does us of the present day. In 1674 John How bequeathed a sum of money sufficient to award twelve pounds to a maid-servant "who shall have lived for two years under the same mistress in the old borough of Guilford, in Surrey." Every year the prize is still awarded if any claimant appears, though to qualify the maid must prove that she has been "obedient and faithful" during the two years.

In the reign of George III was passed an act of Parliament known as the Thellusson Act (39 and 40 George III, c. 98) for the purpose of checking the disposition of testators to accumulate the income of their estates until it should form a large fortune. Peter Thellusson, merchant, of London, possessed a considerable fortune, which he was firmly determined should be put out of the reach of any of his family living at the time of his death or born in a certain time thereafter. Therefore he limited the accumulated property in favor of certain of his descendants who might be living at a remotely distant time. The remote posterity for whom this heaped-up wealth was destined did not, however, profit to the extent proposed. For three quarters of a century there was constant litigation with a view to upsetting the will. It was claimed that the will was too uncertain to be carried into execution and that the accumulation was illegal, and asked whether males claiming through females would be entitled to a share; all of which attempts to upset the will failed. When the accumulated fund came to be distributed among a large number of claimants it was found that the litigation had swallowed up £1,300,000, leaving only £600,000 to be divided. Doubtless the lawyers found the bequest a veritable nest egg. The litigation was ended only by the passage of an act of Parliament as recently as 1858.

The peculiar provisions of the will of Dr. Jeremy Bentham*, who died in 1832, recall the cold-blooded cynicism and even brutality perpetrated in the will of Dr. Messenger Monsey, a physician of Chelsea Hospital, who died in 1788 in his 95th year. A few days before he died he wrote to a friend, Cruikshank, a famous anatomist, begging to know if it would suit his convenience to undertake the dissection of his body, as he felt he could not live many days. When Monsey died he directed in his will that his body must be dissected, and not "subjected to the insult of any funeral ceremony," but after the surgeon had finished with him "the remainder of my carcase may be put in a bag or box with holes and thrown into the Thames." His wishes as regards dissection were carried out, and a lecture was given on his remains to the students of Guy's Hospital. A prior will was found among his papers in which he had desired that his body should be buried in his garden with the following epitaph on his tombstone:—

Here lie my old bones; my vexation now ends,
I have lived much too long for myself and my friends.
As to churches and churchyards, which men may call holy,
'Tis a rank piece of priestcraft, and founded on folly;
What the next world may be never troubled my pate,
But be what it may, I beseech you, O Fate,
When the bodies of millions rise up in a riot,
To let the old carcase of Monsey lie quiet!

*See "Wills—Quaint, Curious and Otherwise," by John De Morgan, *Green Bag*, December, 1901.

The Relative Influence of the Lawyer in Modern Life*

By James M. Beck

Of the New York Bar

DEEP as the foundations of society, almost as wide as human thought itself, "Justice," in all generations, has been "the great interest of man on earth." This much-quoted saying of Webster seems to answer the theme which has been assigned to me. If Justice be the great interest of man on earth, then assuredly those who make it an especial study and by whose efforts its great ends are measurably attained, must occupy in our infinitely complicated modern society a position of pre-eminent usefulness, power and honor. It is therefore surprising to find President Hadley, of Yale, quoted as saying recently that today there are but three masterful professions, journalism, finance, and politics. In my judgment, the law is as masterful as either, and the individual lawyer, measured by the result of his achievements, is as potent a force as the journalist, the financier or the politician. What journalist ever contributed so much to the unification of our country as did Daniel Webster, by his great argument in *Gibbons* v. *Ogden*, and his even more impressive assertion of federal authority in his great reply to Hayne? What financier has ever so potently affected the economic development of this country as the same great lawyer did, when in the great case of *Dartmouth College* v. *Woodward* he established the stability of corporate rights? Between the statesman and the lawyer comparison is more difficult, for in our history the statesman has generally been a lawyer, and his great achievements those of a lawyer who pleads at the greater bar of public opinion and to the court of last resort of posterity. It would be difficult to say which did more to precipitate the Civil War, the decision in the Dred Scott case or the great debates on the constitutional aspects of slavery of the lawyer-statesman, Abraham Lincoln, with his distinguished adversary, Senator Douglas.

Without, however, extending the comparison, it is enough to say of the law, in the language of a great judge and even greater philosopher, Lord Bacon, that "it is the great organ through which the sovereign power (of society) moves."

Mr. Justice Blackstone, in his noble introduction to his Commentaries, speaks of it as—

> A science which distinguishes the criterion of right and wrong; which teaches to establish the one and prevent, punish or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community.

These, however, are but the enthusiastic tributes of lawyers. Let me then quote one of the broadest and sanest of philosophers, Dr. Samuel Johnson, who said with equal terseness and felicity:—

*[The Trustees and Faculties of Columbia University invited Mr. Beck to make an address to the last graduating class of the Columbia Law School. The present article is substantially the address which was delivered last spring.—Ed.]

> Law is the science in which the greatest powers of the understanding are applied to the greatest number of facts.

On another occasion when in the bluff old doctor's presence a superficial critic reflected upon the law and lawyers, Dr. Johnson brusquely said:—

> Let us have no general abuse. The law is the last result of human understanding acting upon human experience for the benefit of the public.

A government of law is the supreme manifestation of civilization. Both its creation and efficient operation are usually the result of the lawyer in his triple capacity of legislator, judge, and practitioner. His power is exerted over the entire range of human thought and action. No human being is exempted from his commands and prohibitions. It is the lawyer who as judge pronounces in the name of society its judgments and commands. It is the lawyer as legislator and constitution builder who sets limits to the arbitrary powers either of princes or majorities, and it is the lawyer as practitioner who puts into operation the complicated machinery of human society in order that justice shall be done between man and man. The rudest law of the savage is better than unrestrained license. Roman law established the "Roman peace" in all the vast territory which the Eternal City dominated, and protected the weak against the strong. When the Centurion ordered the great Apostle to be scourged to compel him to testify, Paul said:—

> Is it lawful for you to scourge a man that is a Roman and uncondemned?

The Centurion reported this to the Chief Captain, and said:—

> Take heed what thou doest; for this man is a Roman.

Thus, in a ruder age, military arrogance, seeking to scourge a man without trial or condemnation, was arrested by the puissant majesty of the civil law. What the lawyer, when unimpeded by mere politicians, can do for society may be illustrated by the fact that during the first three centuries of the Roman Empire the great work of framing the law fell entirely upon the jurists, and so fully did they vindicate their ability that the great body of the Roman law, which still governs civilized man, shares with the culture of the Greek and the religious conception of the Hebrew the distinction of being the greatest intellectual heritage of man. It was the lawyer in the Middle Ages who broke the iron rigor of the feudal system and constructed the modern principles of equity. The lawyers of France voiced the aspirations of their oppressed countrymen and led the successful assault upon monarchical absolutism and class privilege. Of the national assembly which precipitated the French Revolution, three hundred and seventy members were lawyers. Indeed the comparative civilization of a country can be measured by the relative power and influence of its bar. To lawyers like Grotius and Puffendorf we owe the development of international law, that fair rainbow of hope which foretells the coming of the day when the deluge of blood shall cease.

No country more admirably illustrates the masterful character of the legal profession than our own, for it was the American lawyer who precipitated the American Revolution by his agitation of unwritten constitutional principles of liberty. "No taxation without representation" was a lawyer's phrase, and the Declaration of Independence, with its definition of liberty which time cannot make obsolete, was at once an indictment at the bar of history of a tyrannical Parliament and a brief for the young Republic in its appeal "to the opinions

of mankind." The Constitution which brought order out of chaos and has made it possible for this great people to govern itself was the work of American lawyers, and it has been the American bar, sitting since the adoption of the Constitution as a *quasi* constitutional convention, which has for more than one hundred and twenty years builded upon the foundation of the Constitution of 1787 the great and noble superstructure of our Federal system. Henry, Jefferson, Madison, Marshall, Hamilton, Webster, Clay, Lincoln and others of potent achievement all acquired their power and influence as members of the American bar.

Masterful as it is, the law, nevertheless, is not a popular profession. As individuals, lawyers are generally respected and honored. Perhaps no class of men is the recipient of greater social and political distinction. The lawyer's versatility, due to the wide range of his observation, his *savoir faire*, due to his intimate knowledge of human nature, have ever made him welcome as a friend, a guest and an adviser. But this does not affect the prejudice which most men feel towards the profession as such. Indeed there has been from generation to generation a persistent identification of the lawyer with His Satanic Majesty. This uncomplimentary analogy has had many variations. A century ago, when Napoleon was apparently planning an invasion of England, all classes and professions of Englishmen sprang to arms, and amongst others the lawyers of the Temple organized a regiment. The King deigned to review this regiment. At the conclusion His Majesty sent for Erskine, its honorary Colonel, and asked him what he called his regiment, and Erskine replied that it as yet had no name, to which His Majesty replied, "Call it the Devil's Own."

Heine tells us in a humorous poem that when he met the Devil he found him exceedingly well versed in law. An anonymous poet tells us that the Devil visited a court of law and sadly departed, saying:—

They've puzzled the Court with their villainous cavil,
And, I'm free to confess it, they've puzzled the Devil.
My agents were right to let lawyers alone,
If I had them they'd swindle me out of my throne.

The greatest of all poets and the profoundest judge of human nature seems equally hostile to the profession, although it is always unsafe to impute to Shakspere a sentiment to which one of his characters gives expression. We recall for the moment Harry Hotspur's contemptuous remark:—

For in these nice sharp quillets of the law,
Good faith, I am no wiser than a daw.

The supposed avarice of the profession is referred to by Mercutio when he says of his dream fairy, Queen Mab, that she gallops —

O'er lawyers' fingers who straightway dream of fees.

You may remember the satirical and altogether delightful parody upon the scholastic refinement and judicial Bunsbyism of the Elizabethan bench, which Shakspere, with remarkable audacity, inserted in the graveyard scene in "Hamlet." A case had been tried, involving the question as to whether the estate of a suicide escheated. The Court did indulge in some very supersubtle reasoning as to when the crime of suicide, which worked the escheat, was consummated and whether the estate passed to the heirs before such consummation. In discussing Ophelia's chances of Christian burial, the gravedigger thus paro-

dies the opinion of the Court, which may be found in Plowden's Reports:—

> If the man go to this water and drown himself it is, will he nill he, goes, mark you that; but if the water come to him and drown him, he drowns not himself. Argal, he that is not guilty of his own death shortens not his own life.

In the same scene, when the gravedigger tosses up a skull, Hamlet, with biting sarcasm, says:—

> Why may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures and his tricks? Why does he suffer this rude knave now to knock him about the sconce with a dirty shovel and will not tell him of his action of battery? Hum! This fellow might be in his time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries. Is this the fine of his fine and the recovery of his recoveries, to have his fine pate full of fine dust?

And then he asks Horatio the question:

> Is not parchment made of sheepskins?

To which Hamlet replies:—

> Aye, my lord, and of calfskins.

And the princely misanthrope replies:—

> They are sheep and calves which seek assurance in that.

Shakspere forgot to say, however, that many of these technicalities and fictions were the method by which the lawyers emancipated society from the brutal rigor of the feudal system, and the fact is that almost the only autographs we have of the great poet are those attached to these same sheepskin parchments for the better "assurance" of Shakspere's title to his lands, and about the only business transactions in which he engaged, of which we know, were lawsuits in which he benefited by the services of counsel. It is with lawyers as with doctors, men criticise them in health, but run to them in time of need.

But it is the dramatists and the novelists who have given the severest caricatures of the profession. With few exceptions the lawyer of the stage is either a knave or a mountebank. The wide realm of fiction can be searched almost in vain for lawyers who can prove a good moral character. Instead we have a very rogues' gallery.

In modern political discussions frequent reference has been made by responsible leaders of thought to the supposed low tone of the bar. On more than one occasion President Roosevelt, that *castigator censorque minorum*, has referred slightingly to "law honesty," and in his annual message to Congress of 1905, he referred to the great need of—

> A higher sense of ethical conduct, especially among business men and in the great profession of law.

His political rival, Mr. Bryan, was even more emphatic in a recent address. He hoped that the day would come—

> When we will not have so many man who will sell their souls to make grand larceny possible. Perhaps some time it will be less disgraceful for a lawyer to assist in gigantic robbery than for a highwayman to go out and hold up the wayfarer.

He gave but one illustration for this sweeping indictment of a noble profession, of which he himself is a member, and that illustration was founded upon a gross misapprehension of the true facts.

A prejudice which has persisted for so many generations and which is so deeply rooted in popular feeling must have its original basis in some primitive trait of human nature. I find it in the elemental jealousy which the muscle has always felt toward the brain. For example Harry Hotspur's remark, which I have quoted, is the sneer of a hot-blooded warrior for the man of thought. In primitive times physical prowess was

the great source of power. Might was right, and the rule of society was that of a Rob Roy.

> Let him take that hath the power
> And let him keep that can.

Slowly, however, there emerged from ruder times a class whose strength consisted, not in their physical strength, but in intellectual cunning—"cunning" then meaning, not craftiness, but knowledge. The very deterioration in the meaning of "cunning" illustrates the truth of which I speak. It was not unnatural that the man of physical prowess should look with contempt, envy and fear upon the physically weaker man who triumphed through the subtle but potent power of thought. The mythologies of prehistoric times clearly represent the views of life entertained by primitive human nature, and it is significant that the two systems of mythology with which our race is most directly connected both manifested this feeling of depreciation. In Greek mythology the gods symbolized various phases of physical power or beauty, but among them, although occupying a lesser station, was Mercury, the symbol of swift intelligence. He was the patron god of subtle men, of poets, lawyers, orators, and the depreciation of intellectual ability is shown by the fact that he was also accounted the god of liars and thieves. For him was reserved no high place on Olympus. He was lower in the scale of precedence than Vulcan, the symbol of brute strength, of Mars, the god of war, or of Venus, the goddess of beauty.

An even more striking illustration of this primitive estimate was the conception of the Norse analogue of Mercury. He was Loki, the god of fire, and, therefore, of intellect, argument and reason. His was not the thunder hammer of Donner, nor the burning sunshine of Balder, but whenever the gods were confronted with circumstances over which mere physical might could not triumph it was to Loki that they turned to suggest a way of escape. You remember the Norse myth of "The Ring," as glorified by both the literary and musical genius of Richard Wagner. Wotan, the supreme god, desired to build the castle of Valhalla. He turns to Loki for guidance, and is advised to employ the giants Fafner and Fasolt under a promise that to them shall be given as their wage Freia, the goddess of immortal youth. Loki promises when the work is completed to find some method of avoiding performance of the contract, and when Valhalla is built, the giants claim Freia. It is to Loki that the gods turn to save them from the eternal loss of youth. Loki tells them that he has searched the world in vain for any worthy substitute for the goddess of immortal youth, but that he might persuade the giants to take, in lieu of Freia, the gold ring, giving immeasurable power, which Alberich, the spirit of evil, had wrested from the Rhine maidens. By intellectual cunning Loki overcomes the dwarf, obtains the ring and persuades the giants to accept it in lieu of Freia, but when the gods, thus rescued from fatal disaster by Loki's cunning, proceed over the rainbow bridge into Valhalla they leave Loki behind, who, looking down into the waters of the Rhine, whence the gold was ravished, and then upward to the rainbow bridge to the stately procession of the gods, sarcastically exclaims of those whom he had rescued and by whom he was ignored:—

> To their end they fleetly are led
> Who believe themselves founded forever;
> Almost I shame
> To mix in their matters.

How often lawyers have thus expressed themselves after saving clients from their own folly!

This prejudice of primitive man has long outlived its original causes and finds its illustration today in the jealousy of which the legal profession, together with all purely intellectual occupations, is the subject.

This feeling of jealous admiration is probably intensified by the fact that with the growing power of law in the evolution of society the mass of men, who are too often hostile to its restraints, dislike the lawyer because he pre-eminently stands for the enforcement of law and the consequent limitation of license. It was this consideration which doubtless led Jack Cade, as he summoned his riotous followers to revolt, to endorse the sentiment:—

Let us kill all the lawyers first.

This worthy demagogue was philosophically correct, for if it is desired to destroy the fabric of human society, the natural beginning would be to kill those who stand as vigilant guards at its outer portals. These are and ever have been the men of the law. A recent illustration of this spirit of Jack Cadeism is given by the recent attack upon the Supreme Court by Mr. Samuel Gompers, who curiously asserted that the inherent vice of that court is that it is composed of lawyers, and that lawyers are too much swayed by prior decisions and by too great a regard for "vested interests."

Again, there is an unconscious feeling in the community that the legal profession is parasitic in its nature. In an Utopian state of society there might be no occasion for lawyers. Similarly in a state of society where perfect health existed, as it theoretically should, there would be little occasion for doctors. In the interdependence of all classes and occupations upon each other in our complicated modern society, all classes are in a sense parasitic, but as the whole structure of human society rests upon the administration of law, and justice is, as Webster said, "the supreme interest of man on earth," the legal profession is no more parasitic than any other.

Another reason for this popular prejudice is the widespread and erroneous belief in the insincerity of the lawyer. No error is more persistent or widespread than that which asserts that the lawyer will sell his voice to any client, however base, or to any cause, however bad. No question is more constantly asked of a lawyer than his ethical justification for defending a man whom he knows to be guilty. This question, like Banquo's ghost, will never down. I need not remind you of the trial of Courvoisier, the Swiss valet, who murdered his master, Lord William Russell, in 1840. During the course of his trial, his counsel, Mr. Phillips, learned that his client was guilty. He consulted one of the most eminent judges of England as to his duty, and was advised that he could not desert his client, and must continue to defend him by suggesting all considerations which the proved evidence in the cause legitimately suggested. The ethical question thus suggested has never been settled, and probably never will be settled to the satisfaction of most men.

To discuss this mooted question adequately would take more time than is at my command. Probably the answer to the moral enigma was never more tersely given than by Dr. Johnson in one of his *ex-cathedra* utterances. That very great and noble Judge, Sharswood, fully stated the ethical justification from a lawyer's standpoint, and he was a man of stainless integrity. It is enough to say that the question rarely if ever arises in the experience of the ordinary practitioner, and the reason for this is obvious. The great bulk of a lawyer's practice does

not relate to litigated cases, as to which he is obliged to take a public position, but in explaining to his clients what they may lawfully do and how they may do it. As law is essentially applied morality, the lawyer in enforcing its principles without litigation does more to promote justice between man and man than any other profession. He rarely can secure absolute right, because absolute right in a complicated state of human society is rarely attainable. Life is an eternal compromise, and the lawyer cannot rise superior to the conditions under which he works. Many a disappointed litigant has had a poor opinion of the law, and, therefore, of lawyers, either because he has not obtained full absolute justice, or because he is a victim of those general rules of human society, such as the statutes of limitations, which, though they work hardship in individual cases, are most necessary and salutary as rules of general application. The public before condemning the legal profession should always appreciate that the administration of justice is necessarily but an approximation toward that ultimate and absolute justice which may come with the millennium, but never before. There is between the justice of the courts and absolute Justice a "twilight zone," to use Mr. Bryan's recent phrase, which the genius of man has not yet succeeded in spanning. Moreover, the average case is a tangled skein of disputed facts, in which the lawyer necessarily accepts his client's version. In the average litigated case, no one side is wholly right. Upon the court, and not upon the lawyer, rests the ultimate responsibility of determining the law and the facts, and even then it must be said of legal justice, as George Eliot sadly said, in the great climax to "Romola":—

> Who can put his finger on an act and say "This is Justice"? Justice is like the kingdom of God; it is not without us as a fact, but within us as a great yearning.

The belief in the lawyer's insincerity has arisen largely from the least important feature of his professional life, his duties as an advocate. Unquestionably in former times there was much cheap acting in courts of justice, and the "chops and tomato sauce" style of argument of Serjeant Buzfuz, while somewhat of a caricature, has yet some basis in fact; but the graduates whom I have the honor to address are most fortunate in coming to the bar at a time when the

> blustering artifice of a rhetorical hireling availing himself of the vile license of a loose-tongued lawyer,

as Disraeli once styled an attack which a lawyer made upon him, is out of fashion, and today candor, lucidity and sincerity are the most forceful elements in advocacy.

In his work as an advocate, the lawyer is apt to make his client's enemies his own. The latter is not apt to distinguish in the heat of a legal battle between his opponent and the opposing lawyer. In cases where human passion is excited and great interests are at stake, the lawyer is too apt, in winning a case, to add to his personal associations a life-long enemy and—sometimes an ingrate.

Again, the lawyer is unjustly held responsible for all the defects of the law, for most of which he is not responsible. The nobility of law makes but little appeal to men, but its inevitable limitations—owing in part to the fallibility of human nature, and the necessary limitations of organized society—have never failed to escape their attention. Thus the "law's delay" has been the fruitful theme of the poet and the satirist. Dickens, in "Bleak House," preferred a

terrible indictment against the Court of Chancery, but wholly failed to state in the preface to his novel that most of the defects which he had so graphically illustrated had been abolished by act of Parliament before "Bleak House" was printed. *Jarndyce* v. *Jarndyce* would be an impossibility today, and was an impossibility at the time "Bleak House" was written, but the entire legal profession could not with all its eloquence correct the popular impression to which the genius of Dickens has given rise. "Bleak House" was published in August, 1853, and Dickens in the preface asserts the substantial truth of his indictment against the Court of Chancery, but he fails to state that three years before his novel was written, Romilly, Lord St. Leonards and Lord Lyndhurst had secured an investigation of Chancery abuses and that subsequent legislation by Parliament put an end to many of the defects of the Chancery system so vividly and powerfully illustrated by *Jarndyce* v. *Jarndyce*.

Similarly, Dr. Warren in "Ten Thousand a Year," the greatest masterpiece of fiction with reference to law and lawyers, bases the argument of his story upon defects of legal procedure which had already passed away.

The law is and must necessarily be a reflex of contemporaneous society. It is no better, and it is no worse. Given a corrupt and cruel state of society, such as existed in the eighteenth century, and you necessarily have a corrupt and cruel system of laws. Especially in these days of triumphant democracy, the law is what the mass of men make it, and yet the great public, primarily responsible for the defects of the law, condemns the legal profession for whatever defects larger knowledge from time to time discloses. The laws of former times reflected the corruption and cruelty of the times, and it is not surprising that the mass of men, who groaned under such burdens, regarded laws as a kind of witchcraft or black art. The prejudice has long outlived its cause. Many generations of men have been influenced by a misinterpretation of the invective of the great Teacher:—

> Woe unto you; also ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.

The theologian knows that of which the congregation is generally ignorant that "the lawyers" who taxed too sorely the patience of the gentle Master were simply the clerical copyists of the Mosaic Law, and, as such, we of the legal profession willingly resign them to our brethren of the clergy.

I am persuaded, however, that the chief reason for the unpopularity of the lawyer is due to the fact that men get their impressions of law and of the lawyer through the medium of fiction, and very little from personal observation, and it has always been the tendency of the poet, the novelist or the dramatist to select unfavorable and exaggerated types to give dramatic intensity to their productions. An honorable lawyer is too prosaic for literary portraiture. The lay figure of the dramatist and the novelist must be the worst type of the profession, and he so readily lends himself to "treason, stratagems and spoils," that it is not unnatural that the type of lawyer most familiar to the popular mind is the picturesque villain who cunningly thwarts virtue and promotes evil. While Shakspere gives no portrait of a lawyer, unless we except the fair Portia, who so terribly perverted the law of Venice, yet, as previously noted, he has made many scornful references to the "law's delay," and to its

technicalities and fictions. Next to Shakspere, the average man of our race gets his first and strongest impressions of human nature from Charles Dickens. Although Dickens served his apprenticeship in the Middle Temple, and was himself, for a time, a lawyer's clerk, he had an intense hatred of the profession. This was partly due to the fact that he saw more of its shady side in the criminal courts than of its better side, but it is also due to the fact that his personal experiences in some litigation with some literary pirates, who had published imitations of the "Christmas Carol" and "Martin Chuzzlewit," were so unfortunate that when his books were again pirated he wrote to his counsel:—

> It is better to suffer a great wrong than to have recourse to the much greater wrong, the law. I shall not easily forget the expense and anxiety and horrible injustice of the "Carol" case, wherein, in asserting the plainest right on earth, I was really treated as if I was the robber instead of the robbed.

According to Dickens, in "Bleak House":—

> The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

Bitter satire, and like most satire a gross exaggeration!

On the other hand, Sir Walter Scott, himself a lawyer of experience and no mean judge of human nature, puts in the mouth of the Antiquary this truer estimate of a lawyer:—

> In a profession where unbounded trust is necessarily imposed, there is nothing surprising that fools should neglect it in their stupidity, and tricksters abuse it in their knavery. But it is more to the honor of those, *and I will vouch for many*, who unite integrity with skill and attention and walk honorably upright where there are so many pitfalls and stumbling blocks for those of a different character. To such men their fellow citizens may safely entrust the care of protecting their patrimonial rights, and their country the more sacred charge of her laws and privileges.*

Without further defending the legal profession against the assaults of the novelist and the dramatist, let me simply say after being at the bar for nearly a quarter of a century, and after mingling not only with lawyers, but with different classes of men in various parts of this country, that in my judgment no class of men has any higher sense of honor than the legal profession. As a profession it has a threefold character and purpose. It is primarily a trade, in the sense that men pursue it to obtain in exchange for the product of their brains a pecuniary reward. To this extent, it is commercial in the sense that all trades are commercial. It is, secondly, a profession, in that it occupies a special field of knowledge for which no one is capable who will not give the special study of a lifetime to it.

Brougham once said that a "lawyer must know everything about something and something about everything."

But law is not merely a commercial trade or an intellectual profession; it is above all a vocation, and, measured by its beneficent results, of a very high and noble character. While law has its utilitarian and economic side, it has also its moral side, as it is for most purposes the final conception of society as to what is just between man and man.

One further and most potent reason for the unpopularity of the lawyer re-

* For these references to Dickens and Scott in their relations to law and lawyers, I feel I should express my obligation to two very interesting pamphlets on the subject written by John Marshall Gest of the Philadelphia bar.—J. M. B.

mains to be considered. He is the great conservative force in a nation, and is constantly called upon to defend the individual against the tyranny of the majority. He must frequently defy and defeat public opinion by protecting the individual from its unreasonable demands. You may remember the splendid exhibition of professional loyalty when Louis XVI was arraigned before the National Convention during the Reign of Terror, and it was clearly understood that any advocate who defended him would forfeit his own life with that of his client. The great advocate, Malesherbes, in volunteering his services, nobly said:—

> I was twice called to the council of the King when all the world coveted the honor and I owe him the same service now when it has become dangerous.

He gave to his royal client the sacrifice of his own life and perished with him on the guillotine.

Erskine sacrificed his social popularity and political prestige by accepting a retainer to defend the then despised Tom Paine, while Brougham in the teeth of royal displeasure and social persecution espoused the cause of the defenseless Queen Caroline. One of the finest chapters in the history of the American bar is the fact that after the Boston massacre and amid all the tumult which culminated in the Revolution, two leaders of the popular party, John Adams and Josiah Quincy, offered to defend the British soldiers who were charged with murder, and it is to the greater credit of a Boston jury that it so far arose above popular passion that the soldiers were acquitted.

The lawyer must sometimes share with his client public odium, and stand between a relentless public opinion and its victim. In defending the rights of the individual, he must often contravene the interests of the many. This is peculiarly true of our country and of the present time, for with popular passion lashed into a fury by frenzied agitators, and with great constitutional limitations standing as the only barriers to popular aggression, the lawyer must frequently thwart the public will by invoking the sacred guarantees of the Constitution. In thus appealing from "Philip drunk to Philip sober," the lawyer necessarily runs counter to public opinion, which, balked of its prey, visits in the blind passion of the hour its wrath upon the bar and the judiciary. Never in my recollection have more bitter and more unwarranted attacks been made upon the judiciary of our country than in recent years.

The lawyer, if he respects the exalted nature of his profession, will be indifferent to the passing passion of the hour. He has no more right to betray the cause of justice because of the unpopularity of his client than the judge on the bench has to pronounce judgment against him for like reason. Mr. Justice Cresswell, when once charging a jury, uttered some sentiments that caused a wave of applause to go through the courtroom. He quickly stopped, and sharply and sternly, said:—

> The administration of justice is in great danger when the applause of a court is agreeable to a judge's ear.

The remark could be applied with almost equal force to the lawyer, who, if he regards his profession as something more than a trade, must not be affected by popular passion or personal interest. It thus not infrequently happens that the duties of a lawyer call for the greatest courage and the finest moral heroism. Lord Mansfield, in pronouncing a most unpopular judgment in the face of threats not only of royal displeasure

and social ostracism, but of assassination, well said:—

I wish popularity, but it is that popularity which follows, not that which is run after. It is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong upon this occasion to gain the huzzas of thousands or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right though it should draw upon me the whole artillery of libels, all that falsehood and malice can invent or the credulity of a deluded populace can swallow.

Such should be the spirit of every lawyer, especially in these days, when trial by newspaper has greatly impaired trial by the courts of law.

New York, N. Y.

The Late Judge John Kelvey Richards

JUDGE John Kelvey Richards of the United States Circuit Court of Appeals, sixth circuit, died of Bright's disease at his home in Cincinnati, O., on Mar. 1. He had been ill for several months.

Justice Richards, who throughout his public career distinguished himself for his keen insight into the intricacies of his profession, was descended from a long line of Welsh Quaker ancestry, established near Valley Forge, Pa., in William Penn's day. Judge Richards himself was born at Ironton, Lawrence County, Ohio, in 1856, the son of Samuel Richards, one of the pioneers of that town, and for thirty years secretary and general manager of the Ohio Iron & Coal Company and the Iron Railway Company. His mother was a descendant of Theodate, daughter of Stephen Bachiler, who was a Puritan minister.

He received a collegiate education, and was graduated from Swarthmore College in 1875 and from Harvard in 1877. He studied law and was admitted to the bar in 1879. From 1880 to 1882 he was prosecuting attorney of Lawrence County, and from 1885 to 1889 city solicitor of Ironton. In 1889 the Republicans of the eighth Ohio district nominated him by acclamation for Senator. He was elected by a handsome majority, and, although a new man, at once became a leader of his party in the State Senate.

The Republicans of Ohio nominated him in 1891 for Attorney-General, and that fall he was elected. As Attorney-General of Ohio he established the principle that the Legislature was empowered by the constitution of the state, without amendment, to tax franchises, privileges, etc., and drafted laws based on this theory, through whose agency the state debt has been eliminated.

As Solicitor-General he had entire charge of the important cases resulting from the Spanish War, particularly those settling the status of the United States insular possessions. Most of the constitutional questions arising under the Dingley law and the war revenue act of 1898 came under his jurisdiction. Other successful cases of his were the *Joint Traffic Association* and *Addyston Pipe* litigations. He also had charge of the *Northern Securities* case until appointed to the Circuit Court. He was noted as a brilliant public speaker.

He served as Solicitor-General from 1897 to 1903, when he became judge of the Circuit Court of Appeals, succeeding Hon. William R. Day, who was appointed to the bench of the Supreme Court of the United States, three years after Judge Taft gave up his judgeship in the same sixth circuit.

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Aliens (Exclusion). "Judicial Review of Administrative Action in Immigration Proceedings." By Thomas Reed Powell. 22 *Harvard Law Review* 360 (Mar.).

Treating of the question suggested by the possibilities flowing from the decision in *In the Matter of Hermine Crawford* (Oct. 28, 1908), 40 N. Y. L. J. 419, holding that the Commissioner of Immigration may exclude aliens afflicted with a loathsome or dangerous disease, even though such aliens be domiciled in the United States and returning from a temporary sojourn abroad. "This threatens every returning citizen with administrative proceedings in which he must establish the fact not only of his domicile but of his citizenship."

Aliens (Status). "Aliens under the Federal Laws of the United States." By Samuel MacClintock. 3 *Illinois Law Rev.* 493 (Mar.).

This paper, dealing with alienage and citizenship, is the first of a series of four papers. The three others will be entitled respectively: Federal Legislation—Shipping, Patents, Trade Marks, Copyrights. Federal Legislation—Public Lands, Real Estate in the Territories. Treaty Rights of Resident Aliens.

The author here gives a lucid exposition of the status of aliens; their rights, duties and disabilities under the common law and under statutes now in force.

He shows how—

"in ancient and mediæval times an alien had little or no protection from the laws of the country in which he sojourned, while in modern times most states tend to give him full civil rights. In England, the common law disability as to holding real estate has been swept away, and in most of our states the same result has been attained." . . .

He also tells "how citizenship arose in the colonies and how, with the birth of the new federal state, there arose a national as well as a state citizenship. . . . We have seen that the citizenship of these two sovereignties is distinct; that the control of the suffrage is left almost entirely to the states and territories; and finally, that the states may confer state citizenship and political rights upon aliens. So may the territories confer, under Congressional authority, the latter rights."

Banking and Currency. "A Year after the Panic of 1907." By Alexander D. Noyes. *Quarterly Journal of Economics*, v. 23, p. 185 (Feb.).

Was the panic of 1907 an economic crisis of the first magnitude, asks the author, or was it simply and solely a readjustment of over-speculation on the stock exchange? He answers it by saying that it will be classed in future history as a panic of the first magnitude, along with those of 1893, 1873, 1857, and 1837. It was marked by the same five characteristics—impairment of credit facilities of banks, hoarding by individuals, shortage of currency for ordinary business, shutting down of manufactories, and abrupt disappearance of the buying demand.

What was the cause of the panic? There were three popular theories: that it was caused by President Roosevelt's anti-trust activities, that it was due to reckless finance in New York, or that it was occasioned by a defective currency system. Not one of these was the cause, which was, on the contrary, "the extravagant over-exploiting of capital and credit throughout the industrial world." The author discusses with fullness of detail the financial conditions preceding the panic, not only in the United States but in other countries, and indicates the general tendencies illustrated by the movement of prices and the state of foreign and domestic money markets.

Banking and Currency. "Government *v.* Bank Issues." By Prof. J. Laurence Laughlin. *Scribner's*, v. 45, p. 265 (Mar.).

Concludes that bank issues are preferable, as "a protection against arbitrary party action" and as a democratic measure.

Banking and Currency. "Recent and Prospective State Banking Legislation." By Pierre Jay. *Quarterly Journal of Economics*, v. 23, p. 233 (Feb.).

One of the Savings Banks Commissioners of Massachusetts says that it is impossible to forecast what important amendments to the banking laws will be adopted by the thirty-nine state legislatures that are to meet this year, but the fact that this widespread discussion promises to be so general "indi-

cates a realization that the time has come to bring the state banking laws of the country up to a higher standard of efficiency."

New York, Massachusetts, Rhode Island, and Ohio were the states in which important banking legislation was enacted in 1908. As regards legislation relating to savings banks and savings deposits, Massachusetts adopted some provisions possibly of greater interest than those of the other three states. Savings banks were authorized to maintain branch offices for the receipt of deposits. An auditing committee must be appointed each year, and savings banks are to be incorporated through a board of state officers, so that the establishment of new banks may become easier than under the old plan of incorporation by special charter.

The investment law has been considerably changed in Massachusetts, and the writer shows in what respects this state has also undertaken to throw additional safeguards about savings deposited in trust companies, which are now required by law to maintain separate departments wherever such deposits are received, in order that such departments may be covered by the laws regulating savings bank investments. This principle has already appeared, though less completely worked out, in the laws of Michigan, New Hampshire and Connecticut. "It is the logical solution for the present lack of savings facilities outside those states (the New England states, New York and New Jersey) where the mutual, or non-stock, savings bank system is fully developed."

So far as legislation regarding trust companies and state banks is concerned, New York passed the most important measures of 1908, falling into three classes. In the first, relating to the operations of the banks, the reserve requirement was increased, certain state and municipal bonds being no longer permitted as a form of reserve, and trust companies having an active demand business being forced to keep a commensurate reserve, while those having time deposits, by issuing certificates, are not required to keep any reserve on such deposits. Restrictions on loans are also here described.

Under the second head, legislation relating to duties of directors, a remedy was provided in New York for conditions disclosed by the panic, with the purpose of checking the practice whereby individuals formerly obtained control of a chain of banks by using the funds of one bank to purchase the stock of a second, the funds of the second to purchase the stock of a third, and so on.

In the third class, legislation relating to the authority of the supervisor, the 1908 law of New York extends the power of the superintendent to discontinue unsafe practices to all institutions under his supervision. He is also authorized to liquidate an institution which has been closed as unsound and is not in condition to reopen. This follows closely the provisions of the national banking law; in all other states, closed state banking institutions are liquidated by receivers appointed by the courts.

Bill of Rights. "Property." By O. H. Myrick. *Lawyer and Banker*, v. 1, p. 107 (Apr.).

The writer, a member of the Los Angeles bar, describes some of the fundamental attributes of property, which is next in importance to life and liberty, and the power of the state over it under constitutional guaranties.

Bill of Rights. *See* Procedure.

Codification. *See* Illinois, Uniformity of Laws.

Contracts (Agency). "The Liability of the Undisclosed Principal in Contract." By William Draper Lewis. 9 *Columbia Law Review* 116 (Feb.).

"To permit the person who has dealt with the undisclosed principal's agent in such a way as to raise a contract on which the action of *assumpsit* could be brought, on discovery of the principal, to elect whether he shall regard the contract as with the agent or with the principal instead of being an anomaly and contrary to the fundamental common law idea of the reason for the obligation of the contract, would appear to fit in as perfectly with the fundamental idea lying at the foundation of the liability, as the denial of such a right to one who has made a formal contract under seal with the agent of the undisclosed principal, fits in with the fundamental idea lying at the foundation of liability on formal contracts."

Corporations. "Corporate Powers." By Thomas Thacher. 9 *Columbia Law Review* 243 (Mar.).

The grant of a corporate franchise in and of itself creates no power, says this writer, but if incorporation induces combination of capital and energies, it may in that way develop the power which would have been capable of asserting itself without such incorporation.

Corporations. "The Capital of a Corporation." By George W. Wickersham. 22 *Harvard Law Review* 319 (Mar.).

The new Attorney-General of the United States, after reviewing leading decisions, thus concludes his discussion of the "marked tendency" to ascribe to the alleged evil of overcapitalization "a great part of the ills which are charged to large corporate activities:—

"From the foregoing it is apparent that much confusion of thought as to the capital of a corporation has resulted in conflict in both legislative and judicial dealings with the subject. The real evil is not so much in overcapitalization, or in exaggerated valuation of property constituting a part of the capital stock as it is in the misrepresentation or concealment of material facts in soliciting financial aid for the corporation. If instead of creating by strained construction and forced analogies *ex post facto* contracts between subscribers and the corporation, courts would respect the finality of rules laid down by the legislature, and deal with cases of fraudulent misrepresentation or concealment by the application of well settled principles, and if the laws were modified so as to require full, frank disclosure of all the facts concerning the property serving as a basis for stock issue, and safeguards as to its valuation, and some method by which, after due opportunity had been given for full investigation, such determination should be final, the so-called evils of over-capitalization would largely disappear."

Corporations. "The Juristic Person—III." By George F. Deiser. 57 *Univ. of Pa. Law Review* 300 (Feb.).

The rights of stockholders individually are of two kinds, rights of participation and rights of prohibition. Not only has the stockholder a claim to his proportionate share of the profits of the corporation, but he can prevent corporate encroachment on his private rights, through any acts that might change the nature of corporate life, and can insist on not being discriminated against in favor of other stockholders. Parallel with his rights are the corresponding duties.

Individuals of a corporation, like the individuals of the nation, are not recognizable against the background of a composite organism. The wrong that the law may seek to remedy is a corporate wrong, and in the case of corporations whose operations are conducted upon an enormous scale the court has no way of dealing with stockholders. They are citizens not of one country but possibly of all the known countries of the globe. The law professes to regard the corporation as a fictitious person and proceeds to fine it and to convict it of misdemeanors, but the fiction is unequal to the demands made upon it. The law must deal with a corporation as a right and duty bearing unit. It must exact duties corresponding to the rights granted. The duties must include responsibility for all acts, civil and criminal.

Corporations. "The Open Corporation." By Frank Trumbull, E. H. Gary, James McKeen, and T. P. Shonts. *World's Work*, v. 17, p. 11386 (Mar.).

Corporations. *See* Monopolies.

Election Laws (New York). "Direct Nominations." Editorial on the issue now raised in New York and the issue that has been elsewhere fought out, and the distinction between them. *Outlook*, v. 91, p. 426 (Feb. 27).

Employers' Liability. "The Labor Law as a Basis for Suit." By Raymond D. Thurber. 16 *Bench & Bar* 56 (Feb.).

The first of a series of papers dealing with chapter 415 of the Laws of 1897 of New York, as amended. Of its 191 sections, 7, 18, 20, 70, and 81 have chiefly been utilized as a basis for recovery by injured employees. The first two, 7 and 18, relating to Excessive Labor and Safe Scaffolds, are here discussed.

Government (Judicial Organization). "The French Judicial System." By J. G. Rosengarten. 57 *Univ. of Pa. Law Review* 279 (Feb.).

An outline of a recent book on this subject by M. Henri Chardon. The judicial system of France is to a foreigner somewhat confusing, because of the perplexing division between courts of civil, commercial, and administrative jurisdiction. Suits in which the rights of citizens in their relations with the national administration are involved may be adjusted by the municipal councils on appeal from Judges of the Peace, unless carried to the Council of State, which the author describes as "the keystone of the arch of the administrative organization of France."

There are three judicial organizations in France, with their corresponding procedures, administrative, civil, and commercial. The machinery of the administrative division has just been referred to. Civil litigation is regulated by the Civil Code. There are 359 Civil Courts, which have appellate jurisdiction, reviewing cases coming to them directly from the Judges of the Peace, or from the Councils

of Experts, which are courts of conciliation for labor disputes. The Civil Courts also have original jurisdiction of crimes.

The commercial branch of the judicial system is regulated by the Commercial Code, and the commercial courts decide questions arising between merchants, with right of appeal to a higher tribunal.

In criminal actions the Judges of the Peace and the Correctional Courts have jurisdiction, and there are Courts of Assise also, in which members of the press are tried.

Above the Civil and Commercial Courts there are twenty-seven Courts of Appeal, and above all the other tribunals stands the Court of Cassation, consisting of a criminal branch, a civil branch, and the Chamber of Requests, the function of which is to determine whether or not appeals to this Court shall be allowed.

There are 2863 Judges of the Peace in France, deciding as many as 325,000 suits annually. Their decisions are final in matters involving less than $60 in value, except that in certain personal disputes there is an appeal to the Council of Experts.

Each of the Civil Courts consists of a presiding judge and two associates. In Paris, where there are eleven such courts, the presiding judge is paid $4000, the associates $1600.

Illinois (Proposed Legislation). "A Legislative Programme for Law Reform." By Nathan William MacChesney. 3 *Illinois Law Review* 512 (Mar.).

This article reviews a number of bills which have received the official sanction of the leading bar associations in the state of Illinois. These bills include one adopting the uniform sales act endorsed by the Commissioners on Uniform State Laws, which the author speaks of as having been adopted in six states, a bill to remedy the rule recognized by the Supreme Court whereby the attestation by the husband or wife of a legatee renders a will invalid while the attestation of legatee himself merely avoids the legacy, and a remedy for several antiquated and inconvenient rules of property developed under a bygone system surviving in this state which have long since been abandoned elsewhere, including (*a*) The construction of "dying without issue," (*b*) the rule in Shelley's case, and (*c*) destructibility of contingent remainders.

The foregoing three bills are favored by the Illinois Commission on Uniform State Laws.

Other bills are those endorsed by the Illinois State Bar Association Committee on Law Reform, extending the present jury system in Cook County throughout the state; enacting the American Bar Association code oath of admission to the bar into statute law, and proposing some beneficial changes in the formal and administrative law of the state.

The article also sketches some reforms which have received the support of the Chicago Bar Association, including a *certiorari* bill relieving the burden upon the Supreme Court,—

"designed to embody in practical legislation the principle that courts of appellate jurisdiction—the Appellate Courts and the Supreme Courts themselves—should have the right to use their discretion as to what cases should go from the Appellate Courts to the Supreme Court for review. The judgment of the Appellate Court would be made final in all cases excepting where the Appellate Court allows an appeal upon a certificate of importance or the Supreme Court on a writ of *certiorari* issued, if at all, upon an *ex parte* petition by the party desiring the cause reviewed requires the record to stand for review. This is essentially the method adopted by the federal courts with reference to the appeals from the United States Circuit Court of Appeals to the Supreme Court of the United States, and it has there given great satisfaction."

This bill has been introduced in the Senate.

As to matters which will be taken up by the Illinois legislature independently, the most important is a comprehensive bill defining the procedure of the courts of the state for the purpose of bringing about a speedy and satisfactory disposition of business in those courts. Mr. MacChesney considers this bill to need redrafting on the lines suggested by Prof. Pound, who criticised it for going into minute detail instead of dealing with the subjects broadly, leaving details to be settled by rules of court (3 *Illinois Law Review* 365). The author quotes with approval President Taft's remark, expressed in 18 *Yale Law Journal* 28, that the codes of procedure are generally much too elaborate, and the late James C. Carter's contention that the experience of Massachusetts and New York proved by contrast the advantage of retaining the old system of pleading and practice.

International Law. *See* Newfoundland Fisheries.

Labor Unions. *See* Legislative Procedure.

Law Reform. *See* Illinois.

Legal Education. "Jurisprudence and Legal Education." By W. Jethro Brown. 9 *Columbia Law Review* 238 (Mar.).

The author confesses that jurisprudence, as taught in English law schools, has not commanded the respect to which it would otherwise have been entitled, because of the absence of any clear conception of the purposes which the study would serve, the undue importance which has been attached to the theory of legal classification, an excessive regard for legal technique, and the unfavorable influences of Continental theories of natural law.

Austin's "Jurisprudence" has been responsible for these defects to a greater extent than any other single work, but it should nevertheless be read by law students, and other books of the greatest value to the student are Iherings's "*Der Zweck im Recht*" and Professor Dicey's "Law and Opinion in England."

Legislative Procedure (Agreements against Public Policy). "Trade Unions and Parliamentary Representation." By Arthur Henderson, M.P., and J. Ramsay MacDonald, M.P. *Contemporary Review*, v. 95, p. 173 (Feb.).

Discussing the question raised by the decision of the Court of Appeal in *Osborne* v. *The Amalgamated Society of Railway Servants*, 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, on the ground 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. An appeal from this decision was taken to the House of Lords.

Legislative Procedure (Canada). "What are the Functions of a Provincial Legislature?—The Distinction between Public and Private Purposes." By W. E. O'Brien. 45 *Canada Law Journal* 137 (Mar. 1).

Mines. "Lode Locations: A Specific Question of Extralateral Rights and a General Theory of Intralimital Rights." (Continued from 22 *Harv. L. Rev.* 288). By Henry Newton Arnold. 22 *Harvard Law Rev.* 339 (Mar.).

"All courts," says the author, "even those which deny the common-law right rule, are agreed that there is a presumption of ownership in the owner of a surface to all ore underlying such surface," but this presumption is based upon "another presumption, one of fact,—namely, that all ore underlying the surface is presumed to apex within the location." It therefore devolves on a claimant to prove that the ore does not apex within the location.

"Further than this all the courts are not agreed. The great majority of cases wherein the common-law right is recognized at all, however, are to the effect that, the ore having been proved not to apex within the overlying location, the burden of evidence does not thereupon shift back to the owner of the overlying surface, it devolving upon him to prove that the ore does not belong to another, but remains with the claimant under an alleged apex right, it being necessary for him affirmatively to prove further that he himself owns the ore, or at least that some one other than the owner of the overlying surface owns it."

Monopolies (Sherman Act). "Is a Large Corporation an Illegal Combination or Monopoly under the Sherman Anti-Trust Act?" By Prof. George F. Canfield. 9 *Columbia Law Review* 95 (Feb.).

"We must not permit our passions and our indignation over evils, some real, some imaginary or largely exaggerated, to tempt us to the violation of the fundamental rights of property. . . . The builders of our national prosperity, and investors, great and small had a right to rely upon the Knight case [*U. S.* v. *E. C. Knight Co.* (1895) 156 U. S. 1] and the reassuring words of Mr. Justice Brewer in the *Northern Securities* case. . . . That this assault upon vested interests should be made by the federal government; whose function is impartially to protect the rights of all citizens, is specially deplorable. . . ."

The reader will find this article an interesting discussion of the principles enunciated by the United States Supreme Court in recent cases dealing with the Sherman Act and restraints of trade.

Newfoundland Fisheries. "The Prerogative Right of Revoking Treaty Privileges to Alien-Subjects." By Justice Hodgins. 29 *Canadian Law Times* 105 (Feb.).

The reader will find in this article a vigorous argument on the British side of the Newfoundland fisheries controversy. Referring to Mr. Root's claim that American fishermen are by treaty exempted from the operation of local fishery laws applying to the coast-waters of Canada and Newfoundland, the author observes that Mr. Root—

"appears to be unacquainted with the doctrines of British law which govern all parts

of the Empire. It is a doctrine of that law,—affirmed many years ago by the Judicial Committee of the Privy Council, and in later years by the imperial Parliament,—that under the British system of constitutional government a treaty between Great Britain and a foreign power which provides for the cession, or exclusion, of British territory from the British sovereignty, jurisdiction, and laws. . . can only become legally operative therein in the time of peace after being specially confirmed by an Act of the imperial or colonial Parliament having legislative authority in the matter."

Partnership (Real Property). "Partnership Realty." By Prof. Francis M. Burdick. 9 *Columbia Law Review* 197 (Mar.).

The results of this study are thus recapitulated by the author:—

"It is apparent from the foregoing study of authorities that the doctrines in this country relating to partnership real estate are most confused and unsatisfactory. To repeat Judge Story's words, already quoted, they are 'open to many distressing doubts.' How are these doubts to be dispelled and this confusion to be cleared up? The answer, we submit, is very simple. Treat a partnership as a legal entity, at least so far as firm title is concerned; and give full effect to the principle that a partner is not a co-owner of firm property, but that his interest in it is only a right to his proportion of the cash assets of the firm after its debts are paid."

Patent Law. "Suggestions for Amendments to Our Patent Law." By Isaac L. Rice. *Forum*, v. 41, p. 189. (Mar.).

Favors an amendatory law providing for a federal court with exclusive original and appellate jurisdiction throughout the United States in patent cases, and also for a number of changes and additions to the present patent laws.

Problems of the Law. "Conservatism and Progressiveness in Law." By Justice Francis W. Swayze. 32 *New Jersey Law Journal* 35 (Feb.).

Justice Swayze's speech delivered February 5 at the annual dinner of the Hudson County Bar Association in New York. The general constitutional principles of freedom of contract and inviolability of private property are of little help in solving such questions as these: How far may working men go in combining for their own advancement or protection? What contracts are opposed to public policy? Are the rates that public service companies are compelled by law to charge imposed as an incident of fair and reasonable regulation or do they amount to confiscation and spoliation? "Our constitutional principles are a beacon-light by which we may steer, but they do not themselves guide the vessel," for these great questions must in the end be solved by the courts of justice.

Procedure (Actions against Government). "Origin and Development of Legal Recourse Against the Government in the United States." By Charles Chauncey Binney. 57 *Univ. of Pa. Law Review* 372 (Mar.).

The writer, formerly Assistant Attorney of the Department of Justice of the United States, pleads for the entire elimination of political party considerations from the professional staff of the Department of Justice, in order that those representing the interests of the nation in the Court of Claims may stand before their country upon the same nonpartisan level with the men of other learned professions.

Legislation governing civil litigation against the government, and procedure in accordance therewith, are described, and information is also given with regard to separate states which have followed the example of the nation in providing for the adjudication of private claims.

Procedure (British Empire). "The Judicial Committee of the Privy Council." By Wallace Nesbitt, K. C. 45 *Canada Law Journal* 102 (Feb. 15).

Mr. Nesbitt's paper was one of the best read before the New York State Bar Association at its annual meeting in January.

Procedure (Jury Trial). "Jury Trial in Original Proceedings for Mandamus in the Supreme Court." By Professor Henry Schofield. 3 *Illinois Law Review* 479 (Mar.).

"In *The People ex rel. Scott Bibb* v. *The Mayor and Common Council of Alton*, 233 Ill. 542, Cartwright, J., writing the opinion and Scott, J., a dissenting opinion concurred in by Farmer, J., it is decided that a party to an original proceeding for *mandamus* in the Supreme Court has no constitutional right to have an issue of fact tried by a jury; that the mode of trying an issue of fact in such case rests in the discretion of the Supreme Court. . . .

"Perhaps it would have been wiser, if the Legislature that passed the Mandamus Act of June 1, 1827, had not taken the mode of trial by jury from the Act of 9 Anne, c. 20, or had confined that mode of trial to issues of fact in original proceedings for *mandamus* in Circuit Courts, and had enabled the Supreme Court to use its discretion as to the mode of determining issues of fact in original proceedings for *mandamus*, but the plain,

stubborn facts are, that not only that Legislature of 1827, but subsequent Legislatures as well in 1833, 1845, and 1874, *did* take the mode of trial by jury from the Act of 9 Anne, c. 20; and *did* apply that mode of trial to the Supreme Court as well as to Circuit Courts; and that the people ratified and approved the work in and by the jury provisions of the Constitution of 1848 and 1870, and thus placed the work beyond the reach of the improving hand of the Legislature, or of the Supreme Court." . . .

Procedure (Virginia). "What Judgment Should Be Entered by the Appellate Court when it Overrules a Demurrer to a Plea?" By C. B. Garnett. 14 *Virginia Law Register* 836 (Mar.).

Discusses a point of Virginia procedure.

Procedure. *See* Illinois.

Public Finance. "The Financial System of the Mediæval Papacy in the Light of Recent Literature." By W. E. Lunt. *Quarterly Journal of Economics*, v. 23, p. 251 (Feb.).

With the prefatory observation that papal finance is deserving of attention, because the papacy not only organized one of the earliest and best of the mediæval financial systems, but by means of its operations influenced profoundly the general economic development of Europe, the author reviews the literature bearing on the subject and then proceeds to describe the administration created for the management of papal finance and to classify the various revenues of the Holy See. It is a historical article of scholarly value.

Public Lands. "Northern Pacific Lands." By D. S. Luckett. *Lawyer and Banker*, v. 1, p. 91 (Apr.).

The author, after reviewing many authorities, concludes that the joint resolution of Congress in 1870 permitting the mortgage of the Northern Pacific Railroad Company's property and stipulating that lands remaining unsold and not disposed of after five years should be subject to preemption and settlement on payment of not more than $2.50 per acre, gives settlers on these lands between Portland, Ore., and Tacoma, Wash., a right of purchase at this price, and that the law constitutes the Land Department of the United States the selling agent of the railroad company for this purpose.

Real Property (Foreshore Rights). "Riparian Rights: A Perversion of Stare Decisis." By Frederic R. Coudert. 9 *Columbia Law Review* 217 (Mar.).

Discussing the theory that the *jus privatum* in the foreshore was owned by the Crown, a doctrine which was invented by one Thomas Digges, an ingenious Crown lawyer in the reign of Elizabeth, and was sanctioned by the Ship Money judges in the reign of Charles I, when what the writer calls the Stuart doctrine of purpresture was put forward, according to which any obstruction of the foreshore was an erection or enclosure on the King's soil and summarily abateable as such.

Mr. Coudert considers that a perverted respect for precedent has been responsible for the extent to which this doctrine has been adopted in America. Our courts have proceeded upon the theory that it is part of the common law heritage of the United States, in spite of the fact that at the time of the birth of the American nation the ingenious purpresture doctrine had by no means become a settled part of the common law.

In *Town of Brookhaven* v. *Smith* (1907) 188 N. Y. 74, this view that the *jus privatum* theory is part of our jurisprudence, as belonging to the common law, was repudiated, that case having asserted the principle that the United States adopted only such portions of the common law as were applicable to our circumstances, and consequently never took over a theory so utterly inapplicable to the situation of the colonists as this one of a royal prerogative to the ownership of the foreshore.

Thus, says the author, was decided a question which though apparently simple had for years been in dispute. The unsettled condition of the law had led to bitter controversies, yet not until March, 1907, did the New York Court of Appeals definitely establish as a rule of property this proposition, and even then only by a vote of four against three judges, namely, that the—

"riparian owner whose land is bounded by navigable waters has the right of access thereto from the front of his lot, and such right includes the construction of a pier on the land under water, beyond high-water mark, for his own use or for the use of the public, subject to such general rules and regulations as Congress or the state legislature may prescribe for the protection of the rights of the public."

[In deciding *Bardes et al.* v. *Herman* in February of this year (see p. 188 of this issue of the *Green Bag*), the New York Supreme Court has emphasized anew the principle set forth in *Town of Brookhaven* v. *Smith*.—Ed.]

Real Property. *See* Illinois.

Scientific Methods. "On the Concept of Social Value." By Joseph Schumpeter. *Quarterly Journal of Economics*, v. 23, p. 213 (Feb.).

Only individuals can experience wants, and the concept of social value which has been introduced by some leaders of economic thought and has quickly met with general approval, being found in nearly every textbook, may for some purposes be useful, by way of a scientific fiction, in the study of a non-communistic society. "In this case, however, the theory of social value cannot be accepted as a fully satisfactory statement of facts." The author is concerned simply with defining methods of scientific investigation, and showing the meaning and rôle of the concept which he discusses.

Status. *See* Aliens.

Taxation (Income Tax). "The Present Period of Income Tax Activity in the American States." By Delos O. Kinsman. *Quarterly Journal of Economics*, v. 23, p. 296 (Feb.).

Since 1895, sixteen states and three territories have paid some attention to the income tax, through either constitutional amendment, legislative enactment, or commission reports. Bills have been introduced in several states and laws passed in South Carolina and Oklahoma. The current movement in favor of income taxes, says the author, "is not due to the success of the tax in any state, but rather to the spirit of reform now sweeping the country. . . . The people have turned to an income tax because they believe in the theory that individuals should contribute to the support of the government according to ability, and that income is the most just measure of that ability. . . . Whether this demand, urgently expressed in so many of the states, be wise or not, it must be reckoned with."

Taylor's Science of Jurisprudence. An editorial in the March *Illinois Law Review*, of which Professor Roscoe Pound is editor, shows by numerous parallels the extent to which Dr. Hannis Taylor is indebted to Holland's "Elements of Jurisprudence" and to Howe's "Studies in the Civil Law" for the readable exposition of the views of the English analytical jurists in the second part of his "Science of Jurisprudence." 3 *Illinois Law Review* 525. Applying the rule that when another person's property has been converted into a new form, the original owner is only to be regarded as the present owner if it can be re-converted, the *Illinois Law Review* is plainly of the opinion that Dr. Taylor's discussion of fundamental principles which belong to the prolegomena of jurisprudence can be re-converted into its original materials, one of the chief of which was Holland's "Elements of Jurisprudence." Another of the materials of which Dr. Taylor's text is composed is Dicey's "Law of the Constitution." Moreover—

"Since the foregoing was written, the *Juridical Review* for January, 1909, has come to hand. It contains a paper by Professor Goudy of Oxford from which one learns that another portion of Dr. Taylor's book, dealing with the external history of Roman law, is made up of a mosaic from Muirhead's 'Historical Introduction to the Private Law of Rome' and Ledlie's translation of Sohm's 'Institutes of Roman Law,' and that Bryce's 'Studies in History and Jurisprudence' have likewise been utilized in the same way. It would be interesting to examine other portions of the book to see who are the owners of its original materials."

[See *Green Bag*, Feb., '09, p. 75.]

Torts (Legal Cause). "Some Suggestions Concerning Legal Cause at Common Law—II." (With supplementary note, "What is Legal Negligence?" *See infra.*) By Joseph W. Bingham. 9 *Columbia Law Rev.* 136 (Feb.).

From a penetrative analysis of cases, the author concludes that

"conduct may be wrongful in more than one aspect and as regards the right of more than one person. In a determination of responsibility for consequences to plaintiff, the abstract fact that the causal act or omission of defendant was a 'legal' wrong to a third person is never of any weight; but that it was wrongful to a certain person *in a particular aspect* may be of very great importance."

Moreover, the act or omission of which complaint is made may be made "legally" negligent by legislation imposing specified duties, though it might not have been negligence in the absence of such legislation.

"In all cases within either branch of our problem is involved this common question: Were the chances of occurrence of the consequences which constituted plaintiff's harm within any of the dangers that provoked legal condemnation of defendant's conduct? If they were, he is 'legally blamable' for the harm; if they were not, he is not responsible for it."

Torts (Negligence). "What is Legal Negligence?" (Supplementary Note.) By Joseph W. Bingham. 9 *Columbia Law Review* 154 (Feb.).

"The problem 'Negligence or no negligence?' in a particular case may involve merely a determination of the concrete 'due care' and a simple comparison with an ascertained set of facts. In this case the question is mainly one 'of law.' Or it may involve only an ascertainment of what occurred and a comparison with the concrete 'due care' already determined for such circumstances. In this case the question is one 'of fact.' Or it may include a determination of both the concrete 'due care' and the concrete occurrences. In this case the question is one of 'mixed law and fact.' "

Uniformity of Laws. "Uniformity of State Legislation." By J. D. Falconbridge. 29 *Canadian Law Times* 130 (Feb.).

An outline of what has been done in the United States through the admirable work of the Commissioners on Uniform State Laws, presented as an obvious introduction to a discussion of what might be done under the "somewhat similar although less complicated conditions prevailing in Canada."

Uniformity of Laws. *See* Illinois.

Miscellaneous Articles of Interest to the Legal Profession

Banking and Currency. "Wall Street and the Banks." By Herbert N. Casson. *Hampton's*, v. 22, p. 311 (Mar.).

Treating of abuses that have sprung up in the world of "high finance" and Wall street's need of cleaning out the men who profit by fake loans, fake sales of stock, fake ledger entries, fake reports, issues of watered stock, etc., in the interest of a sound banking system properly unified and organized.

Biography (British Cabinet). "His Majesty's Ministers." By Auditor Tantum. *Fortnightly Review*, v. 85, p. 215 (Feb.).

"The Ministry's weakness in the House of Lords is so marked that the strength, not alone of numbers but of intellect, on the other side seems almost brutal in comparison. Of course the Lord Chancellor is an exception. Lord Loreburn is an imposing figure in the Upper Chamber, though even yet he has not learned the 'nice conduct' of a full-bottomed wig. His tact is perfect. His speeches, on the rare occasions when he makes a party speech, are admirable."

Biography (Cleveland). "The Return to the White House and the Second Cabinet." By George F. Parker. *McClure's*, v. 32, p. 457 (Mar.).

This article, the second of a series, describes the campaign of 1892 with dramatic vividness and pictures interesting personalities of the cabinet.

Biography (Cromwell). "William Nelson Cromwell, the 'Wall Street Surgeon.' " *See* for an intimate sketch of his career and personality, *Current Literature*, v. 46, p. 263 (Mar.).

Biography (Erskine). "Lord Erskine." By Henry Flanders. 57 *Univ. of Pa. Law Review* 353 (Mar.).

Among the greatest of all of England's lawyers, says the author, was Lord Eldon, but Lord Erskine, though not in the highest sense a profound lawyer, was probably the greatest forensic advocate that has ever appeared at the English bar. The story of Erskine's becoming connected with Baillie's case against Lord Sandwich is told. Erskine, when his colleagues, men of eminence at the bar, had consumed a day in court, arose insignificant and unlooked for the next morning to reply to the Solicitor-General. The effect of his speech was "most extraordinary. It has rarely been equaled in the annals of the bar, whether of ancient or modern times. . . .

"Erskine rose on the morning of that eventful day with his sky overcast, and while speaking felt, as he has told us, his children plucking at his gown and crying, 'Now is the time, father, to get us bread,' and before the sun went down he had won not only bread, but fame and fortune as well. The attorneys gathered about him and literally thrust briefs and retainers into his hands. He now entered upon a career unique and unsurpassed in the history of the British bar, both for the number of cases he tried and the amount of fees he received. In the twenty-seven years of his practice, before he became Lord Chancellor, he never missed a day in court, and the total of his fees during that period was £150,000."

Biography (Harriman). "Building Up a Great Railway System." By Frank H. Spearman. *Outlook*, v. 91, p. 435 (Feb. 27).

A readable account of E. H. Harriman's remarkable achievement in building up the Union Pacific Railroad system, and the genius for railway operation revealed by his undertakings.

Biography (Hayes). "Rutherford B. Hayes in the White House." By Margarita Spalding Gerry. *Century*, v. 77, p. 643 (Mar.).

Biography (Knox). "Secretary Knox, the Head of President Taft's Cabinet." By William S. Bridgman. *Munsey's*, v. 40, p. 756 (Mar.).

Biography (La Follette). "La Follette,

Political Evangelist." By O. K. Davis. *Hampton's*, v. 22, p. 381 (Mar.).

A description of personal traits and of noteworthy incidents in his public career.

Biography (Lehmann). "Frederick W. Lehmann." *See* "Personalities," *Hampton's*, v. 22, p. 403 (Mar.).

Biography (Lincoln). "Lincoln as a Labor Leader." By Lyman Abbott. *Outlook*, v. 91, p. 499 (Feb. 27).

Biography (Lincoln's Cabinet). "The Diary of Gideon Welles, II." *Atlantic Monthly*, v. 103, p. 361 (Mar.).

This instalment describes without reserve the debates of Lincoln's cabinet over the Emancipation Proclamation and the intrigues of Cabinet members:—

"Stanton is no favorite of mine. He has energy and application, is industrious and driving, but devises nothing, shuns responsibility, and I doubt his sincerity always. He wants no general to overtop him, is jealous of others in any position who have influence and popular regard, but he has cunning and skill, dissembles his feeling, and to a certain extent is brusque, over-valiant in words. Blair says he is a double-dealer."

Biography (McKinley). "Some Recollections of President McKinley and the Cuban Intervention." By Dr. Henry S. Pritchett. 189 *North American Review* 397 (Mar.).

Biography (Miscellaneous). "Reminiscences of Some of the Dead of the Bench and Bar of Richmond." By Judge George L. Christian. 14 *Virginia Law Register* 817 (Mar.).

Biography (Miscellaneous). "The Bench and Bar of West Virginia; Sketch of the Life of Judge Thomas Clairborne Green." By A. W. MacDonald. *Bar* (Morgantown, West Va.,) v. 16, p. 8 (Mar.).

Biography (Platt). "Senator Platt's Reminiscences of Famous Political Events." *Cosmopolitan*, v. 46, p. 512 (Apr.).

Throwing light on his alliance with Conkling, his fight for the gold standard plank in the St. Louis convention in 1896, and his nomination of Theodore Roosevelt for the Vice-Presidency.

Biography (Roosevelt). A Review of President Roosevelt's Administration. I, The Administration's Human and Social Conditions, by Francis E. Leupp, Commissioner of Indian affairs; II, International Relations, by James Brown Scott, Solicitor for the Department of State; III, Economic and Industrial Influences, by James R. Garfield, Secretary of the Interior; IV, Its Influence on Patriotism and Public Service, by Lyman Abbott. *Outlook*, v. 91, p. 298 (Feb. 6), p. 350 (Feb. 13), p. 389 (Feb. 20), and p. 430 (Feb. 27).

These valuable articles review intelligently the more important phases of President Roosevelt's administration and sum up the more noteworthy results which it has accomplished.

Biography (Roosevelt). "President Roosevelt." By Harry Thurston Peck. *Bookman*, v. 29, p. 25 (Mar.).

Lightly reviewing Mr. Roosevelt's administration, his personal traits, his achievements.

Biography (Roosevelt). "T. R." By Edwin Lefèvre. *American Magazine*, v. 57, p. 484 (Mar.).

An imaginary conversation about Roosevelt, in which a railroad magnate, a great nerve specialist, and a famous novelist give their ideas of the man.

Biography (Roosevelt). "The Epoch of Roosevelt." By Judson C. Welliver. *American Review of Reviews*, v. 39, p. 339 (Mar.).

The things that Mr. Roosevelt has accomplished during his administration, and the many things that he has begun and left for others to carry forward who come after him, are here summarized.

Biography (Taft). "An Impression of Mr. Taft." By Mrs. Campbell Dauncey. *Cornhill*, v. 26, p. 351 (Mar.).

"When I had seen and had heard him I understood what I had been told, that his influence over men was largely personal, the sheer attraction of such a character for the mass of mankind, for Mr. Taft is a born leader of men, even of that very difficult nation to whom their own wise Emerson said, long ago, 'Humanity loves a lord.' "

Biography (Taft). "Taft." By George Fitch. *American Magazine*, v. 57, p. 519 (Mar.).

The serious effort of a humorist to supply details concerning the history, character, habits, dimensions, disposition, beliefs and relatives of the President.

Biography (Taft.) "Taft as Administrator." By James A. LeRoy. *Century*, v. 77, p. 691 (Mar.).

Biography (Taft). "The Incoming of Taft's Administration." By Henry Litchfield West *Forum*, v. 41, p. 199 (Mar.).

Biography (Taft). "Turning Points in Mr. Taft's Career: I, He declines to be considered for the Presidency of Yale; II, He accepts the appointment on the Philippines Commission." *Century*, v. 77, p. 685 (Mar.).

Biography (Vanderbilt). "Commodore Vanderbilt and the Hand-made Gentleman." By Irving Bacheller. *American Magazine*, v. 57, p. 46 (Mar.).

An extract from the unpublished manuscript of Mr. Bacheller's new novel, relating a true story of Mr. Vanderbilt's first planning to combine the railroads forming the New York Central system.

Biography (Wright). "Daniel Thew Wright, Associate Justice of the Supreme Court of the District of Columbia." See "Personalities," *Hampton's*, v. 22, p. 408 (Mar.).

Canada. "The Place of the Bar in the Public Life of the Dominion." By A. B. Morine, K. C. 29 *Canadian Law Times* 152 (Feb.).

China. "The Empress Dowager of China and her Court." By Isaac Taylor Headland. *Cosmopolitan*, v. 46, p. 483 (Apr.).

Church and State. "The Church and the Republic." By Cardinal Gibbons. *North American Review*, v. 189, p. 321 (Mar.).

"While the union [between church and state] is ideally best, history assuredly does not prove that it is always practically best. There is a union that is inimical to the interests of religion, and consequently to the state; and there is a separation that is inimical to the interests of religion, and consequently to the state; and there is a separation that is for the best interests of both. In our country separation is a necessity, and it is a separation that works best for the interests of religion, as Mr. Taft recently stated, as well as for the good of the state."

Conservation of Resources. "The New Union among the States." By W. J. McGee. *American Review of Reviews*, v. 39, p. 317 (Mar.).

The Secretary of the United States Inland Waterways Commission describes the recent movement to conserve the natural resources of the country, and to make a stronger nation "on the broader basis of all the sources of prosperity to which states and citizens owe their homes and hopes."

Cost of Living. "The British Board of Trade's Investigation into Cost of Living." By Wesley C. Mitchell. *Quarterly Journal of Economics*, v. 23, p. 345 (Feb.).

A short summary of the findings of the British Board of Trade with reference to cost of living of the working classes in principal towns of United Kingdom and of the German Empire.

Cost of Living. "Where Every Penny Counts." By Ida M. Tarbell. *American Magazine*, v. 57, p. 437 (Mar.).

Sets forth clearly the meaning of present prices of trust-made and tariff protected articles of common consumption, and the difficulties faced by the seven millions of American families supported on wages of $500 a year or less.

Cotton Industry. "The Remedy." By Daniel J. Sully. *Cosmopolitan*, v. 46, p. 546 (Apr.).

A subsidized merchant marine and a government subsidy on cotton, says the writer, would advance the cotton industry and make financial panics impossible.

Democracy. "The Old Order Changeth—III, Certain Definite Tendencies." By William Allen White. *American Magazine*, v. 57, p. 506 (Mar.).

Tendencies of the newer democracy are indicated, such as those of government control of corporations and railroad rate regulation, and reforms of the past few years, including new laws resulting from the temperance movement, are indicated.

Democratic Party. "The Future of the Democratic Party." By William Jennings Bryan. *Munsey's*, v. 40, p. 752 (Mar.).

No one need think that the Democratic party is dead, for "it is the reform party of the country, and it not only stands for reforms, but is strong enough to give to the reformer a reasonable prospect of seeing his hopes realized."

Disarmament. "The Delusion of Militarism." By Charles Edward Jefferson. *Atlantic Monthly*, v. 103, p. 379 (Mar.).

An eloquent article, setting forth the author's diagnosis of militarism and his discovery in it of proofs of a morbid insanity.

Disarmament. "The Two-Power Standard." By Prof. H. Stanley Jevons. *Contemporary Review*, v. 95, p. 129 (Feb.).

Urging Great Britain's need of departing from the harmful policy of supporting a navy equal to the combined fleets of Germany and the United States.

Foreign Relations. "An After-Glance at the Visit of the American Fleet to Australia." By Rt. Hon. George Houston Reid. 189 *North American Review* 404 (Mar.).

Foreign Relations. "An American Concert of the Powers." By Professor Theodore S. Woolsey. *Scribner's*, v. 45, p. 364 (Mar.).

Reviewing the facts of Mr. Root's missions in Mexico and South America, the author asks, "Is it too much to say that a Concert of Powers in America is actually in process of formation; that its influence in keeping the peace has already been exercised, and that the machinery for its working already exists?"

Foreign Relations. "Should the Government Own its Embassies?" By Horace Porter. *Century*, v. 77, p. 782 (Mar.).

Germany. "Germany in Transition." By Anglo-American. 189 *North American Review* 360 (Mar.).

"The trend of the German mind is unquestionably in the direction of giving the people an increasingly effective control over national and Imperial policy, and of modifying the present system of one-man power, if not by direct enactment, then by one of those tacit compromises and informal understandings that regulate the workings of British Constitutionalism. Some day the issue between Crown and People will be definitely joined. So far it has been merely broached. But that it should be raised at all is, perhaps, the most interesting fact about Germany in transition."

India. "The Reform Proposals: A Symposium." *Indian Review* (Madras), v. 10, p. 3 (Jan.).

The second instalment of a collection of opinions with regard to the reforms promulgated by Lord Morley, Minister for India. A typical view is that of Hon. Ambica Charan Muzumdar, who thinks that if the monumental scheme of the Marquess of Ripon inaugurated in 1882 had been steadily worked out, the present situation might never have disgraced the Indian public and blotted the Indian administration. "I am free to admit that the scheme is on the whole a satisfactory measure of reform. . . . The monumental scheme of Lord Ripon which Lord Morley has resuscitated after a quarter of a century's neglect and disparagement affords a striking illustration of the fact that 'rich gifts often wax poor when givers prove unkind.' "

India. "The Tangle in India." By Sir Charles Crosthwaite, K. C. S. I. *Blackwood's*, v. 185, p. 286 (Feb.).

Ireland. "The New Ireland—X." By Sydney Brooks. 189 *North American Review* 416 (Mar.).

Journalism. "Why I Believe in the Kind of American Journalism for which *The Outlook* Stands." By Theodore Roosevelt. *Outlook*, v. 91, p. 510 (Mar. 6).

In the first of his editorials for *The Outlook*, Mr. Roosevelt answers the question in his title as follows:—

"During the last few years it has become lamentably evident that certain daily newspapers, certain periodicals, are owned or controlled by men of vast wealth who have gained their wealth in evil fashion, who desire to stifle or twist the honest expression of public opinion, and who find an instrument fit for their purpose in the guided and purchased mendacity of those who edit and write for such papers and periodicals. This style of sordid evil does not even constitute a temptation to *The Outlook*; no influence of any kind could make the men who control *The Outlook* so much as consider the question of abandonment of duty; and they hold as their first duty inflexible adherence to the elementary virtues of entire truth, entire courage, entire honesty."

Judges. "A Judicial Experience." By Theodore Roosevelt. *Outlook*, v. 91, p. 563 (Mar. 13).

Describing how, during his second term in the New York Assembly, Mr. Roosevelt assisted in the passage of a law prohibiting the manufacture of cigars in tenement-houses, a law which was soon declared unconstitutional by the highest state court, which invoked a technical construction of the Constitution to invalidate a law demanded in the interest of public morals and public weal.

"From that day to this I have felt an ever-growing conviction of the need of having on the bench men who, in addition to being learned in the law and upright, shall possess a broad understanding of and sympathy with their countrymen as a whole, so that the questions of humanity and of social justice shall not be considered by them as wholly inferior to the defense of vested rights or the upholding of liberty of contract. A hair-splitting refinement in decisions may result in as much damage to the community as if

the judge were actually corrupt. Freedom of contract should be permitted only so far as is compatible with the best interests of the community; and when vested rights become intrenched wrongs, they should be overturned."

Labor Laws (Women). "The Woman's Invasion; V, Humanizing Industry." By William Hard; Rheta Childe Door, collaborator. *Everybody's*, v. 20, p. 372 (Mar.).

Gives vital facts regarding hygienic conditions of women's employments, and the operation of eight-hour laws and of legislative regulation in general.

Labor Problems. "The Industrial Dilemma —II, The Railroads and Education." By James O. Fagan. *Atlantic Monthly*, v. 103, p. 326 (Mar.).

Mr. Fagan, the "Author–Switchman," with striking candor pays his respects to labor unions:—

"At a station on a certain railroad, the change of men was supposed to take place at 11 p. m., but on account of the train service the relief man was always five minutes late. The man he relieved objected to this, and insisted upon leaving the office at 11 p. m. The matter was taken up by the union, and considerable feeling was manifested on both sides. Finally, the business was taken to the manager of the road for settlement. But neither conciliation nor arbitration had any effect whatever, and so at last, in despair, the manager changed the schedule of the train.

"How does a settlement of this kind suit the traveling public?"

Liquor Problem. "Prohibition and Public Morals." By Rev. Henry Colman, D. D. 189 *North American Review* 410 (Mar.).

"The courts of every grade have repeatedly affirmed the rightness of prohibition. In the case of *Crowley* v. *Christiansen* (137 U. S. 86; 11 Sup. Ct. 13), the United States Supreme Court, through Justice Field, said: . . .

"'There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of the citizen of the state or of a citizen of the United States.' . .

"In the case of *Stone* v. *Mississippi* (101 U. S. 816), the same court said, 'No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants.' This pronouncement of the Supreme Court fully warrants the decision of Judge Artman, of Indiana, that no legislative enactment can legalize the sale of intoxicating beverages. As sure as Christianity continues its triumphs, so sure will Judge Artman's decision become the law of the land."

Night Riders. "Night Riding in the Black Patch." By Eugene P. Lyle, Jr. *Hampton's*, v. 22, p. 339 (Mar.).

One of a series of articles on the Night Riders. Gives a graphic portrayal of conditions in Clarksville, Tenn., and of the raids on independent tobacco growers in certain sections of the Black Patch.

Oxford. "Oxford, Past and Present." By the Warden of Wadham College. *Blackwood's*, v. 185, p. 181 (Feb.).

Practice. "Organization of a Legal Business—XVII, The Office Staff." By R. V. Harris. 29 *Canadian Law Times* 146 (Feb.).

Stock Market. "The Stock Yards of New York: A Study of the Process of Making 'Killings' in Wall Street." By John Parr. *Everybody's*, v. 20, p. 291 (Mar.).

Descriptive of notable stock manipulators and stock manipulations, illustrated with amusing newspaper cartoons.

Tariff. "Tariff Revision and the Nation's Necessities." By Senator Thomas H. Carter. *North American Review*, v. 189, p. 337 (Mar.).

Vagrancy. "Colonizing the Tramp." By Gustavus Myers. *American Review of Reviews*, v. 39, p. 311 (Mar.).

The author says that the experiment of establishing tramp colonies is well worth the trial, if only for the reason that it is an important attempt at the practical solution of a tragic problem. He describes the tramp colony at Witzwyl, Switzerland.

Reviews of Books

A VALUABLE WORK ON DEFAMATION

A Code of the Law of Actionable Defamation; with a Continuous Commentory and Appendices. By George Spencer Bower, K. C. Sweet & Maxwell, Ltd., London. Pp. 1, 259, and appendices and index 348. (30*s*.)

IF the National Commissioners on Uniform State Laws ever turn their attention to the task of drafting a standard libel law, they will find Mr. Bower's Code of the Law of Actionable Defamation an admirable foundation upon which to build. If Mr. Bower's work must not be judged by the rigid tests which are applied to documents which are the outcome of years of consultation by bodies of experts, and have received that seal of government sanction which implies infallibility, it would bear such tests uncommonly well. In his clear, concise, and logical statement of the law of England, Mr. Bower has not only accomplished, after a vast amount of labor, all that could reasonably be expected of a preliminary draft, but a great deal more. His orderly arrangement of principles which are in the main those of our own jurisprudence commends his code to Americans not only because of its scientific merit, but because of the serviceableness of the plan adopted. His code could therefore be profitably studied by all who desire progress in legislation, such as would come with the general adoption of a uniform statute defining with scientific accuracy the chief features of a subject of great public concern.

Precision of language means precision of thought, and the logical merit and consequent practical usefulness of this treatise is largely secured by the accuracy of its terminology. The author consistently employs the terms *libel* and *slander* to denote the two distinct kinds of defamation, written and spoken, or to be more accurate, the two kinds of defamatory matter one of which expresses and records, the other simply expresses without recording, a defamatory meaning. He is also careful to follow the weight of excellent authority (see p. 358) in abandoning the term *privilege* in favor of the more intelligible and correct one *immunity*. In using *malice* in its common, rather than in its technical sense, in exchanging the term *slander of title* for the expressions *quasi-defamation* and *disparagement of property*, in discountenancing the objectionable phrase *verbal* defamation in the sense of *oral* defamation, he acts in obedience to the purpose of more clearly defining ideas and securing that lucidity which any one must admit is one of the first essentials of any code.

In other respects, also, the author has recognized the essentials of a code. Such a document should embody established principles rather than the unsettled portion of the law. It should present the permanent and fixed portion of the law. It should not be encumbered with minute details, or particular illustrations, or provisions relating to ephemeral and shifting conditions, but should incorporate the great, leading, universal rules about which courts and commentators may build up the fabric of a system constantly undergoing change in smaller particulars without any weakening in the central structure. The greater part of Mr. Bower's work is based on case law, and this is well, for statute law would be of little service in the drafting of a code, unless it were itself the outcome of those same processes of assimilation and organization which are involved in the preparation of a document calling for such wisdom and skill in its preparation. Because it is founded on the common law, this code has a special interest for American lawyers, as a statement, not only of rights under the British Constitution, but of the sacred rights of freedom of speech and of the press under our own Constitution.

Running parallel with the code is a commentary in small type, reviewing with exhaustive learning and with wonderful care the sources of the code rules. There are twenty-one appendices on topics connected with the main title. In one of them the author compares the civil law of defamation with the criminal law of the same subject, having adopted the plan of confining his main inquiry to the former branch of the topic. In another, he pays his respects to the Scots law of defamation, which he elsewhere speaks of as excelling in masculine good sense and fairness the jurisprudence of every other country in this department, be-

cause of the variety of its illustrations and the richness of its subordinate propositions.

It has been objected by one reviewer (25 *Law Quarterly Review* 102, Jan. '09) that the author's definition of defamation is too broad: "Defamatory matter is matter which bears a meaning, in relation to an existing person, such that the natural tendency thereof is to injure that person's reputation, or to diminish the willingness of others to associate with him." This last phrase was added to include publications defamatory in law, such as imputations of insanity or infectious disease, and the reviewer to whom we have referred maintains that the definition is too broad, as it would bring the cases of *Ratcliffe* v. *Evans* (1892; 2 Q. B. 524), and even *Lumley* v. *Gye* (1853; 3 Ellis & Blackburn 216), within the scope of the law of defamation. A complete statement of the author's code definition of defamation, however, would occupy considerable space, as he gradually unfolds it in successive sections. For example, injury to a person's reputation means diminution of "the esteem in which he is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, whether in respect of his personal character, his private or domestic life, his public, social, professional, or business qualifications, qualities, competence, dealings, conduct, or status, or his financial credit." But further on the code carefully defines several "rules of evidence and construction" to be used in determining whether defamatory matter relates to a particular person, or *to a person at all*, and one of these rules is: "Matter which appears on the face thereof to be mere disparagement of property, and not to relate, or not necessarily to relate, to a person at all, may nevertheless be proved, by evidence of extrinsic circumstances, to have borne a meaning which, by reasonable implication from such circumstances, was injurious to the reputation of the person possessed of, or entitled to, or dealing in such property, and in that event, such matter is deemed in law to have been published, and to be defamatory, of such person." The facts of the case of *Ratcliffe* v. *Evans*, in which the defendant published a statement to the effect that the business of the plaintiff had been discontinued, and the plaintiff suffered much loss, were not such as to bring that case clearly within the purview of the law of defamation, unless the statement published could have been proved injurious to the reputation of the person suing, in respect of his business qualifications or status, rather than simply injurious to his business and amounting to what Mr. Bower calls "quasi-defamation" or "disparagement of property," or what Sir Frederick Pollock has suggested in his work on "Torts" it might be well to call "disturbance of a man in his calling." As for *Lumley* v. *Gye*, the act of the defendant in that case in merely inducing the third party to break her contract with the plaintiff for a three months engagement as a singer, would surely not come within the definition of defamation given by Mr. Bower. We cannot see, therefore, how his definition is too broad, merely because he has been compelled to make it broad enough to include statements defamatory in law only. And a careful reading will show, we think, that he consistently draws the line between defamation in law and quasi-defamation, not simply by adhering to the accredited distinction between an ordinary action for slander and a special action on the case for slander, but by differentiating, as above intimated, between injury to a person and injury to his property or employment not affecting his personal reputation. A distinction truly exists between injuries *in personam* and *in rem* arising from defamatory statements, and the question may be raised whether Mr. Bower might not, for the purpose of lucidity, have adopted this terminology to advantage. Statements that a carpenter is a bungler, and that he is ill and unable to work, may alike injure him materially with respect to his employment, but the former imports a distinctly personal wrong as well as disparagement of his calling. As for those common law forms of actions on the case for slander which will not lie without proof of actual damage, we may observe that those usually treated as a part of the law of defamation deal with wrongs which are to be classified as *in personam*, while such actions as that of a *special* action on the case for slander, or the old action for "slander of title," deal rather with wrongs *in rem*.

We would suggest that in any revision of this work the subject of negligence be glanced at in article 32 in considering fair comment. When, for example, a person claiming the privilege, or better, the "immunity," of fair comment proves that the facts on which he relied were true to the best of his knowledge and belief, though subsequently shown to be

false, and that he exercised due care in ascertaining the accuracy of the information upon which he relied, is he entitled to the immunity without proving the facts? Again, in such a case as this, is it wholly immaterial whether his inferences were rational or irrational, or will not the honest intentions of a public-spirited man, on the contrary, go further toward justifying sound than unsound inferences? To such considerations as these some attention, at least, would have to be paid in a work on the law of defamation as it exists in the United States, owing to the view which has obtained a foothold in a minority of our state courts, according to which a defendant who honestly believes in the truth of the facts upon which he bases his statements regarding a political candidate, is entitled to the immunity of fair comment if the publication is made in good faith for the purpose of enabling voters to cast their votes more intelligently, even though the facts are untrue. (*Coleman* v. *MacLellan* (Kansas, 1908) 98 Pac. Rep. 281; see for this and other similar cases 7 *Michigan Law Review* 352, Feb. '09.)

In one of his appendices, discussing newspaper privilege, the author expresses a view from which we dissent when he decries the notion of newspapers bearing the burden of any public duty. The newspaper proprietor, he says, "works for gain, and nothing else; he trades in news, sometimes in calumny: he is a self-constituted, not an official, censor of men and affairs." This may fail to recognize the moral significance of the great influence of newspapers over the minds of men, the unparalleled character of the commodity in which they traffic, their powerful action upon the opinions, prejudices, and passions of their readers. The influence of a newspaper, as an *institution*, is far greater, in the case of a newspaper of good reputation, than the combined influence of its editorial staff and contributors, as *individuals*. Hence a newspaper should be deemed to bear a greater obligation to the public than an individual or body of individuals, to exert its influence on the side of the law and public morals. There is this general duty of newspapers, of such a nature as to render their function semi-official in morals if not in law. But such a general duty may also sometimes be supplemented by a special duty, as for example where one newspaper practically monopolizes its field, and dissatisfied readers and contributors cannot have recourse to its competitors if it shows itself negligent or indifferent in discharging its duties.

The work is a model in arrangement. There are an excellent synoptical table of contents and a full index, as well as a table of cases exhibiting extended research.

It is impossible, in concluding this review, to repress our admiration of the splendid literary and scholarly temper of this book, its noticeable charm of style, the fine flavor of the erudite historical portions, and the apt allusions to masterpieces of great literature.

MINOR ON REAL PROPERTY

The Law of Real Property (Based on Minor's Institutes). By Raleigh Colston Minor, M. A., B. L., Professor of Law in the University of Virginia. Anderson Bros., Univ. of Va. 2 v., pp. 1602, and table of cases and index 233. ($11.50.)

PROFESSOR Raleigh C. Minor, of the University of Virginia, has issued in his two volumes on "The Law of Real Property" a common law treatise of much value. Professor Minor, as he explains in his preface, was led to prepare this work by a desire to prolong the usefulness of that portion of Minor's Institutes which deals with the law of real property. His first thought was to issue the second volume of his father's work in a fifth edition, but on subsequent reflection he decided to prepare a treatise over his own name, in which the substance, and indeed the very language of the Institutes, might be retained by citing the pages from which the extracts were taken, and in which he could incorporate his own material at pleasure in order to bring the volume fully up to date.

The carrying out of this scheme has led to the production of a well arranged exposition of the common law doctrines of real property, in the language chiefly of Minor's Institutes, but with interpolated extracts from standard text-writers, and with valuable supplementary matter from the pen of the author and compiler. Considerable attention is given to Virginia law, but not so much as to mar the symmetry of the work, or to detract from its value to the profession in general as an exposition of a branch of American jurisprudence.

Minor's Institutes, the work of the scholarly Professor John B. Minor, a great law teacher, has been so long published as not to need comment at the hands of the reviewer. It soon became recognized as one of the leading text-books on this subject, its historical por-

tions being particularly clear and informing. The present work of the son must stand or fall by the value of that of the father. Of its historical merits we are not prepared to offer any critical estimate, but as a statement of one of the most difficult branches of the law the present book is to be compared in lucidity and attractiveness of presentation with Blackstone and Kent, and the reputation of the author is such as to lead one to expect of him more than ordinary accuracy and learning.

The first volume covers the general topics and subdivisions of tenures and estates, and the second volume treats of the modes of acquiring title, both by descent and by purchase. The division of the text into short sections with headings in prominent type makes the work convenient for reference. The citations are sufficiently full to indicate the extensive adoption by various states of the common law principles elucidated. The typography of the volumes is excellent.

HANDBOOK OF THE NEW YORK PUBLIC UTILITIES LAW

The Control of Public Utilities. In the form of an Annotation of the Public Service Commissions Law of the State of New York, and Covering all Important American Cases, together with the text of the Federal Interstate Commerce Act and the Rapid Transit Act of New York. By William M. Ivins and Herbert Delavan Mason. Baker, Voorhis & Co., New York. Pp. lxvii+669+appendices and index 481. ($7.)

THIS work is a handbook of the New York public utilities law in the form of compendious yet concise annotations appended to the text of the several sections of the statute. The wording of the law is printed in black type, each one of forty-one headings being followed by a collection of extracts from leading decisions. The extracts frequently occupy a number of pages before the next section of the law is reached. The cases on unjust preference, for example, fill sixty pages.

As the authors say in their preface, the book gives "an elaborate digest of the entire jurisprudence of the subject." A remarkable quantity of material has been brought together to show just what rules have been laid down, not only in the United States, but in widely diverging state jurisdictions, for the purpose of bringing public service activities under government regulation. Hence the volume, though intended for a special purpose, is of more than local utility. It can serve as a valuable aid in the preparation of legislation in other states along similar lines. It also assembles a profusion of citations such as must surely prove serviceable in settling questions of the interpretation of similar statutes now in force in any part of the country.

The object having been confined to a presentation of the New York law, the authors have pursued a course resulting in the production of an extended brief in support of the constitutionality of that law, rather than a scientific discussion. Had the New York law been poorly drafted, their work would be of doubtful value, but under the circumstances it has all the merit of the statute and more besides.

The negative faults of the New York law, if faults they may be called—its failure to define with care some of the leading rules referring to government regulation and its mingling of substantive and adjective provisions side by side—do not impair the value of the work of the annotators, and if an effort is ever made by any state legislature to draft a model statute providing for the regulation of public utilities, the materials collected by Messrs. Ivins and Mason will be ready at hand for carrying out that undertaking. This is a practical working volume, well arranged and well indexed.

The preface to the book makes a bold onslaught upon the *laissez faire* theory, though federal regulation of public franchises is more readily reconcilable with that theory than Mr. Ivins supposes, and indulges in rather extravagant views regarding the already accomplished amendment of the Constitution by judicial decision and the catastrophe sure to come upon the country if the political state in America is not made to conform to the economic state—Mr. Ivins' theory being that a conflict between the two is always precipitated when the political constitution is not to be reconciled with the economic constitution. This preface is to be deemed, with due respect to its author, a somewhat overzealous piece of advocacy. The notion that the economic state molds the political state is confusing, as the economic state in large measure *is* the political state, the economic institutions associated with the production and distribution of wealth sharing, with legal institutions, the character common to both impressed upon them by the instincts and habits of a given society. Mr. Ivins' funda-

mental contention, however, of the necessity of the government's undertaking the regulation of public service corporations, in the interest of the public welfare, and of the constitutionality of such a policy, is unimpeachable, and this contention of his preface derives added authority from the pertinent quotations from the first message of Governor Hughes, to whom the volume is dedicated.

HUBBELL'S LEGAL DIRECTORY

Hubbell's Legal Directory for Lawyers and Business Men. 39th year, 1909. Hubbell Publishing Co., New York. Pp. 1428+400. ($5.35 delivered.)

THE thirty-ninth annual volume of Hubbell's Legal Directory for the year 1909 is a valuable handbook for the use of the profession, furnishing as it does a reliable list, revised for this year, of attorneys throughout the United States and Canada, and much useful information with regard to court calendars and the laws of the various states. To the carefully prepared summaries of state laws, the work of leading members of the profession, it owes much of its usefulness. The excellence of its typography is guaranteed by the imprint of the Riverside Press of Cambridge, Mass.

There are synopses of the statutes of all the states covering important topics with considerable fulness of detail, yet without extreme length, and giving instructions for taking depositions, the execution and acknowledgement of deeds, wills, etc. The synopsis of the laws of New York prepared by Rounds & Schurman of the New York Bar, occupies thirty-five pages of small type. There are also compilations of the laws of British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario and Quebec. There is likewise one of the laws of Mexico. The laws of the United States concerning jurisdiction and practice in federal courts receive attention in thirty-two pages, and the patent laws of the United States have fifteen pages devoted to them. These synopses of laws are all attractively and conveniently arranged in compact typography, and the book would be valuable with no other feature.

For practical use, however, the calendars setting forth the times for holding state and United States courts for the year 1909 will be found serviceable, together with the list of prominent banks and bankers throughout the country, and the list of United States consuls.

The directory proper gives a list of highly recommended attorneys or law firms in each of more than four thousand cities and towns throughout the United States and Canada. There are also lists of attorneys in foreign countries.

An appendix contains about four hundred pages of professional cards of lawyers in all parts of the United States, arranged by their states. This volume is to be commended most highly as a standard directory of the legal profession in America.

BOOKS RECEIVED

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

New York State Library Yearbook of Legislation, 1907. Edited by Frederick D. Bramhall, Legislative Reference Librarian. University of the State of New York, Albany. Pp. 599+index. ($1.)

The Government of European Cities. By William Bennett Munro, Ph. D., LL.B., Assistant Professor of Government in Harvard University. Macmillan Company, New York. Pp. 409, including index. ($2.50 *net*.)

Cardinal Rules of Legal Interpretation. Collected and arranged by Edward Beal, B. A. 2d edition. Stevens and Sons, Ltd., London; Canada Law Book Company, Ltd., Toronto. Pp. lxxx+620+ appendix and index 54. ($5.50.)

A Digest of the Law of England with Reference to the Conflict of Laws. By Professor A. V. Dicey, K. C., Hon. D. C. L. 2d edition. Cromarty Law Book Co., 1112 Chestnut street, Philadelphia. Pp. xcii+714+appendix and index 169. ($8.)

IN addressing the Court it is to be expected that counsel will use choice and accurate language. This does not mean that he should adopt a flowery style or resort to oratorical shifts and devices. The more simple the language, if only it be correct and entirely free from that abomination slang, the better and more effective will be the address.—*Mr. Justice Anglin, in the Canadian Law Times.*

*Notes of Cases**

Admiralty. *General Average—Spontaneous Combustion of Cargo.* N. Y.

In an admiralty case coming before it recently, the United States District Court for the Southern District of New York, in the absence of a decision in this country contrary thereto, followed the authority of a House of Lords case, *Greenshields* v. *Stephens* (Appellate Cases, 1908, p. 431, 10 Mar. Law Cases, N. S., 597, aff'd by the House of Lords, L. R., App. Cases, 1908, p. 431), in which it was held that the owner of a cargo which is lost by becoming ignited by spontaneous combustion, being sacrificed in order to save the vessel, is entitled to a general average contribution from the shipowner. *Atlantic Mutual Insurance Co.* v. *Schooner Wm. J. Quillan* (Jan. 1909).

Agency. *Husband and Wife—Signature to a Check—Evidence.* Kas.

Where the issue is whether a husband was the agent of his wife, with authority to sign her name to a check upon her bank account, it is held, in *Hawkins* v. *Windhorse* (Kas.), 96 Pac. 48, 17 L.R.A. (N.S.) 219, that evidence that he frequently signed checks on her account, with her knowledge and consent, s competent.

Arrests. *Executive Warrant—Constitutional Law—Non-Liability of Official Issuing Process.* U. S.

While a county of Colorado was in a state of insurrection the president of the Western Federation of Miners was arrested on an executive warrant as a precautionary measure and confined two and one-half months. Alleging that his imprisonment was without probable cause, plaintiff maintained that if the action were unconstitutional, the governor of the state was not protected from personal liability. In *Moyer* v. *Peabody*, 29 Sup. Ct. Rep. 235, the United States Supreme Court held that public danger warrants the substitution of executive for judicial process, and that so long as such arrests are made in good faith and in the honest belief that they are necessary to impede insurrection, the governor is the final judge and cannot be subjected to an action on the ground that he had not reasonable ground for his belief.

Automobiles. *Not Free of Duty—Household Effects.* U. S.

The United States Circuit Court of Appeals for the second circuit handed down a decision in *U. S.* v. *W. R. Grace & Co.* which has since been made the basis of a ruling of the Treasury Department. Judge Ward, in deciding the case, held that an automobile was not exempt from tariff duty as a household effect within the meaning of paragraph 504 of the tariff act of 1897, as Congress had "intended to do away with the exemption of household effects generally and restrict it to such as should be like books, libraries, or household furniture."

Bankruptcy. *Contempt of Court—Bankrupt's Plea of Insanity.* U. S.

In the District Court of the United States for the Southern District of New York, proceedings were brought under order to show why one Jacob Cashman, a bankrupt, should not be punished for contempt of court for denying his ability to give information regarding the value of his estate at the proceedings before the commissioner. It was held, per Hough, D. J., that a plea in confession and avoidance taking the form of an allegation of insanity imposes the burden of proof on the defendant to prove his insanity, and that if he cannot prove it he may be adjudged guilty upon the facts of the record. *In the matter of Jacob Cashman* (Jan. 1909).

Contempt. *Unintentional Misstatement of Law—Newspaper Editorials.* R. I.

An editorial misstatement of the law as stated in a court's written opinion on a matter of wide application and importance is held, *in re Providence Journal Co.* (R. I.), 68 Atl. 428, 17 L.R.A. (N.S.) 582, to be a contempt of court, although unintentional.

Contracts. *Debts on Illegal Agreements—Restraint of Trade—Corporations—Sherman Act.* U. S.

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

In *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, decided Feb. 1, the United States Supreme Court, by a majority of five against a minority of four judges, laid down the principle that a corporation cannot collect debts for merchandise sold under an illegal agreement in restraint of trade such as is prohibited by the Sherman anti-trust law. The Court found it could not give judgment to the plaintiff "without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to enforce or to realize the fruits of an agreement which appears to be tainted with illegality." The opinion, which was written by Mr. Justice Harlan, sustained the action of the lower courts. Justices Brewer, White, Peckham and Holmes dissented.

Contracts. *Lex Loci Contractus Governs—Affreightment Contracts—Bills of Lading.* N. Y.

The Appellate Division of the New York Supreme Court, following the decision of the United States Circuit Court of Appeals in *Erie R. R.* v. *P. C. M. & E. Co.*, 162 Fed. Rep. 878, has decided that the validity and construction of a contract of affreightment are to be determined by the law of the place where it was made, unless a different intention of the parties is clearly shown. It was held that an entire contract made in Illinois for the transportation of goods from Chicago to New York, via the Great Lakes, was governed by the law of Illinois which requires provisions in a bill of lading exempting the carrier from liability for damage by fire in order for their validity to be expressly assented to, although the goods were destroyed in transit within the state of New York, according to the law of which latter state the fire exemption provision would become binding by simple acceptance of the bill of lading. *Edward Valk et al.* v. *Erie Railroad Co.* (Jan. 1909).

Criminal Procedure. *Constitutional Law—Right to Jury of the Vicinage.* Cal.

A woman who had sent a box of poisoned candy from California to a woman in Delaware, causing her death, was tried and convicted in California. In *People* v. *Botkin*, 98 Pac. Rep. 861, she sought a rehearing, on the ground that by the trial in California of a crime committed in Delaware, she was deprived of her right to trial by a jury selected from the vicinage or county where the crime was alleged to be committed. The California Supreme Court denied a rehearing. It remarked that as on one side of the line there may be a right of trial by jury, and on the other side no such right, accused was denied no right or constitutional privilege, as each state prescribes its own modes of judicial proceedings.

Divorce. *Amount of Alimony Pendente Lite—Wife's Real Necessities.* N. Y.

Pending a divorce suit the husband voluntarily allowed his wife $25,000 a year for her support. She deemed this insufficient and sought to have the amount raised to $120,000. In *Gould* v. *Gould*, 114 N. Y. Supp. 331, the New York Supreme Court remarked that no rule had been adopted by the courts entitling a wife to one third her husband's income, irrespective of that income's relation to reasonable expenditures by the person who possesses it. The sum granted was amply sufficient as alimony *pendente lite*, in accordance with the rule which requires that, pending a matrimonial action, an award of alimony should be limited to the real necessities of the wife's proper and reasonable support.

Due Process of Law. *Municipal Ordinance—Condemnation of Food without Hearing.* U. S.

In *North American Cold Storage Company* v. *City of Chicago*, in the Supreme Court of the United States (December, 1908, 29 Sup. Ct. Rep. 101), it was held that due process of law is not denied the owner or custodian of food in cold storage by a municipal ordinance under which such food when unfit for human consumption may summarily be seized, condemned, and destroyed by municipal officers without a preliminary hearing.

Highways. *Obstruction by Railroad—Liability for Damage by Fire—Concurrent Cause.* Ill.

The fire department, while hurrying to extinguish a conflagration, was delayed for about thirty minutes by a train of cars which had been left standing across a street. In *Houren* v. *Chicago, M. & St. P. Ry. Co.*, 86 N. E. Rep. 611, the railroad was sued for the destruction of respondent's house, which it was alleged was caused by the inability of the fire-engines to reach it in time. The Illinois Supreme Court held that the obstruction was a concurrent cause of the burning, and that although absolute proof of the result

of the efforts of the fire department could not be offered, it was reasonable to expect that it would have been able to prevent the spread of flames, especially as all the paraphernalia for fire protection were available.

Libel. *Freedom of the Press—Duties of the Press.* N. Y.

The New York Supreme Court, Part VI, in deciding that a newspaper was justified by the truth of the article in accusing a druggist of selling adulterated goods, expressed the following opinion:—

"The defendant was engaged in the publication of a newspaper, not merely for the dissemination of news, but with the additional purpose of upholding a high standard of public decency and morals in the community, and it was not merely its right, but its duty, in connection with a public and official proceeding of the kind in question, to publish, truthfully, so much of the facts as with decency it could publish, so that even if the machinery of the criminal law proved inadequate to reach malefactors of this class, who traffic for gain in human life and health and seek to promote immoral practices, they might be held up to public scorn and contempt." *Weiss* v. *New York Times* (Feb. 18, 1909).

Libel. *Publication—Letter Opened by Other than Addressee.* England.

The English Court of Appeal, in *Sharp* v. *Skues*, decided Feb. 15, held that where a letter containing defamatory matter had been addressed personally to the member of a firm and was opened and read by his partner, and the jury had found that according to the sender's knowledge it was unlikely that the letter would in the ordinary course of business be opened by the partner or a clerk, the sender was not responsible for the publication. He had not intended a publication and the facts did not amount to a publication of the libel by himself.

Livestock. *Interstate Commerce Act—Twenty-Eight Hour Law—Congestion of Traffic no Excuse.* U. S.

Congestion of traffic does not free railroad companies from penalties for failure to observe the twenty-eight hour stock law, was the effect of an opinion rendered Feb. 15 by Judges Van Devanter, Hook and Adams in the United States Circuit Court of Appeals, reversing a decision of the Wyoming Federal Court. The Union Pacific was defendant in a suit brought by the government under the interstate commerce law, which requires livestock not to be in transit more than twenty-eight hours without unloading for rest, feed and water. *U. S.* v. *Union Pacific R. R. Co.*

Master and Servant. *Scope of Employment—Negligence.* Mass.

In *Smith* v. *Peach*, in the Supreme Judicial Court of Massachusetts, Suffolk (January, 1909, 86 N. E. Rep. 908), it appeared that defendant, who kept a livery stable, employed the owner of a gun as his foreman and driver. The gun was left on defendant's premises for defendant's use, but the owner subsequently resumed possession of it, and while exhibiting it to a friend it was discharged and plaintiff was injured. The owner of the gun showing it to a friend had nothing to do with any service connected with his employ ment. The Court said:—

"The plaintiff, before he can recover, must establish that either the defendant's foreman in discharging the gun acted within the scope of his employment, or the defendant himself was negligent in leaving the loaded gun in his office. Upon the evidence neither proposition can be maintained."

Miners' Wages. *Right to Regulate Weights and Measures—Freedom of Contract—Police Power.* U. S.

A state statute prohibiting miners to contract for wages upon the basis of screened coal, instead of that of the weight of the coal as originally produced, was sustained by the Supreme Court of the United States (Jan. 1909) as a valid exercise of the police power, in *McLean* v. *Arkansas*, 211 U. S. 539, 29 Sup. Ct. R. 208. The Court declared:—

"We are unable to say . . . that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the state. Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although, in compelling certain modes of dealing, they interfere with the freedom of contract."

Monopolies. *Anti-Trust Laws of Texas—Retroactive Legislation—Fines.* U. S.

The United States Supreme Court in *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 29 Sup.

Ct. Rep. 220, without a dissenting vote, has affirmed the decision of the state court forfeiting the permit of that company to do business in Texas, other than its interstate business, and imposing a fine of $1,623,500. The proceedings were instituted by the state under the Anti-Trust Acts of 1899 and 1903.

The former makes it unlawful to enter into any agreement or understanding to fix or regulate the price in Texas of any article of manufacture or merchandise, and the latter defines a trust to be a combination of capital, skill, or acts by two or more persons or corporations to create or carry out restrictions in trade or commerce in Texas. The Texas courts found that the Standard Oil Company of New Jersey and the Waters-Pierce Oil Company were under a common management, which fixed the prices of oil in the state and carried out restrictions to prevent or lessen competition in its sale. The Anti-Trust Acts, under which the prosecution was begun, were assailed as being retroactive in effect and as depriving the company of its property and rights without due process of law, and it was argued that the fines imposed were so excessive as to constitute a taking of property without due process of law. None of these contentions was sustained. It appeared that penalties were assessed at $1500 a day for 1033 days and at $50 a day for 1480 days. The company carried on an extensive business in Texas. Its property amounted to more than forty millions of dollars, and its dividends had been as high as 700 per cent per annum. It had persistently ignored the Texas authorities and had continued its course of business notwithstanding a judgment of ouster in a former case. All things considered, the penalties were not regarded as excessive.

Municipal Corporations. *Eligibility of Removed Official for Same Office—Interpretation of Statutes.* N. Y.

The charter of a borough provided that its president be elected by its electors. Owing to charges against Ahearn, the incumbent of that office, he was removed by the governor. Thereafter the board of aldermen appointed him to fill the vacancy caused by his own removal. In *People* v. *Ahearn*, 113 New York Supplement 876, his right to hold office was contested. As there was no doubt about the vacancy and the legal method of filling it, the eligibility of the incumbent was the main question. The New York Supreme Court, holding that Ahearn was eligible, remarked that if in our form of government it was intended that removal from a public trust should also carry with it the penalty of depriving the person so removed from again holding or being chosen to the same, a clear expression of such an intention would have been stated.

This decision has since been reversed by the Appellate Division of the Supreme Court, which held that the removal of a public official by the Governor after the officer has had proper opportunity to be heard, is a final determination, not reviewable by the courts, that he is unfit to hold office for the remainder of his term. The removal of the Borough President of Manhattan separated him from his office and every incident of it, including the remainder of his term. Each term of a public office is an entity separate and distinct from all other terms of the same office, and "to permit the immediate reinstatement of the same persons to the same office for the same term would nullify the constitutional provision for removal." In support of the proposition that the idea of a public office precludes the notion of an undefined term, the Court referred among several authorities to *Matter of Oaths*, 20 Johns. 492, and *Matter of Hathaway*, 71 N. Y. 238: "Public office as used in the constitution has respect to a permanent trust. . . . It means the right to exercise generally and in all proper cases the functions of a public trust or employment, and to receive the fees and emoluments belonging to it and to hold the place and perform the duty for the term and by the tenure prescribed by law." (N. Y. Law Jour. Mar. 11, 1909.)

Ahearn has since secured leave to take the case to the Court of Appeals.

Obscene Literature. *Question One for the Jury—Practical Considerations—Impression on the General Public.* Mass.

A bookseller was convicted under a Massachusetts statute prohibiting the publication and circulation of obscene literature, for selling the book known as "Three Weeks." The Supreme Judicial Court of that state, in *Commonwealth* v. *Buckley*, 86 N. E. Rep. 910 (Jan. 1909), affirmed the conviction unanimously, holding that the case had been properly submitted to the jury. "It could not be ruled as matter of law that the jury could not find the book within the prohibition of the statute." Considerations such as

those presented on the defendant's behalf were always to be weighed, "but after all there is a practical side.

"Doubtless an artist, when looking in his studio upon the model before him in the figure of a perfectly formed young woman standing completely nude may . . . not have one obscene, indecent or impure thought. . . . But it by no means follows that if he should open wide the doors of his studio and fill it with people from the crowded streets, they would be moved by the same lofty and pure feelings. . . . And so a reader may be . . . interested in the development of the character of a woman—no matter how wanton—as a merely psychic study . . . and it may be that the author . . . was in full sympathy with such a state of mind. . . . But such an author cannot expect that the reading public, as a whole, will so read her production."

Public Schools. *Co-Education of Races—Fifteenth Amendment—Equal Advantages.* Kas.

A Kansas statute provides that children of the white and colored races while below the grammar grades may be required to attend separate schools. The children of plaintiff had been attending a school with white children, but were directed to attend another situated near railroad shops, the way to which was crossed by sixteen railroad tracks. These facts were alleged to make the attendance at school hazardous. In *Williams* v. *Board of Education*, 99 Pac. Rep. 216, the Kansas Supreme Court upheld the contention of plaintiff that these circumstances amounted to a denial of equal educational facilities. It concluded that while it was not necessary to permit the attendance of negro children at any certain school, one must be provided where they can enjoy the same educational advantages. (Compare with cases noted in *Green Bag*, Jan. 1909, p. 31.)

Procedure. *Exemption from Service of Civil Process—Non-Resident Attending Trial in State.* N. Y.

The New York Court of Appeals, in a decision recently handed down, held that a non-resident coming into the state for the sole purpose of being a witness in an action is protected from the service of civil process provided he returns home with reasonable dispatch after the trial. The defendant, a resident of California, had been served with a summons, and appealed from an order of the Appellate Division of the Supreme Court affirming an order at Special Term denying a motion to set aside the summons. If, however, he comes for the double purpose of attending court and attending to business having no connection with the trial, the privilege does not attach. *Finucane* v. *Warner*, decided Jan. 26, 1909.

Real Property. *Clear Title of Seashore Lands—Jus Privatum and Jus Publicum—Crown Rights in Our Common Law.* N. Y.

The vendor of a tract of land on the shore of Staten Island brought an action of specific performance against the vendee under a contract for the sale. The question at issue was whether the plaintiff's title was marketable. The defendant contended that the Norwood patent of 1676 did not convey the tideway or foreshore and that the title to property including it was consequently not marketable.

The New York Supreme Court, in deciding the case, adopted the principles enunciated in *Town of Brookhaven* v. *Smith*, 188 New York 74, and *Barnes* v. *The Midland R. R. Terminal Co.* (Nov. 10, 1908), to the effect that the *jus privatum* of the crown, by which the English sovereign was deemed owner of the soil of the sea and of navigable rivers, was inapplicable to the spirit of our institutions, and was abandoned to the proprietors of the uplands so as to have become a common right and thus the common law of the state. It was held that the state, by acts of the Legislature authorizing solid filling of land under water to new bulkhead lines in the interest of commerce, had extinguished the *jus publicum*, the public rights of fishing, boating, bathing and navigation, in the former tideway, and that the private rights remaining to constitute a fee were vested in the owner of the adjacent upland. Consequently as the plaintiff's title is not burdened by any public use it is marketable. *John Bardes et al.* v. *Martin Herman* (Feb. 1909).

Real Property. *Cloud on Title—Cancellation of Unenforceable Covenant—Equity Jurisdiction.* N. Y.

Where a deed from one religious corporation to another contained a covenant in terms running with the land, to the effect that the premises conveyed should be used only for church purposes, and the grantee desired to have the covenant canceled in order that the market value of the premises, which it desired

to mortgage, might not be unfavorably affected by the restriction, the Supreme Court, Appellate Division, held that the covenant was not a condition, in that no right of reentry for a breach was reserved, and that the jurisdiction of equity might be invoked to cancel an unenforceable covenant constituting a cloud on title, its unenforceability affecting not the jurisdiction of a court of equity, but merely the use of its discretion in exercising its jurisdiction. Per Scott, McLaughlin, and Houghton, JJ.; Patterson, P. J., and Laughlin, J., dissenting. *Rector, Church Wardens and Vestrymen of St. Stephen's P. E. Church of New York* v. *Rector, etc., of Church of the Transfiguration in the City of New York*, decided in January, 1909.

Receivers. *Conflicting Jurisdiction of State and Federal Courts.* U. S.

In the proceedings to forfeit the permit of the Waters-Pierce Oil Company to do business in Texas, an interesting conflict arose between the federal and state courts as to the possession of the property by their respective receivers.

A receiver was appointed in the state court and subsequently an appeal was taken to the Court of Civil Appeals and bond given to supersede the receivership. On the same day application was made in the Circuit Court of the United States for the appointment of a receiver. The appointment was made and the receiver was put into possession of the property on the theory that the proceedings in the state court left the property no longer *in custodia legis*, and hence it was liable to seizure by adverse proceedings. The state through its officers and receiver applied to the Circuit Court, asking it to set aside the order appointing the receiver. This it refused, an appeal was taken, and the case in due course reached the United States Supreme Court, *Palmer* v. *Texas*, 29 Sup. Ct. 230, 212 U. S. 118.

The court laid down the broad proposition that if the state court had acquired jurisdiction by the proceedings to appoint the receiver and had not lost it by subsequent proceedings, the federal court had no right to intervene. The decisions of the state courts are reviewed to the effect that the appeal merely suspended the order appointing the receiver and the appellate court had jurisdiction of the *res*, just as the trial court had. The conclusion is reached that the state court did not lose jurisdiction by the appeal and *supersedeas* in the receivership proceedings, and the federal court ought not to have appointed a receiver to take possession of the property.

Sales in Bulk. *Constitutionality of Prohibiting Statutes—Due Process of Law—Equal Protection of the Laws.* U. S.

In *Lemieux* v. *Young* (Jan., 211 U. S. 489, 29 Sup. Ct. Rep. 174) it was held that neither due process of law nor the equal protection of the laws was denied by a statute of Connecticut which prohibited sales of goods in bulk by retailers outside of the regular course of their business.

A statute similar to the Connecticut one has been pronounced unconstitutional in Illinois as class legislation. See *Charles J. Off & Co.* v. *Morehead*, 85 N. E. Rep. 264 (*Green Bag*, Mar. 1909, p. 129).

Commenting upon the New York case of *Wright* v. *Hart*, decided a few years ago, which upheld the constitutionality of a "sales in bulk" statute of New York, the *New York Law Journal* observes editorially: "The overwhelming weight of authority in the state courts is against the position of the majority of the New York Court of Appeals that Sales in Bulk statutes constitute class legislation. It is of great interest that the Supreme Court of the United States has recently expressed a similar view."

Subrogation. *Right of Surety to Reserve Fund—Assignments of Contracts.* U. S.

A contractor engaged in constructing a lock for the United States had agreed that all sums for labor or materials should be promptly paid. Finding himself unable to complete the undertaking he assigned the contract and a sum for work performed which had been withheld by the government. There was a loss on the operation which the surety on the bond had to pay. Both the assignee and the surety sought to recover the fund held in reserve, which had been paid into court. In *Hardaway* v. *National Surety Co.*, 211 U. S. 552, 29 Sup. Ct. 202, the United States Supreme Court held that the sum should be credited upon the total amount paid by the surety for the satisfaction of labor claims. The right of the surety to be subrogated had attached prior to the assignment and was superior to any right of an assignee.

Taxation. *Exemption of After-Acquired Property of Hospital—Legislature's Promise Binding.* N. Y.

The Roosevelt Hospital in New York was

founded in consequence of an endowment bequeathed by Mr. Roosevelt in 1863 on condition that the Legislature should grant a "liberal" charter, and such a charter was accordingly granted, exempting the Hospital from taxation. Subsequently a portion of the property was leased by the Hospital for other than hospital purposes, the revenue being used to help defray expenses of the Hospital. This portion was assessed for taxation upon the theory that under the General Tax Law of 1896, exemption from taxation extended only to such portion of the premises as was used by the hospital for carrying out its corporate purposes. Upon appeal from an order of the Appellate Division sustaining the assessment it was held by the New York Court of Appeals that the transfer of the testator's property having been directly induced by the legislative promise of exemption from taxation, the presumption that the General Tax Law of 1896 repealed by implication all prior exemptions contained in general or special acts did not obtain in such a case, and that the assessment was therefore invalid. *People of the State of New York ex rel. Roosevelt Hospital* v. *Frank Raymond et al.* (Jan. 29, 1909).

Taxation. *Exemption of After-Acquired Property of University—Applicability of Statute to All Property.* Ill.

In 1855 an amendment of the charter of the Northwestern University exempted from taxation "all property of whatever kind and description, belonging to or owned" by it. Since then the corporation had acquired 1-18 of the village in which it is situated. It was insisted that its exemption would cause an unfair burden on other property holders. The Supreme Court of Illinois, in *Northwestern University* v. *Hanberg*, 86 N. E. Rep. 734, held that the exemption was granted not to the property but to the University, and its purpose was to forever exempt it from taxation on all its property whenever acquired. The changed conditions cannot affect the meaning of the amendment passed in 1855.

Trade-Marks. *Arbitrary Name Valid—Unfair Competition.* N. Y.

Where a manufacturer of steam boiler injectors had brought action to restrain a corporation from using the word "Monitor" on injectors of similar pattern, and a judgment was obtained to that effect, the Supreme Court of New York, Appellate Division, affirmed the judgment, two of the five judges dissenting. It was held that the word "Monitor" in no sense described the patented article nor the patentee, but was an arbitrary, fanciful word which the plaintiff selected to designate his own production, and that the use of it by the defendant invaded the rights of the plaintiff and tended to deceive the public. The principle of the leading case of *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, was held not to affect the case. *Nathan Mfg. Co.* v. *H. A. Rogers Co.* (Feb. 1909).

Street Railways. *Defective Transfers—Right of Passenger to be Carried to Destination.* Ark.

Where a passenger on a street car pays his fare and receives a transfer ticket which is void upon its face and which is refused when presented to another conductor, it is held, in *Little Rock Ry. & Electric Co.* v. *Goerner*, 5 St. Ry. Rep. 33, that he nevertheless has a valid contract with the company to be carried to his place of destination, and the company, in expelling him from its car for refusal to pay additional fare, violates its contract and is liable in damages for its breach.

Weapons. *Toy Pistol—Question for the Jury.* Ga.

A child manipulating a toy pistol suffered a wound resulting in tetanus. An action against the dealer was brought under the statute providing that any person knowingly selling or furnishing any minor with a pistol shall be guilty of a misdemeanor. The main question was whether this mechanism was a pistol or a toy. In *Mathews* v. *Caldwell*, 63 S. E. Rep. 250, the Georgia Court of Appeals, remarking that jurors were chosen not only for uprightness, but also for intelligence, and were able to bring into the box knowledge of the common things of life, decided that they were qualified to look at this mechanical creation and to determine whether it was a firearm.

The Editor's Bag

LENIENCY TOWARD CRIMINALS

IF the legal profession should ever resolve to take up the serious study of criminology, the wise administration of the criminal law would be realized much sooner than would be possible were lawyers simply to drift with the tide and make no effort to attain the same standard of progress in this as in other directions.

Respect for the law is ingrained in the fibre of the American people, and America should have the most enlightened system of criminal jurisprudence in the entire world. The American of whose stopping a train in Germany District Attorney Jerome tells is not typical. This traveler wished to alight at a station at which the train did not stop, when he suddenly espied an emergency brake. Notwithstanding the warning that any one applying the brake except in case of accident would be liable to a fine of fifty marks, he got up and stopped the train. He was promptly turned over to the police and paid his fine, and the Germans around the court house talked for two hours about the extraordinary case of the American who cold-bloodedly broke the law to stop a train.

An American under similar circumstances would have been unlikely to stop a train in the United States. Not only does Mr. Jerome underrate the respect of the American people for the law, but he underrates the ethics of the legal profession when he says that of the 15,000 lawyers in Greater New York, the great majority are much more intent upon getting money than they are upon the means by which they get it. Mr. Jerome has himself called attention to the fact that within the last two months the police reports have shown the entire absence of gambling houses in New York. He has congratulated Judge Malone of General Sessions for his prison sentences in cases where the other judges have been in the habit of imposing fines which virtually amount to a license of gambling houses and pool rooms by indirection. This is practically saying that people will respect the law if it is enforced.

Were all judges to assert the extreme vigor of the criminal law the results might be striking, but it is not to be inferred from their leniency that they are lacking in respect for the laws they administer. Leniency in imposing sentence, and in giving the convicted man every possible chance through the probation system, will in many cases do more to inspire him with proper respect for the law than would an assertion of its majesty with full force. The death penalty and the maximum rigors of punishment we must have in readiness for use at any proper time, but we must also cultivate the more

humane and tolerant side of the criminal law.

The probation system requires sound discretion in determining when harshness and leniency can best be used. Judge Cleland of the Chicago Municipal Court has been censured by his associates on the bench for the way he has exercised this discretion. One of the charges brought against him is that of demanding excessive bail. A Lithuanian, for example, who had frequently been in court before, was brought before Judge Cleland drunken and repulsive, with a destitute wife and two starving children beside him. Doubtless with the object of startling this drunken man into some sense of fear of the law, and to jostle him into a realization of the plight of his homeless family, Judge Cleland held him for $10,000 bail. It was a breach of the man's constitutional rights, yet when the man came out from jail he did not get drunk again, and he so improved in the struggle to regain his manhood that he came to regard Judge Cleland as his best friend on earth.

A judge may in the same breath be censured for resorting to drastic measures and for employing measures not sufficiently rigorous, as in the case of Judge Cleland, but we have to make allowance for the fallibility of the human mind in perplexing predicaments, and if we demand of judges extrajudicial attainments and patience, we must not comment too severely upon their extrajudicial acts or abuses of their discretion in the interest of humanity.

If Judge Cleland has placed 1100 cases on probation during his thirteen months in the Maxwell street Court, and his fellow judges are scandalized, it looks as if the lack of a good probation law was quite as much to blame as any shortcomings of the judge. We understand that Judge Cleland's associates introduced one bill into the Illinois Senate and Judge Cleland another, both aimed at establishing a satisfactory probation system, and that the two measures were so diametrically opposed that in the words of Rev. Dr. William E. Barton they stood a good chance of killing each other like the Kilkenny cats. It is a pity if the Judges cannot unanimously agree on a bill.

The prevention of crime depends largely upon the prudence of the bench in enforcing the discipline of courts of law and the keen sensitiveness of lawyers to their responsibilities as officers of the court. The criminal law is an institution which must be as effectively administered by the civil authorities as any other department of public affairs. Civil society has given an illustration of this fact recently in the Rudowitz case. This poor exiled Russian, leading in this country the life of a law-abiding citizen, whom the United States has refused to extradite for a political offense, is an object-lesson to his nation of the majesty of the criminal law as something higher than mere regulations defining political offenses. His countrymen in these United States should be inspired with the spirit which is opposed to that of anarchy and lawlessness. This same inspiration should come to all our people in whose eyes the criminal law acquires new sanctity from the wisdom with which it is upheld by officials charged with the administration of justice.

THE SLOGAN OF THE REFORMER

Let us abolish corporations, injunctions, the tariff, interstate commerce, stocks and bonds, trust companies, railroads, the United States Senate, and the United States Supreme Court, in order that we may uphold the sacred-

ness of the Constitution, and live under a government of laws, not of men.

A NATIONAL DANGER

A contributor to one of our contemporaries, Mr. Tom L. Masson, who is editor of *Life* and presumably, therefore, an authority on that subject, draws attention to a new phase of the immigration evil in *Lippincott's Magazine*:—

A CRYING EVIL

We desire to call attention to a flagrant violation of one of our most important statutes.

Under our immigration laws, no alien can land in this country who has no money and no capacity. If he comes from a foreign shore, he must be identified and duly passed upon.

What is really happening? Every day, nay, almost every minute, in this country babies are being born who really have no right to enter our domain. Not only this, but they are calmly allowed to be here and not the slightest protest is made against them.

It is true that recently some effort has been made to discourage their presence. But this is by private individuals, and not by the authorities.

Every baby comes here from a foreign shore. He is a vagrant. Why, he has n't even clothes on his back. In a large percentage of cases he is sickly, and ought to be kept out by the quarantine authorities, if by no one else.

These intruders ought to be guaranteed under the pure infant act, or else they should be promptly shipped back to the sender, with instructions to at least provide them with the necessities of life before they land among a free people.

Perhaps the best way to remedy this crying evil (if its crying cannot otherwise be abated), would be to enlarge the duties of our inspectors of immigration, and compel them to ship abroad all newborn infants not comparing favorably, as regards education and capacity, with the least desirable class of immigrants we are receiving from foreign shores. It would be impossible to overestimate the vast economic burden of the infantile class upon our national life and resources. We can easily obtain all the people we want from Europe, to prevent the sum-total of our population from decreasing, and the wealth and property of the country would be greatly advanced were we to insist upon every new citizen possessing qualities ensuring his not becoming a private as well as a public charge.

We would not suggest any reform tending to destroy our sacred family institutions; on the contrary, after a probationary term in Europe the young aliens could be brought back to our shores and restored to their parents, provided they were able to pass the standard tests applied in the case of all ordinary immigrants. We would like to see a revision of our immigration laws attempted (if not carried out) on this basis. Any proffers of co-operation sent to us will be promptly transmitted to a gentleman picked for a leader of this movement—a learned and influential Professor of Criminal Law, whose income surreptitiously derived from consultative work for eminent kidnappers, thieves, blackmailers, etc., is said to exceed by three or four times his academic salary.

THE PHILADELPHIA LAWYER

"When I hear that expression about being as smart as a Philadelphia lawyer, I always think of a little thing that occurred way back in '58," an old Virginia lawyer said, smiling. "We had a pretty big case on hand, and our client prevailed upon us to import a Philadelphia lawyer as consulting counsel. I almost dropped dead when he said:—

" 'Well, I guess we had better send the judge who is to try this case a

couple of baskets of wine and a box or two of cigars?'

"I told him that if that were to be done either he or we would have to withdraw from the case at once, and he promptly apologized and said he had meant the remark merely for a joke.

"Well, we won the case in short order. For some reason the other side seemed to get rather rough treatment. I couldn't help saying to our Philadelphia lawyer, with some resentment, 'Your little plan of corrupting the court was entirely unnecessary.'

" 'But I did send the wine and cigars,' he said coolly.

" 'Not to Judge Yancey!' I exclaimed.

" 'Yes, but I believe I was careless enough to send it in the wrong name—I believe I sent it in our opponent's name!' "

$15 AND YOU'RE A GOOD FELLOW

The appended letter has been sent to us by a lawyer of Billings, Montana. The names are suppressed, but we may explain that it was written to the Judge of the District Court by the mother of minor children, for whom a guardian had recently been appointed. The Mister referred to, whose name has been left blank, is of course the guardian:—

Helena, Mont., Feb. 27, 1909.

Mr.——

Dear Sir:—

I have to have fifteen dollars I had to pay a doctor bill for —— and get shoes for the family and some goods for the spring and summer, and if you can write and tell Mr.—— to send it to me I will think you are a good fellow. I will soon be home and then you can come down and put the garden in.

If you will allow me it tell Mr.—— send it at once. I called the doctor and said—— has heart trouble and ought to be in a lower climate. This will be all for this time.

P. S. I would like to go to Seattle.

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.)

BALDERDASH *v.* JOSHMENOT

Supreme Court of Joke-idioture

April Term, 1909

In establishing the validity of a legal joke the burden of proof is on the perpetrator, and the record must set forth all material facts necessary to support an allegation of humor.

Where an attempt was made to have a certain writing adjudicated humorous by the Court, and the record did not include all material facts but the humor would have had to be proved by extrinsic evidence, *held* that a decision that a joke is null and void cannot be reversed for error.

One John Balderdash, who is an attorney-at-law of Syracuse, N. Y., and a reader of a frivolous publication known as the *Green Bag*, is the appellant in this action and plaintiff in the court below. Balderdash requested the editor of that publication, James Joshmenot, to insert in it a nondescript collocation of words purporting, according to the opinion expressed by the fabricator, to be a legal joke, and the editor having refused, brought a bill in *ach*-witty in the Court of Correspondence School naming Joshmenot as defendant and asking for a writ of specific performance. The defendant offered in evidence a contract between the plaintiff and himself, in which the defendant bound himself to furnish the plaintiff a course of instruction in legal jokes in the Greenbag Correspondence School of Humor. The Court, per Mr. Justice Joshmenot (who was, it appears, the same gentleman as the defendant), ruled that as the act of which plaintiff complained was done by the defendant in pursuance of the contract, equity could not be invoked to enforce a breach of contract unless the contract deserved to be broken, and the Court expressed the opinion that it plainly did not deserve to be, as the plaintiff was unquestionably in sore need of the defendant's instruction with regard to the essentials of a legal joke.

From this ruling the plaintiff appealed, bringing the case before the Supreme Court of Joke-idioture for review. The decision of the Court, written by Chief Justice Tush, is here given.

TUSH, C. J. It appears from examination of the record that the writing which the plaintiff wished to have inserted in the *Green Bag* and which the editor declined to print as a legal joke, was as follows:—

"Lawyer:—Do you want me to give you a piece of my mind?

"Stenographer:—(Picking up blank deed from adjacent table) I have it, thank you."

The plaintiff accompanied the foregoing with a statement in which he intimated that it was worthy of publication in the *Green Bag*.

The question which this Court is called upon to consider is whether the court below erred in its decision. The evidence before this Court does not warrant us in saying this, but rather points to the conclusion that the foregoing joke, so called, does not deserve a place with the humorous matter of the *Green Bag*, this conclusion being based on the fact that it is not only not legal and non-humorous, but undeserving. The lawyer would have seen nothing funny in his stenographer's handing him a legal blank. The joke, if it had existed, would have been purely clerical. The stenographer must have thought the act and remark in picking up the blank to have been funny, as construed in a different sense such an act and remark would have appeared imbecile, but the presence of humor cannot be determined merely by elimination of all other possible interpretations.

Again, there is a radical distinction between a mental blank and a legal blank. Just because a lawyer's mind is a legal blank, as it frequently is, it by no means follows that it is a blank in the common sense of the word, unless it can first be proved that he is the reverse of a brilliant leader of the bar. In a good legal joke the record must show clearly all the facts material to support an allegation of humor, the burden of proof being on the perpetrator. When such facts do not appear in the record, but have to be proved by extrinsic evidence, a decision that a joke is null and void cannot be reversed for error.

All Concur.

A PETITION FOR A NOVEL FORM OF EQUITABLE RELIEF

Cassius—Will you sup with me to-night, Casca?

Casca—Ay, if I live, and your mind hold, and your dinner worth the eating.

—*Julius Cæsar.*

A GUEST at the recent banquet of the James Wilson Law Club of the University of Pennsylvania is good enough to give us an opportunity to reproduce this quasi-legal document in our pages:—

In Equity:
Pneumo-gastric Nerve
v.
Wm. D. Lewis

March Term, 1909
In the Court of Common Prudence
Sitting in Discretion

To the Honorable Good Judgment of said Court:—

Your petitioner respectfully represents:

1. That as a duly appointed functionary of the defendant organism, it is your petitioner's duty to quell and suppress riots, surfeits, and congestion of traffic through and along the channels, arteries, and conduits of said bodily organization.

2. That he is informed and avers that certain malicious and evil-minded persons, acting under the name and style of the James Wilson Law Club, are conspiring and contriving to greatly vex and annoy your petitioner by introducing into the confines of the said defendant organism an ill-assorted and disturbing medly of stews, brews, and concoctions, as particularly set forth in an "Exhibit" hereto attached, marked "Menu."

3. That unless precautionary relief is granted by your Honorable Court,

your petitioner will be made sick, sore, and distressed, and greatly hampered and obstructed in the performance of his constitutional and lawful duty and function.

Wherefore, showing the above facts, your petitioner invokes the aid of your Honorable Court, that a writ monitory may issue directed to the head (sometimes called the Governor) of said defendant at his own pain to use all discretion and restraint necessary in the premises, or he will ever swear,—etc.

Sworn to and subscribed, this 11th day of March, A. D., 1909.

Sara Bellum,
Notary Public.

(SEAL)

MENU

Cocktail

OYSTERS

First Lawyer—'Tis a good fat oyster, and hath a gut like His Majesty's Chancellor.
Second Lawyer —Aye hath it that. And an eye, too, like his solicitor's—cold and hard and rheumy—seeing naught but his fees.—*Old Play.*

Holly Beach Salts

Celery *Olives*

SOUP

He sips his sack, and sups his soup,
Nor thinketh of attainders;
He sips his sack, and sups his soup,
And leaveth no remainders.
—*Mortlake's "Old Bencher."*

Terrapin Soup

FISH

King—My ships sweep every sea, and take their toll
Of every finny tribe that cleaves the brine.
Fool —So, Sire, the pirates of your Inns of Court
Do prowl in every troubled sea, and take
A toll of every scaly fish that swims
Within the lawyer's net.
King— Be still, thou fool!
'Tis only wise men know the law.
Fool— And only fools that seek it.
—*Leweson's "The King's Hostage."*

Planked Shad *New Potatoes*

Rhine Wine

MEAT

Judge—'Tis meet the law should thus divide this broad
Domain and give to each his several share.
—*Skilton.*

Judge— Mr. Attorney, 'Tis not meet for thee that thus
Thou twist the law.
Attorney—My Lord, I crave your pardon, but in truth
It is both meat and drink.
—*Merryweather's "White Assize."*

Fillet of Beef, Fresh Mushrooms

Stuffed Tomatoes *Green Peas*

PUNCH

Sheriff—What Ho there! Clear the way for the King's Justiciars. Out varlet, or I'll give thee a punch in thy paunch thou wil't long remember.
—*Beaufort's "A Suit for a Dukedom."*

Punch au Kirsch

GAME

The Judge he was the jelly,
And much he looked the same,
The Jury was the roasting spit,
The client was the game.
—*Baldwin's "Old Ballads."*

Breast of Mallard Duck

SALAD

Chief Justice—'Tis clear thou did'st enfeoff him of the land
But not the emblements. Recount me then
What pregnant grains the fecund soil did hold.
Yeoman— No grains, my lord, but chives and garden greens
And one fair cider orchard, ten roods long.
Chief Justice—A salad, by my troth, dressing and all!
—*Sterling's "A Yeoman's Strategy."*

Salad in Season

Cheese

ICE

King—What, shall the mercy of our State be sealed!
The ocean of our Justice froze to ice!
Fool— I would it were, then would lawyer's fees be icicles,
and bailiffs die of chills.
King—Congeal thy prattle, fool. Should'st know, the frost
Of precedent, like snow on winter corn,
Doth keep the law alive.
—*Crashaw's "A Royal Pardon."*

Neapolitan Ice-cream

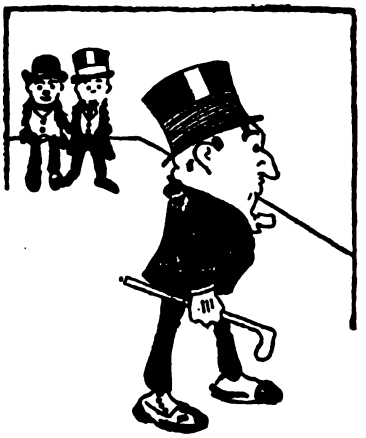
Cakes

Cigars *COFFEE* *Cigarettes*

Lord Jeffrys—Look you, culprit, make an end of the matter that we may proceed to judgment.
Prisoner—As speedily as may be, my lord. I have little more to say.
Attorney-General—More! We have had a surfeit already. Stuff us no more with your sweets and oily reasons, but reach an end.
Lord Jeffrys—That's right, Mr. Attorney-General, smoke him out—pipes do always follow the nuts and raisins.
—*Brackelweight's Trial.*

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 LAWYER'S HARD LOT

Joax—His life is full of trials.
Hoax—Indeed!
Joax—Yes; he's a lawyer.—*Brooklyn Eagle.*

A burglar, who had entered a minister's house at midnight, was disturbed by the waking of the occupant of the room he was in. Drawing his knife he said:

"If you stir you are a dead man. I'm hunting for money."

"Let me get up and strike a light," said the minister, "and I'll hunt with you."

—*Law Student's Helper.*

A New York lawyer recently filed a petition in bankruptcy giving his liabilities as $277,116.29 and his cash assets as $1.33.

—*Law Notes.*

A lawyer once asked a man who had at various times sat on several juries: "Who influenced you most—the lawyers, the witnesses, or the judge?" He expected to get some useful and interesting information from so experienced a juryman. This was the man's reply.

"I'll tell yer, sir, 'ow I makes up my mind. I'm a plain man, and a reasonin' man, and I ain't influenced by anything the lawyers say, nor by what the witnesses say, no, nor by what the judge says. I just looks at the man in the docks and I says, 'if he ain't done nothing, why's he there?' And I brings 'em all in guilty."—*The Bar.*

Uncle Mose, needing money, sold his pig to the wealthy Northern lawyer who had just bought the neighboring plantation. After a time, needing more money, he stole the pig and resold it, this time to Judge Pickens, who lived "down the road a piece." Soon afterward the two gentlemen met and, upon comparing notes, suspected what had happened. They confronted Uncle Mose. The old darky cheerfully admitted his guilt.

"Well," demanded Judge Pickens, "what are you going to do about it?"

"Blessed ef I know, Jedge," replied Uncle Mose with a broad grin. "I'se no lawyer. I reckon I'll have to let yo' two gen'men settle it between yo'selves."—*Everybody's.*

Correspondence

"CONSERVATISM IN PROCEDURE"

To the Editor of the Green Bag:—

Dear Sir: I am in receipt of the March number of the *Green Bag*, and have read with a good deal of interest Mr. Frederick W. Lehmann's article on "Conservatism in Legal Procedure," in which he refers to some Texas verdicts and the discussion of the higher courts in regard to them. He might with equal pertinence have reviewed the holdings of the Texas courts on some indictments.

While Texas has taken a long step forward in regard to the necessary allegations in indictments for murder and other kindred offenses, her Court of Criminal Appeals still follows the old-time unreasonable technicalities with reference to indictments for some other offenses, and with reference to some of the formal parts of indictments. In the case of *Thomas* v. *The State*, 18 Tex. App. 220, the commencement of the indictment is as follows:—

"In the name and by the authority of the State of Texas: The grand Jurors in and for the County of Freestone and State of Texas, duly elected, tried, impaneled, sworn and charged in the District Court of said Freestone County, Texas, at its February Term, A. D. 1884, diligently to inquire into and true presentment make of all offenses committed within the County of Freestone against

the penal laws of the State of Texas, upon their oaths present and charge that, etc."

The Court says: "It is to be noted the grand jury was a grand jury for Freestone County, sworn and charged in the District Court of Freestone County to inquire into offenses committed in Freestone County, but it does not affirmatively allege that the indictment was presented in the District Court of Freestone County." And for this defect the indictment was held bad. The indictment in this case was doubtless filed by the district clerk of Freestone County, and the record shows that the case was called and tried in the District Court of Freestone County, but the Court, appealing to their technical instead of their common sense, could not determine where or in what court this indictment was presented.

The indictment in this case was for forgery, and the Court says that another objection to the indictment is that that it only sets out the alleged forged instrument in substance and not according to its tenor, and the learned Judge rendering the opinion says: "The object of which reqirement (that the instrument be set out by its tenor) is . . . to enable the Court to judge whether or not it is an instrument whereof forgery may be committed."

Now if that be the object of the rule, it is hard for the layman, or ordinary lawyer, to understand why pleading the instrument in substance, when the substance of the instrument shows it to be a subject of forgery (which it must necessarily do) is not sufficient.

In the same opinion the Court says: "In some cases it is permissible, as for instance in perjury or swindling, to set forth the instrument by its substance and effect, but we are aware of no case holding such pleading sufficient in forgery." It occurs to the ordinary mind that if the Court had been willing to make a common sense stride along the line of progress for the protection of civilized society and its ordinary business it would not have lost the opportunity to modify the rule and conform it to the rule theretofore laid down in cases of perjury and swindling.

In the case of *Ex parte Rogers*, 10 Tex. App. 661, in the lower left hand corner of the alleged forged instrument as set out in the indictment, appeared the following words: "In presence of John Gardner, Henry Miller." The instrument introduced in evidence in the lower left hand corner had the words: "Sealed and delivered in presence of John Gardner, Henry Miller." The Court held the indictment did not sufficiently set out the written instrument. Bearing in mind the reason for pleading the instrument according to its tenor laid down by the Court in the case cited above, it is hard to understand why the indictment was insufficient in this case. How would the words "sealed and delivered" assist the Court in construing the body of the instrument, and in determining whether or not it created, increased, diminished, or discharged a pecuniary obligation? In 1887 the Court showed some sign of reform. It held in the case of *Hennessy* v. *State*, 23 Tex. App. 352, that misplacing the dot over the letter "i" did not vitiate the indictment nor make the varience fatal between the indictment and the instrument introduced in evidence, but in the case of *Edgerton* v. *State*, 70 S. W. Rep. 90, decided in 1902, the Court seems to have returned to the old "landmarks." It holds that the words "for labor" in the tenor clause in the indictment and "for labobar" in the instrument itself, are not the same, that the variance is fatal, thus apparently discriminating in favor of the forger who is deficient in orthography.

The Judges of the courts of criminal appeal in this or any of the other states are not altogether to blame for adhering to precedents that have survived the reasons upon which they were based, if they were ever based on reason. Mr. Lehmann in his article above referred to says: "How many members of the profession are there who would not be quick to disclaim that they are criminal lawyers, and are there not some even to resent the designation as a term of reproach?"

This is true, and still when we are representing persons charged with crime we uniformly go before our courts of appeal and insist on their rigidly and strictly following these time-worn precedents and technicalities, at least such of them as apply to the case in hand. And as we see lawyers, usually able lawyers, coming from different parts of the state, appearing each week before the Court of Appeals, each insisting on the Court following the technical precedents laid down in his case, and we realize that the Judges, though learned, and usually broad-minded, high-minded men, are human and subject to human influences, can we wonder at the "Conservatism in Legal Procedure?" How can a reform

be brought about? Lawyers feel that they are not true to their clients unless they urge every defense, both real and technical. Acts of the Legislature looking to reform in criminal procedure are oftentimes, as Mr. Lehmann has pointed out, disregarded or set aside. No doubt but articles like Mr. Lehmann's in the law journals will do a great deal of good in bringing about the much needed reforms he therein discusses.

I have thought that if the states would arrange for the various circuit and district attorneys to attend the courts of appeal, requiring each to prosecute before said courts the cases appealed from his circuit or district, it would have a good effect in that it would, at least to some extent, counterbalance the influence of attorneys for the defense. It is true, most, if not all of the states, have an assistant attorney-general to represent the commonwealth before those courts, but however able he may be he is only one against the many. It would be expensive to have the circuit or district attorneys attend the courts of appeal, but the end to be accomplished is greater than the expense.

J. H. McMILLAN.

Comanche, Texas, Mar. 24, 1909.

A CRITICISM AND A SUGGESTION

To the Editor of the Green Bag:—

Dear Sir: Are questions and criticisms in order? If so, let me submit a criticism on the Latin course required—at least in Pennsylvania—of expectant students of law. It is the one practically required for entrance to a college. Yet from my experience, it is quite beyond the opportunities afforded to quite a proportion of legal fledglings who have only a high school training, and listening to the divine call of Astræa must press forward as rapidly as possible in their studies. I copy the requirements from the pamphlet issued by the State Board of Examiners, which probably does not materially differ from that in other states:—

"A. The first four books of Cæsar's Commentaries.

"B. The first six books of Virgil's Æneid.

"C. The first four Orations of Cicero against Catalíne.

"This examination will include a general knowledge of the subject-matter, history, geography and mythology of A and B:—sight-translations from the above works and sight-translations taken at large from Virgil and Cicero adapted to the proficiency of those who studied the prescribed works. The student will also be required to render into Latin a short passage of English based on the first book of Cæsar's Commentaries."

From what I have seen of the work of high schools in country towns, and from my experience in small colleges, I think few of their students get a sufficient literary grasp of the books set. They do not have the environment, which helps so much; their ambition is roused; they are willing but not sturdy enough to master obstacles and have not the time to begin anew. Yet a distinct proportion of our future lawyers is drawn from such antecedents. For them Virgil is a loss of precious time. Mythology will have no place in their future pleas, and Sallust's report of Cæsar's speech against Cataline is worth to him more than a book of the Commentaries. To the youth who has, or can make, his opportunities the course is proper enough; but the one whose knowledge of Latin is elementary and who has but short time to add to it a different outline is to me practicable. I am, let me say, not a lawyer but a teacher, and fond of legal literature. Having had twice a position in small collegiate institutions, I have partly tested by elective studies the outline I wish to suggest. And I am now trying to bring forward by private tutoring a young man who is in this position. A solid year of hard study will be needed to master the Latin set in the pamphlet, and then there is the loss of time. But a course of this work would give him a good Latin foundation and would in the end prove of great service to him.

A. In place of Cæsar's Commentaries let him read Justinian's Institutes. The Latin is very easy; the technical terms, easily learned; the study would aid him in reading Blackstone; and the amount (c. 160 pages) would be an equivalent to the four books.

B. For Virgil substitute Cicero's De Legibus. The three books with either one of his three essays on oratory, De Oratore, or Orator, or the Brutus, would be quite equivalent to the 7,000 lines of Virgil required.

C. For the Cataline orations, which have largely a historical interest and fine invective to recommend them, these could be read to more practical advantage: the first Verrine, the pro Roscio Amerino, the Manilian Law, that pro Milone, and pro Rabirio, all discuss

proper legal questions, as also constitutional ones.

There seem to be but two practical objections. It would make the courses optional, and would affect seriously the standard of broad literary training, so essential to a fully equipped lawyer. Or if this course be substituted, the college graduate would have to do a double amount of Latin, which again might be a burden through stress of circumstances.

Still, I am sure that there are many students for whom (as in the case now under my care) such a course under pressure of scant means and lack of previous training would make the best, if not the only way to promptly utilize the acquisition of a competent mastery of Latin for all future forensic and legal purposes.

(Rev.) A. A. BENTON.

Foxburg, Pa., Mar. 20, 1909.

HIS INDEPENDENCE DAY

MASTER BILLY TAFT.—"They said I shouldn't be able to get along without my Teddy Bear—but I'll show 'em!"—*Reproduced from* PUNCH, *with acknowledgments.*

The Legal World

Chief Justice John Russell Tyson resigned his position on the bench of the Alabama Supreme Court February 5 to practice law in Montgomery, Ala.

Mr. William D. Guthrie of the New York bar is giving a series of eight public lectures at Columbia University on "The Judicial Power under the Constitution of the United States."

Hon. Francis L. Wellman is giving a course of public lectures under the auspices of Fordham University School of Law at the Catholic Club, 120 Central Park South, New York, on "The Trial Lawyer; with Some Practical Suggestions on the Trial of Cases Before Juries," the dates being February 4, March 11, April 15 and May 6.

The James Wilson Law Club of the University of Pennsylvania held their tenth annual banquet at the University Club, Philadelphia, March 11. Mr. Charles Crawford Hindman, Jr., '09, acted as toastmaster, and the guests were Hon. Robert von Moschzisker, Hon. William H. Staake, Hon. Joseph F. Lamorelle, John M. Gest, Esq., William Draper Lewis, Esq., Crawford D. Hening, Esq., and Glenn C. Mead, Esq. The officers of the club are as follows: Winfield Wilson Crawford, '09, president; John Joseph Stetser, '09, vice-president; Edward Wallace Chadwick, '10, secretary; William Page Harbeson, '10, corresponding secretary; and Charles Crawford Hindman, Jr., '09, treasurer. The membership, besides the foregoing, includes Messrs. J. C. Arnold, S. D. Bell, H. K. Chang, A. McConnell, D. H. Parker, G. H. Baur, W. H. Brundage, R. A. Dungan, F. H. Gaston, J. T. Gibbs, J. G. Gordon, Jr., B. H. Hepburn, R. E. Lamberton, J. E. Nachod, F. A. Paul, T. M. Woodward, J. Adams, Jr., H. B. Dutton, W. S. Farquhar, L. J. Frank, R. E. Harcourt, J. B. Holland, T. McC. Hyndman, W. McC. Johnson, H. C. Parkin, J. F. Ryan, J. F. R. Scott, P. M. Sloan, J. R. Waite, E. L. Wallace, W. R. White, and R. B. Woodring. The interesting menu will be found on one of the pages of the Editor's Bag.

The Justices of the Supreme Court of New York, tired of their cramped quarters in the Tweed County Court House, and weary of the delays of the County Court House Commission, will undertake the selection of a site and the building of a new court house themselves. In this they will follow the precedent of the Justices of the Appellate Division, who managed the erection of their court building on Madison Square.

The Court of Appeals of the District of Columbia on March 11 affirmed the anti-boycott injunction granted to the Bucks Stove and Range Company, in connection with which Gompers, Mitchell and Morrison of the Federation of Labor were sentenced to a year in jail for contempt. The sting of this judgment was modified to some extent by the dissenting opinion of Chief Justice Shepard, who said that the constitutional right of a free press should have protected the *Federationist* from restraint, and that if it did conspire by publishing its unfair list, the remedy of the injured party should have been in a civil suit for damages.

The celebrated trial of Col. Duncan B. Cooper and his son Robin Cooper, charged with the murder of former United States Senator Edward Ward Carmack, who was fatally shot on the streets of Nashville Nov. 9, 1908, ended Mar. 20 with a verdict of murder in the second degree, with twenty years' imprisonment as the penalty. The trial lasted three months, and thirty-one days were taken to select the jury, the competence of which has been widely commented upon on account of the presence of illiterate persons upon it. After a month of testimony the attorneys for both sides began summing up. Arguments of extreme length were heard. Each attorney took a day for his address, and Gen. Washington of counsel for the defense, took twenty-one hours to put his argument before the jury. Judge Hart then took two days to prepare his charge of instructions, which made 30,000 words, and was the longest set of instructions given to any jury in a criminal case in the history of Tennessee.

The bill consolidating and amending the copyright laws was one of the most important to be passed during the closing hours of the 60th Congress. It extends the copyright period from fourteen to twenty-eight years, and gives foreign authors a period of sixty days in which to make arrangements for publication in this country.

William Wirt Howe, twice President of the American Bar Association, former general counsel for the Texas & Pacific Railway and the American Sugar Refinery Company, died Mar. 17 at the age of seventy-six years, at New Orleans. He was born at Canandaigua, N. Y., and educated at Hamilton College, Clinton, N. Y. He enlisted in the Union Army at the beginning of the Civil War and rose to the rank of Major. He was the author of several works on civil law.

The federal grand jury at New York found a verdict early in March against the American Sugar Refining Company, charged with having evaded import duty by the use of dishonest scales. This involves the payment of $134,116 in penalties. An appeal was taken but the government went ahead with another case involving $1,500,000 on similar charges of false weight.

Hon. Charles E. Parker, formerly Presiding Justice of the Appellate Division of the Supreme Court of New York, Third Department, died in his native place, Oswego, N. Y., Mar. 2. He was born in 1836 and was graduated from Hobart College in the class of 1857. Studying law with his father, John M. Parker, he was admitted to the bar in 1859, and was elected in 1867 to the State Constitutional Convention. In 1883 he was elected County Judge and Surrogate of Tioga County, and in 1887 a Justice of the Supreme Court. In October, 1895, he was appointed by Gov. Levi P. Morton Presiding Justice of the Appellate Division, Third Department. He held this place until Jan. 1, 1907, when he retired by reason of the age limit. On the Supreme Bench he made a reputation as one of the most learned and brilliant Justices ever at the head of the Appellate Division. His opinions were notable for the clarity and accuracy of his reasoning. While occupied by legal problems he frequently relieved his mind by reading dime novels of the "Nick Carter" type. He was much interested in scientific agriculture.

An important decision was rendered in the United States District Court at Kansas City, Mo., March 8, by Judge Smith McPherson of the United States Circuit Court for the southern district of Iowa, declaring the two-cent railway rate laws of Missouri invalid. Judge McPherson regarded the evidence as showing without question that the rates did not allow a fair and reasonable profit.

Mr. John F. Geeting delivered a lecture before the Law School of Northwestern University March 22, in which he illustrated what he called some defects and absurdities in the Illinois criminal code, which he described as "a sort of a crazy-quilt consisting of an indiscriminate patchwork. Many of these patches are the result of spasmodic legislation in which previous laws have been lost sight of in efforts to enact new laws to cover particular cases, already within the law."

Judge R. M. Benjamin, who went to Bloomington, Ill., in 1856, after graduating from the Harvard Law School and was admitted to the bar on an examination certificate signed by Abraham Lincoln, delivered an address at the Lincoln centennial at Bloomington recently, on "Lincoln, the Lawyer, and his Bloomington Speeches." Judge Benjamin considers the best description of Mr. Lincoln as a lawyer that he has ever read to be that by Thomas Drummond, at one time Judge of the United States Circuit Court for the seventh district. Judge Drummond thus described Mr. Lincoln as a lawyer: "Without any of the personal graces of the orator; without much in the outer man indicating superiority of intellect; without great quickness of perception, still, his mind was so vigorous, his comprehension so exact and clear, and his judgment so sure that he easily mastered the intricacies of his profession and became one of the ablest reasoners and most impressive speakers at our bar. With a probity of character known by all; with an intuitive insight into the human heart; with a clearness of statement which was itself an argument; with uncommon power and felicity of illustration—often, it is true, of a plain and homely kind—and with that sincerity and earnestness of manner which carried conviction, he was perhaps one of the most successful lawyers we have ever had in the state."

The twenty-first annual banquet of the Kansas City Bar Association was held February 22. Toasts were responded to as follows, Mr. J. J. Vineyard, toastmaster: "The Outlook for the Young Lawyer," Mr. Samuel Sawyer. "The Law and the Lady," Mr. W. S. Gilbert. "Damages," Hon. W. S. Cowherd. "The Democracy of Justice: The Jury," Hon. D. M. Delmas.

The eighth edition of the Directory of the legal fraternity of Phi Delta Phi has just been completed and is now ready for distribution by the secretary, George A. Katzenberger of Greenville, O. Besides the information regarding the 9,000 members, there are several hundred half-tone portraits, including those of the founders of the Fraternity, Convention and Chapter groups; fratres Roosevelt, Taft, Fuller, Harlan, Brown, Brewer, Holmes, Garfield, Hitchcock, Winthrop, and other members.

Two New England Chief Justices, Lucilius A. Emery of Maine and Simeon E. Baldwin of Connecticut, with Supreme Court Justice Francis J. Swayze of New Jersey, were guests of honor of the law alumni of New York University at a dinner Mar. 25 at the Hotel Astor, New York. The law alumni struck silver medals in honor of the New England jurists, replicas of which, depending from purple ribbons, decorated the shirt fronts of the older members of the alumni association. Justice Victor J. Dowling of the Supreme Court of New York, retiring president of the association, presided.

The salient features of the new charter reported for New York City by the Charter Commission are: the Board of Estimate and Apportionment, consisting of eight members to control finances, with seven bureaus under it; the Board of Aldermen to be abolished and in its place a Council of thirty-nine without pay; executive responsibility centred more in the mayor, who is to have $25,000 salary, instead of $15,000, as at present; a uniformed chief of police under a commissioner; Board of Education to cease to be a separate corporation and reduced to fifteen members; coroners to be abolished and inquests to be held by magistrates, autopsies by Health Department; and a uniform system of accounts.

Chief Justice Simeon E. Baldwin of Connecticut retired from the Supreme Bench of that state February 5, having reached the age limit of seventy years. Justice Baldwin was president of the American Bar Association in 1890. In a letter Governor Lilley gracefully expressed the state's appreciation of his long and distinguished career in her service. Governor Lilley has nominated Justice Frederick B. Hall of Bridgeport to be Chief Justice succeeding Judge Baldwin.

Washington F. Willcox, twice a member of Congress from Connecticut died in Chester, Conn., Mar. 8. Born in Killingworth, Conn., in 1854, he was graduated from the Yale Law School, and opened his first law office at Deep River. After serving in the lower house of the Connecticut Legislature and in the State Senate Mr. Willcox was, in 1893, elected to Congress. At the conclusion of his second term Mr. Willcox declined a renomination, resuming the practice of law. At the time of his death he was a member of the Connecticut Public Service Commission.

The second trial of the famous rebating case against the Standard Oil Company, involving the $29,240,000 fine, was terminated in the United States District Court at Chicago Mar. 10 by Judge Albert B. Anderson's direction to the jury causing it to bring in a verdict of not guilty. Judge Anderson concluded his charge by saying that he felt that the government had failed to sustain the allegations in the indictment, and if the jury should find the defendant guilty he would set aside such verdict instantly, as he knew the United States Court of Appeals would. This ruling was based upon the ground that as the defendant was to be presumed innocent until proved guilty, the jury would have to be satisfied beyond all reasonable doubt that there was a definitely fixed 18 cent rate, properly published and filed with the Interstate Commerce Commission. If the Court of Appeals, considering the evidence in all its relations, could not tell that the railroad tariff sheet and the Illinois classification really fixed any 18 cent rate, and it was a matter about which reasonable men could disagree, the evidence of the two documents, said the Court, would not be sufficient to warrant the jury in finding such a rate to be established beyond a reasonable doubt.

HENRY A. WISE, ESQ.

JUST MADE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK

(Photo. by Pach)

The Green Bag

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The New Federal Attorney at New York City

THE appointment of Henry A. Wise to the position of United States Attorney for the Southern District of New York by President Taft in a measure confirms the recent prophecy of a well-known Congressman that President Taft would select old men for counsel and young men for action.

Not many years ago to be United States Attorney was more or less of an empty political honor, and its chief merit was in the popular conception that the individual occupying such a position was the personal representative of the President of the United States, and with the occasional prosecution of a culprit for counterfeiting the currency of the United States, his duties were chiefly political. With the great number of statutes regulating interstate commerce, immigration, naturalization, internal revenue, customs, United States mails, national banks, and crimes on the national reservations and the high seas, his position has become so important that the success of an administration depends greatly upon the prudence and fidelity with which the United States Attorneys perform their duties. Indeed so delicate is his position that the mere intimation in the columns of a newspaper that his office has begun to investigate the affairs of a large corporation, has been sufficient to cause a material depreciation in the stocks and securities of that corporation. In fact, from an executive standpoint, the office of the United States Attorney reflects the policy of the administration. Of the eighty-six districts into which the United States is divided, with one United States Attorney for each district, the Southern District of New York (composed of the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester) is the most important. Hence, with the announcement of the appointment of Henry A. Wise, one frequently hears the query, "Who is Henry A. Wise?" Not so, however, with attorneys and persons who have had occasion to visit the United States Attorney's office during the past five years, for invariably they have left that office with the remark, "That man Wise knows his business."

He was appointed Assistant United States Attorney by ex-Attorney-General Knox on September 1, 1902, and during the past six years has "served time" at every desk in the office. Notwithstanding the fact that he is under thirty-five years of age, a casual glance at the federal records shows that the number of cases in which he has represented the

Government of the United States is well up in the hundreds, with the result that in ninety per cent of the cases his contentions have been upheld and affirmed by the courts.

In addition to his success as Assistant United States Attorney in charge of the prosecution of Charles W. Morse under the National Banking Laws, and more than a score of railroads and large shippers for giving and receiving rebates in violation of the laws regulating interstate commerce, he has made contributions to the federal procedure in brushing aside much of the purely conventional which clings to the federal practice.

While a friend of ex-President Roosevelt and a party man in a strict sense, having fought his way to a position high in the counsels of the Republican organization in New York County, with its powerful influence for the asking, which one of his most intimate friends urged him to solicit, when his name was under consideration by the administration for the position of United States Attorney his reply was characteristic: "I appreciate the favorable attitude of the Republican organization and shall be very glad if President Taft appoints me, but it must come as a promotion and in recognition of my services in this office rather than upon any political identification I may have."

To those who study him at a distance and observe his red hair, flashing eyes and strong features, he might seem to lack Portia's quality of mercy, but those who know more of him think differently, and their faith is well founded. While firm and aggressive in the enforcement of the laws as he finds them, in his private and social life he is mild and gentle, and retiring to the degree of diffidence.

Born in Richmond, Virginia, at the high tide of carpet-bag rule in that state, educated at the Virginia Military Institute, the West Point of the South, where he not only attained distinction in the academic work, but acquired no mean reputation for decision and aggressiveness upon the football field, a good horseman, a sportsman who knows the merits of a gun and dog, a soldier, and sufficiently skilled in politics "to see around the corner," he is indeed an interesting character. He is a busy man, yet no one need present a card to see him. None appreciate this more than the Assistant United States Attorneys who seek his advice when confronted with perplexing propositions of law.

An amusing incident is related by a fellow officer in Wise's regiment in the late war between the United States and Spain. During the early weeks of the war Wise was appointed Judge Advocate to a military court by the late General Fitzhugh Lee, and subsequently was commissioned to organize a civil government in the province of Bayamo, Cuba. One day while sitting quietly in his office he received a report that one McCarthy, a private in his company, enlisted from the Five Points section of New York City, and having spent most of the time since mustered into service in the guard house, had captured a supply of *aqua diente*, an intoxicant to which many of the natives of Cuba are addicted, and was then demoralizing the discipline of the entire Fourth Regiment. Reading the report hastily, he directed one of his subordinates to give McCarthy the following message: "McCarthy, go lock yourself in the guard house." Ordinarily this would have been sufficient to quiet McCarthy, but not so on this day. For immediately upon the receipt of the above he became worse, and giving the messenger a cuff which

sent him sprawling to the ground, McCarthy rushed off in the direction of the officers' quarters. Wise, who had been observing McCarthy's conduct from his window, saw him coming and calmly withdrew his revolver from its holster and waited for McCarthy to enter, which he did in a rage, slamming the doors behind him and uttering the oaths of a Spanish pirate. Approaching within a few feet of Wise he saw the revolver, paused and said: "Put down de gun and I will lick the ground wid ye." Wise did put down the gun, and a few minutes later those who heard the commotion and had assembled outside saw McCarthy's body flying through the front door as if shot from a cannon and roll down the steps, to be taken not to the guard house, but to the hospital. Later, when McCarthy had fully recovered from the severe thrashing, he again approached Wise and, coming to "attention," saluted and said: "Major, I wants to thank you for not killing me."

As soon as vacation time comes, he migrates to Cape Charles, Virginia, the ancestral home of the Wise family since the early part of the seventeenth century. And if the weather is fair, he is likely to be seen rambling along the beach in company with his three babies, Bosso (a Shetland pony), and a variable number of pointers and setters. If, however, the weather is cloudy, as it frequently is at the Virginia capes, it is a fair guess that he will be found lying on the floor in the same company, Bosso excepted, reading Mother Goose stories for their edification.

Those of an older generation observing the confidence and abandon with which he presents his facts to the jury, recall the famous debates in which his father, John S. Wise, who, in one of the most brilliant and picturesque campaigns in the annals of American history, marshaled the young men of Virginia under the Readjuster party, and his grandfather, Henry A. Wise of Virginia, standing over the prostrate form of Know-Nothingism, which he had driven from American politics, and saying: "I have met the Black Knight with his visor down, and his lance and spear are broken."

Thus history has held the name of Wise for twelve generations, unto Sir William Wise, knighted by Henry VIII.

The Law as a Career in America*

By Hon. Charles J. Bonaparte

To one debating with himself which road he shall take of several open before him it is of decisive moment where he wishes to go; until he is clear in his mind as to this, he can make no intelligent choice. For the same reason, before a young man can decide upon his work in life and before any one can advise him fruitfully how he ought to decide, he or his mentor must know what he hopes and wishes to get out of life by means of such work; what, for him, are the ends of working and of living; what he would make of himself and be to others through the work he does and the life he lives. Of course, there are certain conditions imposed by the nature of things upon the choice of any profession: a blind man cannot

*Delivered at the Harvard Union, April 2, 1909.

be a painter, nor one stone-deaf from birth a musician, nor, in short, anybody a successful workman in work he is morally or mentally or physically unfit to do. Moreover, one of the great majority of men, in America as elsewhere, must look to his hands or his head to fill his mouth and other mouths, big and little, which will crave filling around his fireside; and, whatever the dignity or interest of any form of work, unless it make the pot boil it can be but a luxury in this work-a-day world. But given that, so far as he can tell in advance of experience, he could do the work of the law no worse and not much better than the work of any one of several other callings, and given further that he thinks he could make a living either as a lawyer or otherwise, whether our supposed young man will do well if he become a lawyer will depend, in last resort, on what, beside a lawyer, he expects and wishes and hopes the practice of the law to make of him.

He may look to it to make him a rich man, as men are nowadays counted rich in America: to some, perhaps to many Americans of today wealth, of itself and in the main for itself, is, or at least seems to be, the end of life, the *summum bonum* of an earthly existence. In saying this, it is needless to add that I do not mean by "wealth" a reasonable, even an abundant, provision for old age or misfortune; nor yet the wherewithal of comfort, or even of rational luxury, for himself and his family; that he should seek for these things shows merely that he has common sense and the common wants and wishes of mankind. The frame of mind which makes riches the goal of human effort is illustrated by a remark said to have been made many years ago by a well-known old gentleman of my native city. Speaking with great contempt of one among his neighbors, he exclaimed: "Oh, he is a miserable creature! He hasn't ten thousand dollars in the world!" The sentiment inspiring this remark was not common in Baltimore then, and in truth is not common there now, but there is a larger and more prosperous city to the north of Baltimore where, in certain circles and with some expansion in figures, it is sufficiently familiar. If a man have a million, he is entitled to treatment as a human being; if he have ten, he is named with reverence; if a hundred, he is approached with nine prostrations. It may well be, nay it is certain, that some young Americans look forward to the last mentioned happy estate as the *dies idealis* of their earthly days; and it may be also that among them some may think of the law as a portal to the sublunar paradise. But if any would-be "captains of industry" or "Napoleons of finance" or others longing to be multi-millionaires among my hearers propose to study and practise law as a means of becoming what they thus would be, I give them the advice of *Punch* to those minded to get married: "Don't." The methods whereby our phenomenally rich men and our huge corporations and clusters of corporations have grown to be so rich and so huge are well illustrated in the record of a suit which I recently heard decided by the Supreme Court of the United States. A certain great combination, almost incredibly prosperous, had some 6,600 gallons of coal-oil in a large receptacle at Guthrie, Oklahoma. By the laws of Oklahoma, then a territory, when oils could not stand certain tests in flashing and specific gravity they were required to be sold in special packages marked so as to show their dangerous character. By some mistake, 300 gallons of gasolene were run into the tank at Guthrie, and

the local agent asked instructions of his company's general manager at Dennison, Texas, as to what should be done with its contents. The manager replied, in substance, that he hoped the mixture with gasolene wouldn't make the oil unduly dangerous, but that, anyhow, they must "take the risk" and "see what would happen." What did happen was that they sold three barrels of the compound, for ordinary coal-oil, to a grocery store, that a clerk in the store bought a canful for use in his home, that his house was destroyed and his wife and two children were burned to death. In this instance it will be noted that the corporation in question had to choose between rendering some thousands of gallons of its product less readily salable through compliance with the law and good faith towards those with whom it dealt, and endangering life and property through disregard of the law and a fraud upon its customers; its manager promptly chose the second course and took the attendant "risks," meaning, we may safely conjecture, the risks of trouble and expense to the company through litigation or loss of trade, not at all the risks of death or misery to others; these last mentioned "risks" probably never enter the mind of any experienced officer of this corporation. Resolute and consistent observance of the policy illustrated by his answer has made some men enormously rich and some aggregations of corporate capital enormously profitable and enormously powerful; but lawyers are hardly fitted for such work. A lawyer is trained to feel scruples, perhaps a cynic may say he is trained to affect them; but you will know when you are as old as I am, if you do not know already, that no man can make other men think him very scrupulous unless he is at least a little scrupulous in fact: no hypocrite is a successful or dangerous hypocrite who is altogether a hypocrite; the most mischievous impostors the world has known have been more than half fanatics. I know, of course, that the *generalissimo* of industry or finance in our days wants lawyers and pays them well, but he doesn't want as lawyers men like himself. He is a very "practical" man, and, just for this reason, he knows that a legal adviser no less "practical" might be perhaps too "practical" to be useful or safe. He needs and wishes the services of the strongest men the Bar can furnish, and he has sense enough to be willing to pay for such services what such services are fairly worth; but it is precisely because the strongest men for the work of the Bar are very different men from those strongest in his work that he needs and pays them.

It follows from what I have said that I do not recommend the law as a career for one whose chief purpose in life is to die a multi-millionaire; my subject does not demand that I express any opinion as to whether that purpose is itself a wise or worthy purpose. A story, which may or not be wholly mythical, is told of one of the best known among the Crœsuses of today. When he was already a very rich man, he had the habit of dining near his place of business at an eating house which furnished a *table d'hote* dinner for forty cents and each day he gave his waiter a "tip" of ten cents. After a while the proprietor raised the price of his dinners to forty-five cents; thereupon the capitalist reduced his gratuity to five cents. The waiter remonstrated, and remarked, "If I were such a man as you are, I wouldn't try to save five cents on my dinner." "If," rejoined the man of wealth, "you were such a man as I am, you wouldn't be a waiter in a cheap restaurant." This

in the so-called original package cases of *Bowman* v. *Railway Company*,* and *Leisy* v. *Hardin*† and the governmental principles therein expressed were politically and socially untenable and a retreat was necessary. Prior to the Civil War and especially in the fifties, a temperance wave swept over the country. Even Abraham Lincoln was a pronounced prohibitionist. Prohibitory laws were passed in Maine, Minnesota, Massachusetts, Rhode Island, Vermont, Michigan, Connecticut, New York, New Hampshire, Nebraska, Delaware, Indiana, Iowa, Wisconsin, Ohio and Illinois, while a prohibition statute was only lost in Pennsylvania by one vote, and in Minnesota a popular vote ratified the adoption of the Maine law. The rulings in the License Cases were the result of this public sentiment. With the breaking out of the war, however, the liquor interests became entrenched. The Government had resorted to an excise tax on liquor, and liquor paid a large portion of the expenses of the war. After the war both political parties were unwilling to do without this enormous revenue, and the war issues also had for a time overshadowed the temperance question.

It was in these surroundings and in this condition of popular thought that the case of *Leisy* v. *Hardin* was decided. Since the decision in that case, however, the prohibition sentiment has grown with leaps and bounds, and the prohibitionists have today the same political strength (not as a party, but in the parties) as they had before the Civil War. The License Cases, it is true, were not decided until 1867, but they were decided by judges who had been trained in the ante-bellum days. *Leisy* v. *Hardin* and *Bowman* v. *Railway Company* substantially overruled the so-called "License Case" of *Peirce* v. *New Hampshire** and especially the position of Mr. Justice Grier taken therein.† The cases of *In re Raher* and *Delamater* v. *South Dakota* could have been satisfactorily and easily decided by a frank statement on the part of the court that the decisions in *Bowman* v. *Railway Company* and *Leisy* v. *Hardin* were wrong in principle and by a frank overruling of them. Instead of this there was found the usual reluctance to overrule which has lead to so much of the refinement and confusion which mars our judge-made law. The result is that we have two more cases which are right in their immediate results and whose ultimate conclusions will be followed, but whose reasoning and legal doctrines must as time goes on be modified and explained, and in many particulars must ultimately be overruled. In the cases of *Bowman* v. *Railway Company* and *Leisy* v. *Hardin*, the Court, it will be remembered, held that it was incompetent for a state legislature to impose a license fee on or to prohibit or in any way restrict the sale of liquor imported from an outside state while in the original package. In them were announced the doctrines, that the power of Congress over interstate commerce was exclusive and supreme; that silence on the part of Congress implied a command that the states should not act, and that the protection of the commerce clause of the Constitution continued until the original package had been broken or the goods had been mingled with the mass of the common property of the state. As a practical governmental proposition they held that the state was powerless without federal aid to enforce its own public policy in

* 125 U. S. 465.
† 135 U. S. 100.

* 5 Wall. 462.
† See long foot note on p. 214 *infra*.

social and moral matters which in any way were connected with interstate commerce unless that social and moral policy conformed with that of the national Congress and the national courts. They gave to the interstate commerce clause of the Constitution much the same control over state legislation and local home rule, as the recent judicial constructions of the fourteenth amendment have given to that clause. They absolutely ignored the distinction before made and recognized between things and regulations which were social and moral and those which were commercial, and to all intents and purposes overruled the License Cases and the statement made in the case of *Gibbons* v. *Ogden*,* "that inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, originate from powers which are reserved to the states." They squarely took issue with the holding of the License Cases that—

> "The police powers of the state have uniformly been maintained on the ground that the states have a right to make them, and this right is not to be questioned although in the exercise of it the laws and powers of the United States must be affected, or the remedy against alarming evils be incomplete. . . . . the courts have practically and for the best of reasons placed such laws on the ground that they emanate from exclusive and independent powers enjoyed by the states." "The police power of a state and the foreign commercial power must stand together. Neither of them can be so exercised as to materially affect the other. The sources and objects of these powers are exclusive, distinct and independent and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a state. The former ceases when the foreign product becomes commingled with the other property in the state. At this point the local law attaches and regulates it as it does other property. The state cannot, with a view to encourage its local manufacturers, prohibit the use of foreign articles or impose such a regulation as shall in effect be prohibition. But it may tax such property as it taxes other and similar articles in the state either specifically or in the form of a license to sell. A license may be required to sell foreign articles when those of a domestic manufacture are sold without one. *And if the foreign article be injurious to the health or morals of the community, a state may in the exercise of that conservative and great police power which lies at the foundation of its prosperity, prohibit the sale of it.*"

They erred because in their perusal of the history and of the decisions of the past they failed to distinguish between checks or interferences with the freedom of interstate commerce which were imposed for the mere purpose of raising revenue or the protection of a local trade monopoly and those which were imposed for the protection of health and morals. They failed to distinguish between things commercial and things social and to realize that it is in the latter that the roots of the doctrine of home rule and local sovereignty are the most firmly embedded, and that no government can long endure which denies to its localities, in things social and moral at least, the "inherent rights of self-protection," and the right in a large measure to judge of what is and what is not dangerous to its morals and its social life.

The first case in which state regulation based on these considerations was involved was that of *New York* v. *Miln*,* and in it a statute was upheld which required the master of every vessel entering the port of New York to make a report in writing of the name, place of birth, last legal settlement, age and occupation of every passenger under a penalty of $75.00 for each person not so reported. In this case the Supreme

* 9 Wheat. 1.

* 11 Peters 102.

Court quoted with approval its language used in the prior case of *Gibbons* v. *Ogden** and in which it said: "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive." It also unqualifiedly granted the proposition that the state might exclude "pestilence, either to the body or mind, shut out infectious diseases, obscene painting, lottery tickets, convicts and other criminals, as well as paupers and vagabonds." It made a clear distinction between an act which was a regulation of commerce and one which was of police, and asserted the doctrine that if any law passed by the state in the exercise of its police power came in conflict with a commercial regulation of Congress the latter must yield. "All those powers," said Mr. Justice Barbour, "which relate to merely municipal regulations, or what may perhaps more properly be called internal police, are not thus surrendered or restrained; and consequently in relation to these the authority of a state is complete, unqualified and exclusive." This holding was affirmed in the so-called License Cases* and to all intents and

* 9 Wheaton 1.

* "The true question presented by these cases, and one which I am not disposed to evade, is whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effect, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point. It has been frequently decided by this court 'that the powers which relate to merely municipal regulations, or what may more properly be called "internal police," are not surrendered by the states, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category. As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision; *salus populi suprema lex.* If the right to control these subjects be 'complete, unqualified, and exclusive' in the state legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others. It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society. Paupers and the convicts are refused admission into the country. All these things are done, not from any power which the states assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare must of necessity have full and free operation, according to the exigency which requires their interference. It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition

purposes in the Passenger Cases,* for, although in these later cases the particular statute was held unconstitutional, it was held so not because of a denial to the state of the right to protect itself, but because it seemed to the Court that the regulations imposed were imposed for the purpose of raising money rather than for self-protection.

The next case of importance was that of *Cooley* v. *Board of Wardens*,† and in it was fairly and squarely announced the doctrine for which we contend. That doctrine is that, "whether the power of Congress is exclusive or concurrent with a like power in the state, is to be determined not from the *nature* of the *power* itself but from the nature of the *subjects* over which the power is to be exercised. Whatever subjects of this power are in their nature national or admit only of one uniform system or plan of regulation may justly be said to be of such a nature as to require exclusive legislation by Congress." And it is only in the distortion of this case and its real holding and not in the statement of the rule that the Court erred in the cases of *Bowman* v. *Railway Company* and *Leisy* v. *Hardin* which followed. In them the Court, if it desired to be consistent with its prior decisions, should have said, not that interstate commerce was necessarily national in its character and required to be governed under a uniform system of regulations and by the federal Congress alone and that silence on the part of Congress implied a prohibition on action on the part of the states, but that regulations of commerce which were *commercial* in their nature and based on commercial and business reasons were national and required to be uniform. How otherwise indeed can we justify the numerous decisions which have from time to time upheld the validity of state regulations in regard to the color blindness of railroad engineers, which have enforced Sunday laws even when applied to trains engaged in interstate traffic, and which have generally regulated that traffic for the protection of the lives of their citizens? All of these have seriously affected the course and speed and ease of interstate transportation, and the attempt which is sometimes made to reconcile them with the theory of *Leisy* v. *Hardin* by attempting to draw a distinction between commerce and the agency of commerce is too refined to be worthy of sound consideration, and will never meet with any degree of popular approval in this practical and common-sense age.

Of the truth of these statements and that the cases of *Leisy* v. *Hardin* and *Bowman* v. *Railway Company* had gone too far in their assertion of national sovereignty, Congress and the Supreme Court itself were apparently soon convinced. The decisions in question indeed were a death blow to the movements for prohibition in the United States and seriously threatened to disrupt the Republican party in whose ranks the prohibitionists were chiefly to be found. A remedy was necessary, but instead of the natural remedy of confession of error and repentance which every one would have appreciated, a nostrum of legal refinement was furnished which left the people even more in the dark as to the fundamental theories of governments than before, and started another web of entangling legal and political refinement.

necessary to effect the purposes are within the scope of that authority. There is no conflict of power, or of legislation, as between the states and the United States; each is acting within its sphere, and for the public good; and, if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in the health, wealth, and happiness of the people." See License Cases, 5 Wall. 462.

* 7 How. 283.

† 12 How. 299.

To remedy the evils wrought and to stem the tide of popular disapproval the so-called Wilson Act was passed. In it it was provided "that all fermented, distilled or other intoxicating liquors transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

But if the logic of *Leisy* v. *Hardin* prevailed, the Wilson Act itself was unconstitutional. Sustained, however, it had to be unless the Court cared to face one or other of the horns of the dilemma of popular indignation or an overruled decision. It was therefore sustained in the case of *In re Rahrer** and the vested rights and dignities of the case of *Leisy* v. *Hardin* protected, but by a process of reasoning which is difficult to follow and which if followed and adhered to will lead to the most serious governmental consequences and revolutionize our whole constitutional theory. The Supreme Court did not attempt to deny the fact that it had already decided that the control of Congress was exclusive until the original package had been broken and the property mingled with the common property of the state, and covered the first sale in the original package. Nor did it deny that it was well settled and that it had frequently held, that the regulation of interstate commerce had been expressly delegated to Congress by the states, and could not be re-delegated by Congress even to the states themselves except under the sanction of a constitutional amendment. Nevertheless it to all intents and purposes conceded the right of re-delegation and merely justified the grant by calling it something else.

"The Constitution does not provide," the opinion said, "that interstate commerce should be free, but by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. . . . The laws of Iowa under consideration in *Bowman* v. *Railway Company*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S. 100, were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce . . . is national in its character, and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such a way as to allow the laws of the state to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled, and that therefore the laws of Iowa referred to were inoperative, in so far as they amounted to regulations of foreign or interstate commerce . . . It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured. Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature . . . It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of the state. . . . But this furnishes no support to the position that Congress should not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In doing so Congress has not attempted to dele-

* 140 U. S. 545.

gate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. . . . Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part."

This kind of logic is sophistical. It discloses a legal refinement with which the public have entirely lost patience and which is largely responsible for the present lack of confidence in the courts, for the charge so often made, that "that may be in the law, but it is not justice or common sense." It could have been the result of no other conclusion and belief than that the case of *Leisy* v. *Hardin* had gone too far and that there was a certain measure of home rule which had to be respected. Either the court had to face the angry hostility of Kansas, Iowa, North Dakota, and the rapidly increasing number of prohibition states and sanction the Wilson Bill, or overrule the cases of *Leisy* v. *Hardin* and *Bowman* v. *Railway Company*. But their rule had been not to overrule even at the expense of logic. *In re Rahrer* therefore must be reconciled and the Wilson Bill sustained. Hence the reasoning that in the Wilson Act Congress was not re-delegating power, but merely announcing a rule that the state laws should apply. But Congress in the act in question had not said what those laws should be. They could be different in every state. It is too well known that the commerce clause was adopted because the states were jealous of each other and that it was universally conceded and desired that commerce should be *free* except as restricted by a central and impartial Congress, to need any one to prove that the states would never have voted for a Constitution which should have provided that Congress should have the power to regulate commerce between the several states, "provided, however, that if at any time Congress so desires, it may by act provide that any and all of that commerce may be regulated by the states as *they* may see fit." If Congress can provide that as soon as liquor comes within its borders a state may do with it as it pleases, it may relinquish its control over every other kind of article. The power to regulate is not exercised by you when you say to another *you* may regulate as *you* see fit. *Delegatus non potest delegari* holds good in constitutional as well as in private law. The reasoning of *In re Rahrer*, indeed, even if clear to the legal, will never be clear to the average mind. The Constitution of the United States gives to Congress what the courts in *Bowman* v. *Railway Company* and *Leisy* v. *Hardin* held to be the *exclusive* power to regulate commerce. "Congress," to use the language of Judge John J. Jenkins, of Wisconsin, in a recent address before the American Bar Association—*

"surrendered its power of protection so as to permit the state to prevent sale by the importer. This is a regulation of interstate commerce by the states and a violation of the Constitution, doing indirectly what cannot be done directly. The Supreme Court established the limit, and Congress itself recedes from its constitutional limitations with the approval of the Supreme Court. The act of 1890 transferred the power of regulation from Congress to the states, and it cannot well be said that it is a regulation by Congress when the states are permitted to regulate. It is the power of regulation that is so vital and important, not whether a given act is a regu-

* Reports of Am. Bar. Assoc., vol. xxix, pp. 418, 444.

lation; for anything that in any manner interferes with the operations of interstate commerce is a regulation and a refusal to permit transportation; and a refusal to permit a sale by the importer in the original package is a regulation by the states. As said by the Supreme Court, 'the power to regulate is the power to prescribe the rules by which commerce is to be governed.' It is the power of regulation which is transferred from Congress to the states. It does not make any difference whether it is called a delegation of power by Congress to the states to prohibit transportation of interstate commerce or a regulation of interstate commerce by Congress. The effect is the same, for it permits the state to regulate interstate commerce. It is not a question of name, but right and power. The equality and freedom sought by the fathers is seriously interfered with. Commerce is not as free as one would be led to believe after reading this opinion of the Supreme Court; not as free as the Constitution intended. The citizen has not the right the language of the case implies. Prior to the act of 1890, under the broad principles of the freedom of commerce between the states, the citizen could freely contract to receive and ship his products from state to state, and return with his money. Now he has a restricted freedom of commerce, he cannot ship the products and return with his money."

And that *In re Rahrer* and the Wilson Act had gone too far and were antagonistic to the logic and reasoning of *Leisy* v. *Hardin* and *Bowman* v. *Railway Company*, to say nothing of the License Cases, the Supreme Court of the United States seemed for a time itself to have realized. The result was a line of decisions restricting the operation of the Wilson Act. Sweeping though that act was in its terms, the Court held that its provisions only became operative after there had been an actual or constructive delivery of the liquor to the consignee. It was held that a statute of the state of Iowa was unconstitutional which prohibited railroad companies from delivering or carrying for the purpose of delivery liquors to consignees within the state without having first obtained a certificate from the auditor of the county in which said liquors were to be transported or consigned for transportation, certifying that the consignee was duly authorized to sell such intoxicating liquors in such county, when applied to liquors shipped from a point in Illinois to a citizen of Iowa at his residence within the last named state, and while in transit from its point of shipment to its delivery to the consignee.* The court also held an act of South Carolina to be unconstitutional in so far as it compelled a resident of the state who desired to order alcoholic liquors shipped in from another state for his own use to first communicate his purpose to a state chemist.† It in short held that the laws of the state could not operate, even after the passage of the Wilson Act, until the goods had reached their destination, which was practically the stomach of the importer, and that though he could be prevented from selling or giving away intoxicating liquors, even in the original package, he could not be prevented from importing them for his own personal use or at any rate from receiving them into his possession.

But again the court was in trouble. Individual trade was everywhere encouraged by the liquor men, and the prohibition states were not merely flooded with liquor advertisements but with liquor drummers who, in order to avoid the local laws, were in the habit of merely taking written offers for the purchase of liquor to be shipped into the states and which did not become contracts until accepted by the foreign houses. To prevent this method of solicitation the state of Iowa imposed a license fee "upon the business of selling or offering for sale intoxicating

* *Rhodes* v. *Iowa*, 170 U. S. 412.
† *Vance* v. *Vanderwok*, 170 U. S. 468.

liquors within the state by any traveling salesman who solicits orders by the jug or bottle in lots less than five gallons." This act the Supreme Court of the United States sustained in the case of *Delamater* v. *South Dakota*,* and this it did in spite of the fact that it had already held that the power of the states to regulate intoxicating liquors did not become operative until the liquors had reached their destination. To reach this necessary conclusion, for it was absolutely necessary for the Court to catch up with popular opinion and to appease the prohibition states, the following logic was resorted to: "As we have stated, decisions of this Court interpreting the Wilson Act have held that that law did not authorize state power to attach to liquor shipped from one state into another before its arrival and delivery within the state to which destined. From this it is insisted, as none of the liquors covered by the proposals in this case had arrived and been delivered within South Dakota, the power of the state did not attach to the carrying on of the business of soliciting proposals, for until the liquor arrived in the state there was nothing on which the state authority could operate. But this is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson Act, state authority did not extend over liquor shipped from one state to another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one state to exert its authority in another state by preventing the delivery of liquor embraced by transactions made in such other state. The proposition here relied on is widely different, since it is that, despite the Wilson Act, the state of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals related to liquor situated in another state. But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another state had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original package, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce. But as by the Wilson Act the power of South Dakota attached to intoxicating liquors when shipped into that state from another state after delivery but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other states, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson Act did not exist."

Here again we find a legal refinement which it is hard to understand or to

* 205 U. S. 93.

justify. It is difficult to understand why the solicitude of the courts over the interstate powers of Congress should be so great as to preclude the state from prohibiting a person from ordering liquor shipped to him from another state or from interfering with that liquor while in transit, but should nevertheless permit the state to prohibit the making of an offer to make a contract for such shipment. Surely in the later case as in the former the state is regulating interstate commerce. Is there not a serious question indeed whether, after all, the art of refinement and discrimination has not been carried too far by our courts, and whether more frankness is not now being imperatively demanded. There is nothing sacred in a theory of law or in a governmental policy which has outlived its usefulness or which was radically wrong in the beginning. Respect for the courts, it is true, may be won by a respect on their part for the precedents of the past and an obedience to the law and a reasonable consistency. Much of our business stability rests upon a wise conservatism. But after all truth is truth and logic is logic, and a complete change of front is not the less complete because justified by an attempted reconciliation with prior decisions which ignores logic and distorts premises. After all it is obedidience to the letter and spirit of the Constitution that is required of the courts, and not to any particular construction which they or their predecessors may have put upon it. The question is What is the law and what is the true public policy? not What did Mr. Justice So and So say about it? What is the Constitution? not How did So and So construe it? Many of the constructions of the past were adopted under totally different social and industrial conditions than now prevail, and are unadapted to our modern life and commercial and national growth. Many, too, were adopted without sufficient deliberation or information. There is no ground for the fear so often evidenced of overruling prior decisions. The public have lost their respect for the law, not because it has from time to time been changed to meet new conditions or because long standing errors have been now and then corrected, but because of its growing refinement and incomprehensibility. Each new distortion, each new surrender of basic principle and of irresistible logic, paves the way for still further surrender, makes the law less and less certain, and encourages that class of lawyers, now only too common, whose main business seems to be to teach their clients how to violate the basic principles of society and human kinship and by the weapons of delay and obstruction to hinder if not prevent all progress and all reform.

The writer believes that the only logical theory to be deduced from the real spirit, though not necessarily from the logic of the decisions, and a survey of our historical growth and advancement, is that from the beginning the Constitution recognized people rather than states, but people who had surrendered or rather conceded to the central government powers which were commercial and national only and had chosen in all matters which were local and social to remain under the sovereignty of the states to which they belonged and with which they had united. We cannot get away from the theory of the social civil compact in society, whatever we may do. Whenever a new state is formed, whenever a constitution is adopted, the compact is made. Whenever a new emigrant becomes a citizen and is naturalized, he in turn promises and is promised. There

is a mutual covenant. The new citizen in return for the blessings of government, the privilege of living in an organized society and sharing in its protection, relinquishes a certain amount of personal freedom as well as the right to foreign protection. The state promises a certain amount of opportunity and protection. In every one of the American states the citizen expressly or impliedly subscribes to the doctrine that the public welfare is the highest law, and promises to so use his own rights as not to injure those of others. He agrees to yield obedience to and concedes to the government of the state the power to pass laws for the furtherance of the public good, practically conceding that he no longer claims any right to property or to liberty in that which is injurious to the state as a whole. He however retains his natural rights in all things else. This is the first and great commandment of every civilized society. It is the gist of the fifth and fourteenth amendments, which have been adopted into the constitutions of practically all if not all of the American states, and it expresses the unwritten constitution of every civilized country. This is a citizenship of the state, and when the American colonists consented to the formation of the new central government and to yield obedience thereto, they surrendered to it no jurisdiction in these matters nor withdrew any of their allegiance from their respective states in so far as they were concerned. But there was an allegiance which they yielded to the central government and which they withdrew from the several states. It was in things especially national; in things pertaining to the currency, the postal system, peace and war, to intercourse with foreign nations, and above all interstate commerce. Formerly, perhaps, the state had control of these things, that is to say in the interregnum between the Declaration of Independence and the adoption of the Constitution. Before this time Great Britain perhaps had control of these things. At any rate it had control over intercourse with foreign nations. Now there was a new social compact made. The citizen reaffirmed his former contract with his state in all things except those which were national and *commercial*. As far as these things were concerned he changed his sovereign. He agreed to yield obedience henceforth to the central government in so far as they were concerned, but he took back and retained his natural rights in and concerning them in so far as his former state was concerned. Henceforth the compact ran that in so far as the right to engage in and enjoy the privileges of interstate commerce and commerce with foreign nations and with the Indian tribes was concerned, he should be free from all restrictions and all control except that which should be imposed by the central government. He had yielded to that central government, however, no control over his private and his social life. He had agreed with the citizens of his own state that he should so use his rights and liberty as not to injure the rights and liberty of others. He had agreed to respect the morals and ideals of the state. He had agreed to consider as injurious and as a nuisance to others that which the enlightened intelligence of the majority, as represented in the state constitutions and in the decisions of the state courts, should so consider, and not to use or sell or deal in that which the public policy of his state forbade. His right to be free and unmolested in so far as interstate commerce was concerned, except when Congress itself should desire to interfere, did not, however, confer upon him or imply the right to use or sell or give

away within the state that which the morals and public policy of the state forbade.

Is not this practically the result of the Wilson Act and of the cases *In re Rahrer and Delamater* v. *South Dakota*, and should it not be definitely stated and the network of conflict and refinement and faulty logic be removed, even if in order to do so it is necessary to state that former cases have been overruled? As it is, the cases cannot be reconciled and an attempt to do so only leads to inexplicable confusion. Each new distortion, each new surrender of basic principle and of irresistible logic, paves the way for still further surrender, and makes the law less and less certain. The fundamental fact remains that a reasonable amount of social home rule is absolutely necessary to the permanence of a federated nation, and that whenever the social policies of a state are really affected, the courts will find some theory by which to abate the exclusiveness of Congressional control.

Up to the time of the Bowman case, indeed, there were no decisions which denied to the state this right of self-protection and of formulating its own social and moral code. It is true that in the early cases, as in the later, the exclusive power to regulate interstate commerce was held to be vested in Congress and in Congress alone,* and that this was later somewhat modified by the recognition of a concurrent power;† that is to say, the power of the state to act until Congress itself had acted on the subject inconsistently with state action. And that later still this concession was repudiated or modified and the statement made that the concurrent power could never exist in things that were national in their nature and that interstate commerce was one of these.* But up to the time of the *Bowman* case all of these decisions were in relation to matters and transactions which were fiscal and commercial in their nature, and none of them were in connection with matters in which health or morals were concerned.

The decision in the case of *Bowman* v. *C. N. W. Ry. Co.*, on which the later case of *Leisy* v. *Hardin* is based, is not indeed supported by the history and decisions of the past and contains a remarkable *non sequitur*.

"If the state of Iowa," the Court says, "may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases, as well as those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the Constitution or Congress has intended to limit the freedom of commercial intercourse among the people of the several states."

Here the Court failed to recognize the distinctions and demarkations which it itself had frequently made in former decisions. Even the seemingly clinching question, "Can it be supposed that by omitting any express declarations on the subject Congress has intended to

* 3 Madison Papers 1585; Passenger Cases 7 How. 283–396; *Brown* v. *Maryland*, 12 Wheat. 419

† *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Peters 245.

* See *Leisy* v. *Hardin* and *Bowman* v. *Railway Co.*, *supra*.

submit to the several states the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country?—if so, it has left to each state, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any state and sought to be introduced as an article of commerce into any other," and that which afterwards appears in the opinion, if fairly weighed, gives no ground for apprehension. The safeguard lies in the fourteenth amendment, which provides that no state shall deprive any person of life, liberty or property without due process of law. Every unreasonable statute is invalid under this provision, and by enforcing this provision the federal courts can put a stop to all unreasonable legislation. The Supreme Court certainly had no grounds for apprehension in the Bowman case. It could not contend that the prohibition of the sale of liquor, if deemed necessary by the state, was an unreasonable exercise of legislative power, since it itself repeatedly held that liquor, although a subject of commerce, was more or less tainted and that a state might constitutionally prohibit its manufacture and sale within its borders without violating the fourteenth amendment or depriving any one of life, liberty or property without due process of law. It had even gone so far as to hold that no compensation need be given to brewers and others who had been ruined by the adoption of a state prohibitory policy and whose buildings and investments had been rendered worthless.* The trouble lies in the fact that the Court failed to make a distinction between provisions which were social and moral and those which were commercial. The dread expressed in the opinion that the state, if allowed to restrict the importation of liquor, would restrict the importation of articles generally and for commercial purposes alone is worthy of but little consideration. Every one concedes and has always conceded that such regulations would be invalid, not merely as unjustifiable regulations of interstate commerce, but as deprivations of property without due process of law. It has never been contended that the police powers of the state extend thus far.

* *Mugler* v. *Kansas*, 123 U. S. 623.

The Hour Has Come

By Harry R. Blythe

WHEN forth to the front
With clangor of arms
The soldier shall go
'Mid war's alarms
To shoulder the brunt
Of freedom's woe,

His heart must be strong,
  His heart must be true,
For the battles are long,
  And the victories few,
And the world demands that he loyal be
To the cause that is just, to the cause that is free.

Ah! must there be a lower standard for
The strife of peace than for the strife of war?
May, then, the man who marches to the field
Of legal battles fling his arms and yield,
Or seek by treachery and trick to gain
The goal without which living is in vain?
May he, then, stab fair Justice in the back
And traitor turn, and all her temples sack?
Transform her patient blessings to a curse
And prostitute her virtue for a purse?

The world is sick of quibblings, sick of shams,
And sick of smiling wolves that fleece the lambs,
It wants but justice, wants but simple right,
It merely asks for honor in the fight;
Great God! the hour has come when we must clear
The legal fields from poison and from fear;
We must re-mold our standards—build them higher,
And clear the air as though by cleansing fire,
Weed out the damning traitors to the law,
Restore her to her ancient place of awe.

For nothing below
  And nothing above
Shall last to the end
  If it be not love;
We must meet our foe
  As we meet a friend,
We must play him fair
  If justice be done,
If we be not square
  No goal is won;
And the world demands that we loyal be
To the cause that is just, to the cause that is free.

Cambridge, Mass.

Practical Legislation for Governmental Surveillance of Corporations

By Perley Morse, C.P.A., of New York

THE nefarious practices of corporations and their pernicious influence in politics and business, have been the subject of much discussion in the public press and by politicians and others in the past two or three years. It can be asseverated that the people have just cause for complaint, but we must not lose sight of the fact that corporate organizations are a necessity, as large business enterprises could not be successfully conducted in any other manner.

In the general clamor, however, no practical plan has as yet been proposed making it impossible for corporations to commit acts inimical to public interests.

Corporations exist by consent of the government (in this country by consent of the governed) hence the government should supervise the business conducted by corporations. This fact is believed by the people and admitted by the corporations. Therefore, the only question would seem to be the equitable mode of procedure.

The Constitution of the United States gives power to Congress to regulate commerce between the states; hence legislation that is constitutional could be enacted by Congress providing a system for the inspection of all corporations doing an interstate business.

A necessary part of this system would be the appointment of a large corps of inspectors of corporations. Unless the proper class of inspectors is employed the accomplishment of the desired object would at once be defeated. Experts with the requisite training rarely accept government employment, inasmuch as the private remuneration of such men for their skill, knowledge, industry and integrity is far greater than the government would be willing to pay them. It therefore follows that the government would be obliged to appoint as inspectors of corporations men without any special training, thereby enormously increasing the expenses of the government, without effect. In the majority of cases the appointment of these pseudo-experts would be secured through political or subtle influences opposed to governmental regulation.

During the Roosevelt administration an enormous amount of money was spent by the government (and there is no way for the public to ascertain the amount) in investigating so-called trusts in order to obtain evidence of violation of the law. In many instances suit was brought by the government, but without results; not because there were no violations of the law, but because the evidence obtained by the government was faulty. Notable examples of this were the failure of the so-called beef combine case and the Standard Oil case, in which Judge Landis imposed the now famous $29,000,000 fine, which appealed to the American sense of humor, and caused an interminable number of cartoons and jokes to appear in the newspapers and periodicals. Notwithstanding the humor, confidence was still further destroyed and thoughtful people heaved a sigh of relief when the higher courts came to the rescue and reversed Judge Landis.

The government has now practically

abandoned the prosecution of the Standard Oil Company and other so-called trusts, and it is rumored that it is President Taft's intention to alter the character of the Bureau of Corporations and reorganize it in connection with the Inter-state Commerce Commission and the Department of Justice, as he apparently recognizes the futility of obtaining results otherwise.

Many states have recognized the necessity of creating a competent body of trained men, expert in economics, the science of accounts, commercial law and corporate organization, hence their legislatures have enacted laws regulating the practice of accountancy and providing for the granting of the degree of Certified Public Accountant (C.P.A.) to those having the requisite qualifications and passing the prescribed examinations, thereby placing this profession upon the same plane as the practice of law and medicine. The state of New York enacted laws in 1896 regulating the accounting profession, many of the larger states having since done likewise.

If Congress enacted legislation providing for the employment of the Certified Public Accountant, who is independent of political parties and corrupt influences, by all corporations doing an interstate business (the corporation to pay the accountant's fees) and made such employment a part of the plan of reorganization of the Bureau of Corporations in connection with the Inter-State Commerce Commission and the Department of Justice, absolute control of corporations doing an interstate business could be effectually secured with a minimum expense to the government.

Legislation along the following lines would be simple and efficacious, and an effectual check would be put on corporation wrongdoing. Preventing violation of the law is better than prosecution:—

First. Create and grant the degree of Federal Accountant (F. A.) to the Certified Public Accountant (C. P. A.) who has received this degree from his state, and after he is sworn to faithfully perform his duties as Federal Accountant issue a certificate to him.

Second. All corporations doing an interstate business should be compelled to have their business investigated and accounts audited annually by the Federal Accountant, the corporation paying the Federal Accountant a fee commensurate with his services.

Third. The proper governmental department to prescribe the necessary form of the Federal Accountant's report, but it should consist generally of the following: (a) Text or comments on irregularities or unusual circumstances that may have occurred during the period under investigation and audit, also such explanations of various items as may be deemed necessary, together with suggestions for the improvement of the accounting system. (b) Certified General Balance Sheet (Assets and Liabilities—Assets segregated as follows, Invested Assets, Current Assets and Deferred Assets; Liabilities segregated as follows, Capital or bonded debt, Current Liabilities, Deferred Liabilities, Surplus and Reserves) all amounts where necessary being supported by schedules showing detail. (c) Certified Statement of Income and Profit and Loss; all amounts where necessary being supported by schedules showing detail.

Fourth. One copy of the Federal Accountant's report to be filed with the proper governmental department, and one or more copies with the corporation; the contents of all reports to be regarded by the governmental department as confidential unless it is shown that the corporation has violated the law, when it shall be the duty of the proper governmental department to immediately begin suit against such corporation.

Fifth. Federal Accountants wilfully certifying to a false General Balance Sheet or Statement of Income and Profit and Loss, or willfully making any false statements, shall be deemed guilty of having committed a crime, punishable by a fine of not less than One Thousand ($1,000.00) Dollars, and imprisonment for not less than one year at hard labor, and the forfeiture of their certificate as Federal Accountant.

Sixth. At the annual or shareholders' meeting of the corporation the shareholders are to select the Federal Accountants for the ensuing fiscal year, such selection to be approved by the proper governmental department, thus minimizing the influence of the officers and directors of the corporation on the Federal Accountant. In the event of the shareholders failing to choose the Federal Accountants for the ensuing year, they are to be appointed by the proper governmental department.

Seventh. A certified copy of the General Balance Sheet and a certified copy of the Statement of Income and Profit and Loss (but without the supporting schedules showing detail) to be mailed by the Federal Accountant direct to the shareholders of record at the end of the corporation's fiscal year.

Practically every corporation in the United States does an interstate business, whether it be financial, railroading, manufacturing or mercantile, as any corporation manufacturing or selling, shipping or carrying a pound of merchandise, or carrying on any business whatsoever between the different states, is doing an interstate business.

It may be said that laws such as the above would be class legislation, as the Certified Public Accountant would be benefited. While it is true that the business of these experts would be increased, still the public as a whole would be benefited. It would decrease taxation, as the expense of the investigations would be borne by the corporation instead of the government, as has been the case during the last administration; it would benefit the security holders of corporations, especially the minority shareholders; it would inspire confidence and effectually stop agitation from which the country has suffered, and would help restore confidence and prosperity.

The Bureau of Corporations in recent reports has taken rather distinct grounds in favor of publicity of accounts and transactions pertaining to corporations, and the plan outlined above gives publicity in its true sense, and where it is most desired, without divulging confidential business information that might be used by rival concerns.

The services of the Federal Accountant could also be utilized in the examination of national banks, which would be a great improvement over the present incompetent national bank examiners who are subject to political influences.

The Federal Accountant would report direct and fully to the Comptroller of the Currency on the condition of the national bank examined by him, also to the bank officials, and at the same time he would send by mail direct to the shareholders a certified copy of the General Balance Sheet, and a certified copy of the Statement of Income and Profit and Loss.

The Federal Accountant for the ensuing year to be chosen by the shareholders of the national bank at their annual meeting.

Great Britain is far in advance of the United States in the regulation of its corporations, or, as they are called, Limited Companies. Following are excerpts from its Companies Acts:—

1862, *Section* 83. "Once, at the least, in every year the accounts of the company shall be examined, and the correctness of the balance sheet ascertained, by one or more auditor or auditors." Sections 84 to 94 contain detail as to the manner in which the audit is to be conducted.

1879, *Section* 7. "Once, at the least, in every year, the accounts of every banking company registered after the passing of this act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting."

1900, *Section* 21 (2). "If an appointment of auditors is not made at an annual general meeting the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services."

1907, *Section* 19 (1). "Every auditor of

the company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors." (2) "The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state," etc., etc. The auditor (or auditors) employed by the shareholders of the Limited Companies is known in England as the Chartered Accountant (F. C. A.).

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Admiralty (Death Claims). "A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts." By George Whitelock. 22 *Harvard Law Review* 403 (Apr.).

"From the foregoing it is apparent that there is no present right of recovery for loss of life by negligence on the high seas, either by the general maritime law of the United States or by federal statute. It is now also settled by the *Hamilton* and *La Bourgogne* cases, that if the owner of an offending ship surrenders the remains of his property with freight pending in order to limit his liability, persons entitled to an action by reason of the death of their decedent under the law of the ship's flag or domicile, will be allowed, upon being brought into court, to participate in the distribution of the fund. But on the other hand it has not yet been determined by the Supreme Court in a case of death on the high seas, that a lien created upon the ship itself by a statute of one of the American states will be enforced in admiralty, nor has it been expressly decided by that court that an action *in personam* will lie in the admiralty under a statute of the state of the ship's domicile. What may be the next step in the development of the law does not yet appear."

Aliens (Status). "Aliens Under the Federal Laws of the United States. II, Federal Legislation: Shipping, Patents, Trademarks, and Copyrights." By Samuel MacClintock. 3 *Illinois Law Review* 565 (Apr.).

This is the second of a series of four papers, the first of which was reviewed in 21 *Green Bag* 166 (Apr.).

"In concluding this chapter we see that our policy with regard to shipping has followed closely British precedents. . . . The legislation regarding patents . . . made no discrimination against aliens at first. Then followed a period in which the privileges of our patent laws were confined to citizens. . . . Such legislation was finally swept away and the alien put upon the same footing as citizens. As to trademarks, alien friends have always been entitled to the protection of their property." An alien is protected in his common law property in both published and unpublished works of authorship, though copyright laws confine their benefits to citizens. "In 1891 an international copyright act was passed, extending the benefits of our copyright laws to aliens upon terms of reciprocity."

Bankruptcy (Unrecorded Liens). "The Position of a Trustee in Bankruptcy with Reference to Unfiled or Unrecovered Chattel Mortgages and Conditional Sale Contracts." By Ralph W. Aigler. 7 *Michigan Law Review* 474 (Apr.).

The principles of *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, 26 Sup. Ct. Rep. 481, 50 L. Ed. 782, are here discussed. In this case the United States Supreme Court held that an adjudication in bankruptcy was not equivalent to a judgment, attachment, or other specific lien upon the machinery sold to the bankrupt by the York Mfg. Co., and that the trustee, representing only general creditors, was not entitled to the property in question, which had been sold under a conditional sale contract unfiled as required by Ohio law.

Bucks Stove Co. Case. See Injunctions.

Bulk Sales Laws. Valuable and comprehensive editorial discussion, 7 *Michigan Law Review* 504 (Apr.).

Child Labor. "The Child and the Law." By A. J. McKelway. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2, Supplement, p. 63 (Mar.).

Illinois. "The Present Situation in Illinois." By Edgar T. Davis. *Annals of the American Academy of Political and Social*

Science, v. 32, No. 2, Supplement, p. 153 (Mar.).

Kentucky. Report of the Kentucky Child Labor Association. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2. Supplement, p. 172 (Mar.).

Louisiana. "The Forward Step in Louisaana." By Jean M. Gordon. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2, Supplement, p. 162 (Mar.)

Mississippi. "The Difficulties of Child Labor Legislation in a Southern State." By James R. McDowell. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2, Supplement, p. 166 (Mar.).

See also Juvenile Crime, Labor Regulation.

Codification. See Marriage and Divorce.

Conflict of Laws. See Corporations, Marriage and Divorce.

Constitutional Law. See under special topics, *e. g.*, Bulk Sales Laws, Government, Interstate Commerce, Jury Trial, Labor Regulation, Monopolies, Status.

Contracts. "Mutuality of Options." By R. T. Holland. 7 *Michigan Law Review* 484 (Apr.).

Under the present current of authorities there is considerable doubt as to the validity of options.

"The difficulty appears to have been that the lack of mutuality . . . is more apparent than real, and that courts have sometimes been impressed more with one contractual phase of the option than the other, for an option is really a compound contract.

"It would seem on principle, then, that there ought to be no doubt that the vendee in an option does acquire a chose in action, and that he ought to have not merely the right of specifically enforcing such a contract, but in the event that the vendor has placed it beyond his power to convey the lands by disposing of them to innocent third parties, that the vendee should have a right of action against the vendor for his damages, and that these damages should not be limited merely to the consideration for the option."

See also Procedure.

Conversion. See Measure of Damages.

Conveyances. See Torrens System.

Corporations. "Nature of Stockholders' Individual Liability for Corporation Debts." By Wesley Newcomb Hohfeld. 9 *Columbia Law Review* 285 (Apr.).

A learned and most carefully prepared article, analyzing and discussing the specific principles concerned in *Risdon Iron & Locomotive Works* v. *Furness*, L. R. (1905) 1 K. B. 304, affirmed L. R. (1906) 1 K. B. 49.

"The decision involves, as of most immediate interest and practical importance, a question in the conflict of laws, that is to say: According to what law should be determined the stockholders' individual liability or nonliability for the debts of the corporation? . . . As a result of that discussion the following conclusions are suggested: that a corporation is simply an association of natural persons organized and doing business under forms, methods and procedure that are *sui generis;* that all corporate transactions can be adequately understood and stated only in terms of the rights, powers, liberties, duties, liabilities, disabilities, etc., of the natural persons concerned; that, in the case of an ordinary 'limited liability' corporation or company, such as the Copper King, Limited, it is the stockholders that are really subject to the only obligations existing in favor of corporation creditors; that such obligations and the liabilities resulting from a breach are really 'quasi-joint' and quasi-contractual; that, so far as a California corporation is concerned, the obligation and liability are closely analogous to the ordinary joint and several obligation and liability; that both the corporate (or quasi-joint) and the individual (or several) obligations and liabilities of the stockholders are quasi-contractual rather than strictly contractual; that the same is true of the stockholders' obligations and liabilities arising under the laws of various other American states."

Canada. "Ontario Company Law." By Thomas Mulvey, K. C. 45 *Canada Law Journal* 220 (Apr.).

Criminology. "Alcoholism; its Causation and its Arrest." By Samuel McComb, D.D. *Everybody's*, v. 20, p. 533 (Apr.).

"My experience leads me to believe that by a combination of medical, hygienic, psychological, social, moral, and religious forces, we can, in the great majority of cases, beneficially affect the sufferer from this morbid craving."

Defamation (Mercantile Agencies). "A Note on the Case of *Macintosh* v. *Dun*." By Leo. B. Cussen. 6 *Commonwealth Law Review* (of Australia) 105 (Jan.–Feb.).

The defendants in the case of *Macintosh* v. *Dun*, 1908 A. C. 390, were a trade protection society, which in the United States would be called a mercantile agency, and supplied confidential information to a subscriber regarding the standing and responsibility of the plaintiff. The jury found no improper motive on the part of the defendants, but the trial judge, on the contrary, held that the occasion was not privileged and entered a verdict for the plaintiff. Lord Macnaghten, in the Privy Council, likewise held that the occasion was not privileged, on the ground that the communication was not fairly made in the discharge of some public or private duty, nor warranted by any reasonable occasion or exigency. He deemed it harmful to the community to extend the protection of immunity

to communications made from motives of self-interest by persons who trade for profit in the characters of other people.

The author regards this judgment as of doubtful stability. "In American courts it seems to be settled beyond all question that confidential communications made by a trade protection society to a subscriber, if made *bona fide*, are privileged; see *Ormesby* v. *Douglass*, 36 N. Y. 477. . . . We must all agree with the judicial committee that American decisions as such, though entitled to the highest respect, are of no authority in English courts, and questions must be decided by reference to the principles of English law, but it appears to me that in a case of this kind, where there is no direct English authority, to pass over a decision like *Ormesby* v. *Douglass*, and refuse the undoubted help which it affords simply because it is labeled American, is like kicking away a ladder and then attempting to scale a wall with the meager help of one's fingers and toes."

Disturbance of Religious Worship. "The Element of *Bona Fides* in the Crime of Disturbing Religious Worship." By J. M. Greenfield, Jr. 13 *Law Notes* 6 (Apr.).

Divorce. See Marriage and Divorce.

Employers' Liability. "Economic Aspects of the Law of Master and Servant, in its Relation to Industrial Accidents." By Clarence A. Lightner. 7 *Michigan Law Review* 461 (Apr.).

The author reaches these conclusions:—

"*First:* That the present condition of our law, whereby the rights of master and servant, in the event of accident to the latter in his employment, are adjusted, is unsatisfactory to all parties concerned.

"*Second:* That legislation along the lines of modifying the present common law rules, by increasing the measure of liability of the master, have not and will not remedy the evils of the situation, but will rather aggravate them.

"*Third:* Considering the insurance feature, being one of the two remedies which have elsewhere been applied, I would suggest (a) that compulsory insurance, such as we find in Germany and other European countries, is with us impracticable, both because our people are not favorably disposed toward State Socialism, to which that tends, and, also, because of constitutional objections, which render such legislation difficult, if not impossible; and (b) that voluntary insurance, whether by statutory authority or by private initiative, is beneficial as far as it goes, and that legislation along these lines, like most permissive legislation, will not have large results, but that the creation of voluntary relief departments, in particular industries, has proven the most effective remedy for the evils that we are considering, which have been tried in this country, and yet that such measures are necessarily limited in scope.

"*Fourth:* That, as far as legislation is concerned, the principle of compensation to the injured servant, irrespective of the common law rules of liability, being substantially the idea contained in the English Workmen's Compensation Act, is both just and effective. I believe that such an act has been found, in England, to be, and would likewise be found to be in this country, if adopted in our states, beneficial to all parties concerned."

This estimate of the Workmen's Compensation Act is not shared by the anonymous author of:—

Workmen's Compensation Act. "The Workmen's Compensation Act." By "Specialist." 25 *Scottish Law Review* 91 (Apr.).

"This Act, originally devised by Mr. Chamberlain, will, unless materially altered, cause trouble and destitution, and throw out of employment a large number of hard-working and industrious men. Already it must have kept many thousand workmen in unemployment, and, unless its present terms are much altered, probably one-third of the workers in the country will be made unable to find occupation."

New York. "The Labor Law as a Basis for Suit. Part II. By Raymond D. Thurber, 16 *Bench & Bar* 93 (Mar.).

See also Government, Labor Regulation.

Equity. See Marriage and Divorce.

European Politics. "Foreign Policy." By Sir Rowland Blennerhassett, Bart., P. C. *Fortnightly Review*, v. 85, p. 615 (Apr.).

"Signor Tittoni and the Foreign Policy of Italy." By Romanus. *Contemporary Review*, v. 95, p. 429 (Apr.).

Evidence. "A Mixed Question of Law and Fact." By Judge James L. Clark. 18 *Yale Law Journal* 404 (Apr.).

The remedy for existing conditions is to be found in pursuing one of two courses:—

"The first course, the more scientific and less practical, is to at all times make the so-called mixed question a question of fact.

"That is, in a negligence case, make the question of negligence at all times one of fact. For the purpose of advising the adversary of the facts that will be relied on as constituting negligence, set them out in the pleading, but for the purpose of the sufficiency of the pleading state negligence in general terms. On the trial let the Court instruct the jury that one who acts as an ordinarily prudent person would not act under the circumstances is guilty of negligence, and leave it to the jury to say whether the acts complained of are such as an ordinarily prudent person would not do under like circumstances, and thus determine the question of negligence by the standard of the ordinarily prudent person. . . .

"In adopting this procedure, however, courts could not escape the responsibility of deciding as a matter of law, on the introduction of evidence, what would tend to establish negligence and what would not so tend. Such

responsibility might also be cast upon the Court on a motion to strike allegations from the complaint.

"The second course therefore seems to be the better one: that is, to make the question of negligence always a question of law.

"Let the pleader in all cases be required to set out the facts relied on as constituting negligence, and require the Court to say, as a matter of law, whether those facts make a case of negligence.

"Likewise, require the Court on the trial to specifically instruct as to what facts within the issues and evidence will authorize an inference of negligence as an ultimate fact, if the jury should find those facts established by the evidence." . . .

See also Legal Interpretation, Procedure.

Foreign Relations (Cuba). "The Policy of the United States Toward Cuba." By Prof. Edwin Maxey. 43 *American Law Review* 266. (Mar.–Apr.).

The writer devotes many pages to a historical outline of our relations with Cuba. He concludes:—

"The future policy of the United States is clear. It is an inheritance of the past. We will defend the island against aggressions of foreign powers and maintain in so far as possible most friendly relations with the government at Havana. The importance of the island and hence of friendly relations with it will increase with the completion of the Panama canal."

Government. "The Extent of the Treaty-Making Power of the President and Senate of the United States." By William E. Mikell. 57 *Univ. of Pa. Law Review* 435 (Apr.).

"A strict construction of the power of the President and Senate is a broad construction of the power of Congress and *vice versa*. . . .

"How, then, are these seemingly conflicting powers to be reconciled? The writer ventures to suggest that our history has answered them correctly, and that that answer is this: That so far as the domestic or intraterritorial effect of the exercise of any of the powers committed by the Constitution to Congress is concerned, Congress alone has any power in the premises. But Congress has no power to treat with foreign nations, hence when any of these powers vested in Congress are to be exercised in agreement with a foreign power, the *agreement* with such foreign nation must first be completed hy the treaty-making power, but this *agreement*, though it is a treaty in the meaning of that word as used in international law, is not a treaty in the sense intended by the Constitution when it says a treaty is the supreme law of the land. To be that it must be sanctioned by an act of Congress. This view, it is submitted, not only does no violence to the Constitution, but on the contrary gives effect to the seemingly conflicting powers of the two departments without making one supreme over the other."

Scope of National Powers. "The American Hague Tribunal." By Andrew A. Bruce. 18 *Yale Law Journal* 377 (Apr.).

The problems of the law of the United States are becoming interstate, writes Dean Bruce, and almost international in every aspect and in every scope. The Supreme Court is getting to be a sort of Hague Tribunal, with the added power of enforcing its decrees. As such, it is developing an interstate, international law of its own, whose foundation principle is equality of rights and whose procedure is divorced from the technicalities of the past and allows the fullest latitude of investigation. *Kansas* v. *Colorado*, 22 Sup. Ct. Rep. 522, 27 Sup. Ct. Rep. 655.

This jurisdiction has mainly been in vogue in cases where the citizens of one state have polluted or diverted streams to the detriment of the citizens of other states, or have so conducted manufacturing operations as to befoul the air and injure the natural resources and vegetation of other states. A broad groundwork on which to build an extended jurisdiction has been laid.

The interstate jurisdiction has been exercised in cases "where Congress perhaps could not have legislated at all, that is to say in cases in which no power of legislation has either directly or inferentially been delegated to that body. It arises out of the inherent necessity of the case and the otherwise inadequacy of the national system of jurisprudence."

There can be little doubt "that the clashing interests of the sections will in the future call more and more for settlement and adjustment, and that the interstate jurisdiction of the Supreme Court will not only be constantly invoked, but will, as time goes on, become more and more necessary."

A somewhat similar view of the jurisdiction of the Supreme Court under the interstate commerce clause is taken by the author of the annual address delivered before the Kansas Bar Association in January:—

"National Sovereignty." By S. S. Gregory. *Michigan 7 Law Review* 381 (Mar.).

This writer contends that "the Constitution must be construed in the illuminating light of present conditions; thus its framers intended." Expressions of John Marshall are quoted.

"Without stopping to refer to subsequent discussions it should be noted that in the recent litigation as to the validity of the Employers' Liability Act, passed by Congress and approved June 11, 1906, the Supreme Court, against most able and exhaustive arguments to the contrary, held that Congress might prescribe, as between an interstate carrier and such of its employees as are engaged in interstate commerce, the rule of liability of such company for the death or injury of any employee, while so engaged.

"The question how far this grant of power to Congress, particularly in respect of regulation of railway rates, impairs or modifies the authority of the states as to prescribing

rates for carriage wholly within the state by interstate carriers, has been much debated.

"It seems to me quite obvious that if each state has this power, its exercise by all necessarily and directly affects the rates for interstate carriage.

"It is not just to these carriers, nor in my judgment is it expedient, to attempt thus to control them by so many different authorities.

"Ultimately, I venture to say, it will be perceived that such efforts are an invasion by the states of the field of national sovereignty, and broadly speaking the entire authority over this subject will, by common consent, be remitted to the general government."

Considering the question whether this broadening jurisdiction of the general government threatens any grave consequences, a writer proposes as his subject:—

"Will the Supreme Court become the Supreme Legislature of the United States?" By Clifford Thorne. 43 *American Law Review* 228 (Mar.–Apr.).

"The development of our law as to the power of the legislature and the courts in fixing rates to be charged by the public service corporations," says Mr. Thorne, "is practically the history of one case. . . . From time to time criticisms have been made upon the doctrine of *Munn* v. *Illinois* [94 U. S. 133; 24 L. ed. 77], but an impartial review of the cases must convince a fair-minded person that this noted decision has successfully withstood these attacks up to the present time. . . . Has our Supreme Court substantially abandoned the doctrine of *Munn* v. *Illinois*?" The attacks made in *Chicago M. & St. Paul Ry. Co.* v. *Minnesota* (134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. Rep. 462) in *Budd* v. *New York* (143 U. S. 517, 36 L. ed. 384, 12 Sup. Ct. Rep. 468), and in *Brass* v. *No. Dakota* (153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. Rep. 857), were unsuccessful, and "since 1901 there has been no direct attack upon the doctrine of *Munn* v. *Illinois* in the decisions of the Supreme Court. . . . A careful reading of *Smyth* v. *Ames* [169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418] will show that it makes no attempt to overthrow or alter the former decisions of the Supreme Court. . . . The doctrines of *Smyth* v. *Ames* in 1898 and *Stone* v. *Farmers' Loan and Trust Co.* [116 U. S. 307, 29 L. ed. 636, 6 Sup. Rep. 334] in 1886 are substantially the same. . . . In no case up to the present time has the Supreme Court of the United States ever set aside any rates fixed by a legislative tribunal, which the court found would yield under ordinary circumstances some compensation above legitimate expenses. . . . The doctrine of *Munn* v. *Illinois* has been embedded in our system of law by thirty-one years of experience. . . .

"This condition of our law throws grave responsibility upon our legislatures. . . . Up to the present time the Supreme Court has steadfastly refused to encroach upon the functions of the legislature as outlined in *Munn* v. *Illinois*. . . . This example of our Supreme Court, which alone has no superior to define the limits of its activity, this refusal by that august body to gradually extend its jurisdiction over functions exercised by another department of our government is a profound example not only of judicial wisdom, but of far-sighted statesmanship."

Corruption. "Attempted Apologies for Political Corruption." By Robert C. Brooks. *International Journal of Ethics*, v. 19, p. 297 (Apr.).

"These are, first, that political corruption makes business good; second, that it may be more than compensated for by the high efficiency otherwise of these who engage in it; third, that it saves us from mob rule; and fourth, that corruption is part of an evolutionary process the ends of which are presumed to be so beneficent as to more than outweigh existing evils."

The same writer discusses "The Nature of Political Corruption," in *Political Science Quarterly*, v. 24, p. 1 (Mar.).

"Reformers should learn," he says, "to bring down all direct and personal accusations to the level of existing law, until they have succeeded in bringing the level of the law up to their ideal standard."

Oklahoma. "The Constitution of Oklahoma." By Charles A. Beard. *Political Science Quarterly*, v. 24, p. 95 (Mar.).

Canada and British Empire. "The Supreme Court and the Nation." By Walter H. Trueman. 45 *Canada Law Journal* 177 (Mar. 15).

"While the Judicial Committee has attracted to itself a great deal of business, because of its high efficiency, it is doubtful if it were composed to a considerable extent of members from the different parts of the Empire, the same need would be felt of resorting to it that now exists. The utmost that can be said in favor of a central court for the Empire is that it would have an immense sentimental aspect. That it is required in order that there may be a competent elucidation of the legal questions that arise within the Empire, I scarcely believe can be proven if colonial courts were made up of the best men available. . . . The litigation that arises within the Empire is not a matter falling within the purview of its Imperial concerns, but is a subject of local interest. A scheme of Empire which consistently preserves to each of its constituent parts complete autonomy as to all domestic affairs as an arrangement founded on convenience and necessary for the full development of its individual nationality, will, I should think, so regard it."

"The House of Lords and Taxation." By Ernest E. Williams. *Fortnightly Review*, v. 85, p. 760 (Apr.).

France. "The Political Capacity of the French." By James Thomson Shotwell. *Political Science Quarterly*, v. 24, p. 115 (Mar.).

See also Interstate Commerce, Legal History, etc.

Injunctions. "Injunctions and Pardons—*In re Gompers*." By Richard W. Hale. 43 *American Law Review* 192 (Mar.–Apr.).

"The executive practice in Massachusetts, for instance, comes pretty near to the rule of law that a consumptive shall not die in jail. . . . The Constitution was intended to and does grant the pardoning power in all cases where mercy is applicable, and everyone who is being *punished* may be pardoned, including Mr. Gompers, if he ever gets to jail. . . . Mr. Davenport, attorney for the Manufacturers Association . . . said that Gompers could not be pardoned. . . . To sum up, the question is whether a sentence for contempt punitive in its nature is beyond the possibility of pardon. It is desirable that the law should be obeyed. Justice is not possible unless we succeed in getting it obeyed. It is neither desirable nor necessary that justice should not be tempered with mercy. Personally and by the way, if Mr. Gompers obeys the final decision on appeal the writer would prefer to see him pardoned. If he does not, the writer expects to be sorry for him no matter how many pardons he gets. It is especially desirable that no class, either lawyers or capitalists or trades-unions, should take strong ground against the general principles of law without imagination and without thinking what the rules should be if it was the lawyer's bull that gored the layman's ox. The law therefore ought to be and is that if a sentence be punishment it may be pardoned, if it be a civil process to secure obedience to the law it is not for an 'offense' and is not the subject of pardon."

The *Bucks Stove Co.* case is ably discussed editorially in 7 *Michigan Law Review* 499 (Apr.).

Insane Persons. "La Législation Française des Aliénés." By Jacques Roubinovitch. *Revue des Deux Mondes*, v. 50, p. 671 (Apr.).

International Law. "International Law as a Factor in English Law." By Pitt Cobbett. 6 *Commonwealth Law Review* (of Australia) 97 (Jan.–Feb.).

The writer shows that the relation in which international law stands to English law can be thus expressed: English law recognizes international law as a body of rules capable of being ascertained and when ascertained as being binding on states by virtue either of usage or agreement, and English law recognizes a rule that can be shown to have been accepted internationally and gives it the force of a part of English law, but matters properly to be determined by the Crown, by treaty or as acts of state, cannot be subject to the jurisdiction of courts administering municipal law, nor in matters subject to the jurisdiction of those courts will rules of international law derogating from or in conflict with English law be recognized, English courts always seeking, nevertheless, to adopt such interpretations of municipal law as will not bring it into conflict with the law of nations.

"It will be seen that international law still constitutes an important factor in English law, and that some knowledge of its rules must be regarded as a necessary part of the equipment of the ordinary practitioner."

See under special topics, *e. g.*, Aliens, Government, Marriage and Divorce, Sanction. See also European Politics, Foreign Relations.

Interstate Commerce. "Court Review of the Orders of the Interstate Commerce Commission Under the Hepburn Act." By Charles A. Prouty. 18 *Yale Law Journal* 297 (Mar.).

The writer, who is a member of the Interstate Commerce Commission, expresses the belief that the Supreme Court of the United States will finally hold:—

"1. That an order of the Interstate Commerce Commission establishing a railway rate for the future is legislative, and that the Commission in making such an order is a part of the legislative branch of this government.

"2. That such orders of the Commission are conclusive unless they contravene either the statutes or the Constitution of the United States.

"3. That if the Commission has proceeded in the manner and within the limits prescribed by the statute, its order will not be interfered with by the Courts unless so plainly wrong as to transcend the bounds of legitimate regulation, or as to amount to a taking of property without just compensation or due process of law."

For articles referring to the broadening scope of the national government under interpretation of the interstate commerce clause, see Government. See Monopolies, Railroads.

Jury Trial. "Shall Juries be Dispensed with in the Trial of all Negligence Cases?" By F. M. Field, K.C. 29 *Canadian Law Times* 271 (Mar.).

"The sentimental and constitutional arguments for the retention of juries in the trial of such actions, should not be lightly passed over. They are worthy of careful consideration in legislating on the subject. The proposal to abolish jury trials in negligence actions where corporations are concerned, if pressed, might become an important political issue."

"The Democracy of Justice: The Jury." By D. M. Delmas. *Kansas City Bar Monthly*, v. 11, p. 43 (Apr.).

"I give my fullest assent, therefore, to the memorable words uttered by one of the great chief justices of England of the Victorian age, who summed up his judicial experience by saying:

" 'A jury trial gives expression to the sense of justice of the people, which is the nearest approach to absolute justice attainable in earthly tribunals.' "

See Procedure.

Juvenile Crime. "Child Labor and the Juvenile Court." By James A. Britton, M.D. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2, Supplement, p. 111 (Mar.).

"1. The production of juvenile delinquents causes the state an enormous expense.

"2. Child labor is one of the important, if not the most important, factor in the production of juvenile delinquency.

"3. Lack of school and stunted physical development in the majority of cases prevent a possibility of any future but that of unskilled labor for the average child who is sent to work too early.

"4. From an economic standpoint the family who sends out a ten-year-old boy to sell papers loses a geat deal more in actual money from the boy's lack of future earning capacity than the boy can possibly earn by his youthful efforts. In other words, this sort of labor from an economic standpoint is an absurdity."

Labor Regulation. "A Year of Bench Labor Law." By David G. Thomas. *Political Science Quarterly*, v. 24, p. 80 (Mar.).

"On the whole, the prevailing tendency has been to justify interference with industrial freedom, and so far the decisions of the year may be regarded good. . . . So far as the writer is aware, the blacklist has never been declared illegal; but if a case were brought up involving this question, the court must in the light of the boycott decisions put the blacklist in the same category. Also combinations of capital to fight organized labor should be put under the ban."

"Labor and Wages." A collection of papers by a score of writers, including Edward T. Devine, Andrew Carnegie, Prof. Charles R. Henderson, Prof. F. Spencer Baldwin, E. Levasseur, Sidney Webb, and others. With supplement on "The Child Workers of the Nation," containing twenty or more papers, and a full report of the proceedings at the fifth annual meeting of the National Child Labor Committee. *Annals of Am. Acad. of Political and Social Science*, v. 32, No. 2 (Mar.).

"Some Ethical Aspects of Industrialism." By Prof. D. H. MacGregor. *International Journal of Ethics*, v. 19, p. 284 (Apr.).

"I may quote a remark of a great English economist that 'factory acts are a disgrace.' By this is meant that the things expressly enacted, with penalties attached to their non-observance, are such as ought surely never to have required to be insisted on by law. . . .

"To dismiss a workman on the ground of trade depression is unjust if the firm continues to work even at lower speed."

Australia and New Zealand. "Present State of Labor Legislation in Australia and New Zealand." By Victor S. Clark. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2, p. 63 (Mar.).

Massachusetts. "Recent Massachusetts Labor Legislation." By Prof. F. Spencer Baldwin. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2, p. 63 (Mar.).

United Kingdom. "The Problem of Unemployment in the United Kingdom; with a Remedy by Organization and Training." By Sidney Webb. *Annals of the American Academy of Political and Social Science*, v. 32, No. 2 (Mar.).

See also Child Labor, Employers' Liability, Injunctions.

Legal Ethics. "The Resignation of District Attorney Kealing." Editorial, 13 *Law Notes* 2 (Apr.).

Discussing the action of the Indiana United States District Attorney in resigning rather than assist the Department of Justice in its libel suit with reference to the Panama affair. To quote:—

"Of course, Mr. Kealing had a perfect legal right to resign his office; and since he did resign, he is not chargeable with using his office to prevent trial, or removal for trial, or for any improper purpose whatever, and his motives are not to be impugned; but it would seem that he labored under a misconception of his obligations, and that he would have better fulfilled his duties if he had retained his office, presented fairly the question of removal of the defendants, and left it to the court to determine the law of the case."

"Practical Ethics of the Lawyer." By M. H. Ludwig. 29 *Canadian Law Times* 253 (Mar.).

Read before the Ontario Bar Association December 18, 1908.

"The extreme views expressed by Lord Brougham on the trial of Queen Caroline, where he is reported to have said: 'An advocate by the sacred duty which he owes his client knows in the discharge of that duty but one person in the world, the client, and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties. He must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon that other'—did not meet with the approbation of the English bar, and counsel in our day do not deem it proper or necessary to hazard everything to protect a client. If the bar is sometimes unfavorably spoken of by the public such disfavor is perhaps engendered as much because of the uncalled for attacks sometimes made by counsel upon honest witnesses as from any other cause. A friendly attitude towards witnesses is desir-

able in most cases in the interests of the legal profession."

Legal History. "Normandy under William the Conqueror." By Charles H. Haskins. *American Historical Review*, v. 14, p. 453 (Apr.).

"The organization of Norman society is feudal, with the accompaniments of feudal tenure of land, feudal military organization, and private justice, but it is a feudalism which is held in check by a strong ducal power. The military service, owing to the duke, has been systematically assessed and is regularly enforced. Castles can be built only by the duke's license and must be handed over to him on demand. Private war and the blood feud are carefully restricted, and private jurisdictions are restrained by the reserved jurisdiction of the duke and by the maintenance of a public local administration."

This scholarly paper also throws some light on the *curia*, the ancestor of the English *curia regis*. "It is clear that, contrary to Freeman's view of the exclusion of ecclesiastics from the Norman curia, the bishops took an active part in its proceedings, and it is probably among them, rather than in the office of seneschal, that we should seek the origin of the English justiciarship."

Burgundy. "The Formation and Constitution of the Burgundian State (Fifteenth and Sixteenth Centuries.)" By Prof. Henri Pirenne. *American Historical Review*, v. 14, p. 477 (Apr.).

Legal Interpretation. "Extrinsic Evidence in Respect to Written Instruments." By Prof. C. A. Graves. 14 *Virginia Law Register* 913 (Apr.).

This paper, though read before the Virginia State Bar Association as long ago as August, 1893, has been quoted with approval by several of the Supreme Courts of the states and has been referred to frequently in legal literature. It can properly be considered a legal classic. In it Professor Graves denies there is any difference between patent and latent ambiguities.

Legislative Procedure (Congress). "The Powers of the Speaker." By Prof. Edwin Maxey. *Forum*, v. 41, p. 344 (Apr.).

"Viewing the powers of the Speaker both as a moderator and as a political leader, we cannot fail to see that he is an officer of great power—in fact, he is the first man in our legislative system. But this power he has secured not by laying violent hands on it—it has been granted him by the House in accordance with the dictates of experience and the logic of facts. . . . The rules of the House ought not to be held accountable for the fact that Joseph G. Cannon has an arbitrary and imperious cast of mind. If this diagnosis is correct, the logical remedy would be a change in the Speakership rather than a revision of the rules."

"The Rules of the House of Representatives: A Criticism." By Gov. Claude A. Swanson (of Virginia). "The Rules of the House: A Defense." By Frederick C. Stevens, M. C. *Review of Reviews*, v. 39, pp. 465, 470 (Apr.).

Marriage and Divorce. "The Divorce Question in the United States." By C. LaRue Munson and William D. Crocker. 18 *Yale Law Journal* 387 (Apr.).

This paper, which was read before the Pan-Anglican Congress at London last June, derives its facts and conclusions largely from three recognized authorities in the United States: (1) "Report on Marriage and Divorce" by Carroll D. Wright, U. S. Commissioner of Labor, (2) "History of Matrimonial Institutions," by George E. Howard, Ph.D., of Chicago University, and (3) "Bishop on Marriage, Separation, and Divorce." Divorce legislation in the United States is grouped into three periods, the Colonial, that before the Civil War, and that of the last fifty years.

The paper gives a valuable though brief historical summary of divorce legislation, with an analysis of the causes differentiating such legislation from that existing in England and other countries. The work accomplished by the Pennsylvania commissioners to examine and codify divorce laws, the subsequent National Divorce Congress held in Washington in February, 1906, and the Uniform Divorce Code unanimously adopted in November, 1906, at an adjourned meeting of the Congress are given much attention. This code has been adopted by two states, New Jersey and Delaware. The conference of Commissioners on Uniform State Laws in August, 1907, unanimously endorsed the act, and the legislatures of several states are now considering its adoption.

Equity Suits. "Of Matrimonial Actions as Equity Suits and of the Pleadings Therein." By W. A. Purrington. 9 *Columbia Law Review* 321 (Apr.).

Prepared by a New York lawyer with special reference to New York courts.

"To sum up the matter, the weight of authority seems to be, (1) that in New York, and in all states wherein the statute has created matrimonial actions and placed their conduct in Chancery, those causes are equity suits, to which equitable maxims are applicable, (2) that although, beyond doubt, proper pleading in these suits requires that all the facts which the statute declares shall be bars to a decree should be set up affirmatively as defenses, nevertheless such is the importance to the state of a stable marriage relation that even under the prevailing and lax pleading in which affirmative defenses are anticipated and the general issue only is pleaded by the answer, for fear that affirmative defenses may imply an admission of guilt,—nevertheless the Court in its discretion may require that, if the existence of any one of those defenses shall transpire in evi-

dence, the pleadings shall be amended and, if necessary, the case continued, in order that the truth shall be made manifest and a party with unclean hands deprived of the relief that he craves."

International Marriages. "The English View of Capacity in International Marriages." Editorial Note. 22 *Harvard Law Review* 439 (Apr.).

"In the light of the adjudged cases and the language used in deciding them, it is difficult to say whether an English court will apply the *lex loci* or the *lex domicilii* to determine matrimonial capacity. . . . It is submitted that the domiciliary theory expresses more accurately the present state of English law."

A somewhat analogous question is discussed by another writer. "The Law Ruling the Moveables of Americans Married in France or in Belgium without any Settlement or Marriage Contract." By Emile Stocquart. 18 *Yale Law Journal* 399 (Apr.).

When an American woman marries a Frenchman or Belgian, the question what law governs the moveables, if there has been no marriage contract or settlement, becomes important. The principle that when there is not an express contract, a tacit contract evidenced by the intention to make choice of a matrimonial domicile in another country than the husband's regulates the rights of husband and wife to their moveables, seemed to be a well established principle in French jurisprudence; but it proved difficult to ascertain the parties' intentions, and courts adopted the doctrine that "a person's civil rights are, in the cases to which English and American Courts apply the law of his domicile, to be determined not by such law, but by the law of the country or state to which he belongs by allegiance or citizenship."

The proposed convention of The Hague, 1904, gives up the law of domicile and adopts that principle of nationality which generally applies in Europe, though not in the United Kingdom. This view may be generally taken by the courts in the near future.

Master and Servant. See Employers' Liability, Labor Regulation.

Measure of Damages (Conversion). "Measure of Damages When Property is Wrongfully Taken by a Private Individual." By Hugh Evander Willis. 22 *Harvard Law Review* 419 (Apr.).

"The rule of damages adopted and applied by many of our state courts and by our United States Supreme Court is unjust and an outrage on the rights of property. . . .

"The true rule should compensate the innocent party for the labor and expense he has bestowed upon the chattels to the extent their value is enhanced thereby, but it should give all the other advantages of ownership to the owner. Thus, if A inadvertently trespasses on B's land and cuts timber, when its value standing is three dollars a thousand and after severance four dollars a thousand, and he then transports it to his saw-mill and saws it up into boards at a total expense of five dollars a thousand, but at that time and place the value of the lumber is twenty dollars a thousand, B should be allowed to sue A in any form of action and recover either the lumber or its present value of twenty dollars, less five dollars a thousand."

Mines. "Important Recent Decisions on Mining Law." By R. B. Michell. 19 *Madras Law Journal* 1 (Jan.).

This paper discusses the effect of subsidence of the surface on the rights of owners and occupiers of lands containing coal mines, in the light of the recent decision of the English Court of Appeal in *Butterley Co. Ltd.* v. *New Hucknall Colliery Co. Ltd.* (25 Times Law Reports 45, L. R. (1908) W. N. 221.)

Monopolies. "The Sherman or Anti-Trust Act." By J. H. Benton, LL.D. 18 *Yale Law Journal* 311 (Mar.).

"At the last session of Congress, a bill was introduced by Mr. Hepburn and hence known as the 'Hepburn Bill,' to carry out the President's recommendation. . . .

"Of this bill it can well be said that the remedy proposed by it is worse than the disease. . . .

"The fact is that the reason why the Sherman Act has not been efficiently enforced is because it is an unenforceable statute. It is as useless to enforce it generally and uniformly, according to its plain provisions, as it would be to attempt to enforce a statute regulating the price of commodities or the intrinsic value of money. The Act is an attempt to control commercial and economic forces by statute, and like all similar Acts, must ultimately either fall into entire disuse, or be repealed, after having caused, as such statutes always do, more or less injury to the community.

"The remedy for the evils of the Act is not in providing cumbrous, mischievous and unworkable methods for avoiding some of them, but by substituting for it, so far as the public welfare requires, a properly framed, guarded and workable Act, with proper provisions for its efficient and uniform enforcement."

See Interstate Commerce, etc.

Negligence. "Negligence and the Act of God." By Wilbur Larremore. 18 *Yale Law Journal* 338 (Mar.).

Speaking with approval of the doctrine of *Railroad Company* v. *Reeves*, 1869, 10 Wall. 176, and a number of cases following it in different states, the editor of the *New York Law Journal* expresses the opinion:—

"In the obvious interests of justice, a direct exception should be grafted upon the theory of proximate and remote causes by holding that whenever a person by his, or its, negligence exposes the person or property of

another to an act of God, that otherwise presumably would have been escaped, damages may be recovered against the negligent person for the injury sustained. Such a rule would treat an act of God not as an independent agency, but as identical with the damage or loss it produces, and confine legal consideration to antecedent causes. In effect this is what has been done by the courts of New York, Minnesota, Iowa and Alabama, but they have proceeded not straightforwardly but by casuistical distinction.

"This suggestion for an avowed change in the law is made for the consideration of courts before which the question shall come as one of first impression, and, more particularly, of courts that are now committed to the view of the Supreme Court of the United States. It would be entirely legitimate for tribunals in the latter class to overrule their former decisions without an enabling statute."

See also Admiralty, Employers' Liability, Evidence, Jury Trial, Procedure.

Partnership. "Some Judicial Myths." By Prof. Francis M. Burdick. 22 *Harvard Law* Review 393 (Apr.).

The author finds two examples of the myths under consideration in a recent article from the pen of a learned judge. ("Some New Aspects of Partnership Bankruptcy under the Act of 1898," 8 *Columbia Law Rev.* 599–604.)

"No one will question that 'partnership entity' is a commonplace phrase at the present time; and there may be many members of the bar who have no recollection of its use prior to 1899. To them the inference of the learned judge would seem warranted, that the legal profession is indebted for the phrase to a decision rendered in that year of grace. But a fuller knowledge of the history of the phrase repudiates the inference. . . .

"A very interesting judicial myth in this country is connected with the English doctrine of out and out conversion into personalty of partnership real estate. It is especially noteworthy, not only because it has been repeated frequently by judges in widely separated jurisdictions, but because it illustrates the easy transition from 'it might have been' of one court to 'it was' of another."

Patents. "The Patent Rights of Army and Navy Officers." By Lt.-Commander Cleland Davis, U. S. N. *Forum*, v. 41, p. 312 (Apr.).

See also Trademarks.

Practice. "The Art of Legal Practice." By Edson R. Sunderland. 7 *Michigan Law Review* 397 (Mar.).

A description of the manner in which the teaching of practice has been developed at the University of Michigan.

"After the men assigned to a given case deem the same at proper issue on the pleadings, they file notes of issue to indicate that fact, and the pleadings filed are then carefully examined by the instructor in charge. He then meets the group and the pleadings are discussed and criticized and suggestions are made as to better methods of dealing with the case and ways of avoiding errors. Amended pleadings are usually required to be prepared and filed, and upon the pleadings as they stand in their final form a law argument is based.

The law argument is made before some member of the faculty; it consumes from one to two hours, and covers the issues raised by the pleadings. Each man must take part in the argument and must show familiarity with the facts and principles involved in the leading cases cited. . . . The men are graded upon their arguments and upon their briefs, and if they do not attain a sufficient standard in either one a reargument or a new brief may be called for.

"The foregoing represents the work of the first semester. The second semester is devoted largely to court work in jury cases."

"The Organization of a Legal Business, XIX—Accounting Methods, I." By R. V. Harris. 29 *Canadian Law Times* 274 (Mar.).

"Damages." By W. S. Cowherd. *Kansas City Bar Monthly*, v. 11, p. 52 (Apr.).

A paper read at the last annual meeting of the Kansas City Bar Association.

"Opportunity beckons us and society demands that we right the wrongs labor now endures and make business certain of the profit to which it is entitled. Let no one think the passage of such an act will leave the lawyer without an occupation. As long as there are rights to be preserved and wrongs to be redressed there will be business for the lawyer. As long as free governments stand the lawyer will be the chief corner stone of the structure. Our great profession has instigated every revolution that advanced the rights of men. We stood beside the cradle of liberty and when we pass away we shall rest with freedom in a common grave."

Procedure. "Concerning the Present Method of Charging Juries." By Edward J. Maxwell. Letter in *New York Law Journal*, Mar. 5, 1909, p. 2386.

"It was repeatedly said, after the conclusion of the Maybrick case, that the charge of the judge presiding led to the woman's conviction. It is not surprising when one remarks the character of the language made use of on that occasion. . . .

"It were a 'consummation devoutly to be wished' if some method could be devised whereby this evil could be remedied. Doubtless the judges who are called upon from time to time to lay down the law to juries would be quite as much gratified and relieved as litigants and counsel if the power to do more than state the propositions of law applicable to the case were taken from the court. The rule in operation in Illinois and Colorado accomplishes this result. In all jury trials in those states the counsel in the case are required to have prepared such instructions as

they desire the court to submit to the jury. They are written on but one side of the paper. During the trial, as the court has opportunity, these instructions on either side are examined, and those which are allowed are cut out and placed together. These are read to the jury at the close of the case, before the counsel have begun their arguments, and the latter are predicated upon the instructions thus read. Those which have been rejected are preserved and are made a part of the record on appeal, with the proper exception. In short, the judge does not have occasion to say one word to the jury."

Privileged Testimony. "Immunity of Witnesses and Parties." By S. Vaidyanatha Iyer. 11 *Bombay Law Reporter* 33 (Feb. 28).

"Thus we see that according to the Madras and Bombay High Courts, the question of criminal liability would be decided totally upon the principles of English law as to public policy and without reference to the Indian Penal Code. A contrary view is held by the Allahabad High Court, according to which the English law would not apply and the question would have to be decided purely under the Indian Penal Code. The Calcutta High Court also, we find, is in favor of the Allahabad view as regards the applicability of s.499, Indian Penal Code, to the case, but privilege is accorded only in respect of *relevant* statements made by *witnesses* in the course of their giving evidence and not to *parties* making *voluntary and irrelevant statements*. It can scarcely be doubted that these conflicting rulings leave the law on such an important question as the one under consideration in a very unsatisfactory and unsettled condition and there is need for legislative interference."

Public Contracts. "Government Contracts —Before the Court of Claims." By Charles F. Carusi. 43 *American Law Review* 161 (Mar.–Apr.).

This is the second of two articles, the former (21 *Green Bag* p. 116, Mar.) being devoted to "Government Contracts—Before the Accounting Officers." The procedure adopted in trying cases in the Court of Claims is here described with much clearness.

Kansas. "The New Kansas Code of Civil Procedure." 13 *Law Notes* 10 (Apr.).

A description of the revised code recently enacted by the Kansas legislature. The code provides, with respect to new trials:—

"A new trial shall not be granted as to any issues in a case unless on the pleadings and all the evidence offered at the trial and on the motion for a new trial the court shall be of the opinion that the verdict or decision is wrong in whole or in some material part, and the new trial shall be only of the issues as to which the verdict or decision appears to be wrong, when such issues are separable."

A change with reference to evidence is made, affidavits being admissible under certain conditions. Exceptions, bills of exceptions, and cases for review are abolished.

"One of the main purposes of the revision is to put an end to reviewing mere matters of practice in the Supreme Court, and to require a consideration of the merits of the case as it was presented to the trial court with a view to a final determination of the cause, rather than an approval or condemnation of the various rulings of the trial judge."

See also Evidence, Interstate Commerce, Jury Trial.

Public Service Corporations. See Interstate Commerce.

Railroads. "Valuation of Railways." By Prof. J. Laurence Laughlin. *Scribner's*, v. 45, p. 434 (Apr.).

"To the extent that a railway is a monopoly, its commercial valuation will be based on its earnings. But a physical valuation overlooks sources of earnings properly belonging to a transportation company."

See Interstate Commerce, Monopolies, Rates, etc.

Rates. For articles referring to the broadining scope of the national government under the interstate commerce clause, see Government.

Real Property. See Torrens System.

Sanction. "The Sanction of International Law." By Elihu Root. 9 *Phi Delta Phi Quarterly Brief* 1 (Mar.).

"For the great mass of mankind, laws established by civil society are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life.

"The rules of international law are enforced by the same kind of sanction, less certain and peremptory, but continually increasing in effectiveness of control. 'A decent respect to the opinions of mankind' did not begin or end among nations with the American Declaration of Independence; but it is interesting that the first public national act in the new world should be an appeal to that universal international public opinion, the power and effectiveness of which the new world has done so much to promote.

"The most certain way to promote obedience to the law of nations and to substitute the power of opinion for the power of armies and navies is, on the one hand, to foster that 'decent respect to the opinions of mankind' which found place in the great Declaration of 1776, and on the other hand, to spread among the people of every country a just appreciation of international rights and duties, and a knowledge of the principles and rules of international law to which national conduct ought to conform; so that the general opinion, whose approval or condemnation supplies the sanction for the law, may be sound and just and worthy of respect."

Sherman Anti-Trust Act. See Interstate Commerce, Monopolies.

Stare Decisis. "A Plea for Straight Thinking Concerning the Enforcement of Laws as They Exist." By John S. Sheppard, Jr. 22 *Harvard Law Review* 427 (Apr.).

"The logical course is to accept the situation and work toward our goal along the path apparently marked out for us. Let us realize that the agreed rule is to be the rule under any and all circumstances, and that the exact application of it, even where it works what seems to us injustice in a given case, is the course best adapted to the attainment of our ideal because it will drive us to such a modification or restatement of the rule as will embody in it the elements necessary to accomplish the justice we seek in all cases. The course of some judges, in seeking to stretch the rule so as to prevent what they regard as an unjust result in any given case, is thus, in the long run, most injurious: it precludes exact knowledge of what the rule is; if the rule is inartificially or inadequately formulated, it retards the process of reformation. It has produced more injustice than all the 'hard cases' since the world began, because of the confusion and uncertainty it has injected into our system. The sagacious person, seeking antecedently to make his conduct conform to the rule, is unable to do so because he cannot ascertain what the rule is. As a result, despite all his care and desire to act properly, he is adjudged to have contravened the rule. Surely, no injustice is equal to this!"

Status. "Race Distinctions in American Law." By Gilbert Thomas Stephenson. 43 *American Law Review* 205 (Mar.–Apr.).

The second of a series of articles (see 21 *Green Bag* 123), on the race problem in the South.

This article describes at length laws before 1865 which discriminated against the black race. These laws "are interesting to the student of that period of American history, as having furnished an argument for the radical *régime* of reconstruction which Thaddeus Stephens and his supporters inaugurated and advanced."

Indians. "The Indian Before the Law." By Prof. Isaac Franklin Russell, D. C. L., LL. D. 18 *Yale Law Journal* 328 (Mar.).

"As to personal status, the Indian is not, in general, a citizen of the United States by birth, because not born, in the language of the Fourteenth Amendment, subject to the jurisdiction thereof. But Indians may be naturalized, individually or collectively, by treaty or by statute. Every Indian in the Indian Territory is a citizen by statute. So, too, is he, if he has received an allotment of lands in severalty pursuant to statute. In such cases he may vote, serve as a juror, testify as a witness in court, and sue and be sued. . . . Our national policy continues to be that of 'a benevolent guardian, engaged in raising a race of human beings from barbarism to civilization.' "

See also Aliens.

Taylor's Science of Jurisprudence. The somewhat too conspicuous indebtedness of this work to predecessors is now notorious, and a typical attitude is expressed by an editorial in 13 *Law Notes* 5 (Apr.):—

"It cannot well be questioned that a very strong case has been made out against Dr. Taylor. Unless he can establish the propriety of borrowing without citation or quotation marks from the writings of others, piecing the excerps together, and offering the product to the public as an original work, he will find some difficulty in justifying himself in the eyes of the legal profession. No wonder we all thought it a mighty fine book."

One reviewer, however, goes further than the generality of critics, and would not find the volume praiseworthy even if it represented wholly the results of Dr. Taylor's own labors. To quote from 9 *Columbia Law Review* 369 (Apr.):—

"Our quarrel with the author is not so much that he has put forth as his own the work of other and, may we add, better men, but that he has made such bad work of his borrowings. Surely Muirhead and Sohm and Bryce and the rest were entitled to have their contributions to Mr. Taylor's literary fame combined to some purpose. The work is announced on the title page as 'A Treatise in which the growth of positive law is unfolded by the historical method and its elements classified and defined by the analytical.' But there is in fact no unfolding of the growth of positive law and nothing that deserves to be called a classification of its elements. The several parts and chapters of the work are *disjecta membra*, without relation to one another and without organic unity."

Torrens System. "The Torrens System of Land Registration." By J. A. Harzfield. 9 *Phi Delta Phi Quarterly Brief* 22 (Mar.).

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Trademarks. "Comments on Modern Law of Unfair Trade." By Edward S. Rogers. 3 *Illinois Law Review* 551 (Apr.).

Discusses a wide range of trademark cases with extremely full citations and quotations from English as well as American decisions.

"This is the present state of the law, that every trader has a property in the good-will of his business, that he has the right to the exclusive benefit of this good-will, that therefore he has the exclusive right to sell his goods as his own, and that no one has any right by any means to sell as his, other goods than his. In short that no one has any right to sell his goods as the goods of another. This principle is perfectly general and without exception. The means by which the end is accomplished do not matter, whether in the

particular case it be by the use of a personal, descriptive, or geographical name, imitated labels, color of label, appearance of package, shape of package, form or peculiarities of the goods themselves, misleading advertising, oral false statements, or silent passing off. Whether any particular contrivance is calculated to result in the sale of one man's goods as those of another is a question of fact in each case."

Uniformity of Laws. See Marriage and Divorce.

Workmen's Compensation Acts. See Employers' Liability.

Miscellaneous Articles of Interest to the Legal Profession

Biography.

Bismarck. "Cavour and Bismarck, II." By William Roscoe Thayer. *Fortnightly Review*, v. 85, p. 721 (Apr.).

Cavour. See Bismarck.

Cleveland. "Grover Cleveland; Stories by Him—Stories about Him." By Jesse Lynch Williams. *American Magazine*, v. 67, p. 533 (Apr.).

Full of anecdotes showing the great statesman's dry and lively humor.

Mr. Cleveland, speaking of the fate of ex-Presidents, once said:—

"'Now there was Harrison; he went into law. The first time he got up to argue a case *in* court everybody laughed; it seemed so queer. I know how it is. I went back into law myself between the two terms at Washington. Well, the first time I went into court, the supreme court, there on the bench sat two judges I had appointed myself. No, it doesn't do. . . . So a fellow has to remain a loafer all the rest of his life simply because he happened to be President. It isn't right. It isn't fair.'"

"Cleveland's Opinions of Men." By George F. Parker. *McClure's*, v. 32, p. 569 (Apr.).

His estimates of Thomas F. Bayard, J. Pierpont Morgan, James J. Hill, George Gray, Patrick A. Collins, Joseph B. Foraker, and Theodore Roosevelt.

"Cleveland as a Lawyer." By Wilson S. Bissell. *McClure's*, v. 32, p. 583 (Apr.).

His law partner's excellent portrait of his personal traits, reprinted from a campaign document circulated in 1892.

Hussein Hilmi Pacha. "The New Grand Vizier." *Current Literature*, v. 46, p. 389 (Apr.).

Jay. "John Jay." By Clarence B. Kelland. *Law Student's Helper*, v. 18, p. 106 (Apr.).

Knox. "How Mr. Knox became Secretary of State." By Walter E. Clark. *World's Work*, v. 17, p. 11433 (Apr.).

Lincoln. "Lincoln's Assassination told by an Eye-Witness." "Edwin Booth and Lincoln." "Lincoln's Interest in the Theatre." "Lincoln and Wilkes Booth as Seen on the Day of the Assassination." *Century*, v. 77, pp. 917, 919, 942 and 954 (Apr.).

Pulitzer. "The Dramatic Intensity of Joseph Pulitzer." *Current Literature*, v. 46, p. 382 (Apr.).

Roosevelt. "President Roosevelt's Record." By Sydney Brooks. *Fortnightly Review*, v. 85, p. 658 (Apr.).

"What Mr. Chamberlain did for the Colonial Office and Mr. Lloyd George for the Board of Trade, Mr. Roosevelt has done for the entire government of the United States. He has graded it up; he has penetrated it with a new vitality, almost, one might say, with a new morality. . . . That the Sherman law will ultimately be repealed or amended, and that the large corporations will be granted a federal license subject to federal supervision, I take to be inevitable, and the credit for this will belong mainly to Mr. Roosevelt."

Roosevelt and Taft. "The Personal Relations of Mr. Roosevelt and Mr. Taft." *Current Literature*, v. 46, p. 379 (Apr.).

"It was not known until a few months since that in 1904 Mr. Taft, then Secretary of War, sent in a letter of resignation to President Roosevelt. . . . He asserted his unwillingness to jeopardize in any way Mr. Roosevelt's re-election, but also asserted his answering loyalty to the Philippines, and his inability to cease the advocacy of a decrease in the duties on Philippine products. . . . President Roosevelt took just two minutes to dispose of this letter of resignation. It was returned to Mr. Taft with these words inscribed across the corner:—

"'Dear Bill—Fiddledeedee.—T. R.'"

British Naval Policy. "The German Naval Case." Anon. *Contemporary Review*, v. 95, p. 395 (Apr.).

An open letter from the German Michel to John Bull. "Dear Mr. Bull, let me say in conclusion that I deplore as much as any one this headlong race to ruin. But who began it?"

"The Naval Situation," by Sir William H. White, K.C.B. "A Rude Awakening," by Col. the Earl of Erroll, K. T. "German Armaments and the Liberal Government," by J. Ellis Barker. *Nineteenth Century*, v. 65, pp. 541, 565, and 570 (Apr.).

China. "The New Education in China." By Paul S. Reinsch. *Atlantic*, v. 103, p. 515 (Apr.).

"When we consider the entire educational movement in contemporary China, we are

forced to admit that with all the daring innovations that have been made, the great battle is yet to come. . . . The attitude of the government itself is more favorable to purely technical studies, like engineering, physical science, and jurisprudence," than to "the more general cultured branches."

"The New Ruler of China." By Prof. Isaac Taylor Headland. *Century*, v. 77, p. 805 (Apr.).

"The New Regime in China." By Eleanor Franklin Egan. *Everybody's*, v. 20, p. 587 (May).

Conservation of National Resources. "A Continent Despoiled." By Rudolf Cronau. *McClure's*, v. 32, p. 638 (Apr.).

"It may be new to you that white pine has so fallen off, that its domination of the lumber market has practically ceased. Rapidly decreasing also is our supply of hard woods, the prices of which go up higher and higher. White oak went up from $48 in 1890, to $85 in 1907; hickory from $38 to $65, and yellow poplar from $29 to $53. Expert foresters proclaim that we are, without having made any provisions against it, dangerously near a hard-wood famine, which will strike at the very foundation of some of the country's most important industries."

"Making Rivers Work." By John L. Mathews. *Everybody's*, v. 20, p. 443 (Apr.).

Criminology (Japan). "Life in a Japanese Prison." By Andrew Soutar. *Wide World Magazine*, v. 23, p. 60 (Apr.).

"It was natural that, after parading this paradise, I should doubt if Japan's treatment of her criminals led to a decrease in crime. The officials confessed that, of robbers, burglars, thieves, and swindlers, sixty per cent came back to the prison. Of those who had been twice imprisoned, sixty per cent returned; of the first offenders, forty per cent found their way back.

"And I did not wonder. Looking back at the pile of palatial buildings set in a garden of green and gold, I marveled that only one little man with a very big sword was needed to guard the gates and prevent the hordes of Tokio from rushing in!"

Democracy. "The Old Order Changeth—IV, Progress in American Cities." By William Allen White. *American Magazine*, v. 67, p. 603 (Apr.).

Uniformity of municipal accounts, government by commission, municipal ownership, and home rule, are some of the topics here discussed.

Eugenics. "The Older and Newer Ideals of Marriage." By Prof. W. F. Thomas. *American Magazine*, v. 67, p. 548 (Apr.).

"At the age of perhaps eight the child's brain is practically all in; he is short only in experience and practice. He can understand any abstract principle and any piece of literature, from the theory of evolution to the Hamlet of Shakespeare, but when he spends his time with an uneducated nurse or an unideaed mother he goes to school and even to college with a mind barren."

Fiction. "Their Hearts' Desires." By Judge Edward A. Parry. *Cornhill*, v. 26, p. 478 (Apr.).

A fanciful story of an eminent barrister who in consideration of a grant of youth, a new appetite, and a two hundred and fifty yards drive in golf, takes over his nephew's personality, with his incapacity for earning money and all his existing love affairs whatsoever.

History. "English Conspiracy and Dissent, 1660–1674, I." By Wilbur C. Abbott. *American Historical Review*, v. 14, p. 503 (Apr.).

"The death of Oliver Cromwell on September 3, 1658, assured the ultimate downfall of the so-called Puritan cause, but the catastrophe was not as sudden as many men had hoped and prophesied. . . . It is the purpose of this paper to consider another element of this fallen party—those who did not quietly submit to their fate—during the period of their greatest and most influential activity, the first dozen years of the reign of Charles II."

"The South Carolina Federalists, I." By Ulrich B. Phillips. *American Historical Review*, v. 14, p. 529 (Apr.).

"A beginning of the Federalist frame of mind may be seen as early as the movement of revolt from Great Britain The movement in South Carolina was controlled by the aristocracy, and had little concern with the doctrine of natural rights. It was merely a demand for home rule, with few appeals to theory of any sort. It was, furthermore, a movement for home rule in Anglo-America as a whole, and not for the independence of the separate commonwealth of South Carolina."

"The Diary of Gideon Welles; II, The Cabal against Seward, and the Emancipation Proclamation." *Atlantic*, v. 103, p. 471 (Apr.).

Labor Problems (Women). "The Woman's Invasion; VI, The Working Home." By William Hard; Rheta Childe Door, collaborator. *Everybody's*, v. 20, p. 521 (Apr.).

"Widows, 800,000 of them, and more, were earning their living in the United States in the year 1900. And married women, likewise, to the number of more than 700,000. And divorced women, likewise, to the number of more than 60,000. One million, six hundred thousand of them altogether!"

Legal Miscellany. "The Literary Side of the Law Reports." Anon. *Blackwood's*, v. 185, p. 506 (Apr.).

Treating of the lighter and more human side of Scotch law reports.

San Francisco Graft Prosecutions. "They who Strike in the Dark." By Will Irwin. *American Magazine*, v. 67, p. 564 (Apr.).

Exceedingly interesting stories of plots, abductions, dynamiting and attempted murder undertaken against the San Francisco graft prosecution.

"The 'Parkside' bribery case against Abe Ruef was on the docket. The evidence of the prosecution, know to both sides in advance, was very clear—an unbroken chain. Ruef's hope lay in a prejudiced jury. The fight then centered about the 'box' of 200 men, from which, according to California practice, the jurors were selected. Haas was in that box. . . .

"He was hardly seated in the box, when Burns discovered that one Anixter, a juror who was under examination and who had passed provisionally, had served a term in the House of Correction. . . . The court decided against Anixter.

"The day after Anixter retired, a Jewish tailor named Cohn telephoned to Heney:

" 'You have another ex-convict on the Ruef jury; come up and see me about it.'

"A Burns detective saw Cohn and learned all about the past of Haas. He had been in the San Quentin penitentiary for embezzlement. He had long been intimate with Cohn's wife. Cohn had heard him say to her:

" 'I am going on the jury to get Ruef off and make money and pay my debts.' "

Haas was put out of the jury box, and, a little later, shot Heney in open court. A few days after this he shot himself while in jail.

Social Evil. "The White Slave Traffic." By Harry A. Parkin, Assistant U. S. Attorney for Northern District of Illinois. 9 *Phi Delpha Phi Quarterly Brief* 7 (Mar.).

"We find that there is a society, or syndicate, thoroughly equipped and organized and extremely wealthy, which in the past imported on an average of two thousand foreign girls from Paris, Montreal, Austria-Hungary, Japan, and Italy. . . .

"In the northern district of Illinois there have been returned in the last six months thirty-eight indictments. About half of these indictments have been tried and convictions secured. Girls are being deported every month who are taken from these houses of shame and are returned to their parents in Europe.

"The only remedies are segregation, registration and thorough medical inspection."

Stock Speculation. "A Hireling of Wall Street. By a Manager. *Everybody's*, v. 20, p. 505 (Apr.).

"Boiled down, my principal occupation was: Meet men—crawl into their favor by being a good fellow—make them like you—and get them to trade. Then watch out that they don't get away from you. For this work I received the salary of a United States general. . . . In almost three years I had over two hundred accounts, and not only have I never seen anybody make any money to keep, but I have seen many a fortune wiped out."

"The Game Gets You." By John Parr. *Everybody's*, v. 20, p. 499 (Apr.).

"When the broker lends you capital for margin speculation, he compounds the interest on it monthly. He does more. He charges interest on his commissions. Ask your broker if that is true. Take him some monthly transaction of yours and suppose that, instead of its being closed in one month, it stands open for two months.

"You will find that you are paying interest on interest and interest on the commission, and it would be so compounded monthly as long as the account stood open. Is it to be wondered at that brokers are secretive about the interest account?"

Tariff. "Juggling with the Tariff." By Ida M. Tarbell. *American Magazine*, v. 67, p. 578 (Apr.).

" 'I wrote the bill of 1870,' the late Joseph Wharton, iron master, steel master and nickel king, once told the writer proudly. 'Three men will make the next tariff bill, not one of them a member of Congress,' Mr. Havemeyer told David A. Wells in 1894. He was right. That bill, like all its predecessors, for nearly forty years was made in practice by the representatives of wood and woolen, of iron and steel and sugar. And in spite of all the signs to the contrary it is probable they will control the bill of 1909."

"Europe's Tariff Laws and Policies." By Frederic Austin Ogg. *American Review of Reviews*, v. 39, p. 427 (Apr.).

"Of the three European nations with which the trade relations of the United States are closest, two,—France and Germany,—have long been strongly protectionist, and one,—Great Britain,—has maintained steadfastly for over half a century the policy of free trade. But in all of them tariff is today a very live issue, and although the three do not, of course, comprise strictly for the United States the Europe of commerce, no one can doubt that so far as our tariff system is to be affected by European influences at all it will be the measures of these three powers that will weigh most heavily."

"Unemployment; Its Cause and Cure." By Sir Nathaniel Dunlop, LL. D. *Blackwood's*, v. 185, p. 459 (Apr.).

Advocating tariff duties as the most effective means of promoting the prosperity of England.

Women (Turkey). "Prisoners of the Harem." By E. Alexander Powell, F.R.G.S. *Everybody's*, v. 20, p. 465 (Apr.).

"So long as the harem exists in Turkey, just so long must slaves be procurable. The internal organization of the harem is as dependent upon the slave as were the cotton-planters of the South before the war."

Reviews of Books

WAS CHRIST'S TRIAL ILLEGAL?

The Trial of Jesus, from a Lawyer's Standpoint. By Walter M. Chandler, of the New York bar. V. 1, The Hebrew Trial; v. 2, The Roman Trial. Empire Publishing Co., New York. Pp. xxxv, 366; xi, 381 + bibliography and index.

THE author of this work has tried to convey clear ideas about a matter upon which little information is accessible. If his attempt to show precisely what took place at the trial of Jesus is unsuccessful, he has nevertheless done a service by collecting material relating to the principles of Roman and Hebrew jurisprudence probably in existence at the beginning of the Christian era.

As Prof. Nathaniel Schmidt says in his scholarly work on "The Prophet of Nazareth" (p. 286), "It has been repeatedly shown that the trial as described in the Gospels is out of harmony with the legal procedure prescribed in the Mishnaic tractate 'Sanhedrin' and its Talmudic amplifications." Mr. Chandler's book makes an elaborate effort to demonstrate the illegality of the Hebrew trial. Unfortunately, however, he commits at the outset the fatal mistake of accepting the Scriptural record of fact as final and unimpeachable. As a result he obtains a distorted perspective of his subject, and no thoroughness of research can atone for the defect.

The Scriptural narrative is in several respects lacking in verisimilitude. It is incredible that so much could have happened in the twenty-four hours preceding the Passover. It is also incredible that Jesus should have been tried by summary proceedings and executed within so inconceivably short a space of time. There is a touch of incredibility in the high-handed procedure before Caiaphas, so inconsistent with the humane spirit of Hebrew criminal law; there is also an informality in the proceedings before Pilate which offends one's historical sense. While we know that Christ died an ignominious death, the inhuman brutalities attendant upon his execution are difficult to reconcile with the spirit of Roman as well as of Jewish criminal law. Whoever, therefore, wishes to understand what actually occurred at the trial of Jesus must take the credible portion of the Biblical narrative as a basis and try to reconstruct the record of fact with the aid of historical research. Modern Biblical scholars employing critical methods seem thus far to have accomplished little or nothing in this direction.

Were there two trials, or was there only a single trial? The Scriptural account does not really give the answer to this question. There is no reason to doubt that there was at least one trial of Jesus, in accordance with the regular procedure either of Hebrew or of Roman jurisprudence. The sentiment of the Jewish hierarchy, even amid party turmoil and intrigue, would not have tolerated a violation of every legal right of the accused. Pilate would not have allowed the death sentence without a regular conviction. But there is also good reason to suppose that there were two regular trials of Jesus. In the first place, the circumstantiality of the account of the trial before Pilate leads one to suppose that Jesus was in all probability regularly tried and acquitted of the charge of sedition. If, then, he was acquitted of this charge, his conviction was probably secured on a different accusation, that of a religious rather than a civil offense. The Sanhedrin would have had the jurisdiction to try a charge of blasphemy, and such a trial would have had to occur before Pilate would have permitted the death sentence to be carried out. We may therefore conclude that there were probably two regular trials, and that Mr. Chandler is right in devoting one volume to each. One cannot, however, approve of the method by which he reaches the conclusion that there were two trials, from a study of the Bible record. The majority of laymen would not get the idea from the Bible that the proceedings at the house of Caiaphas amounted to a trial, but rather to an informal preliminary hearing.

The presumption is that there were regular proceedings before Caiaphas, and the burden of proof rests with those who contend for an irregularity. Josephus, in spite of what he says about the haughty, cruel spirit of the family of the high priest Ananos (Annas), father-in-law of Caiaphas, offers no ground for the assumption that Caiaphas and Annas would have been likely to defy Hebrew law. Josephus tells us that Ananus, son of Ananos,

was deposed for holding an illegal session of the Sanhedrin to pass sentence on the Apostle James, but even if Caiaphas resembled in character this personage we have no right to assume that a gross violation of law and tradition could have taken place under the very eyes of the Roman governor, with his actual consent. The probability is that the trial before the Sanhedrin was regular.

We do not feel compelled to agree with Prof. Schmidt, who considers that the proceedings before Caiaphas in the night were irregular and that the Pharisees could have cast the responsibility for the irregularities on the Sadducean party (p. 286). For if the calendar of events preceding the Crucifixion cannot be accurately determined, and the duration of the episodes of the Passion is obscure, we cannot rely wholly upon negative evidence to support conclusions like those reached by Prof. Schmidt.

The Gospel accounts of Jesus' public career are meager in detail, and the record of the Passion must naturally be supposed to omit a great deal of important matter. The interval between the arrest and the proceedings before Pilate may have been one of several days, for aught we know to the contrary, and there may have been ample time for a regular trial before the Sanhedrin in which all the technical rules of procedure were observed. Mr. Chandler, in adhering to the view of predecessors that the rights of the accused under Hebrew law were grossly violated, has simply begged the question and has failed to sustain the burden of proof.

In the trial before Pilate there is such meagerness of detail that one cannot agree with Mr. Chandler that Pilate's conduct after his acquittal of Jesus, "after a comparatively regular trial," was necessarily marked by unmanliness and cowardice. Pilate would naturally have brought upon himself the condemnation of the early Christians for giving up Jesus to his persecutors, but we cannot assume that in so doing he was acting otherwise than as a dispassionate and honest magistrate. There would have been no cowardice in his permitting Jesus to be tried in the ecclesiastical court, or to be executed after a legal conviction in that court, and just as there is the presumption that the proceedings before Caiaphas were regular, there is also the presumption that Pilate acted properly and consented simply to have Jesus tried on a religious charge by an ecclesiastical jurisdiction ("we have a law, and by our law he ought to die," John 19: 7) after he had been acquitted of a political charge by the civil jurisdiction.

What actually occurred at the trial before Pilate must have been one of these three things: (1) Pilate after acquitting Jesus confirmed a Sanhedrin judgment legally pronounced before the Roman trial; or (2) the Sanhedrin trial occurred *pendente lite*, the high priests returning to Pilate to get the conviction affirmed; or (3) Pilate after acquitting Jesus turned him over to the Sanhedrin with full power to try and convict and the Sanhedrin trial was held subsequently. It would take up too much space to discuss which of these suppositions is the most probable, and it is to be hoped that Biblical scholars in a better position to clear up the subject may shed the light of their authority upon it.

The author of the two volumes on the "Trial of Jesus" has brought together a large mass of data about criminal law and procedure among the Jews and under the Romans, and has compiled much interesting legal and historical information not conveniently accessible elsewhere. While his application of the principles of Greenleaf and Starkie to the Bible account is misguided, he shows a disposition to investigate historical sources carefully and to review a large volume of evidence impartially. In all fairness, however, it must be said that his work gravely suffers from lack of the methods of modern critical scholarship and from failure to build its hypotheses upon a sound historical foundation.

MORAWETZ ON THE CURRENCY PROBLEM

The Banking and Currency Problem in the United States. By Victor Morawetz. North American Review Publishing Co., N. Y. Pp. 119. ($1 *net*.)

THIS writer takes up the problem of the National Monetary Commission appointed by Congress, and a competent critic, Mr. Mayo W. Hazeltine of New York, does not hestitate to say that nothing on the currency problem has been forthcoming which for a moment can be compared with it "as regards breadth of knowledge and depth of insight."

Mr. Morawetz opens his discussion at the very threshold of the subject by addressing himself to the reader who has no technical knowledge of finance or economics, and gradually leads him into the mazes of a complex problem. The result of this method is a clearness and effectiveness of treatment which

lends the book one of its strongest qualities. The author takes pains to show exactly what the causes and significance of money stringency are, and he is commendably cautious about reaching an accurate diagnosis before suggesting a remedy. The currency question, he says, is simply a question of bank credits and bank reserves. The problem is—

"(1) to avert a depletion of bank reserves and a consequent large reduction of bank credits in times when lawful money is withdrawn to pay taxes and is locked up by the Government, or when lawful money is largely withdrawn for use as a circulating medium to move the crops or to be hoarded; and, on the other hand, (2) to enable the banks in times of great business activity to expand their deposit liabilities, together with their loans and discounts, and also adequately to increase their reserves of lawful money."

Mr. Morawetz discusses the experience of European countries, then he outlines his own plan for a central agency provided for by an act of Congress, in the form of a joint association with no capital, having power when banks having an aggregate capital stock of not less than $250,000,000 have become members, to increase from time to time, ratably as to all banks, the authorized amount of their note issues with the approval of the Secretary of the Treasury, each bank having taken out notes being required to keep on deposit with the association a sum equal to twenty per cent at least of such notes. This agency would have power to control the volume of uncovered bank-note currency without the creation of a central bank having a monopoly of the financial situation.

Mr. Morawetz is not devoted to his project with an enthusiasm which prevents him from analyzing its features dispassionately and from setting forth its practical operation with reference to the smallest particulars. Persons at all interested in the subject should read this book at first hand, as its clearness of treatment and moderateness of length entail no sacrifice of the time of the busiest man. It is surprising what a vast amount of pregnant matter has been compressed within this little volume. Scarcely a sentence could have been dispensed with. The author avoids prolixity and technicality and covers a field of astonishing breadth.

No student of the monetary problem in the United States, no patriotic banker, no public officer whose official duty may force him to deal with this question, can rightfully neglect to make himself familiar with Mr. Morawetz's important contribution.

AN AMERICAN ON AMERICA

The American as He is. By Nicholas Murray Butler, President of Columbia University. The Macmillan Co., N. Y. Pp. 97. ($1 *net.*)

THIS book gives in three chapters lectures delivered before the University of Copenhagen in September, 1908. President Butler says that a familiarity with the writings and speeches of Hamilton, Lincoln, and Emerson is necessary to a general understanding of the intellectual and moral temper of the American people. In consonance with this sentiment he takes an extract from each of them for the text of one chapter; Hamilton suggesting consideration of the American as a political type, Lincoln the American apart from his government, and Emerson the American and the intellectual life.

The book is marked by a sane optimism which sees in the American state a worthy expression of that democratic impulse which first exerted itself in northern Europe between the Vistula and the Rhine. "Democracy," President Butler quotes Pasteur, "is that order of the state which permits every individual to put forth his utmost effort." This impulse found expression in the Mayflower compact of 1620, the Declaration of Rights of 1765, the Declaration of the Causes and Necessity of Taking up Arms of 1775, the Declaration of Independence of 1776, the Ordinance for the Government of the Northwest Territory of 1787, and finally the Constitution of the United States. The outcome has been that we have a popular government in the fullest sense of the word. It was the theory of the Constitution that the Electoral Colleges should deliberate and nominate the President and Vice-President, and the great national party conventions are wholly unknown to the Constitution and laws, but after Jackson's time the system of national conventions was instituted, and popular control of nominations began coincidently with the more commanding position of the Presidency. When the choice was exercised by the Electoral Colleges, the controlling groups in Congress really chose the President, but since Jackson's time he has been regarded as a direct representative of the people. It is probable that before many years the people will come likewise to control the nomination

of national Senators, the state legislatures merely registering the decision of state conventions.

Bagehot could not find where the sovereignty was placed in the government of the United States, and that is because the government under the Constitution controls but a part of the activities of the sovereign people. "This explains why so much of the highest and best trained and most representative talent and ability of America are found outside of the government. . . . Only occasionally . . . do men of the highest intellectual and moral type enter the government service and remain in it." The development of the American spirit of independence has not resulted in a hypertrophied individualism, for the sense of responsibility for the administration of great wealth as a public trust is widespread.

The book, while not at all profound or weighty, abounds in keen observation. President Butler has given us his views as to the typical American, who is to be found not in Boston nor in New York, which are comparatively near to Europe, but in northern Illinois and in the adjacent parts of Iowa, Wisconsin, and Minnesota. Here the soil is rich, the population well-to-do and intelligent, manners and morals of a high grade, and vice and crime little known. In Indiana, Missouri, Kansas, Nebraska, Colorado, California, and elsewhere, similar conditions abound.

New York is the intellectual and the social capital as well as the financial centre of the United States. "The opportunities which New York offers to men of capacity are literally boundless." The differences between the East and the West are more largely in modes of expression than in modes of thought. "The typical American is he who, whether rich or poor, whether dwelling in the North, South, East or West, whether scholar, professional man, merchant, manufacturer, farmer, or skilled worker for wages, lives the life of a good citizen and a good neighbor; who believes loyally and with all his heart in his country's institutions, and in the underlying principles on which these institutions are built; who directs both his private and his public life by sound principles; who cherishes high ideals; and who aims to train his children for a useful life and for their country's service."

THE LAW OF APARTMENTS

The Law of Apartments, Flats, and Tenements. By William George. Fallon Law Book Company, N. Y. Pp. 213 + indexes and appendices 275 ($4.)

THE author of "George on Partnership" has here presented the law governing the rights, liabilities, and remedies of owners, proprietors, and tenants of apartment and tenement houses, with notes of cases decided in all jurisdictions. The text-book is in three parts, dealing with the owner, proprietor, and tenant respectively, and each part is in three chapters which severally deal with each of these three, in his relations with the two others and also with third persons. This arrangement enables one to turn quickly to the rule of law one wishes to find.

It is perhaps to be regretted that the author does not venture upon a concise terminology, instead of using for dissimilar ideas words of such similar meaning as owner and proprietor. In a Pennsylvania decision cited by the author, *Shott* v. *Harvey*, 105 Pa. St. 222, an owner was defined in construing a statute as the person "in possession and occupancy of the premises who has the immediate dominion and control over it," but the authority of this and similar decisions would not have obliged the author to use the term owner in a sense which may include a tenant for years or even a mere tenant at will.

The plan of the book, however, is logically laid out, and it will serve a useful purpose to those who desire a convenient manual of apartment house law.

The appendices contain the Tenement House Act of New York State and the Building Code of New York City.

BOOKS RECEIVED

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

A Treatise on the Law Relating to Injunctions. By Howard C. Joyce, of New York City. Matthew Bender & Co., Albany. 3 v., pp. xlvii, 2075 + table of cases and index 308. ($16.50 *net*.)

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.)

Questions and Answers for Bar Examination Review. By Charles S. Haight of the New York bar and Arthur M. Marsh of the Connecticut bar. 2d edition. Baker, Voorhis & Co., N. Y. Pp. lii, 530 + index 55. ($4 *net*.)

*Latest Important Cases**

Bankruptcy. *Conveyances for Good Consideration—Vendee Acting in Good Faith.* D. C.

The Supreme Court of the District of Columbia, per Mr. Justice Barnard, dismissed a bill in equity in March, 1909, brought by a trustee in bankruptcy to set aside a sale of property in good faith and for a valuable consideration (*Wilson* v. *Powell et al.*, *Washington Law Reporter*, April 2, 1909, pp. 210–212). It was held that when it is proved that the vendor made the sale with fraudulent intent to hinder and delay his creditors, the burden is upon the vendee to prove payment of a sufficient consideration; but this being established the burden is then upon the creditors attacking the sale to show bad faith in the vendee. Moreover, where it appeared the vendees were not acquainted with the vendor prior to the negotiations for the sale, had given a full and fair consideration for the property, which had been actually delivered, and had employed an attorney to examine the title, it was held that there was nothing to overcome the presumption of good faith.

Billboards. *"Sky Sign" Ordinance—Police Power.* N. Y.

The New York Court of Appeals decided on March 30, in *People ex rel. M. Wineburgh Adv'g Co.* v. *Edward S. Murphy* (N. Y. L. J. Apr. 8), that the ordinance of the City of New York forbidding the erection of a "sky sign" for advertising purposes over nine feet in height above the front wall or cornice of a building is unenforceable when the sign is on private property and is safely and securely constructed. The prohibition in such a case cannot be said to be in the interest of the public health, morals or safety, and the ordinance is not, therefore, enforceable as an exercise of the police power. (Building Code, City of New York, sec. 144.)

Commenting editorially, the *New York Law Journal* (Apr. 8) says, "It may be taken as finally determined for this state that a general right to prohibit advertisements on private property cannot be secured without a constitutional amendment," and quotes an article in the *Harvard Law Review* for November, 1906 (20 H. L. R. 42), the writer of which says that while the law must be taken as settled, "it is entirely possible that the increasing æsthetic sentiment will, in time, sanction the judiciary in taking a cognizance of particular nuisances, as is now done with nuisances of noise and smell."

Common Carriers. *Liability Limited to Valuation in Shipping Receipt—Interstate Commerce Act.* N. Y.

Under section 20 of the Interstate Commerce Act, as amended by Act of Congress, passed June 29, 1906, an initial carrier is liable to a shipper for a loss occurring on the lines of connecting carriers, as well as his own, having a right of recovery over against a connecting carrier if the loss occurred on the line of the latter. But in *Greenwald et al.* v. *Weir*, decided in March (N. Y. L. J. Mar. 17), the New York Supreme Court, Appellate Division, held that such amendment to the Interstate Commerce Act does not, however, abrogate the rule that a carrier's liability is limited to the value of merchandise shipped as declared in the shipping receipt signed and delivered by or in behalf of the carrier and accepted by or in behalf of the shipper.

Contracts. *Equitable Mutuality.—Injunctions.* U. S.

An injunction *pendente lite* was granted against breach of that portion of a contract as to which there was equitable mutuality by the United States Circuit Court for the southern district of New York, in *B. F. Keith* v. *Annette Kellerman*, decided in March (N. Y. L. J. Apr. 7), the contract being one to perform unique services, in giving diving and swimming exhibitions. But the Court refused to lend its relief for a breach of that part of the contract which regulated the summer season, as that portion failed to fix the periods for summer performances and lacked equitable mutuality. For if no summer performances should be held the defendant

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

would be without compensation and at the same time would be under a covenant to perform for no one else.

Contracts. *Water Rates—Defective Meter—Construction of City Charter.* N. Y.

The charter of the City of New York provides that the consumer shall pay for water according to the registration of a meter. In *People ex rel. McAuliffe* v. *City of New York et al.*, 114 N. Y. Suppl. 312, it appeared that the meter of respondent had failed for some months to record, although water was being used continually. The New York Supreme Court remarked that although the neglect of the officials of the city has perhaps given relator something for nothing, it is the plain mandate of the charter that no charge can be be made except for water actually used as shown by the meter. If the meter showed nothing, the charter seems to allow no charge.

Copyrights. *Dramatic Composition not a Book—Domestic Manufacture Unnecessary.* U. S.

Congress has intended all through its copyright enactments to distinguish between books and dramatic compositions, said the United States Circuit Court for the southern district of New York in *Paul Hervieu* v. *J. S. Ogilvie Publishing Co.*, decided in March, 1909 (N. Y. L. J. Apr. 5). A dramatic composition, even though printed in book form, is not a book within the meaning of section 4956 of the copyright law. Hence a dramatic composition need not be printed from plates made or type set up in the United States to be entitled to full copyright protection.

Copyrights. *Transcript Play—Common Law Rule—Publication.* Ill.

The author of a drama does not lose his common law right in the production by public performance, when the drama is not printed in a book, as the federal copyright law does not apply to any drama not printed in a book, said the Illinois Supreme Court in *Frohman* v. *Ferris*, 238 Ill. (adv. sheets) 430. Though a different rule prevails in England under the act of 5 and 6 Vict., in this country public performance of a play from manuscript is not equivalent to a publication.

Copyrights. *Moving Picture Shows—Author's Permission to Dramatisation.* U. S.

In a decision rendered in March in the United States Circuit Court of Appeals, a moving picture exhibition was held to be a stage representation violative of the rights of the author's copyrighted book. The question arose in a suit brought by Klaw & Erlanger and Harper & Brothers against the Kalem Company to enjoin the moving picture exhibitions of "Ben-Hur." The Court held that in order to give a moving picture exhibition it was necessary to take the novel of the author and prepare a synopsis or story, which was in effect a dramatization, and that the author alone had the right to make or authorize a dramatization.

Corporations. *Criminal Law—Indictments Under Elkins Act.* U. S.

"Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. . . . The modern authority, universally, so far as we know, is the other way. . . . It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz, Priv. Corp. §733; Green's Brice, Ultra Vires, 366." Per Mr. Justice Day, in *New York C. & H. R. R. Co.* v. *U. S.*, decided Feb. 23, 1909.

Corporations. *Criminal Law—When Indictable for Manslaughter.* N. Y.

Within the principles declared by the Supreme Court of the United States in *New York C. & H. R. R. Co.* v. *U. S.*, decided Feb. 23, 1909 (see *supra*), the New York Court of Appeals expressed the opinion, in *People* v. *Rochester Ry. & Lt. Co.*, decided Mar. 23 (N. Y. L. J. Apr. 7) that certain forms of manslaughter might be defined in a statute applicable to corporations, making a corporation criminally liable for homicide under certain circumstances. But the Court considered the New York Penal Code not to make a corporation indictable for manslaughter.

The *New York Law Journal* (April 7) comments on this decision editorially:—

It is a source of satisfaction that both the Supreme Court of the United States and the New York Court of Appeals recognize the

utility of subjecting corporations to criminal liability. . . . The absurdly oppressive proceeding against the Standard Oil Company of Indiana, resulting in a colossal fine, betrayed the influence of popular clamor, but it must not be overlooked that the determination of the trial court was as promptly as possible reversed by the Circuit Court of Appeals. We do not believe that penal statutes affecting corporations will be abused by being systematically used as a means of oppression."

Corporations. *Holder of Voting Trust Certificate—Stockholders.* N. J.

In an opinion filed in March, in the case of *O'Grady* v. *U. S. Ind. Telephone Co.*, the New Jersey Court of Errors and Appeals held that the holder of a "voting trust" certificate is the beneficial owner of the stock represented by it in the hands of the "voting trustees," and a stockholder within section 69 of the corporation act, and as such entitled to institute liquidation proceedings.

Corporations. *Rights of Preferred Stockholders upon Dissolution.* N. J.

A corporation organized in New Jersey provided in its certificate for the creation of preferred stock, "the holder thereof to receive and the company to pay a fixed yearly dividend of six per cent before any dividend shall be set apart or paid on the general stock." The New Jersey Court of Errors and Appeals, in *Lloyd et al.* v. *Penn. El. Vehicle Co.*, decided Mar. 1 (N. Y. L. J. Mar. 8), held that upon the dissolution of the corporation the preferred stockholders were entitled only to the preference set forth in the certificate and were not to be paid on account of the par value of their shares in preference to the common stockholders.

Corporations. *One Cannot Organize Another—Illegal Increase of Capital Stock.* N. Y.

One corporation has no power to organize another, much less can a corporation by a vote instruct its directors to organize a new company and convey to it certain real estate. In rendering this decision, *Schwab* v. *E. G. Potter Co. et al.*, decided Mar. 2 (N. Y. L. J. Mar. 12), the New York Court of Appeals held that the proposed plan, which amounted practically to an increase of the capital stock, was *ultra vires*.

Corporations. *Right to Merge—Unanimous Consent of Stockholders Necessary.* N. J.

The New Jersey Court of Errors and Appeals, in *Colgate* v. *U. S. Leather Co.*, and *Johnston* v. *U. S. Leather Co.*, decided Mar. 1 (N. Y. L. J. Mar. 9), rendered a decision following the principle stated by the Court:—

"It is entirely well settled that the power of corporations to consolidate and merge is not to be implied and exists only by virtue of plain legislative enactment (1 Thomp. Corp. sec. 315; 7 *id.*, sec. 8216).

"It follows of necessity that there is no right to consolidate without unanimous consent of stockholders, unless the power to consolidate has been conferred by legislation so that the power may be read into the contract of incorporation (1 Thomp. Corp. secs. 75, 343)."

Corporations. See Public Service Corporations.

Criminal Intent. *Perjury—Honest Belief in Justifying Circumstances.* N. Y.

The New York Court of Appeals, in *People ex rel. Hegeman* v. *Corrigan*, decided Mar. 16 (N. Y. L. J. Mar. 24), held that to constitute perjury the false statement must, under the statute, be material, the question of materiality being for the court, and there must also be criminal intent. The Court, per Cullen, C. J., said:—

"There runs through the Criminal Law a distinction between offenses that are *mala prohibita* in which no intent to do wrong is necessary to constitute the offense, and offenses that are *mala in se* in which a criminal intent is a necessary ingredient of the crime. While there are to be found both in judicial decisions and in text-books elaborate discussions of what is a criminal intent, no attempt has been made to accurately define the term. Very possibly the attempt to make a definition so comprehensive as to be applicable to all cases would be futile, and it has often been doubted whether the term 'intent' is an accurate one. However this may be, it is very apparent that the innocence or criminality of the intent in a particular act generally depends on the knowledge or belief of the actor at the time. An honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the defendant is prosecuted innocent would be a good defense. . . . In other words, it is the knowledge or belief of the actor at the time that stamps identically the same intent as either criminal or innocent, for the intent to take life, unless under

circumstances that the law regards as sufficient to justify the taking, is the criminal intent, and the only criminal intent that can exist in case of murder (excepting, of course, where the killing is done in the commission of an independent felony). So, ordinarily, a criminal intent is an intent to do knowingly and willfully that which is condemned as wrong by the law and common morality of the country, and if such an intent exists, it is neither justification nor excuse that the actor intended by its commission to accomplish some ultimate good (1 Bishop's Crim. Law, sec. 341)."

Defamation. *Fair Comment—Criticisms Offered in Good Faith.* Ill.

The Illinois Supreme Court, in *People* v. *Fuller*, 238 Ill. (adv. sheets) 116, held that a false charge that a county treasurer had "filched" a sum of money from the county treasury, or that he had intentionally taken money from the county for his own use to which he was not entitled, was a libel. The public conduct of all public officers is a matter of public concern and may be made the subject of fair and reasonable criticism, but this privilege does not extend to false and defamatory statements imputing criminal offense or moral delinquency to the officer, even though they are made in good faith concerning an act of the officer in the discharge of his duties.

Defamation. *Publishing Wrong Portrait—Evidence.* N. Y.

Appellant, desiring to publish a sensational article involving a woman of evil reputation, obtained her photograph on a button. The portrait was published over the name of the criminal. The dissimilarity was so great that a person of ordinary intelligence before using the picture would have made further investigation. In *Burkhardt* v. *Press Pub. Co.*, 114 N. Y. Supp. 451, appellant complained of the admission in evidence of another picture for comparison. The New York Supreme Court held the picture admissible and sustained a judgment for punitive damages.

Employers' Liability. *Fellow Servant—Engineer or Section Foreman and Section Hand.* U. S.

The United States Circuit Court of Appeals for the fifth circuit handed down a decision in an accident case which was reversed by the United States Supreme Court, Mr. Justice Moody laying down the rule that a railway engineer and a section foreman are both fellow-servants of a section hand, and failure so to instruct a jury is reversible error where the jury may well have based its verdict on the carelessness of either the section foreman or the engineer. *Texas & Pacific Ry. Co.* v. *Bowman*, decided Feb. 23, 1909.

Extradition. *Non-Extraditable Offenses—Acts Ordered by Revolutionary Leaders.* U. S.

On the findings of Samuel M. Hitchcock, Esq., Commissioner, the discharge of Jan Janoff Pouren was ordered in March by the United States District Court for the southern district of New York, in *Matter of Albert Schlippenbach, Imperial Consul-General* (N. Y. L. J. Apr. 8). The Commissioner found these facts to have been established:—

"(1) At the time when the offenses were committed the Russian Empire, including the district in which the offenses were committed, was in a state of revolution.

"(2) That the accused was identified with and a part of the revolutionary party; that the offenses committed by him were committed under the directions of the leaders of that party, and were incidental to the political distrubances existing in the district."

Indictment. *Incompetency of Evidence when Not Excluded on Motion.* Ill.

It has been decided in Illinois, in *People* v. *Scattura*, 238 Ill. (advance sheets) 313, that an indictment charging an offense in the terms and language of the statute creating it is sufficient, if the words of the statute so far particularize the offense that by their use alone the defendant is notified, with reasonable certainty, of the precise offense with which he is charged. (Per Dunn, J.) Where in an answer to a proper question, incompetent testimony is given, the court should, on motion, exclude such testimony; but the fact that the party against whom the testimony is given does not move to exclude it does not waive his right to raise the question of its competency.

Insane Persons. *Duties of Committee as Landlord—Liability of Committee for Torts.* N. Y.

A question of first impression as to the individual liability of the committee of an insane person, for alleged negligence in failing to keep in repair the common passageway of rented premises, arose in *Rooney* v. *People's*

Trust Co., 114 N. Y. Supp. 612. The suit was for personal injuries sustained by one of the tenants. The Court, commenting on the fact that in these days of multitudinous reports no decision on the point seemed to have been found, concluded that if the committee rented the property under its charge in such a way that it retained control over the common passageways used by the various tenants, there was no conceivable reason why it should not be charged with all the duties of a landlord. The reason why it could not be held liable in its representative capacity was that the estate of the incompetent should not be subjected to a liability for the torts of one who was not his agent in the legal sense.

Insurance. *Accounting in Equity—Trust Relations—Construction of Statute.* U. S.

In the construction of the charter of an insurance company, the decisions of the highest court of the state under whose general law the charter was obtained are binding upon the federal courts. This rule was laid down by the U. S. Supreme Court in *Equitable Life Assurance Society* v. *Brown*, decided March 1. A policyholder had filed a bill in the Circuit Court for the southern district of New York asking for an accounting and winding-up of the company. The demurrer of the defendant company was sustained, but the Circuit Court of Appeals reversed the decree and gave judgment in favor of the policyholder. The insurance company then brought the case before the Supreme Court of the United States on a writ of *certiorari*. The Court, in reversing the decree of the Circuit Court of Appeals, held that a court of equity is bound to take all facts into consideration in determining whether an accounting should be granted, that an uncontested declaration that the stockholders in a mutual company own the entire surplus does not authorize a suit in equity to wind up the company, that wrongdoing by officers and directors gives no jurisdiction for an accounting in equity in the absence of a trust relation shown, and that there is no trust relation in New York between the company and the policyholders resulting from the policy.

Insurance. *Statute Limiting Business—Constitutionality.* N. Y.

That section of the new insurance law of the State of New York which limits the $150,000,000 the amount of business which an insurance company may write in one year was declared constitutional by Justice O'Gorman in the New York State Supreme Court April 1. The decision was given in the case of *Charles H. Bush* v. *New York Life Insurance Company*, the agent having brought suit to recover from that company his commission upon a life insurance policy of $25,000 which the company rejected last December. The reason given for the rejection was that the company had already accepted enough business to make up the $150,000,000 limit.

Intoxicating Liquors. *Statute Taxing Trade in Temperance Beverages—Constitutionality—Title of Legislative Act.* Ga.

A law passed by the General Assembly of Georgia for the improvement of the penitentiary system was upheld as constitutional in *Carroll* v. *Wright*, 63 S. E. Rep. 260. To provide revenue the law provided for a tax upon certain persons. The Court held that the legislature, which had the right to exercise discretion, did not transcend its power in making a distinct class, for the purpose of taxation, of those persons engaged in selling non-intoxicating beverages in imitation of and as a substitute for beer and other spirituous or malt liquors. The Court, referring to the provision of the constitution that no law shall refer to more than one subject-matter, or contain matter different from what is expressed in the title, said that the title and the act must correspond substantially, and there was substantial correspondence between the title and the act in question, "beer, ale, wine, whisky or other malt liquors" named in the title being substantially equivalent to alcoholic liquors in general, of substitutes for which the act treated.

Labor Unions. *Strikes and Lock-outs—Capital and Labor.* U. S.

The ever recurring question of restraining boycotts, strikes, and other combinations by employees has been again reviewed in *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 166 Fed. Rep. 45, and the Circuit Court of Appeals adds another able opinion to those in which the rights of employers and employees have been often judicially determined. The final decree under review enjoins four Wisconsin local unions of the iron-moulders' national organization and a number of individual officers and members from doing numerous specific acts interfering with or hindering the business of the complainant. The principa[l]

question involved was whether the means used in the endeavor to make the strike effective were lawful or unlawful. In discussing this question, the Court draws a clear line of demarcation. It says that in contests between capital and labor, the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual. But attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy, to make raids in the rear, cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself. In illustration of these principles, it is shown that the rights of contestants are fairly balanced. Employers may lock out, or threaten to lock out, employees at will with the idea that idleness will force them to accept lower wages or more onerous conditions, and employees at will may strike, or threaten to strike, with the idea that idleness of the capital involved will force employers to grant better terms. On the other hand, an employer having locked out his men will not be permitted, though it would reduce their fighting strength, to coerce their landlords and grocers into cutting off shelter and food, and employees having struck will not be permitted, though it might subdue their late employer, to coerce dealers and users into destroying his business.

Monopolies. *Arkansas Anti-Trust Act—Fourteenth Amendment—Pleading—Due Process of Law.* U. S.

In *Hammond Packing Co.* v. *State of Arkansas*, 29 Sup. Ct. Rep. 370, which was decided by the Supreme Court of the United States Feb. 23, the Arkansas anti-trust act of Jan. 23, 1905, was upheld as not taking property without due process of law, nor denying the equal protection of the laws, nor impairing contract obligations, nor permitting unreasonable searches and seizures. Mr. Justice White in his opinion, among the numerous points treated, held that the ruling in *Hovey* v. *Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, was not applicable to the case in hand, but that on the contrary an honest, unavailing effort of the corporation to produce books and papers and secure the attendance of its officers before a commission, will prevent the striking out of its answer and entering of a default judgment in a suit in which it may be made a defendant, and in the absence of such an effort a judgment by default after failure to produce material evidence in the pleadings would not be a denial of due process of law.

Monopolies. *Indiana Anti-Trust Act—Constitutionality.* Ind.

The Indiana anti-trust act was upheld as constitutional by the Indiana Supreme Court in *Miller* v. *Knight & Jillison Co. et al.*, decided March 16. The plaintiff alleged a combination in restraint of trade on the part of master plumbers and dealers in plumbers' supplies. The Court held that such a combination was within the rule so often applied to railroads, that makes their charges for property and services subject to regulation and control.

Negligence. *Street Railways—Rate of Speed—Sounding Gong at Crossings.* D. C.

The Court of Appeals of the District of Columbia, in *City & Suburban Ry.* v. *Cooper* (*Washington Law Reporter*, Apr. 2, 1909, pp. 216–218), decided Mar. 2, 1909, decided that the question of the defendant's negligence was for the jury, in an action for personal injuries, where there was evidence that the car was approaching a crossing at a rate of speed greater than that prescribed by the police regulation, and no gong had been sounded before the car crossed the street, and there was also evidence that a witness had called to the motorman as he approached the crossing, but that the motorman was wiping his mouth with the hand with which the brake was applied, and apparently did not take notice of witness' warning until the car was at the curb line and too late to avoid collision with the wagon on which plaintiff was riding. The Court also held that the duty of stopping to look and listen, of general application in cases of steam railway crossings, cannot be applied in a strict sense to street railway crossings.

Negligence. *Telephone Companies—Failure to Answer Emergency Call Promptly.* Ky.

The liability of a telephone company for danger resulting from delay in calling the fire department, is discussed in *Lebanon L. & L. Telephone Co.* v. *Lanham Lumber Co.*, 115 S. W. Rep. 824. Plaintiff alleged substan-

tially that on discovery of the fire its watchman endeavored to telephone, but that through the negligence of the operator no connection was established until the fire had spread to the other buildings. The Court held that the facts on which a recovery was sought were too speculative and remote.

Negotiable Instruments. *Liability of Indorser on Fraudulently Raised Note.* N. Y.

Where a promissory note was raised by the maker from $75 to $375 without the knowledge or consent of the indorser, and the plaintiff bank discounted the note for the defendant indorser as altered, the New York Court of Appeals held Mar. 5, in *National Exchange Bank* v. *Lester* (N. Y. L. J. Mar. 15), that the indorser is not liable to a *bona fide* holder for the increased amount, and that the presence of open spaces inviting forgery, and the presumption that some one will commit forgery, obligating the indorser to guard against it, is not to be recognized.

Nuisances. See Billboards.

Procedure. *Certificate of Reasonable Doubt —Appeals—Expeditious Trials.* N. Y.

"The test of propriety of granting a certificate of reasonable doubt," said the New York Supreme Court (per Marcus, J.) in *People* v. *Meadows* (N. Y. L. J. Apr. 10), in March, "is not that the judge to whom the application is made should be satisfied that the judgment will be reversed on appeal, but that questions of law are raised sufficient for the consideration of the appellate tribunal. . .

"The present law, providing for a certificate of reasonable doubt in a proper case, has doubtless grown to some extent from a certain manifestation of public impatience with the delays that at times mark the administration of criminal law. Such considerations, however, should not control judicial action. If the present mode of procedure in criminal trials, with the appeal or appeals allowed, results in undesirable delay in the enforcement of criminal law, relief should be had by legislative action in the way either of abolishing appeals altogether, which, however, would be undesirable, or still further expediting their disposition toward final adjudication. As it is, appeals in criminal cases are given preference upon the calendars of all appellate courts in the state.

"As illustrating the danger from allowing no appeals in criminal cases, it is sufficient to note that within the past two years a Court of Appeals in criminal cases has been established in England for the first time in its judicial history, where no appeal from a judgment of conviction or acquittal of the trial court formerly lay."

Procedure. *Mandamus to Secure Evidence of Non-Resident Witness—New Trials.* Cal.

A building supplied with gas was destroyed by a sudden explosion. The owner of the house recovered damages. A new trial was asked on the ground of newly discovered evidence, which was a statement that Harry Orchard, under sentence of death in a foreign state, would testify that he had blown up the house in an attempt to assassinate one Bradley. A new trial having been denied, an appeal from the order was pending. The Superior Court had refused to have Orchard's deposition taken, and had refused, also, application to perpetuate his testimony. In *Gas & Electric Co.* v. *Superior Court*, 99 Pac. Rep. 539, the California Supreme Court held that where a trial court improperly refuses to issue a commission to take the deposition of a non-resident witness pending an appeal for use in a new trial in the event of a reversal, mandamus will lie to compel its issuance, an appeal from the order denying the application being an inadequate remedy. The issue is not whether the testimony of such witness will be material to the issues already tried, but whether it will be material to a new trial.

Public Morals. *Bible as Evidence—Liquor Trade.* Conn.

In the endeavor to defeat the granting of a liquor license appellant urged that the sale of intoxicating liquors was so destructive to the public health and so inherently immoral that no law upholding it was valid. He further contended that the Bible condemns the sale of intoxicating liquors as a beverage, and therefore the state cannot permit it on any terms. In *Appeal of Allyn*, 71 Atl. Rep. 794, the Connecticut Supreme Court of Errors held that even when in the early history of the state the Bible was a rule of political government, it was never considered to contain any absolute prohibition of such a business.

Public Morals. *Swedenborgian Doctrines—Devise Against Public Policy.* Pa.

A devise for the benefit of an educational institution, to enable it to teach the doctrines

of Emanuel Swedenborg, was held void as against public policy in a decision rendered March 4 by the Orphans' Court of Lancaster County, Pennsylvania, in *Estate of Frederick J. Kramph, deceased* (reported in 26 *Lancaster Law Review* 137–144, 145–152, 153–160). The Court said:—

"The Swedenborgian doctrine of fornication and concubinage smacks of the anarchistic doctrine of 'legalized prostitution.' It attacks the main foundation of our national existence, it undermines that upon which the Republic rests, it defies the very laws which courts are called upon to protect, it takes from us the most precious inheritance which has made courts of justice not only possible, but rational."

Public Service Corporations. *Confiscatory Rates—Burden of Proof—Depreciation Fund.* U. S.

Where a decree had been issued by the Circuit Court of the United States for the eastern district of Louisiana enjoining the enforcement of telephone rates established by a state commission, and the telephone company appealed to the Supreme Court of the United States, it was held by the latter, per Mr. Justice Peckham, that the burden of proof rested upon the telephone company to prove that the rates were so low as to be confiscatory or unreasonable, and that the court below erred in saying that there was no presumption in favor of the validity of the rates established by the commission. The commission may have made erroneous inferences with regard to such rates as it might be proper to establish, but that would be far from showing that it had acted arbitrarily without knowledge of the subject. The rates promulgated must be regarded as *prima facie* fair and valid. Moreover, if the money raised by the company for its depreciation fund had not been improperly added to the capital, so that dividends could be paid upon it, as urged on behalf of the state commission, the onus rested upon the telephone company to show that fact, and the Court cited *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. Rep. 148; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. Rep. 192. No part of the depreciation fund can be added to the capital upon which the company is entitled to a fair return from rates established by a state commission. *Railroad Commission of La.* v. *Cumberland Tel. & Tel. Co.* (decided Feb. 23, 1909), 29 Sup. Ct. Rep. 357.

Public Service Corporations. *Regulation—Constitutionality of Statute.* N. Y.

The constitutionality of the New York Public Service Commissions Act was upheld Mar. 22 by the New York Supreme Court, Appellate Division, in *Gubner* v. *McClellan et al.* (N. Y. L. J. Mar. 22). The Court confined its attention to the two constitutional questions argued:—

(1) that the act offended section 16, article 3 of the state constitution, which provides that "no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title"; (2) that it offended that portion of section 10 of article 8 of the Constitution of the state, which provides that "nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes."

Real Property. *Vested and Contingent Remainders—Rules of Construction.* D. C.

In *Alexander D. Johnson et al.* v. *Washington Loan and Trust Co.*, decided April 7, the Court of Appeals of the District of Columbia held that a remainder will not be construed to be contingent when it can be taken to be vested. In construing the intention of the testator, the Court resorted to these established rules:—

"1. The law will not construe a remainder to be contingent when it can be taken to be vested. 2. Estates shall be held to vest at the earliest possible period, unless there is a clear manifestation of the intention of the testator to the contrary. 3. Adverbs of time, as where, there, after, from, etc., in a devise of a remainder are construed to relate merely to the time of the enjoyment of the estate, and not the time of vesting in interest." (*Washington Law Reporter* Apr. 9, 1909.)

Negligence. *Duty of Railroad to Fence—Railroads.* U. S.

A Tennessee statute provides that railroad companies shall be liable for all stock killed unless their tracks are properly fenced. In *Gill* v. *Louisville & N. R. Co.*, 165 Fed. Rep. 438, an action was brought to recover for the death of an engineer caused by a collision with a cow. The United States Circuit Court held that neither the common law nor the statute imposed any liability upon a railroad for the death of its employee caused by an unfenced track.

The Editor's Bag

THE PLETHORA OF CASE LAW

OUR esteemed contemporary, the *Central Law Journal*, finds a "perplexing situation" in the superabundance of reports of cases, and asks what can be done to reduce a plethora of case law which "ought not to exist to encumber a lawyer's shelves, nor to confuse the public mind, nor to be a burden and an expense upon the taxpayer as well as the lawyer." To quote further:—

"A number of suggestions have been made. Some have suggested codification of all laws. Codification, however, has proven a disappointment in many cases, because of its unbending rigidity. Others have suggested that courts be forbidden to write opinions at all and that the rule of *stare decisis* be abandoned. This remedy is rather too harsh, and while it would probably be effectual as a surgical operation it should be resorted to only as a last resort. Some have suggested that the opinions of the Supreme Court of the United States be regarded as controlling on all questions of substantive law passed upon by that Court. This is not an impracticable suggestion but would meet with considerable opposition from those who are jealous of the growing ascendancy of federal power over state autonomy.

"Mr. James Bryce, of England, in one of his notable contributions to the literature of the law, recommends, in lieu of codification, the enactment of the Roman precedent of giving to the works of certain jurists or text writers a certain degree of authority much after the manner of the Law of Citations of Valentinian, which gave to the works of Paulus, Ulpian, Papinian, Gaius and Modestinus quasi-statutory force. (Bryce's Studies in History and Jurisprudence, p. 685.) There is much to be commended in this idea.

"We have no suggestion of our own to make at the present time although the subject has given us frequent occasion for deep meditation and consultation with the authorities."

Brevity is a quality not sufficiently cultivated in judicial decisions, probably for the reason that it is easier to elaborate a doctrine of law in one's own language than it is to turn immediately to a more succinct statement by a standard authority. Courts ought theoretically to avoid covering ground already covered, and when a citation will serve the purpose equally well they should not deliberately prefer extended discussion to a concise summary of controlling principles. Familiar constitutional provisions need only be named, and it may be laid down as a general proposition that the shorter the opinion the greater its value. Complexity of case law is in a large measure artificial and the unfortunate result of self-indulgent garrulity.

Long-winded decisions by inferior courts are particularly to be discountenanced. The soundness may even be questioned of the custom of permitting such courts to render anything more than a brief statement of the grounds of their judicial findings. Every judge should endeavor to measure accurately his relation to the judiciary system of

the country as a whole, and to preserve the right proportion between his judicial opinions and the mass of case law to which they must usually be, in point of quantity, but an insignificant addition. The moment he realizes how little he is really adding to the sum total of case law already in force, he will see how futile, how vainglorious, and how devoid of good taste is an opinion of even moderate length covering settled points of law.

But brevity while it would alleviate would not remedy the evil. There is perhaps one other possible remedy besides those which have been above suggested. The confusion with which the American lawyer is confronted arises from the fact that there are so many state jurisdictions handing down opinions independently of one another. There is nothing inconvenient in our two-fold state and national jurisdiction in itself. Every lawyer can post himself easily with regard to the progress of case law in the highest courts of his own state and the United States. It is the pursuit of simultaneous decisions in a multitude of states which offers an insurmountable problem. The proposal which we are about to make is that in place of the state reports now issued separately by the several states, there be a single official compilation of all the state reports made by one competent editor-in-chief aided by his staff of law reporters, together acting as a quasi-national commission maintained by the co-operation of all the states.

Imagine the teeming mass of unpublished state reports pouring into one central office, to pass through the necessary processes of analysis and classification, and take their proper place, after passing through the hands of several experts, in a compendium of current case law. That such a commission might perform this work most advantageously, individual members should be held responsible for different fields. One expert, for example, might have charge of the law of corporations, another that of contracts, another that of real property, and so on.

All the typewritten decisions, as fast as they were received, would be assigned to separate departments, according to the subjects treated. A decision dealing with corporation law would go to the head of the department in charge of that subject, who would be a leading authority upon the law of corporations. He would first determine whether the case decided any new point of law or not. He would then decide whether to publish a full report, a brief abstract, or merely a note giving a clue to court records. He or one of his associates would discover other important matters touched upon besides the law of corporations; the case would be referred from one department to another; and a point would at last be reached where it could go no further.

The result would be a compilation of case law arranged not by states but by subjects. The important cases would be reported in complete form, and the less important ones more briefly, those of no importance from the point of view of legal development being summarized in succinct footnotes or wholly ignored. The compilers would bring to their task not simply the accuracy of the law reporter, but the discrimination of the jurist. They would in no sense attempt a digest or consolidation of case law, but they would place at the disposal of the reader, in a logical arrangement and in a form convenient of access, all the essentials of a comprehensive perspective of contemporary case law.

Were national codification, carried out

by means of uniform state laws, to be more generally accomplished—a codification restricted to settled principles of law and therefore not open to the objection of rigidity—the labors of such a commission would be lightened and its work would yield results of greater utility; but codification would be by no means essential to the success of the project. For a compilation of decisions arranged in logical sequence, readily to be found by the practitioner under the subjects to which they relate, would accomplish much the same purpose, though clothed in a more clumsy form, as a copiously annotated model statute or code.

It can be seen at a glance that this method of treating state reports would effect a tremendous reduction in their bulk, as there would be absolutely no duplication, and useless reiteration of settled principles of law would be eliminated. If we conceive this compilation being issued monthly, it would seem reasonable to suppose that two or three volumes a month, at most, would cover the entire field.

The chief practical obstacles would be found in the natural inability of the human mind to imagine a radical change in conditions to which is has always been accustomed, in the drawbacks to unanimous state co-operation, and in the difficulty of assuring the permanence of the project without a federal statute. Moreover, the project to be successful would entail considerable expense, and could not be embarked upon without certainty that the skilled services of the right men could be secured. If men could be found who could safely be intrusted with such responsibilities, the separate publication of state reports would no longer be necessary, and it may well be asked whether the economy thus effected might not prove a strong inducement to carry out the enterprise.

THE TRUTH, THE WHOLE TRUTH

A Boston lawyer, yielding to our request for *facetiæ*, furnishes the following note of an incident which actually occurred:—

In the trial of an accident case an Irishman was testfying for the plaintiff against a street railroad corporation. He had arrived on the scene after the smash-up which injured McGuinness his friend. He testified:—

"I was walking along the street, and I saw the electric car strike Mac's team, and Mac landed on his head in the street. I ran up, and says I to Mac—"

Counsel for the railroad jumped up and exclaimed, "We don't want to know what you said, tell us what you did."

This more or less flustered the witness, so he started all over again, and when he came to where he came up to the scene of the accident, he again said: "and I says to Mac—"

Counsel again indignantly interrupted,—"Don't tell us what you said, tell us what you did; what was the first thing you did when you came on the scene?"

"The first thing I did?" shouted the witness, now thoroughly roused, "the first thing I did—I spoke."

The Judge, jury and spectators had a quiet laugh, and the witness went ahead and told the story his own way.

AN INDETERMINATE SENTENCE

We wish to thank the members of the profession who have seen fit to send us notes of those humorous incidents of professional practice which exert so tonic an influence upon the legal mind. Here is one which has been received from a lawyer in Iowa:—

Under the Iowa law, in cases of felony punishable with imprisonment in the penitentiary, the Court is required to fix the penalty at not to exceed the maximum prescribed by statute. The statute fixes the maximum punishment for the crime of rape at confinement in the penitentiary for life.

One of our District Courts was confronted

with "a condition and not a theory" in sentencing a man found guilty of rape.

The sentence, the only one which could be imposed under this statute, was "That the defendant be confined at hard labor in the penitentiary at Ft. Madison for a term not to exceed his natural life."

HIS SOLEMN OATH

A friend interested more or less actively in social settlement work sends us the following, with the observation, "Below is a bit of humor which I think your readers would enjoy; it is from life." For the edification of readers who may not be familiar with Boston topography, we may say that Sullivan Square is a name shouted in the subway stations to designate the destination of certain trains, and is therefore familiar to that portion of the populace which cannot read or write:—

A man, Isbitzkoy, who knows very little English, was in court the other day as a witness in a certain trial. The next day he came to me, and with a very puzzled air said:—

"I wonder why they made me put up my right hand and say, 'I Sullivan Square.'"

No amount of explanation could make him see that the street mentioned had nothing to do with the court.

ENTERPRISE IN LEGISLATION

A prominent popular newspaper has compiled information with regard to some eccentric bills before the state legislatures. In five states bills have been introduced to tax bachelors, or to place discriminating marks upon those who are shirking the burdens of married life. In other states bounties will be offered for babies if the bills go through. In Delaware it is proposed to tax bachelors and gypsies, both of whom are regarded as undesirable citizens.

In Maine a plan is advocated for a pension fund for spinsters, to be obtained by taxing all bachelors over thirty $10 a year. This bill contains a provision that a bachelor who has made an honest attempt to get a wife by proposing to at least three women, or who has proposed to one woman three times, shall be exempt from the tax. Conversely, a spinster who can be shown to have capriciously refused good offers of marriage is not to be entitled to the benefit of the pension fund.

In Illinois State Senator Samuel A. Ettelson, it is said, is framing a bill in which the title of "Mr." is to be reserved for married men, bachelors being called "Master." The object of this is to enable an unmarried woman to learn at first meeting the status of the man, so that she need not have to waste her time.

Another sort of thing has been introduced in the Kansas Senate, in the form of an anti-affinity bill. The man with an affinity in Kansas may be sent to the penitentiary for a year or paroled on his good behavior.

In Colorado it is proposed to make it a misdemeanor for any one to give, accept, or ask for a tip, except sleeping-car porters. We cannot make out whether the exception is intended in sarcasm or in earnest.

A member of the New York Legislature wishes to admit to the Union the new state of Manhattan, consisting of Greater New York, and a Congressman, it is said, is drafting a bill providing for three Presidents of the United States, one for the East, one for the Middle West and South, and one for the extreme West.

YELLOW JOURNALISM

At a dinner of the Sphinx Club in London recently, at which the Lord Chief Justice and several of the Judges of the High Court were present, one of the speakers told this amusing story, which we reproduce from the *Canada Law Journal*:—

A London magistrate was leaving his court one day in the dead season of the year, and it was pouring with rain. He was making his way in an omnibus to his club, when, looking out of the window, his eye was attracted by a news sheet, on which he saw his name in enormous capitals, "Mr. Jones on Peace." He was a sensitive person, and he allowed himself to think of what had passed in his court, but he could remember nothing that was not sordid and commonplace. There was what was called a cloud on the horizon, international relations were strained, and everybody was expecting statements from important politicians. He felt, therefore, hot and uncomfortable to see his name connected with peace. When he reached his club he rushed to the file, seized a newspaper, and saw that that morning there had been a quarrel between two sisters over a dead

rabbit and that he had said, "You had better make it up for the sake of peace." (Loud laughter.) That was hard on the magistrate.

AN IOWA JUDGE

A lawyer of Cedar Rapids, Iowa, sends us these interesting stories of an Iowa judge for readers of the *Green Bag*.

To the Editor of the Green Bag:—

The late Judge Caswell, for fifty years a well-known lawyer and judge throughout Iowa, was as cutting in retort as he was powerful and shrewd as a trial lawyer. The following are a few of the gems which fell from his lips during the latter years of his life, while he presided over the district courts of our state.

A blustering attorney was trying to keep his client from the gallows and wept before the jury, and after a windy argument won his case. When the jury came in with a verdict of "not guilty" the client was surrounded by a weeping wife and relatives, who were all making quite a stir in the court room, when the Judge, as well as the defendant's attorney, walked into the side room to get away from the commotion. The Judge turned to the lawyer and said, "Why don't you continue weeping with the rest of your crowd?" The attorney, realizing the pointed remark, turned to the Judge and said, "No, my pay is stopped."

During a long-winded trial about the value of certain fanning mills which had been turned on to a foolish speculator by fraudulent promoters, the evidence showed that the fanning mills were worthless, at least for the purposes for which they were purchased, and there was more or less evidence tending to show up the fraud. The Judge, stepping down from the bench, said to the attorneys as the jury was filing out for recess, "I have always heard that a fanning mill never amounted to much after the chickens roosted on it; now I know it."

During a trial where the plaintiff was getting the worst of it, and the attorney being really ashamed of his case walked up to the Court saying, "It looks a little dark for our side, and I really don't know how to get out of it," the Judge stoically remarked, "A case is never so bad in my Court but I will let plaintiff dismiss if he feels like it."

A receiver had been appointed by the Court and was getting discharged, and there was a fight over the value of his services. He had considerable evidence showing the value of the services, when the Court asked him his name, age and what he had been doing before he was appointed receiver, and about what he was worth in money at the time he took this receivership. These questions were answered, and finally the Judge says, "You are trying to get more money out of this receivership in six months than you have made in all your life; I don't think that a receivership should be a sinecure, and I will allow you $5.00 a day and will not pay you more working days than there really are in a year, and I believe from your past record that this is paying you $4.00 a day more than you ever made before in your life."

The Judge in his younger days was more or less of a criminal lawyer and defended a horse thief. Some time after that the horse thief came around to pay the Judge for his services, which the Judge always admitted was not very much considering the client he had to defend, and he asked the client after he received his pay whether he really was guilty of stealing that horse. The freed horse thief replied, "Well, you see here, Obe, I always thought I was guilty of stealing that dare horse until I heard your eloquent plea, and since then I have had me doubts about it."

B. L. WICK.

USELESS BUT ENTERTAINING

Mr. Roosevelt is no longer President of the United States, and a certain Emperor is said not to be sorry. In his opinion the fellow attracted too much attention.—*Punch*.

The class was given "Oliver Cromwell" as the subject for a short essay, and one of the efforts contained the following sentence: "Oliver Cromwell had an iron will, an unsightly wart, and a large red nose; but underneath were deep religious feelings."—*The Bar*.

In reward of faithful political service an ambitious saloon keeper was appointed police magistrate.

"What's the charge ag'in' this man?" he inquired when the first case was called.

"Drunk, yer honor," said the policeman.

The newly made magistrate frowned upon the trembling defendant.

"Guilty, or not guilty?" he demanded.

"Sure, sir," faltered the accused, "I never drink a drop."

"Have a cigar, then," urged his honor persuasively, as he absently polished the top of the judicial desk with his pocket handkerchief.—*Everybody's*.

A North Carolina lawyer says that when Judge Buxton of that state made his first appearance at the bar as a young lawyer, he was given charge by the state's solicitor, of the prosecution of a man charged with some misdemeanor.

It soon appeared that there was no evidence against the man, but Buxton did his best, and was astonished when the jury brought in a verdict of "guilty."

After the trial one of the jurors tapped the young attorney on the shoulder. "Buxton," said he, "we didn't think the feller was guilty, but at the same time didn't like to discourage a young lawyer by acquitting him."

—*Law Student's Helper*.

The Legal World

Secretary of War Jacob M. Dickinson left Washington for Panama April 18 and expects to be back to Washington about the middle of May.

Walter Reeves, former Congressman from Illinois and a defeated candidate for Governor, died in Streator, Ill., April 9. He studied law while he taught school, and early came to be regarded one of the leading lawyers of the state.

Honorable James Maclennan has retired on superannuation from the Supreme Court of Canada after a long and honorable service at the Ontario bar and on the bench at Toronto and Ottawa. His successor is Mr. Justice Anglin, who leaves the Exchequer Division of the High Court of Ontario to become a member of the Supreme Court in Ottawa.

As a result of the limitation placed upon new business of life insurance companies, the New York Life Insurance Company will on May 31 discharge one thousand of its agents. The order was rendered necessary by the decision rendered April 2 by Supreme Court Justice O'Gorman upholding the constitutionality of that section which limits new business in any calendar year to $150,000,000.

Federal indictments against Governor C. N. Haskell of Oklahoma and others charged with fraud in Muskogee town lots, were quashed April 10 in the United States Circuit Court, on the ground that they were returned by a grand jury composed of twenty-three men under the Federal law, instead of a jury of sixteen, as provided for by the Arkansas law which was held to be in force in Indian territory by Federal enactment. Sylvester Rush, special assistant attorney general, stated that he would again present the matter to the grand jury.

The International Naval Conference, which was in session for an extended period in London, agreed upon a code regulating the rights of neutrals and belligerents in time of war. As to blockade, an important change is made in existing practices. Hitherto, under Anglo-American practice, a vessel might be seized on any part of its voyage to or from a blockaded port. Under the new regulations, the right of seizure is restricted to the immediate area of the blockading operation. The agreement as to contraband classifies certain articles as absolute contraband, certain others as absolute non-contraband, and certain others as contraband under some conditions.

It is announced that President Taft's article on his judicial decisions and his election will appear in the June number of *The English Review*. The May number will contain his paper on Panama Canal.

The Senate on April 19 confirmed the nominations of Ira A. Abbott to be Associate Justice of the Supreme Court of New Mexico and of Aloysius I. McCormick to be United States Attorney for the southern district of California.

The firm of Paxton & Warrington of Cincinnati has been dissolved, and Messrs. Thomas B. Paxton, Thomas B. Paxton, Jr., George H. Warrington, and Murray Seasongood have formed a partnership in that city under the firm name of Paxton, Warrington and Seasongood.

Sir Francis William Maclean, K.C.I.E., Chief Justice of the High Court at Calcutta, retired from the bench March 11. His retirement furnished an occasion for general regret, both in the community and in the profession, as his administration had been marked by eminent services, and some of his decisions had formed landmarks of Indian law.

The Boston Bar Association April 10 adopted a code of professional ethics not exactly similar to that of the American Bar Association, going into greater particularity on some topics. The adoption of the code was largely due to the zeal of Alfred Hemenway, the president. Members are required not to aspire to the bench unless they are qualified for judicial position; not to assert in court their personal belief in their client's innocence; not to mix their client's money with their own; not to curry favor with juries; not to connive at chicane; and to appear as lawyers, not as lobbyists, before legislative bodies.

Federal Judge Smith McPherson, in an amended decree at Kansas City, April 17, reserved exclusive jurisdiction in Missouri's rate cases, and in effect instructed the state courts to keep out of the case. The decree dissolved the pending injunction to restrain the eighteen railroads operating in Missouri from putting the three-cent passenger rate into effect. But the Missouri roads will probably be forced, nevertheless, to establish passenger rates of two and one half rather than three cents. In a supplementary decision handed down April 28, Judge McPherson also decided that the section of the state statutes imposing penalties was void.

Judge D. E. Hydrick was installed as Chief Justice of the Supreme Court of South Carolina April 15, succeeding Hon. Y. J. Pope, resigned.

Judge F. M. Bixby, a prominent lawyer of Plymouth County, Mass., died April 11. He acted as senior counsel for Jane Toppan, the nurse who was tried for murdering several of her patients and was adjudged insane.

Hon. Rodney C. Abell, a prominent lawyer of Vermont, died at West Haven, Vt., April 14. He had the reputation of being one of the best parliamentarians ever having served in the Vermont Legislature.

Former Judge Alton B. Parker made an admirable toastmaster at the Appellate Division Dinner given by the New York County Lawyers' Association March 20. Judge Dillon's address of welcome charmed all present.

Justice William J. Gainor gave a lecture on "Code Pleading and Practice," in the auditorium of Brooklyn Law School April 24. Another lecture by Justice Gainor will follow later, on "Have the Courts made a New Constitution for Us?"

The Florida State Bar Association held its annual meeting at St. Augustine February 19 and 20. The following papers were read: annual address of the President, "Which, the Mob or the Law?" by Frederick T. Myers, Esq., Tallahassee; "Remarks on the Judiciary Article of the Constitution of the State of Florida," by Rhydon M. Call, Esq., Jacksonville; "Proximate and Remote Cause in the Law of Torts," by A. A. Boggs, Esq., Miami; "The Science of Jurisprudence," by Hon. Hannis Taylor, LL.D., Washington, D.C.

It has been maintained in some quarters that the Elkins law no longer has any force, since Judge Anderson reversed the decision of Judge Landis in the Standard Oil fine case; but while the Department of Justice will not attempt to overthrow the decision, there are other cases against the Standard Oil which will be prosecuted under the Elkins act. Some "high official of the government" pointed out that the United States Court of Appeals held substantially, in the re-trial of the fine case, that the government had to prove that the shipper knew he was getting the legal rate, a thing which rarely if ever could be done. But, as the *Boston Advertiser* appropriately observes, "There is every reason to believe that the Elkins law suffices to furnish adequate machinery for obtaining convictions where the evidence is sufficiently strong and where the case is prepared with sufficient thoroughness and care."

Justice John M. Davy, for seventeen years a Justice of the New York Supreme Court, died April 21 in Atlantic City. He was born in Ottawa in 1835. Going to Congress in 1875, he was elected Justice of the Supreme Court in 1888, and was one of the state's best-known jurists.

Causten Browne, a prominent Boston lawyer, died in Brookline, Mass., April 8. Born in Washington, D.C., in 1828, he began the practice of law in Boston in 1852. He was the author of a treatise on "The Construction of the Statutes of Frauds" which has passed through five editions.

"International arbitration has so progressed in our time," said Secretary of War David M. Dickinson at the Appomattox Day banquet of the Hamilton Club in Chicago April 9, "that no one can doubt that it is the most powerful force now working upon the nations for the temporal happiness of mankind. International arbitration as we know it, is no more the product of the last hundred years than was the federal Constitution of 1789 a product of that era. It is the flower of our time. There can be no disarmament until the greater powers agree upon a system of concurrent action. The tide of public sentiment all over the world is setting strongly in this direction."

The prosecution of the Standard Oil Company for alleged violation of the Sherman Anti-Trust Act came to trial April 5 at St. Louis before the full bench of the United States Circuit Court, Judges Sanborn, Van Devanter, Hook and Adams. The arguments in behalf of the Government were made by Frank B. Kellogg, assisted by former United States District Attorney Morrison of Chicago. The corporation was represented by John G. Milburn of New York, Moritz Rosenthal and John S. Miller of Chicago, David T. Watson of Pittsburg and John G. Johnson of Philadelphia. An entire week was occupied in hearing the arguments. After the hearing the judges retired and held a consultation concerning their long and tedious future work of going through the evidence and briefs of counsel, each of the latter having presented a separate pivotal argument on both the law and the facts. It is not expected that a decision will be rendered before early next autumn. The record in the case embodies 11,000,000 words, and the case has employed the attention of a score of eminent corporation attorneys for almost two years. It is estimated that the total expense of the suit will finally represent an expenditure of about $5,000,000. The case is one of the most important and far-reaching civil actions that has ever been tried in this country. The issue is so important that, whatever may be the result of the trial before the Circuit Court, the case certainly will be appealed to the United States Supreme Court.

Judge L. J. Storey, one of the Railway Commissioners of Texas, died suddenly at Dallas March 28. He was one of the leading lawyers and Democrats of Texas.

Several volumes were found recently to be missing from the Library of Lincoln's Inn, and a full description of them was circulated among booksellers and the aid of the London police was invoked to trace the thief. The particulars were published in the daily press and widespread attention was drawn to the robbery. In spite of all these precautions the eight missing books suddenly appeared in a catalogue of one of the leading firms of English book auctioneers. The honor and integrity of the firm are above suspicion. The volumes were immediately claimed and returned to the library. They were worth £50 or £60.

"The upper house of the English Parliament," says Mr. Price Collier, in his book on "England and the English" (Charles Scribner's Sons), "is the most democratic institution in England. It is not a house of birth or ancestry, for it is composed today, to an overwhelming extent, of successful men from almost every walk of life. . . . The adult males in a town meeting in Hingham, Mass., for example, could trace back to male ancestors who attended that same town meeting one hundred years before, in greater numbers, in proportion to their total number, than could the members of the House of Lords to ancestors who had sat in that same chamber. Nor is it easy to see wherein they fail to represent the nation, since they come from every and all classes, nor why they should govern badly, since they are chosen only after proving themselves to be of superior ability and sound judgment."

The third annual meeting of the American Society of International Law was held in Washington, D. C., April 23 and 24. Senator Root, the president of the Society, opened the meeting, taking for the subject of his annual address, "The Relation Between the Jurisdiction of National Courts and International Arbitration." "Arbitration as a Judicial Remedy" was then discussed by Hon. John W. Foster, Prof. F. W. Aymar, and others. Wayne MacVeigh spoke on the work at The Hague. Others taking part in the sessions were Rear-Admiral Charles S. Perry and Rear-Admiral Chas. H. Stockton, who spoke upon the results of the recent international naval conference at London. "The Development of International Law by Judicial Decisions in the United States" was discussed by Mr. Justice Brown and Mr. Justice Peele. On the morning of the second day these topics were discussed, "The Constitution and Powers which an International Court of Arbitral Justice Should Possess," and "Equality of Nations."

Dr. James H. Canfield, Librarian of Columbia University, who died March 29, was admitted to the bar in Michigan and practised law for several years in the seventies, until he became Professor of Civics and History in the University of Kansas.

Sir Edward Boyle, K.C., died in London March 19 at the age of sixty. He was first an architect, afterward being called to the bar at the Inner Temple. He was the author of "The Principles of Rating," "The Law of Compensation," and other text-books.

The Maine Legislature for 1909 adjourned April 3. The close of the session was marked by the passage of a bill aimed at eradicating graft in state and town liquor agencies by providing for the purchase of liquors on a competitive basis, the goods being sold in sealed packages.

The publication in newspapers of the facts of divorce cases is deemed by the *Irish Law Times* to be "absolutely necessary in the interests of general morality. To what extent the details should be given seems to be a matter that must be left to the good taste and sense of decency of the editors."

Prof. A. V. Dicey, in a lecture delivered in March, proposed that no constitutional laws should become effective in England without a popular referendum. "The difficulty, however, of this proposal," says the *London Law Times*, "is that as Prof. Dicey himself has declared, 'there is under the English Constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental and constitutional.' "

Lord Alverstone made an address at Manchester, England, March 2, before the Manchester Law Students' Society. He warned his auditors against the constant craving to be in a different branch of the profession from that which they were in, as there were few finer positions than that of leading solicitors such as Mr. Cobbett, for example, who could have had a brilliant career at the bar. In his opinion, there was no better training for the bar than that of the solicitor.

Among bar association meetings to be held this spring are those of the New Hampshire State Bar Association, to be held the first week in May, Hon. William B. Hornblower of New York delivering the annual address; the Pennsylvania State Bar Association, which will meet at Bedford Springs June 29, 30 and July 1; the Tennessee State Bar Association, which will meet at Chattanooga about the same time; and the Iowa State Bar Association, which will meet at Marshalltown, June 24–5.

HON. WILLIAM H. MOODY

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The Green Bag

Volume XXI June, 1909 Number 6

Mr. Justice Moody, Lately Attorney-General

By George Whitelock, of the Baltimore Bar

JUSTICE MOODY'S remarkably able opinion in the recent case of *Twining* v. *New Jersey*[1] calls attention to the work of this jurist in the Supreme Court of the United States both as Attorney-General and as judge. The record is one of high efficiency, and public importance.

In *Clyatt's* case[2], Mr. Moody sustained as Attorney-General the Congressional legislation against peonage, demonstrating its constitutionality under the Thirteenth Amendment, which abolished slavery and established universal liberty.

Still earlier, in *Swift's* case[3], he obtained a perpetual injunction for the Government against a powerful combination of meat dealers controlling six-tenths of the trade in fresh meats between the states, and which threatened to monopolize the business by a scheme so vast as to present for decision a new problem in pleading. It is true that Judge Humphrey afterwards upheld, by his unpopular but accurate and courageous reading of the statute, the pleas of immunity which saved the beef packers from criminal conviction in Chicago, but Attorney-General Moody's ability in the prosecution which failed was indisputable. Congress has since amended the law to conform with the interpretation for which he contended at the trial (Act June 30th, 1906).

In *Shipp's* case[4] he successfully resisted as Attorney-General the release of persons charged with contempt of the United States Supreme Court for participation in the murder of a prisoner sentenced to death by a state court in Tennessee. This prisoner was lynched while seeking a review of his conviction in the highest Court of the nation.

Justice Moody's three-score opinions in the Supreme Court cover a wide range of subjects, federal and otherwise. They show an intellectual fearlessness of distinguished merit, and never descend to the level of mediocrity. The Justice's power of analysis, lucidity of statement and cogency of reasoning are impressive, while his style is terse and virile. The opinions abound in historic and legal illustrations, and carry a profound conviction of the author's industry, learning and acumen.

Mr. Moody represented the United States in the important case of *Kansas* v. *Colorado*,[5] which involved the irrigation of arid lands from the Arkansas River within the boundaries of two

[1] 211 U. S. 78, December, 1908.
[2] 197 U. S. 207, March, 1905.
[3] 196 U. S. 375, January, 1905.
[4] 203 U. S. 562, December, 1906.
[5] 206 U. S. 46, May, 1907.

commonwealths, the original parties to the litigation. Intervening on behalf of the government, he contended for the paramount right of the United States to control the whole system of reclaiming arid lands by virtue of supposed sovereign and inherent power. He conceded that his proposition was an apparent challenge of great decisions of the Court, but argued that: "There is a gap and vacancy of sovereignty somewhere, if the sovereign and inherent power of one state is restricted to its own territory, and there is no sovereign and inherent power in the nation to regulate where the powers of two or more states overlap, and so clash, and injure each other and the aggregate interests." The Court rejected by a unanimous decision the contention of the Attorney-General, which was so radical as to imperil the autonomous condition of the several states.

Forty years earlier Chief Justice Chase had presided in the leading case of *Texas* v. *White*[6], an original proceeding in the federal Supreme Court instituted just after the Civil War, to procure an injunction preventing the fruition of a scheme to loot the state's treasury of bonds said to have been seized by a combination of persons in armed hostility to the United States. If Texas by her participation in secession had ceased to be a state of the Union, the Court would have no jurisdiction of the controversy. In delivering the opinion sustaining the right of the prostrate state to maintain the suit, the Chief Justice, when the animosities engendered by the war were still fiercely burning, wrote these noble and momentous words: "There is no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may not be unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union, composed of indestructible states."

And Justice Brewer's memorable opinion, delivered in *Kansas* v. *Colorado* on May 13, 1907, held that while the Constitution is not to be construed technically and narrowly "it still is true that no independent and unmentioned power passes to the national government or can rightfully be exercised by the Congress." The Constitution enumerates the powers granted by the people to their national government. All powers which properly appertain to sovereignty and have not been so delegated to the federal government belong to the states and the people.

So Justice Moody's judicial opinions in the Supreme Court present a remarkable contrast to his argument as Attorney-General in *Kansas* v. *Colorado*. Thus in *Tilt* v. *Kelsey*,[7] speaking for the Court, he declared the sovereign authority of the individual states in respect to the settlement of the succession of property on death, and their right to give to their judicial proceedings conclusive effect as against the world, subject, of course, to constitutional limitations. And in *Maiorano* v. *B. & O. Railroad*[8] the Justice holds that the construction by the Supreme Court of Pennsylvania of a statute of that state creating a right of action for death in favor of the surviving relatives of a deceased as not extending to those who are non-resident aliens must be accepted by the federal Supreme Court on writ of error. This

[6] 7 Wall. 700, April, 1869.

[7] 207 U. S. 43, October, 1907.

[8] 213 U. S. 268, April, 1909.

doctrine was fully applied despite the fact that similar statutes had been otherwise construed in Illinois and in Justice Moody's own state of Massachusetts. He said there was no violation of the treaty between the United States and the Kingdom of Italy affording to Italian subjects here domiciled all the direct protection and security afforded our own people, by reason of the fact that non-resident alien relatives of a deceased Italian citizen were denied by a state court a right of civil action when the right is given to native resident relatives. And even when vigorously dissenting from the Court's conclusion that the Employers' Liability Act was unconstitutional (1908), Justice Moody distinctly recognized the supremacy respectively of state and nation within their different spheres, and the allotment between them of the powers usually exercised by governments. He agreed with all of his brethren of the bench that Congress cannot regulate purely internal commerce of the states.

In the criminal case of *Twining* v. *New Jersey* (heretofore mentioned) the Justice probably rises to the height of his present intellectual evolution. He answers in masterly manner the argument of the able and eminent counsel for the prisoners, and lays especial emphasis on the perils of forced construction of the federal Constitution in restraint of the power of the states. Twining and one Cornell had been convicted of statutory crime by a New Jersey court. They had not testified in their own behalf. In other states (Maryland, for example, Code, art. 35, sec. 4), no presumption would have been created against them by their silence, and a judge could not have commented on their failure to testify. But the trial court in New Jersey, in conformity with the well-settled state law, had instructed the jury that they might draw an unfavorable inference therefrom against the prisoners. The traversers, suing out a writ of error from the Supreme Court of the United States to the New Jersey Court of Errors and Appeals, complained of the instruction as a violation of the Fourteenth Amendment to the federal Constitution. They alleged an abridgment of the privileges of citizens of the United States, and also a deprivation of their liberty without due process of law. Both contentions were overruled and the conviction in the state court was affirmed, the Supreem Court holding that exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the federal Constitution. The Justice declares in the course of his judgment that: "The power of the people of the states ought not to be fettered, their sense of responsibility lessened and their capacity for sober and restrained self-government weakened by forced construction of the federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

Mr. Moody was appointed to the federal Supreme Court from the Cabinet of an Executive not keenly alive to the distribution of powers between the United States and the component commonwealths. Nor was this Executive highly sensitive to the Constitutional division and separate apportionment of functions, executive, legislative and judicial. If the intimate association with such a President suggested a doubt as to the wisdom of Mr. Moody's appointment, his record on the bench dispels it. That record, like the record of other distinguished jurists, demonstrates the ability of an able

lawyer to relinquish the partisan role of advocate and rise to the impartial duties of a judge. It also demonstrates that the qualities of intellect and temperament necessary for success in these respective callings are not incompatible.

It is clear that Justice Moody will not judicially uphold the doctrine of sovereign and inherent power in the nation apart from constitutional grant, for which he contended as Attorney-General in *Kansas* v. *Colorado*. He will safeguard the autonomy of the states, and preserve the separate sovereignty of the governments, state and federal, maintaining the jurisdiction of the states over the areas of governmental power unceded to national authority. Justice Moody's appointment is more than justified. *Palmam qui meruit, ferat.*

The Kansas Revised Code of Civil Procedure

By Stephen H. Allen, of the Topeka Bar

THE Kansas Legislature of 1909 passed, without many changes, the Revised Code of Civil Procedure, which had been prepared by a committee of the State Bar Association. At the annual meeting in 1906 the Kansas State Bar Association adopted a resolution for the appointment of a committee, "to report a general revision of the Code of Civil Procedure, eliminating as far as practicable all arbitrary rules which tend to delay the disposition of causes, determine them otherwise than on their merits, occasion unnecessary cost or inconvenience or require successive trials of the same issue." Pursuant to this resolution a committee of five was appointed, which prepared a bill that was introduced at the session of 1907. It was found impracticable to act on this bill, owing to the lateness of its introduction. At the annual meeting of the association in 1908 the membership of the committee was increased from five to twelve, and the whole work was again carefully revised and many further changes were made. The general purpose of the revision is expressed in the resolution above quoted.

In recent years there has been a marked tendency to obstruct the progress of causes in the courts by technical motions, demurrers and other dilatory tactics through which defendants not only gain delay, but seek to inject reversible error into the record, so that a judgment for the plaintiff will be barren of substantial advantage. Certain provisions common to most of the codes were found to afford the basis for most of these practices, but the committee were not content with the mere abrogation of a few useless arbitrary rules of procedure. They perceived that the whole theory on which causes are considered on petitions in error by the Supreme Court is burdensome and unjust to litigants. Instead of the rights

of the parties in the cause, reviewing courts everywhere habitually consider the technical correctness of the rulings of the trial court, and many cases are reversed merely for errors in matters of practice in which the parties have no interest, but which theoretically deny some right or confer some illegal advantage. The universal practice in all the courts of this country, so far as I am aware, is to take exceptions to adverse rulings of the court, and the questions raised by these exceptions are alone considered by the reviewing court, unless the case turns on questions of law decisive of the main issues in the case. A provision is common to all codes, requiring the court in all stages of the action to disregard technical errors which do not affect the substantial rights of the parties. The courts, however, have felt bound to give effect to positive requirements of the statute with reference to procedure, and to reverse cases where they have been disregarded. There seems to be an inevitable tendency to magnify the importance of matters of form and shirk the consideration of matters of substance. The revised code abolishes exceptions and bills of exception, and requires the Supreme Court to pass on the merits of every case, where it is practicable to do so.

Among the stumbling blocks over which suitors have fallen day by day may be noticed the provision, common to all the codes, which restricts the joinder of different causes of action to those falling within one of a number (seven in Kansas) of arbitrary classes. Lawyers are constantly confronted with most perplexing questions as to their right to join different claims in the same action. This difficulty is remedied in the new code by striking out all the classifications and allowing the plaintiff to join all the claims he has, provided they affect all the parties to the action.

The little section which peremptorily enjoins that each cause of action in a pleading must be separately stated and numbered often necessitates a great mass of useless verbiage, and a failure to comply with the section has occasioned a number of reversals in this state. This section is stricken out and it is made discretionary with the trial court to require separate stating and numbering or not according to the nature of the case.

The old code made it a ground of demurrer if there was a defect of parties plaintiff or defendant or if several causes of action were improperly joined. Such defects may now be called to the attention of the court and remedied by motion, but are not grounds of demurrer.

The new code does not treat the defendant quite as liberally in the matter of pleadings as it does the plaintiff. The only enlargement of the subject-matter that may be used in defence is made through a change of the definition of a set-off, which now includes any demand for money, and allows a set-off to be pleaded in any action for the recovery of money. In order to shut off sham answers for delay in actions founded on written instruments for the unconditional payment of money, or verified accounts for goods sold, or verified claims for wages, the answer must be verified. In counties where the courts are behind with their work it has been common practice to file answers pleading payment of money demands of all kinds and sorts when there was really no defence but the defendant desired delay.

Aside from changes in the article relating to the venue of civil actions, which are only of local interest, and those relating to constructive service of

summons, which are changes of form more than of substance, no other important amendments are made in those parts of the code which relate to the commencement of actions and the pleadings. The articles relating to the provisional remedies are not materially changed except by adding a provision, modeled after the Massachusetts statute, providing for the attachment of corporate stocks.

Important changes are made in the article relating to trials and new trials. The judge at chambers may hear and dispose of all preliminary matters and pass on all questions of law, whether raised by motion, demurrer, or merely suggested by the pleadings, so that it is no longer necessary to wait from term to term for the disposition of preliminary matters. Where a number of different causes of action are joined which cannot be all tried in the same manner, the court or judge may direct separate trials of one or more issues in the appropriate manner. Where the plaintiff is permitted to join all kinds of causes of action, it may happen that a jury trial will be a matter of right as to some of them, that a reference may be necessary of another, and that another ought to be tried by the court. The judge has full power to meet the situation, whatever it may be. Actions are triable on the issues of fact in ten days after they are made up. Heretofore it has been necessary that the issues be made up ten days before the first day of the term. Many of the judicial districts of the state include only one county and have but three or four terms of court a year, so that considerable delay resulted from this requirement. Peremptory challenges to jurors were formerly made in open court and in the presence of the jurors, so that the challenged juror knew who made the challenge. Now eighteen jurors are selected, who are free from challenge for cause; each party then strikes three names from the list, and the remaining twelve constitute the jury. Motions for a new trial were formerly required to be filed within three days and at the term at which the verdict or decision was rendered, except for the cause of newly discovered evidence. Now they may be filed within three days without reference to the end of the term, and may be decided by the judge at chambers. Where a verdict, report or decision is procured by corruption, a new trial is a matter of right, and all costs must be taxed against the party in fault. A new trial may be granted in any case in which there has not been a fair trial, but if the court is satisfied that a correct result has been reached a new trial may be refused notwithstanding errors in matters of procedure. When the application is made on the ground of newly discovered evidence, or the exclusion of competent evidence, such evidence must be produced on the motion for a new trial, and if upon all the evidence the court is satisfied with the verdict or decision the new trial will not be granted. In cases tried by the court or referee the judgment may be modified in accordance with the facts disclosed by all the evidence, or a new trial ordered as to one or more issues and refused as to the others. The new trial is to be granted only as to the issues as to which the verdict or decision appears to be wrong, when such issues are separable. In practice these provisions will not be likely to result in greatly reducing the number of new trials granted by the trial courts, but as they vest far greater discretion in the trial court, and allow the correction of minor errors and a modification of judgments after their rendition, the basis for reversal in the Supreme Court

is materially diminished. The leading idea here as throughout the code is to minimize matters of form and require the administration of substantial justice without unnecessary delay.

The rules of evidence are changed in some important particulars. Heretofore witnesses could only be required to attend in the county of their residence. They may now be required to attend in any county of the state on tender of the mileage allowed by law and fee for one day's attendance, but the cost of such attendance will be taxed against the party who subpœnas the witness, unless otherwise ordered by the court. The use of affidavits on the trial of actions is a very important innovation. Either party may prevent the use of affidavits by his adversary by simply denying the truth of the matter contained in them, or by asking the privilege of cross-examination. It is believed, however, that in making formal proof, especially by witnesses of unquestioned veracity, much expense and annoyance will be saved by allowing the use of affidavits. It is often a matter of very great inconvenience to witnesses to be required to wait around a court house to give some brief statement, which might as well be shown by an affidavit that could be taken at any convenient time or place. It not infrequently happens that the loss and inconvenience occasioned to witnesses by attendance at court is of more moment than the matter in dispute between the parties. On the other hand *ex parte* affidavits are unsatisfactory where it is necessary to call out all the facts within the knowledge of the witness. The purpose of the change was of course to secure the advantages of an inexpensive method of procuring testimony and at the same time guard against the well-known dangers of that kind of evidence.

In the authentication of records of the courts of foreign countries the requirement of the certificate of the officer who has the custody of the principal seal of the government has been dropped out and a certificate of the clerk and one of the judges is all that is required. The old rule with reference to books of account was very narrow. Now substantially all entries relating to commercial and statistical matters may be admitted in evidence merely on proof that they were made in the regular course of business, at or near the time of the transaction.

The most important changes relate to the record of the proceedings at the trial and the review of judgments of the trial courts on appeal. In the early days, when notes of the testimony of witnesses were taken down in longhand by the lawyers and the judge, it was a sensible practice to make bills of exceptions to preserve the questions of law raised at the trial. Cases for review were also adapted to the necessities of the situation. The use of official stenographers, who preserve not only all the testimony of all the witnesses, but often all that is said in the progress of the trial by court or counsel, while very convenient and helpful in many ways, has its disadvantages. It makes it possible to try a case solely with a view to injecting error into the record, and by objecting and excepting to everything done by the adverse party to raise a multitude of technical questions. After the lawyer gets his transcript of the stenographer's notes, he can study his objections and exceptions at his leisure, and assign error in the reviewing court on any matter that seems doubtful. Under the old practice only those adverse rulings deemed of importance would ordinarily be incorporated in a bill of exceptions. It not infrequently

happens that cases are reversed on matters not fairly presented to the trial court, and that questions on which no reliance was placed at the trial are urged as of prime importance in the reviewing court.

While it is impossible to draw a definite line between the mere technicality and the wholesome rule of procedure, between form and substance, it is possible to do away with many needless arbitrary rules, and to allow the courts at all stages of the progress of the case to do their best in working out substantial justice between the parties without so much regard to matters of form. There is no longer a valid reason for making a new history of a case for the Supreme Court in the form of a bill of exceptions or a case. It is entirely practicable to treat all the files, documents and exhibits in the trial court and the stenographer's notes of the proceedings at the trial as matters available for a review on appeal. It is altogether better to have the whole record available in the Supreme Court than only a part of it. The new code provides for an appeal by a simple notice served on the adverse party. The Supreme Court thereupon becomes possessed of every matter that was before the trial court; pleadings, motions, affidavits, instructions and stenographer's notes when transcribed and filed, and all exhibits offered at the trial are available for a review of the cause. It is not compulsory, however, on the parties to present more to the Supreme Court than is necessary for the determination of the questions raised. Cases appealed are to be presented by abstracts unless otherwise ordered by the Supreme Court. These abstracts must be printed unless permission be granted for typewritten abstracts. The Supreme Court is authorized to allow amendments, take further testimony and adopt any procedure it may deem necessary in order to finally dispose of the case. It is required to either render final judgment or direct such judgment to be rendered by the court from which the appeal is taken, in all cases where it is practicable to do so.

It cannot be denied that lawyers, who have not merely been required to learn the arbitrary rules of procedure found in the code, but also to study critically the construction placed on them by the courts of last resort, become attached to mere matters of form, and are prone to look on a violation of a settled rule of procedure as good grounds for overturning a judgment no matter how righteous in substance. It will doubtless be a matter of extreme difficulty to eradicate this attachment to matters of form. On the other hand it has become manifest to the profession that the business community in particular, and the great multitude in general, have little but contempt for the nice hair-splitting so often indulged in by members of our profession, not merely in discussing the rights of the parties but in wrangles over form and procedure. The Revised Code of Kansas is a resolute attempt to exalt substance above form in all stages of the trial of a cause, to expedite trials and decisions, and to minimize the expense and annoyance of litigation.

APROPOS OF VACATIONS

"Despite his material success, the American has still much to learn about the conduct of business, particularly with foreign nations. . . He has yet to learn that twelve months' work may be done in ten months or even in eleven, but that it cannot possibly be done in twelve."—*Nicholas Murray Butler, in "The American as He Is."*

The Canons of Legal Ethics*

By George P. Costigan, Jr.

Dean of the College of Law of the University of Nebraska

I HAVE been asked to say something to you on the subject of a Code of Legal Ethics, and I have interpreted that to be a request to say something about the particular code which is now before the bar of the United States for adoption—the American Bar Association's Canons of Legal Ethics.

At the outset I want to say a word about the reasons which led the American Bar Association to adopt canons of ethics. If one is asked to name the professions other than the ministry in which practitioners are confronted most frequently with important moral problems, I think his answer would be that they are law and medicine. If then he should be asked which profession he naturally would expect to be the first to codify rules of professional conduct for its members, his answer would almost certainly be the law, since codification is the lawyer's work; but the slightest investigation would show that as a matter of fact the medical profession has been years ahead of us in adopting a code. As the physician is often the most careless about taking medicine, so the lawyer has been the most careless about applying law—rules of conduct—to himself. The ethical Code of the American Medical Association, to which I understand the various state and other local medical associations give loyal adherence, was adopted in its present form by that association in 1903, while the American Bar Association's Canons of Legal Ethics were not adopted by that Association until last summer. Apart from the need of a code of Legal Ethics, one motive for its adoption was that the lawyers of America should not be behind their brethren of the medical profession in announcing those fundamental rules of professional conduct by which all members of the profession should be bound.

But a far deeper motive is to be found in the reports of the American Bar Association's Committee on Code of Professional Conduct. The changing conditions of professional practice, tending in the direction of commercializing a large part of the bar of the country, both in and out of our cities, and in particular the weakening of an effective professional public opinion due chiefly to the growth of large cities with their infinite possibilities of concealed wrongdoing, have combined, in the opinion of reflective lawyers, to create a situation calling for something more definite in the way of rules of professional ethics than we have had in the past. Then, too—and here is where my own interest in the matter has been most aroused—there has been and is infinite need of an authoritative statement in simple and readily accessible form of rules of ethical professional conduct to be impressed upon our young men as they start upon their professional careers. In our profession it is as true as it is elsewhere, that if we train up the young man in the way he should go, in after life he will not depart therefrom.

Before the American Bar Association's Committee went to work upon an

*An address delivered before the Lancaster County Bar Association at Lincoln, Neb., on March 27, 1909.

ethical code, it was requested to report upon the advisability and practicability of the adoption of such a code. In order that you may understand fully what was in the minds of the members of that Committee I shall read to you excerpts from its report made in 1906:—

Your instructions direct us to report upon the "advisability and practicability" of the adoption of such a code.

First, *as to advisability*.

We are of opinion that the adoption of such a code is not only advisable, but under existing conditions of very great importance. There are several considerations moving us to this conclusion:

1. With Wilson, Webster, and others, we believe that "justice is the great interest of man on earth." And here in America, where justice reigns only by and through the people under forms of law, the lawyer is and must ever be the high-priest at the shrine of justice. Under our form of government, unless the system for establishing and dispensing justice is so developed and maintained that there shall be continued confidence on the part of the public in the fairness, integrity, and impartiality of its administration, there can be no lasting permanence to our republican institutions. Our profession is necessarily the keystone of the republican arch of government. Weaken this keystone by allowing it to be increasingly subject to the corroding and demoralizing influence of those who are controlled by graft, greed and gain, or other unworthy motive, and sooner or later the arch must fall. It follows that the future of the republic depends upon our maintenance of the shrine of justice pure and unsullied. We know it cannot be so maintained unless the conduct and motives of the members of our profession, of those who are the high-priests of justice, are what they ought to be. It therefore becomes our plain and simple duty, our patriotic duty, to use our influence in every legitimate way to help make the American bar what it ought to be. A code of ethics, adopted after due deliberation, and promulgated by the American Bar Association, is one method in furtherance of this end.

2. With the marvelous growth and development of our country and its resources, with the ranks of our profession ever extending, its fields of activities ever widening, the lawyer's opportunities for good and evil are correspondingly enlarged, and the limits have not been reached. We cannot be blind to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past, and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood, or of personal aggrandizement. With the influx of increasing numbers who seek admission to the profession mainly for its emoluments have come new and changed conditions. Once possible ostracism by professional brethren was sufficient to keep from serious error the practitioner with no fixed ideals of ethical conduct; but now the shyster, the barratrously inclined, the ambulance chaser, the member of the bar with a system of runners, pursue their nefarious methods, with no check save the rope of sand of moral suasion so long as they stop short of actual fraud and violate no criminal law. These men believe themselves immune, the good or bad esteem of their colaborers is nothing to them, provided their itching fingers are not thereby stayed in their eager quest for lucre. Much as we regret to acknowledge it, we know such men are in our midst. Never having realized or grasped that indefinable ethical something which is the soul and spirit of law and of justice, they not only lower the morale within the profession, but they debase our high calling in the eyes of the public. They hamper the administration, and even at times subvert the ends, of justice. Such men are enemies of the republic, not true ministers of her courts of justice robed in the priestly garments of truth, honor and integrity. All such are unworthy of a place upon the rolls of the great and noble profession of the law.

3. Members of the bar, like judges, are officers of the courts, and like judges should hold office only during good behavior. "Good behavior" should not be a vague, meaningless or shadowy term devoid of practical application save in flagrant cases. It should be defined and measured by such ethical standards, however high, as are necessary to keep the administration of justice pure and unsullied. Such standards may be crystallized into a written code of professional ethics, and a lawyer failing to conform thereto should not be permitted to practise or retain membership in professional organizations, local or

national, formed, as is the American Bar Association, to promote the administration of justice and uphold the honor of the profession. Such a code in time will doubtless become of very great practical value by leading to action through the judiciary, for the courts may, as conditions warrant, require all candidates for the bar to subscribe to suitable and reasonable canons of ethics as a condition precedent to admission. If this be done, the courts will be in an indisputable position to enforce, through suspension or disbarment, the observance of proper ethical conduct on the part of members of the bar so admitted. Indeed, eventually the people, for the welfare of the community, and to further the administration of justice, may, either by constitutional provisions or legislative enactments, demand that all, before being granted by the state the valuable franchise to practise, shall take an oath to support not only the Constitution but such canons of ethics as may be established by law. One state already, Alabama, to its credit be it said, has by statute made it a misdemeanor for an attorney to employ runners to solicit practice, and the public prosecutor is required to institute proceedings upon complaint of the council of the state bar association. But whatever measures may in time be developed to preserve the judicial department of the government, of which the bar forms so important a part, from the taint of unworthy motives and conduct, we believe that, viewed from almost any standpoint, the adoption and promulgation of a series of reasonable canons of professional ethics, in the form of a code by the American Bar Association, cannot but have a salutary effect upon the administration of justice, and upon the conduct of lawyers generally, whether on the bench or at the bar. Action by the national Association will also tend to develop uniformity between the various states, not only in form and method of statement, but also in application, and this we deem of practical importance. Indeed, the ultimate measure of success of this movement to keep the bar true to its pristine glory will be largely enhanced by harmony between the different states, and by the moral support given not only by the bars of various jurisdictions to each other, but by the courts of the sovereign states one to the other.

4. A further reason why we report the advisability of canons of ethics being authoritatively promulgated arises from the fact that many men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of the ethical requirements of the situation. Habits acquired when professional character is forming are lasting in their effects. The "thus it is written" of an American Bar Association code of ethics should prove a beacon-light on the mountain of high resolve to lead the young practitioner safely through the snares and pitfalls of his early practice up to and along the straight and narrow path of high and honorable professional achievement.

Second, *as to practicability*.

We report that the adoption and promulgation of a code of ethics by the American Bar Association is entirely practicable.

1. It is in keeping with the objects for which our Association was organized, among which the following are declared by the constitution:

"To advance the science of jurisprudence, promote the administration of justice and . . . uphold the honor of the profession of the law."

2. It is not impossible or indeed difficult to crystallize abstract ethical principles into a series of canons applicable to the usual concrete ethical problems which confront the lawyer in the routine of practice. Several state bar associations have already done so."

The most significant statement in that report to me, and I invite your attention to it again, is the assertion "that many men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of the ethical requirements of the situation." A few years ago I should have put such a statement to one side as an astonishing misapprehension of the facts, but the more I see of the young men who come under my instruction and the more I learn about the young men who are crowding into our profession the country over, the more I am convinced that this statement is true. It need be true no longer, however, if only the other states of the country will follow the example set by the New York State Bar Association when it adopted the American Bar

Association Code. The New York State Bar Association in January of this year adopted the following resolutions:—

"*Resolved*, That the Court of Appeals be respectfully requested to amend its rules for the admission of attorneys and counselors at law by adding to rule 1 thereof the following:—

"Each applicant for admission to practice as aforesaid shall be required to state in the affidavit filed by him on his application for admission that he has read the canons of professional ethics adopted by the New York Bar Association and has faithfully endeavored to make himself acquainted with the same, and that he will endeavor to conform his professional conduct thereto.

"*Be it further resolved*, That the State Board of Law Examiners be requested to examine on said canons of professional ethics all applicants applying to it for admission to the bar, and that the faculties of all law schools within this state be requested to teach the subject of professional ethics.

"*Be it further resolved*, That the secretary of the Association be directed to send a certified copy of these resolutions to each judge of the Court of Appeals, to each member of the State Board of Law Examiners, and to the deans and faculties of each law school in the state."

Having called attention to the reasons which led the American Bar Association to adopt canons of professional ethics, I now wish to present to you a short statement of the way the Association's committee did its work. That Committee consisted of Messrs. Henry St. George Tucker, of Virginia, chairman; Lucien Hugh Alexander, of Pennsylvania, secretary; David J. Brewer, of the District of Columbia; Frederick V. Brown, of Minnesota; J. M. Dickinson, of Illinois; Franklin Ferriss, of Missouri; William Wirt Howe, of Louisiana, Thomas H. Hubbard, of New York; James G. Jenkins, of Wisconsin; Thomas Goode Jones, of Alabama; Alton B. Parker, of New York; George R. Peck, of Illinois; Francis Lynde Stetson, of New York; and Ezra R. Thayer, of Massachusetts; and it went about its work, as a committee of such ability would, in a thoroughly business-like manner. In the first place it found that codes of ethics had already been adopted in the eleven following states on the dates specified respectively: Alabama, December 14, 1887; Georgia, May 9, 1889; Virginia, July 24, 1889; Michigan, June 30, 1897; Colorado, July 6, 1898; North Carolina, June 28, 1900; Wisconsin, February 13, 1901; West Virginia, February 12, 1902; Maryland, July 2, 1902; Kentucky, July 2, 1903; Missouri, September 28, 1906. The Committee thereupon proceeded to make a compilation of these state bar association codes, the later ones being based upon, but modifying in various ways, the first code, that of Alabama. Then, as the Alabama code was based very largely on Sharswood's little book on Legal Ethics, the Committee succeeded in getting copies of Sharswood's book distributed to the Association's members. With the compilation of the state bar association codes, the Committee printed Hoffman's famous Fifty Resolutions in Regard to Professional Deportment and some other information. Having made the compilation and distributed Sharswood's book on Professional Ethics, the Committee asked for another year in which to make a final report and proceeded to send out appeals for suggestions for the Code. Those appeals received many responses, and it is because I was one of those to respond that I felt bound to address you this evening, after Judge Frost astonished me by making and getting carried at your last meeting a motion that I do so.

My contribution to the Code was slight, but has carried with it certain obligations. In general, the provisions of the state bar association codes already in existence satisfied me, but they were poorly arranged, contained

needless repetition, and were wholly without index. From my point of view, interested as I was in getting such a code before the young men about to enter or already in our profession, with a prospect of the code being read and understood by them, a poorly arranged, long and confused code seemed greatly to be regretted, and accordingly I urged that the Committee break away from the order of arrangement and language of the state codes, and rearrange, rephrase and in every possible way simplify the provisions of those codes, and then furnish an index to them. The secretary of the Committee wrote me that I was the only one advocating such a plan, but as I persisted in urging it he suggested that I submit a scheme for the rearrangement and classification of the state code provisions. I did so. My classification was not adopted, else I should not feel free to speak of it here, but the Committee did come to see the advisability of breaking away from the poor arrangement of the state codes and of making a new code which would be an improvement upon the state codes in every way. I may say in passing that in my judgment the Committee hit upon an arrangement that in simplicity and clearness was far better than the one that I had suggested. Yet because I was in some measure responsible for the breaking away from the state codes and for depriving the Association of the chance to say that it is advocating a code already substantially existing in eleven states, I feel it my duty to assist in every way that I can in getting the code adopted by this Association and in having Nebraska one of the states to take up the new code.

The Bar Association's committee received, as I said, many responses to its appeal for suggestions. A number of these responses, together with extracts from magazine articles deemed helpful, were printed by the Committee in the form of a red book of 131 pages, a copy of which I hold in my hand. This Red Book, which contains detailed criticisms of the various canons of the different state bar associations' codes, was distributed to the members of the Committee and others who were deemed worthy, and the various members of the Committee prepared for the committee meeting at which it was to adopt a draft of a code.

The Committee met in Washington, March 30, 1908, for that purpose, and spent three days in making a preliminary draft of the Code. They made, as all the bar associations since the Alabama Association adopted its code have made, the Alabama code the foundation of their work. They asked for and of course received the attendance at their meeting and the assistance of their fellow member Hon. Thomas G. Jones of Alabama, who drafted the Alabama code of legal ethics and who was responsible for a number of the modifications of the Alabama Code made by the Committee. The preliminary draft of the Code thus framed was then printed and distributed to the Association members with a request for criticisms, and the officers of the various state bar associations were also asked for criticisms of the draft. The secretary of the American Bar Association's Committee received over 1,000 replies to that request, and except as relates to one canon—that on contingent fees—the preliminary draft was enthusiastically approved.

Thereafter the Committee made its final report, which came before the American Bar Association at Seattle last August. Each of the canons was separately voted upon and all but one were

adopted without change. The only one changed was the canon about contingent fees. That canon, as proposed by the Committee, read:—

> 13. *Contingent Fees.* Contingent fees may be contracted for, but they lead to many abuses and should be under the supervision of the court.

So worded, it was deemed too broad, and as the sole purpose of the committee was to get assent to the proposition that no lawyer has the moral right to charge his client an unjust contingent fee, it was amended to read:—

> 13. Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges.

As thus amended it was adopted.

Just a word in regard to that provision as amended. Perhaps I may best get the matter before you by quoting what Judge Simeon E. Baldwin of Connecticut has to say about it. "The canon regarding contingent fees," says Judge Baldwin, "was the only one amended in substance by the Association in dealing with the report of the Committee, and indeed it is not clear that this amendment changed anything but the form, so as to make plainer what was the intention of those who drafted it. In its present shape it seems to sanction, by implication, arrangements for contingent fees (when not contrary to local law), provided their terms are reasonable; and its real emphasis is laid on the necessity of providing a prompt remedy for the client by the supervisory action of the court, if any unfair advantage of his necessities has been taken. Precisely how this supervisory action should be invoked was left to be decided by the local practice; and it would have been difficult to frame any form of procedure of universal application."[1]

It should be borne in mind that the American Bar Association was not framing a statute, but was trying to frame an ethical canon which could be subscribed to in every state, whether the given state did or did not legalize contingent fees and whether (where it did recognize such fees to be legal), it did or did not already provide a particular method of supervision. How any one actuated by right motives could fail to subscribe to that canon, aimed as it is solely against exorbitant contingent fees, I cannot understand. If the code were a bill to be passed by the legislature, its failure to point out a specific method of supervision would be highly objectionable, but it is not such a bill. The code is simply a statement of a few of the important ethical principles which all lawyers should be bound by and may very appropriately provide that the court should supervise contingent fees whenever clients claim them to be exorbitant or in anyway unjust, without pointing out the method of supervision. One who looks at the code for what it is, and does not worry himself unnecessarily by likening it to that very different thing—state or federal legislation—can surely not object in good faith even to the canon on contingent fees; for should he say, as some do say, and as in a certain sense at least is true, that the doctrine of the canon is already a rule of law recognized and enforced by the courts, he will surely not want to be recorded as saying that it is bad law and should not be enforced, while if it is not already the law of the state he will surely want to be recorded as saying that it should be lived up to anyhow.

Just a word more about this con-

[1] 8 *Columbia Law Review* 541, 544.

tingent fee canon. You may somehow have gotten the notion that the American Bar Association's Committee that drafted the code was hostile to contingent fees. Such I understand was far from being the case. When that distinguished Committee of fourteen members sent out its preliminary report with the original clause about contingent fees bearing the unlucky number 13, it contained this notation: "Hon. James G. Jenkins [the Wisconsin member] of the Committee dissents from Canon 13, as he is opposed to contingent fees under any circumstances." He was the only member of that Committee of whom that was said, and, as a matter of fact, it is the real friends of the contingent fee system that support the canon, for they realize that it is only if contingent fees are not exorbitant in amount that they have a social or moral excuse for being. There are some contingent fee lawyers who are like Shylock, demanding their pound of flesh though it take the life of the other contracting party, just because it is written in the bond, but for those who deal thus unjustly with their fellows the bar has only a righteous contempt.

I said just a little while ago that the American Bar Association's Canons of Ethics were not to be put in the same class with an act of the legislature. I must modify that statement in one particular. Attached to the Code is a form of oath of admission to the bar, to be recommended for adoption by the proper state authorities. To that extent the Code seeks legislation, though it is not asking in any other way for legal sanction. That oath finds its place there because of the suggestion of Mr. Justice Brewer of the United States Supreme Court, who was himself a member of the Committee, that a short body of rules, so few and clearly stated that there could be no excuse for their violation, should be prepared, "to be given operative and binding force by legislation or the action of the highest courts of the states, assuming that those courts have, as doubtless they have in some states, the power to make and enforce such rules." No such endorsement is sought for the code as a whole, but only for the oath.

I am not going to take up your time by going over the provisions of the code,—you are all familiar with those already,—nor am I going to take up your time discussing particular ethical problems touched upon in those provisions. I have no hesitancy in saying that the Code will commend itself to the bar of the country as a whole and that, because uniformity on this subject is so desirable as well as because the code itself is so essentially sound, it ought to be adopted by the Lancaster County Bar Association and by the Nebraska State Bar Association. You will be interested to know that after the preliminary draft of the Code appeared and before the final draft was adopted, the states of Tennessee (May 23, 1908), Florida (June 26, 1908) and Indiana (July 20, 1908), adopted that preliminary draft, which is in all essentials the same as the final draft. Since the final draft was adopted by the American Bar Association, the states of North Dakota and New York have adopted it, and you will hear of many more states doing the same.

The adherence of New York to the Code is the most significant of all. The State Bar Association of New York has adopted the Code, with only one slight change. That change does not come in the contingent fee canon—the so-called "commercialized" lawyers of New York saw no danger in that—but occurs in that part of canon 5 relating to prose-

cuting attorneys. It consists of the addition of the following sentence in regard to the prosecuting attorney: "He should avoid oppression and injustice of any kind whatever." With that one change the Code of Ethics adopted in New York in January of this year is the American Bar Association's Code of Ethics.

In closing my commendation of the American Bar Association's Canon of Ethics, I think I cannot do better than to quote the judgment of Judge Simeon E. Baldwin, whose retirement from the Supreme Court of Connecticut has recently been announced and whose long and honorable career as lawyer, law teacher, and judge peculiarly qualify him to pass upon the matter. He says:—

> It might be too high praise to say that this code, as finally approved, could not have been made better. But the question for the American lawyer is not whether a more perfect one could be made. It is whether this Code, having been framed after long deliberation and extensive correspondence by a capable Committee representing all parts of the United States, and adopted with practical unanimity after full opportunity for discussion by the American Bar Association, ought not, as a whole, to receive his support.
>
> If this Code is accepted by the bar associations of every state as a fair general statement of the main duties of members of the legal profession, a great purpose will be well accomplished. An authoritative criterion will be supplied, by which every lawyer can be safely guided, when he is in doubt as to the conduct he should pursue in respect to any of the questions which oftenest prove a source of perplexity. The law student will have a mentor always at hand. The courts will hesitate less in enforcing the discipline of the bar, since professional misconduct will be, more than ever before, a sinning against the light.[2]

[2] 8 Columbia Law Review, 541, 546-7.

To James Barr Ames

By a Harvard Law Student

A student of ye ancient English schools
Once met his legal Master in the yard
And said, "This time I shove aside the rules,
Take off your wig, I'm going to call you 'pard'!"
And so, dear Dean, ere passes this bright day
I, too, from reason's path shall step apart
To tell you things that I have longed to say
But never dared since they concerned the heart.

It simply comes to this—we love you, James;
The statute time our suit shall never Barr,
We shall recover wisdom from our Ames
Though from your presence we have gone afar;
Oh! we shall count it great that once we knew
The peerless Master of the law, James—you!

The Late Justice Davy of Rochester

JOHN M. DAVY of Rochester, N. Y., formerly Justice of the Supreme Court of New York and a prominent member of the New York State Bar Association, died at Atlantic City April 21, at the age of seventy-three, after a brief illness.

Justice Davy was of English-Irish extraction, and was born in Ottawa June 29, 1835. When he was six months old his parents moved to Rochester. He studied law in the office of the late L. H. Hovey of Rochester, and enlisted in the Civil War, being appointed captain of a company he had helped to raise. After an honorable discharge he resumed the study of law, in the office of Strong, Palmer & Mumford, and was admitted to the bar. Inside of five years he had placed himself in the front rank of the younger practitioners, and in 1868 he was nominated and elected on the Republican ticket to the office of District Attorney. His administration was marked by an able prosecution of several notable criminal cases.

He declined the office in 1871 and was appointed by President Grant Collector of Customs. In 1874 his sterling worth was again recognized and he was elected a member of the Forty-fourth Congress, taking his seat in 1875. A year later he was re-elected, but suffered defeat in the Democratic landslide. For twelve years he scored success after success by his astuteness in legal practice. In 1885 he formed with one of his three sons the legal firm of Davy & Davy.

In 1888 he was accorded the signal honor of a unanimous nomination for Justice of the Supreme Court, a distinction that was repeated on October 1, 1902. During his sixteen years' service on the bench Justice Davy presided over many important trials. It is the consensus of opinion of the lawyers who had occasion to practise before him that Justice Davy was possessed in a rare degree of "the judicial mind and temperament." He was frequently drafted for service in New York and other districts. Several times Justice Davy was asked to take a place in the Appellate Division, but declined.

He retired from the Supreme Court bench Dec. 31, 1905, because of the age limit.

While in office in his last term, Justice Davy was honored by the Governor by designation to the Appellate Division bench, where he served with distinction, and in conferences with the associate justices his knowledge of the law earned him admiration and respect. In New York City he was known almost as well as in Monroe County. He tried the famous *Sharkey* case in New York, in which a Tammany politician was accused of a brutal assault on a man named Fish, who died from the effects of the blow. Tremendous pressure was brought to bear on Justice Davy to inflict a light sentence, but he imposed the full penalty of the law and the Court of Appeals sustained the decision.

JUSTICE JOHN M. DAVY
A jurist of ability and worth who had held several distinguished offices in New York State

Most of the distinguished counsel of the metropolitan bar had appeared at one time or another before Justice Davy in his career as judge and most of them he knew personally and well.

Besides a personal and intimate acquaintance with Joseph H. Choate and Elihu Root and others of the New York bar, Justice Davy was a personal friend of President Chester A. Arthur, with whom he was in the New York

State General Republican Committee. He knew General U. S. Grant and Abraham Lincoln intimately.

To those who knew Justice Davy he was a true friend in the highest sense. He was not obstrusive, he was not profuse; his was the modest nature which was loved.

Often when opposed to younger and less versatile lawyers, he paused to instruct, and he did it in that kindly, genial manner which made his opponent his friend. To the embryo lawyer he was always a fountain of information. He had fewer reversals from the higher courts than any Supreme Court Justice in the state. In chambers, he was as easy of access as in his office or his home.

Assistant Attorney-General Oscar Lawler

OSCAR LAWLER

Whose success at the California bar has been recognized by his appointment to Mr. Wickersham's staff

OSCAR LAWLER, whose appointment as Assistant Attorney-General of the United States was confirmed by the Senate April 5, comes from California, though not a native of that state. He is only thirty-four years of age, having been born April 2, 1875, at Marshalltown, Iowa.

Mr. Lawler is the son of William T. and Margaret (O'Connor) Lawler, and as a boy he attended the public schools of his native place until September, 1888, at which time he removed to Los Angeles, California, where he has resided since he was thirteen years old. He worked as messenger, and later as stenographer and secretary to Hon. Erskine M. Ross, United States Circuit Judge for the southern district of California. He was admitted to the bar of California in April, 1896. On June 17, 1901, he was married, and has two children, aged respectively seven and three years. He practised law in southern California, and in December, 1905, he was appointed United States Attorney for the southern district of California.

Mr. Lawler is a member of the Masonic fraternity, and at present Grand Master of Masons for the state of California. He is a Republican in politics.

Col. Franklin Bartlett, All-Round Lawyer and Man

"THE Court expresses its deep regret for the loss of Col. Franklin Bartlett. He came of an old and distinguished family and one of great legal reputation. He maintained that reputation and even enhanced it."

These were the words of Justice Almet F. Jenks, who was presiding over the Appellate Division of the New York Supreme Court in Brooklyn, when the news of Col. Bartlett's death was presented to him. Col. Bartlett, who was one of the best known lawyers of New York City, for many years secretary of the Union Club, secretary of she Sun Printing and Publishing Association, and an authority

on National Guard affairs, died Friday, April 23, 1909, at his home, 26 West Twentieth street, New York.

He was born in the town of Grafton, Worcester county, Mass., on September 10, 1847. His father, William Osborne Bartlett, was a distinguished constitutional lawyer, who took great pride in the education of his three sons, Willard, now a Judge of the Court of Appeals of New York State, Franklin and Clifford A. H. Bartlett.

The second son was prepared for college by tutors and was graduated from the Brooklyn Polytechnic in 1865. He was graduated from Harvard University in 1869, being third in his class. He was a member of the Institute, Porcellian, Hasty Pudding, D.K.E., and other clubs at Harvard.

He then completed the law course at Columbia University. After a year and a half abroad, where he attended lectures of James Bryce and the late Sir Henry Maine at Oxford, he entered the New York law office of his father and attended another course of lectures at Columbia Law School. In 1878 Harvard conferred upon him the degree of Doctor of Philosophy.

For a number of years he was retained by the city as special counsel, protecting the city's interests in the matter of the new parks. He was a member of the Constitutional Commission appointed in 1890 to inquire into the expediency of consolidating Greater New York.

The national Democratic committee retained him, together with Senator Roscoe Conkling, in the Presidential campaign of 1884, in which Mr. Cleveland defeated Mr. Blaine by a very narrow plurality in the state of New York. He represented the active contestants in the celebrated Hamersley will case. He succeeded his father as counsel for the *Sun*.

He became a member of the National Guard of New York in 1884, and maintained an active connection with it until September, 1905. In 1896 he was unanimously elected Colonel of the 22d Regiment, and had command of the regiment during the Spanish War, at Fort Slocum and David's Island.

He was elected to the Fifty-third Congress and re-elected to the Fifty-fourth, serving on the Committee on Appropriations, the Interstate and Foreign and the Militia committees. He refused to follow William J. Bryan's free silver doctrines in 1896, expressing his opinion

COL. FRANKLIN BARTLETT

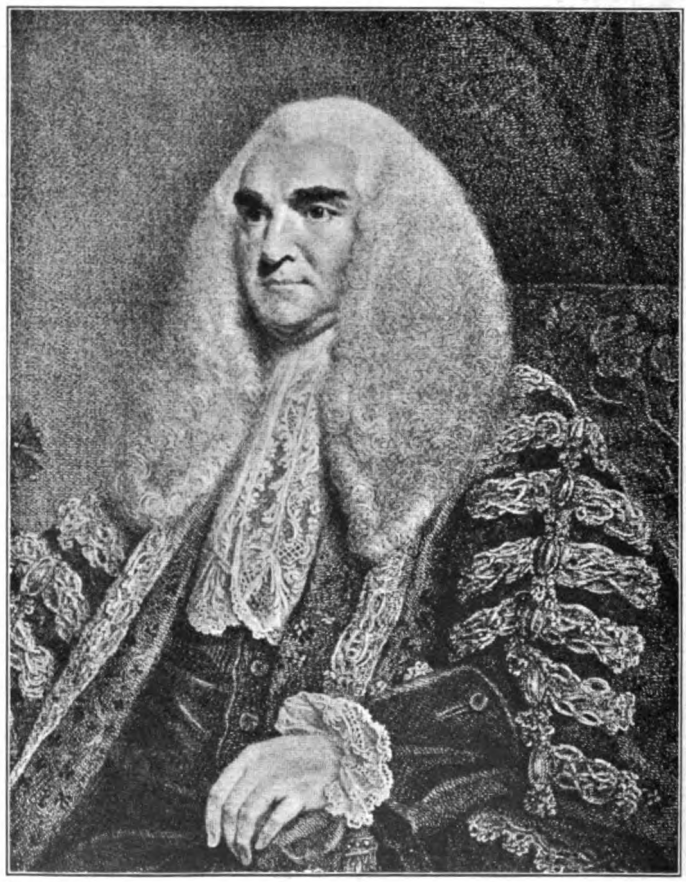
A New York lawyer of distinction whose career exhibited a noteworthy versatility

that the action of the Democratic convention could not make dishonesty honest or that constitutional which was unconstitutional. Col. Bartlett's stand on Bryanism attracted wide attention. He was again nominated for Congress by the Republicans and Gold Democrats, but was defeated by John H. G. Vehslage. Col. Bartlett was a member of Tammany Hall for many years. In 1903 his name was brought forward prominently for Mayor of New York City.

He was extremely active in club life and in society. His lists of clubs included the Union, of which he was the secretary for twenty-one years and member of the board of governors; the Knickerbocker, the Turf and Field, the Brook, of which he was one of the founders; the University, the Manhattan, the Players, the Country, the City Midday and the Metropolitan of Washington. He was a member also of the Society of Colonial Wars, the Military Order of Foreign Wars and the Sons of the Revolution.

He was somewhat distinguished in former years as an athlete. He was an expert horseman and oarsman, a crack swimmer, adept with the foils and the gloves. His friends were pleased to refer to Col. Bartlett as a fine type of all around American gentleman,

lawyer, soldier, scholar, journalist, athlete, too prone to depreciate and neglect the advocate's branch of the profession. He was an exceedingly forceful and convincing speaker, with a pleasant turn for the lighter fields of oratory.



LORD THURLOW

Lord Thurlow

By "E. M."

(Condensed from London *Law Times*)

GREAT men are often *enfants terribles* in their youth—it may be owing to the exuberance of their vitality—and being born in a parsonage does not seem to make any difference. At all events it did not in the case of the youthful Thurlow. He was as fine a specimen of the incorrigibly "bad boy" as any moral story-book could desire. Being unmanageable at home, he was sent to a clerical disciplinarian of the name of Brett, who

kept a school at Scarning, in Norfolk. Here what he chiefly learnt was the art of "cock-throwing"—that is shying sticks at an unfortunate cock, as the mid-Victorian age did at an "Aunt Sally" and a cordial detestation of his reverend preceptor. In after life, when this gentleman claimed his old pupil's acquaintance in a bookseller's shop at Norwich, saying, "Mr. Thurlow, do you not recollect me?" Thurlow—very rudely, it must be confessed—remarked, "I am not bound to recognize every scoundrel who recognizes me."

To Thurlow, despite his talents, his first years at the bar were—as they must be to all who start without connections—years of stress and often discouragement.

But every man gets his chance sooner or later, and the traditional story is that Thurlow got his chance in connection with the great case of *Douglas* v. *Hamilton*.

Thurlow had studied the evidence—which was very voluminous—with great care, and one evening, the topic coming up for discussion at Nando's, he held forth on the subject, argued with great force and plausibility that the Scotch court had come to a wrong decision, and gave a masterly analysis of the evidence. Now, as luck would have it, there happened to be among his listeners two law agents of the curators of the infant heir, who had come to London to enter an appeal. Greatly impressed with Thurlow's sagacity and powers, they made inquiries about him, ascertained that he was a member of the bar, and the next morning he found awaiting him at chambers a brief in the great case, marked with such a fee as had never brightened his career before. The appeal took long in the hearing, but the result was a triumphant vindication of Thurlow's opinions, and it was achieved, to a large extent, by Thurlow's zeal, industry, and ability.

It was fortunate that the trial did not prove the end as well as the beginning of his career, thanks to the insane system of duelling which then prevailed in the country. Thurlow, in opening the case, had made some strong reflections on the conduct of Mr. Stuart, the law agent on the other side. A challenge was sent, which Thurlow at once accepted, only stipulating that the meeting should not take place till he had concluded his argument. That done, the parties met in Hyde Park on Sunday morning, the 14th Jan. 1769, and pistols were discharged at ten yards, but, happily, without effect. Swords were then drawn, but the seconds intervened. It shows Thurlow's coolness that on his way to the rendezvous he stopped and ate an enormous breakfast at a tavern near Hyde Park corner.

"At times," says Mr. Butler in his Reminiscenses, "Lord Thurlow was superlatively great," and he gives us a scene in the Lords. Thurlow's dictatorial tone in debate had, it seems, given some umbrage to the Peers, and the Duke of Grafton seized the opportunity of an inquiry into Lord Sandwich's administration of Greenwich Hospital to reproach him with his plebeian extraction and his recent admission to the peerage. At the close of the speech Thurlow rose from the woolsack and advanced slowly to the place from which the Chancellor generally addresses the House; then, fixing on the Duke the look of Jove when he grasped the thunder: "I am amazed," he said, in a loud tone of voice, "at the attack which the noble Duke has made on me. Yes, my Lords"—considerably raising his voice—"I am amazed at his Grace's speech. The noble Duke cannot look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this House to successful exertions in the profession to which I belong. Does he not feel that it is as honorable to owe it to these as to being the result of an accident? To all these noble lords the language of the noble Duke is as applicable and as insulting as it is to myself. But I don't fear to meet it single and alone. No one venerates the peerage more than I do; but, my Lords, I must say that the peerage solicited me, not I the peerage. Nay, more; I can say and will say that as a Peer of Parliament, as Speaker of this right honorable House, as Keeper of the Great Seal, as guardian of His Majesty's conscience, nay, even in that character alone in which the noble Duke would think it an affront to be considered, I am at this moment as respectable—I beg leave to add I am at this moment as much respected—as the proudest peer I now look down upon." The effect of this speech, adds Mr. Butler, both within the walls of Parliament and outside of them, was prodigious. It gave Lord Thurlow an ascendency in the House which no Chancellor had ever possessed.

Dr. Johnson was well acquainted with Thurlow when the latter was at the bar, and had a high esteem for his powers. "Sir," he

said to Boswell, "it is when you come close to a man in conversation that you discover what his real abilities are. To make a speech in a public assembly is a knack. Now, I honor Thurlow, sir; Thurlow is a fine fellow. He fairly puts his mind to yours." On another occasion he said: "Thurlow is a man of such vigor of mind that I never knew I was to meet him but—I was going to tell a falsehood—I was going to say I was afraid of him, and that would not be true, for I was never afraid of any man yet; but I never knew I was to meet Thurlow but I knew I had something to encounter." He must "always think," he added, before he replied to Thurlow. Horne Tooke, Sir Philip Francis, and other noted talkers of the day all quailed before Thurlow. Pity that his conversation was so garnished with oaths!

He became in his retirement a great reader of novels, and, on one occasion so interested was he in the plot that he dispatched his groom from Dulwich to London, after ten o'clock at night, for the concluding volume that he might know the fate of the heroine before going to sleep. This was like Lord Selborne, who, in his retirement at Petersfield, burnt his candles to the socket reading novels. Mr. Justice Maule did worse. He set his chambers in the Temple on fire from a similar love of fiction, which he considered excellent to "air the mind." A life of law, it must be confessed, tends to starve the imagination, and Nature—as these eminent judges show—is always avenged.

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Adoption. See Comparative Jurisprudence.

Aliens (Status). "Aliens under the Federal Laws of the United States. III, Federal Legislation: Public Lands, Real Estate in the Territories." By Samuel MacClintock. 4 *Illinois Law Review* 27 (May).

The third of a series of four papers (see 21 *Green Bag* 166, 228).

"We thus see by way of summary, that Congress has full power to dispose of the public domain. It has allowed aliens to purchase the public lands on the same terms as citizens; it has granted them pre-emption and homestead rights upon declaration of intention to become citizens, though in the latter case, full title might not be acquired until complete citizenship had been attained.

"The result of this liberal policy has been the attraction of great numbers of immigrants from Europe who have settled upon the public lands and in time have generally become American citizens."

Animals. "The Responsibility at Common Law for the Keeping of Animals." By Thomas Beven. 22 *Harvard Law Review* 465 (May).

An erudite and witty review of the decision of the English Court of Appeal in *Baker* v. *Snell* (1908), 2 K. B. 325, 825.

"The being *feræ naturæ* is not (as the Court of Appeal is unanimous in supposing) the ground of the liability for the acts of an escaped tiger or of a biting dog. If it were so the liability would extend to the devastations of rabbits, the thefts of foxes, the evil wrought by squirrels, jackdaws and the rest, which it plainly does not. For the rule of liability for the mischief done by animals *feræ naturæ* is diverse; and the ground of the diversity is whether the mischievous agency is property or not. This does not seem to have occurred to any member of the Court of Appeal. They accept a loose statement and clothe it with a pretense of uniformity where in truth there is none."

Bailments. "Liability of Deposit Companies." By E. Fabre Surveyer. 29 *Canadian Law Times* 462.

Blockade. "Some Points in the Law of Blockade." By Sir William Rann Kennedy, Lord Justice of the Court of Appeal. *Journal of Comparative Legislation*, no. xx, p. 239 (Apr.).

This paper was read at the Conference of the International Law Association at Budapesth, 1908. To quote:—

"It appears to me that in this matter it is not a question of choice between the very wide Anglo-American area of capture and the very narrow area given by the French view of international rights, . . . but it occurs to me that a solution of the difficulty of agreement between the advocates of the two systems might be found in the compromise which would result from the adoption by international compact of a rule which should

require that the belligerent's notification of blockade should specify, by latitude and longitude, or in some other way, a zone (not necessarily a narrow zone) within which the blockading force would operate in its maintenance of the blockade, and entry into which would subject all vessels to capture and condemnation unless it could be clearly proved that they were not attempting to enter the blockading port."

See Reprisals.

Codification. "Judiciary and Statute Law." By Julius Hirschfeld. *Journal of Comparative Legislation*, no. xx, p. 322 (Apr.).

"The fundamental rule for drafting those codes [the Sale of Goods Act and similar statutes], as laid down by the late Lord Herschell, was a strict adherence to the judiciary law, avoiding all and any attempts at altering and improving—the latter process to be left to the legislature. Now, considering the hurry of political life, one cannot wonder if *lacunæ* remain and amendments go astray. Codifications on a large scale would of course, at the outset, have to go unhampered by such restrictions and to work in a progressive and reformatory spirit."

Switzerland. "Report on the Swiss Civil Code of 1906." By Carl Wieland, LL.D., of Basle. *Journal of Comparative Legislation*, no. xx, p. 349 (Apr.).

Comparative Jurisprudence. "A New Era in Legal Development." By Hannis Taylor, LL.D. 189 *North American Review* 641 (May).

"After thirty years of study in comparative law, the idea dawned upon me . . . that a world-wide fusion is now going on . . . in the blending of Roman and English law. . . . After centuries of growth Roman public law, constitutional and administrative, perished, leaving behind it the inner part, the private law, largely judge-made, which lives on as an immortality and universality,—as the fittest it survives. In the same way and for the same reason, English public law, the distinctive and least alloyed part of that system, is living on and expanding as the one accepted model of popular government."

The Journal of the Society of Comparative Legislation, New Series no. xx, v. ix, pt. 2 (Apr.).

This number, consisting of nearly four hundred pages, contains much important matter belonging to the sciences of international law and of municipal law or, as Professor Westlake would prefer to term it, national or state law. The number contains the following articles. For some of the more important of them, see under the headings Blockade, Codification, Domicile, Government, Papacy:—

"The Rt. Hon. Lord Justice Kennedy: Portrait and Biographical Notice."

"Merchant Shipping Legislation in the Colonies." By A. Berriedale Keith.

"The Great Jurists of the World: VII, Vico." Part 2. By Michael H. Rafferty.

"Some Points in the Law of Blockade." By Lord Justice Kennedy.

"The Papacy and International Law." By A. Pearce Higgins, LL.D.

"Trade Domicile in War: A Reply." By Prof. J. Westlake, K.C., LL.D.

"Judicial Appeals in the Commonwealth." By A. Berriedale Keith.

"The Great Jurists of the World: X, Richard Zouche." By Coleman Phillipson, LL.D.

"Roman-Dutch Law in the Law Reports." By Prof. R. W. Lee.

"The International Law Association at Pesth." By T. Baty, D.C.L.

"Judiciary and Statute Law." By Julius Hirschfeld.

"The New Turkish Constitution." By Norman Bentwich.

Following the articles is a section of two hundred pages reviewing the legislation of 1907 in China, Egypt, France, Germany, Sweden, Switzerland, United States (state legislation only), United Kingdom, British India, Eastern Colonies, Australasia, South Africa, West Africa, East Central Africa, South Atlantic, North American Colonies, West Indies, and Mediterranean Colonies. Sir Courtenay Ilbert, who also prepares the important section on British India, contributes an introduction.

Adoption. "An Example of Legal Make-Believe—III–VI." By P. J. Hamilton-Grierson. 21 *Juridical Review* 17 (Apr.).

This article, following one in 20 *Juridical Review* 32–46 dealing with the form of adoption, treats of the purposes and effects of adoption, and contains much information about the custom of adoption as practised among many barbarous peoples.

Baganda. "The Clan System, Land Tenure, and Succession Among the Baganda." By W. Morris Carter, Judge of H. M. High Court, Uganda. 25 *Law Quarterly Review* 158 (Apr.).

A valuable article on the customs and tenures of one of a Bantu-speaking division of the negro race inhabiting a portion of the Uganda Protectorate lying north of the Victoria Nyanza.

England and Scotland. "English Law in Scots Practice—II, Error, Partnership, Sale." By Hector Burn Murdoch. 21 *Juridical Review* 59 (Apr.).

"It is in the spheres of Contract and Delict that English authorities are chiefly consulted. These articles may supply at least some serviceable danger-signals upon points where similarity between the two systems is apt to be deceptive."

United States. "State Legislation." By R. Newton Crane, of the Middle Temple.

Journal of Comparative Legislation, N. S., no. xx, p. 354.

"The output of legislation in the various states of the United States for the year 1907 is the largest for many years past. Forty-one regular and six special sessions of the numerous state legislatures were held, this being the 'odd' year, in which the legislatures of those states which have only biennial sittings meet. In all no less than 16,064 acts were passed, more than half of which, however, were private, local, or temporary enactments having but slight, if any, interest to the general public. . . . During the year no less than ninety-nine statutes . . . were declared to be unconstitutional."

Conflict of Laws. "*Chetti* v. *Chetti*." By Prof. A. V. Dicey, K.C. 25 *Law Quarterly Review* 202 (Apr.).

Discussing the decision of the Probate Division (Sir J. Gorell Barnes, President) that an Englishwoman married in England to a Hindu retaining his Indian domicil and asserting his native right to a plurality of wives, by whom she and her child were afterward deserted, was entitled to a judicial separation. P. Div. (1909) p. 67.

"Foreign jurists of authority, as for example Savigny, Bar, and Pillet, no less than English writers, such as Westlake, agree in the doctrine that capacity to marry is governed by an individual's personal law, even though they may differ as to the criterion, namely, whether it be domicil or nationality by which such personal law is determined. How strong is this sentiment in favor of the personal law as contrasted with the *lex loci contractus* among foreign jurists will become plain to any one who studies Professor Pillet's admirable *Principes de Droit International Privé*, a treatise far too little known as yet in England. . . . A marriage no doubt is a contract between the parties thereto, but as celebrated in England, and indeed in any Christian country, it is much more than a mere private contract. It is a contract which creates a status, it involves the rights and the status of persons not parties to the contract, *e. g.*, the issue of the marriage."

"*In re* Johnson." By W. Jethro Brown. 25 *Law Quarterly Review* 145 (Apr.).

Mary Johnson died in Baden leaving movables and the master certified that she was domiciled there, and that by the law of Baden movables not disposed of by will should be distributed in accordance with the law of the country of which she was a subject. As she was a British subject of Maltese domicil of origin, it was held by Farwell, J., that the movables must be distributed according to Maltese law. [1903] 1 Ch. 821.

"I conclude that on the facts in *re Johnson*, the goods should have been distributed in accordance with Baden law as the law of the domicil; that the whole law of that domicil governing such cases should have been applied by the English courts subject to such necessary reservations as are implied in English considerations of public policy; and that, as the evidence before the court was inadequate for the purpose of proving what the foreign law really was, the case should have stood over until evidence was adduced.

Conservation of Natural Resources. Pt. i, "Public Forestry on Private Lands," by Gifford Pinchot, Prof. Henry Solon Graves, and F. C. Zacharie. Pt. ii, "Water Resources and Water Power," by W. J. McGee and others. Pt. iii, "Conservation and Use of Land Resources," by George W. Woodruff and others. Pt. iv, "Minerals: Their Waste and Preservation," by George Otis Smith and others. *Annals of the American Academy of Political and Social Science*, v. 33, no. 3 (May).

Prof. Graves, in one of many notable papers here collected, expresses the opinion that:

"State regulation of private forests should be confined to restricting the use of fire and to requiring a reasonable organization of the forests for protection, and should not be extended to governing the methods of cutting; that the protection of watersheds should be accomplished by the establishment of public forests; and that the problem of the future timber supply may be solved effectively by means of the public forests supplemented by forestry practised on private lands under state encouragement and co-operation."

Contracts. "Section 2479, Code of Virginia, and Its History." By Thomas Wall Shelton. 15 *Virginia Law Register* 1 (May).

This section, as it stands today, substantially provides that if a sub-contractor makes a sworn statement in writing of his claim against the general contractor within thirty days after the completion of the work, the owner shall be personally liable for such claim.

Corporations. "Is the Creation of a Floating Charge Competent to a Limited Company Registered in Scotland?—I." By A. J. P. Menzies. 21 *Juridical Review* 87 (Apr.).

"In the absence of a proper connotative definition, a sufficiently definite conception of a floating charge must, for the present purpose, be arrived at by a description of its leading essentials, and by differentiating it from certain other forms of security for borrowed money. In doing so the opinions in the English law courts must be used, as they form the only available guide."

Egypt. "Foreign Companies in Egypt." By F. R. Sanderson. 21 *Juridical Review* 1 (Apr.).

The present position of companies in Egypt is unsatisfactory because of questions continually arising due to conflict of laws and uncertainty of jurisdiction.

"The best remedy for the grave evils of the present system is to be found in the promulgation of a carefully-thought-out com-

pany law for Egypt, and that requires the consent of the powers which have Capitulations with the Ottoman Empire."

The writer proposes that the Mixed Courts be invested with criminal jurisdiction to be exercised under an amended Mixed Penal Code, and that the Commercial Code be amended so as to define the rights and liabilities of companies whether incorporated in Egypt or abroad.

See Interstate Commerce, Monopolies, Public Service Corporations, etc.

Defamation. "Absolute Privilege for Licensing Justices." By Ernest E. Williams. 25 *Law Quarterly Review* 188 (Apr.).

"Absolute immunity from the consequences of defamation is so serious a derogation from the citizen's right to the state's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right of civic protection; and any extension of the area of immunity must be viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated."

Divorce. See Marriage and Divorce.

Domicil. "Trade Domicil in War: A Reply." By J. Westlake, K.C. *Journal of Comparative Legislation*, No. xx, p. 265 (Apr.).

In this article Professor Westlake meets the criticisms directed against his views by Dr. J. Baty, in the last issue of this journal.

See Conflict of Laws.

Fixtures. "Trade Fixtures, in Condemnation." By Benno Lewinson. 17 *Bench and Bar* 24 (Apr.).

Discussing the recent decision of the New York Court of Appeals in *Matter of The City of New York, Conron* v. *Glass*, 192 N. Y. 295. The writer deduces three rules regarding the measure of compensation, and adds:—

"The 'value of the use' of a set of trade fixtures can be readily determined by ascertaining the difference between the rental value of the demised premises for the balance of the term of the lease, as equipped for the purposes of the tenant's business, and the rent reserved in the lease for the premises without such equipment. Such difference comprises the value of the unexpired term of the lease itself, as well as the 'value of the use' of the tenant's trade fixtures: for both of which items the tenant is entitled to an award."

Government. "The Jurisdiction of State and Federal Courts over Federal Officers." By James L. Bishop. 9 *Columbia Law Review* 397 (May).

"The mutual relations between the state and federal courts have come to be regarded as the subject of critical and scientific study rather than of partisan or local debate. The result of all this is that there is not now any substantial difference of opinion as to the desirability of giving the federal courts power to bring every subject relating to the functions of the federal government, and the performance of their duties by federal officers, in the first instance within the jurisdiction of the federal courts. At the same time the extension of the activities of the national government and the large increase in the number of federal officers require that the remedies of the individual against the abuse of power by such officers should be carefully secured.

Another question affecting the distribution of powers in the frame of government provided for by the Constitution is discussed in the following:—

"The Extent of the Treaty-Making Power of the President and Senate of the United States—II." By William E. Mikell. 57 *Univ. of Pa. Law Review* 528 (May).

The second and concluding article on the subject. See 21 *Green Bag* 231 (May). The writer here considers the power of the President and Senate to make a treaty invading the rights reserved to the people by the first ten amendments of the Constitution.

"It appears that in every case that has come before the Supreme Court where reserved rights other than those involved in *Chirac* v. *Chirac*, *Hughes* v. *Edwards*, and *Hauenstein* v. *Lynham* [have been considered] those judges who have discussed the question have either expressly denied, or have questioned, the power of the federal government by treaty to infringe the reserved rights of the states; and that in discussing the question neither the judges nor counsel have cited *Chirac* v. *Chirac*, *Hughes* v. *Edwards*, or *Hauenstein* v. *Lynham*, as authority for the doctrine that the reserved rights of the states were subject to the treaty-making power. It also appears that while *all* of the judges who sat in *Holmes* v. *Jennison*, the *License Cases* and the *Passenger Cases*, did not, in any one of those cases, hold that the reserved rights of the states were exempt from the treaty-making power, yet *all* of the nine judges, who sat in those cases, did in one of the three hold that the reserved rights were exempt. It is therefore submitted, in view of these facts, that the doctrine that the treaty-power is supreme over the reserved rights of the states is by no means established in our jurisprudence. . . .

"The question whether by the reservation of the power to make agreements, with the consent of Congress, the states intended to deprive the federal government of the power to make treaties concerning their reserved rights, has never been raised in the courts."

British Empire. "The Judicial Committee of the Privy Council." By J. M. Clark, K.C. 29 *Canadian Law Times* 340 (Apr.).

"I do not overlook the great services to Canada rendered by the Supreme Court of Canada. The Supreme Court of the United States has also done great work for that country, but on several occasions it would

have been of great advantage to the United States if there had been such a body as the Judicial Committee of the Privy Council, to whose impartial decision various disputes might have been referred."

Canada. "The Scope of the Power of the Dominion Government to Disallow Provincial Statutes." By C B. Labatt. 45 *Canada Law Journal* 297 (May 1).

"The expediency of protecting the general credit of the Dominion constitutes a specific ground of public policy . . . and the course pursued by a Minister of Justice with respect to petitions for the disallowance of a statute of the type under discussion [one infringing vested rights or impairing the obligation of contracts] should be decided . . . in accord with the opinion of Sir John Macdonald, that statutes which 'affect the interest of the Dominion generally' may properly be disallowed."

Another writer, treating a different topic, is evidently of the opinion that English legal institutions are not entirely applicable to Canada:—

"Justice, Precedent and Ultimate Conjecture." By W. E. Raney. 29 *Canadian Law Times* 454 (May).

"When the English common law is imported over-seas as a fixed and dominating system, and made to do duty where it did not grow, it becomes to a degree a rigid and lifeless thing. 'The letter killeth, but the spirit maketh alive.' The establishment in Canada of ultimate Courts of Appeal would relieve our judiciary from the thraldom of this artificiality."

China. "The Experiment in Constitutional Government in China." By O. F. Wisner, D.D. 189 *North American Review* 731 (May).

"To prepare the people for a national representative government the experiment in municipal self-government was undertaken at Tientsin. The scheme was carefully wrought out. It is clear that in its elaboration the most approved Western usage was followed. Yet it is not a mere work of imitation. The authors borrowed freely from Western sources but with evident intelligent adaptation to conditions in China. . . .

"The Tientsin constitution is a model which is to be copied by other localities. The Throne has ordered the local authorities in Canton and several other important centres to introduce the same system, following the Tientsin pattern, and preliminary steps have been taken to carry out the order. It is proposed as rapidly as possible to bring whole provinces into line, granting to each a provincial constitution, and conducting its affairs through a representative assembly. And it is entirely within the field of reasonable hope that within a very few years the final goal will be reached,—that the entire country will be organized on a constitutional basis, and all public policies determined, public utilities controlled, and public interests conserved through the deliberations and enactments of a National Popular Assembly."

India. "The English in India." By Charles Johnston. 189 *North American Review* 695 (May).

This author shows in a historical *résumé* the indebtedness of India to England. The remedy for India's poverty is to be found in a cessation of child marriage and a higher ideal of chastity, and in a temporary abstinence from gold brocade and a fostering of industrial life. "The English have accomplished marvels in India; but these reforms must be carried out by the Indians themselves."

Of the legal system of India he writes:—

"The laws of Manu with their developments are administered as the civil law of the Hindus. All personal, domestic and testamentary disputes of the Mussulmans are settled in accordance with the Koran and its law-books. The same is true for the Jaina, the Buddhist, the Parsee. And with this has gone a conservation and cultivation of the ancient sacred idioms of all these old religions. . . .

"Perhaps the best single work in the modern tongues has been the translation into all of them of the Indian Penal Code, and its distribution broadcast in cheap editions. No one not familiar with the hazards of humble lives under Oriental despotisms can realize what a boon is conferred on India by a simple, uniform and impartial system of law, the statement of whose obligations and sanctions is within the reach of every one. For, while preserving to each cult and tribe its own civil and religious law, England has given her Indian possessions a single criminal law, simple, impartial, intelligible."

Turkey. "The New Turkish Constitution." By Norman Bentwick. *Journal of Comparative Legislation*, no. xx, p. 328 (Apr.).

"There is set out explicitly a series of first principles touching the rights of the subject which, from their unbroken acceptance here since the time of Magna Charta, seem axiomatic. And it is not less remarkable to find provisions which mark an advance upon the public law of many Western states side by side with statements of elementary duties and with the foundation of some dangerous prerogatives. The English Constitution, the mother of parliamentary governments, seems to have been the chief model of the Turkish reformers, but in the relations of the Ministry to the Parliament and in the constitution of the Senate there is imitation rather of Continental states."

United Kingdom. "The House of Lords: Its History and Constitution—IV, The Lords Spiritual." By Charles R. A. Howden. 21 *Juridical Review* 75 (Apr.).

"The reason why the Lords Spiritual were only Lords of Parliament and not Peers of

the Realm is to be discovered mainly in their own conduct. They refused to be put on a level with the Temporal Lords. From the earliest times they declined to consider themselves amenable to secular jurisdiction, or to submit themselves for trial as Peers before their Peers. Again, the canons of the Church prevented them from taking part as judges in the trial of a Peer of the Realm when a question of death or demembration arose."

History. "History and Citizenship—A Forecast." By A. L. Smith. *Cornhill*, v. 26, p. 603 (May).

"On every line we are passing away from the century of 'acute individualism.' The collectivist attacks it in the economic sphere, the publicist in the sphere of politics, and the jurist in the sphere of law. . . . 'Man *versus* the State' already begins to sound a grotesque antithesis. And we are only at the beginning of realizing what vast forces lie dormant in this associative principle."

This article contains a glowing tribute to the late Professor Maitland.

International Arbitration. "International Arbitration." By Joseph B. Moore. 7 *Michigan Law Review* 547 (May).

"No one who is observant of world conditions hopes for universal peace at once, nor for entire disarmament at any time, for the seas as well as the lands must be policed and guarded against the lawless, and a reasonably large navy and army will be required for that purpose. It is, however, fairly certain that if a court of international arbitration is established and the United States, Great Britain, France, Germany and the Russias would sign treaties of obligatory arbitration the expenses for increasing and maintaining the armies and navies of those powers could at once be cut in two. Then the day of universal peace would not be far away.

"Is this too much for which to hope?

"Secretary Melendy in the announcement of the Second National Peace Congress soon to meet in Chicago states: 'At the second Hague conference, thirty-five powers, representing 1,285,272,000 inhabitants, voted for general, obligatory arbitration; four powers, representing 55,562,000 inhabitants, refrained from voting; while only five powers, representing 167,436,000 inhabitants, voted against. Thus has the civilized world, by the vote of the official representatives of nearly nine-tenths of its population, declared itself in favor of obligatory arbitration as a substitute for war. More than eighty treaties of obligatory arbitration have been concluded between the nations in Paris within the last five years, our own country being a party to twenty-four of them.' "

See Reprisals.

International Law. "The Declaration of London." By Thomas Gibson Bowles. *Nineteenth Century*, v. 55, p. 744 (May).

"So far as the Declaration [of last February] goes at present it would seem to be strictly no more than a suggestion, incomplete in itself, and without binding authority."

For various topics of international law, see Blockade, Comparative Jurisprudence, Conflict of Laws, Domicil, International Arbitration, Papacy, Reprisals. For the work accomplished by the bar of the United States and of Belgium, in developing international law, see Practice.

Interstate Commerce. "Federal Common Law and Interstate Carriers." By E. Parmalee Prentice. 9 *Columbia Law Review* 375 (May).

"The primary relations of the carrier are to the state of its organization and operation. Federal control relates to but one of its functions, and to the carrier only in respect to, because of, and to the extent of its exercise of, that function. Concerning these matters, then, Congress may legislate, but the power has never been held to be an exclusive power nor does it displace state law. In this field of jurisdiction state and federal laws work side by side, state law being of controlling authority in all details not superseded by the legislation of Congress. In the case of land carriers, therefore, there is no room for the operation of a federal common law."

See Monopolies.

Labor Regulation. "The Principles and Practice of Labor Co-partnership." *Edinburgh Review*, no. 428, p. 308 (Apr.).

"The danger of socialism is a great and menacing one. We do not refer to the socialism of the Fabian Society nor of the Social Democratic Federation. We refer to the socialistic legislation passed by Liberal and Conservative Governments under the euphemistic appellation of social reform. . . . Would it not be wiser to let it pass peacefully away and introduce a higher organization of industry?"

Legal Education. "A Further Word on the Next Step in the Further Evolution of the Case Book." By Albert Martin Kales. 4 *Illinois Law Review* 11 (May).

"What I object to in the present case books is that they are made on the patent medicine plan—the same ingredients in the same proportions for all conditions and all stages of legal order or disorder. . . .

"The present mode of teaching general law has been developed by men of extraordinary ability through a generation or more. They have, as it were, created the national law school before the existence of the local school. They have given the country a standard of uniformity while the local law was yet in a formative state. Their school is supported by the strongest feelings of sentiment and loyalty on the part of those who have made it, and whom it has made. Its continued existence as a national law school and as the source of certain standards of uniformity is devoutly to be hoped for. So overwhelmingly, however, has been its influence, that it has taken possession of the field of legal edu-

cation, and it is today insisting that throughout the country no first-class law school should do aught but strive to be a national law school. This position is the one resisted.

"I protest against its being dogmatically laid down that the particular materials in the present case-books are the best materials for the preparation for practice in any particular jurisdiction. I protest against the teaching of students by men who do not (I do not say, who cannot) from a complete mastery of the state of the law in a particular jurisdiction on the subjects taught, undertake to assert that these are the proper materials for informing the student of the rules which the courts of some particular jurisdiction apply, or may be expected to apply."

Legal History. "The Effect of Tenure on Real Property Law." By James Edward Hogg. 25 *Law Quarterly Review* 178 (Apr.).

"Common law tenure seems to have made possible a theory of land ownership under which all concurrent and successive rights in land known to either Roman or feudal law can be accurately stated, without the disadvantages either of the single *dominium* of Roman law or of the split *dominium* of feudal law.

"The germ or suggestion of this theory is to be found in a passage from Spelman's Feuds and Tenures, chapter ii. . . . It will be noticed that Spelman does not say (as we would gather he did from merely reading Blackstone's words) that the King has *directum dominium*. Neither does Coke say so in so many words, though he quotes a Latin sentence to that effect." That Spelman came nearer than Blackstone to defining a fee simple as a complete proprietorship is this writer's opinion, and the Privy Council, in certain Canadian and New Zealand cases, has shown a disposition to regard Blackstone's theory of allodial ownership as invalid.

Thus Henry Spelman, the writer who introduced the feudal system into England about the middle of the eighteenth century—Maitland's generalization, though paradoxical, is "brilliant and stimulating"—by his study of the continental law of feuds anticipated the modern tendency to treat a fee simple as a complete proprietorship.

"The Jurisdiction of the Court of Exchequer Under Edward I." By Charles Gross. 25 *Law Quarterly Review* 138 (Apr.).

"Below are printed for the first time some cases which throw light on the relations of the Court of Exchequer to the other central courts of England in the thirteenth century. . . . Already in the thirteenth century the jurisdiction of the Court of Exchequer was extensive—much more extensive than one would be inclined to infer that it was from the enactments of Edward I." These cases have been copied from the Exchequer plea rolls in the Public Record Office, London, "which have never been turned to account by historians."

"English Law as an Exponent of English History." By Edson R. Sunderland. 7 *Michigan Law Review* 570 (May).

"As the English moral sense and spirit of justice early formulated and insisted upon the notion that the right was the main thing, the remedy secondary, a foundation was laid for the systematic development of English law."

Passing from Great Britain to Rome, we come to a readable article into which a surprising amount of rich human material has been compressed:—

"The Roman Lawyer—A Sketch." By George L. Canfield. 7 *Michigan Law Review* 557 (May).

Great Roman advocates are noticed, Porcius Cato, Servius Galba, Cicero, Hortensius, Julius Cæsar, and others.

"Foreign kings and governments at that time needed powerful representatives at Rome, to keep them out of lawsuits, . . . Probably Cicero derived a large income in this connection. It was also customary to remember one's lawyer in one's will. . . . Cicero makes it his boast that he had received in legacies upwards of twenty million of sesterces—the equivalent of, perhaps, two million dollars today. . . .

"Julius Cæsar . . . was a finished advocate, trained in the schools of Asia Minor, and a successful practitioner before he commenced his military career at forty. His contemporaries ranked him with Cicero. His Latin was the purest of the day. Both Cicero and Tacitus apply the terms splendid to his oratory and clear and logical to his argument. There was nothing tricky or puzzling in Cæsar, says one of them, everything was clear and bright, as in full sunshine; his voice, his figure, his bearing in court were all characterized by something high-bred and magnificent."

Marriage and Divorce. "Divorce." By James Cardinal Gibbons. *Century*, v. 78, p. 145 (May).

"This social plague calls for a radical cure, to be found only in the abolition of our mischievous legislation regarding divorce, and in an honest application of the teachings of the Gospel."

"The Significance of Increasing Divorce." Prof. Edward Alsworth Ross. *Century*, v. 78, p. 149 (May).

"The fact that the likelihood of divorce is in inverse proportion to the length of time the parties were acquainted before marriage suggests the wisdom of requiring a formal, but not public, declaration of intention to marry some weeks before a marriage license will be issued. Law or custom ought to devise some means of protecting pure women from marriage with men infected with vice. A way may be found to detect and punish the husbands who desert their families. Finally, the fact that intemperance figures in nearly a

fifth of the divorces ought to invigorate the temperance movement."

See Conflict of Laws.

Medical Jurisprudence. "The Present Law of Procedure in Medico-Legal Cases in which Insanity is an Element." By A. R. Urquhart, M.D., F.R.C.P.E. 21 *Juridical Review* 43 (Apr.).

One of the notable contributions to the periodical literature of the past month.

"It is an admission that the boundary line between sanity and insanity is vague, and indefinable to a nicety. I believe that it is increasingly difficult to induce a jury to find a criminal guilty if the result is to be a sentence of death. It would appear to be appropriate in such cases to mitigate the punishment, but to maintain the deterrent effect in the interests of the community. . . .

" 'Insanity in a prisoner, if manifest and unquestionable, puts a stop to all criminal proceedings against him at whatever stage.' To that practice I adhere, whether as a citizen or as an expert, and therefore support the reasoning and conclusions of the Lord Justice-General. I repeat that insanity is an impairment, a degradation, a weaking of the mind; and therefore while it persists even-handed justice demands a stay of proceedings.

"Finally, I repeat my conviction in the words of the eminent judge [the Lord Justice-General of Scotland] already quoted at length —'that scientific opinion on insanity has greatly altered in recent years, and Courts of Law have altered their definitions and rules along with the experts.' That these alterations cannot be regarded as final, until the master science of the art of healing, with all the subsidiary sciences, are complete, must be admitted by those who regard law as the reflex of educated and enlightened opinion."

Monopolies (Sherman Act). "Federal Anti-Trust Legislation and President Taft's Proposed Amendments." By Lynden Evans. 4 *Illinois Law Review* 1 (May).

"The purpose of this paper is to urge discussion by the members of the bar of the necessary amendments to the Sherman Law, and to this end, in conclusion, I suggest that the amendments to be adopted should, while following the lines of Judge Taft's remarkable address, define a monopoly, let us say any act of a corporation, person or persons that materially interferes with the usual output of, or price of, any commodity or labor used in interstate commerce or employed therein. It should define, within rational limits, the terms 'partial', 'consideration' and 'reasonable' as applied to such monopolies, and for this purpose the numerous decisions of all English-speaking courts should be examined that the extravagances of some of these decisions may be avoided, or as little as possible left to the economic eccentricities of judges; it should provide for publicity of all persons or corporations who wish to avail themselves of the provisions of such a statute, with a proper commission under some of the Departments at Washington and an appeal therefrom to the courts; it should impose (and here is the really new departure, for almost all the cases refer only to private grievances) a duty upon the Department of Justice to enforce the provisions of the Act in all cases of public injury resulting from abnormally stimulated prices of either products or labor, and make proper provision for a preliminary investigation by such Department. It should provide that injuries peculiar to persons or corporations should be recovered according to the usual measure of damages with all costs of litigation, rather than to seek to accomplish its purpose by ineffectual attempts to frighten by dread-sounding penalties; it should 'make the punishment fit the crime' by a graduated system of fines and make the directors of a corporation personally liable in cases where the law would charge such directors with knowledge of an infringement of such law. Of one thing we may, I believe, be assured, that the incoming administration, with the brilliant legal minds whom we understand are to be members of the cabinet, will give this subject profound investigation and study before it undertakes the difficult task of framing a law."

With refreshing directness and perspicacity Mr. Victor Morawetz, whose illuminating study of the currency problem has added to his reputation, takes a view of the Sherman Act sharply contrasted with that of Mr. Thomas Thacher in the April *North American Review* and to that of the present Administration:—

"Should the Anti-Trust Act be Amended?" By Victor Morawetz. 22 *Harvard Law Review* 492 (May).

The cases arising under the Sherman Act may be classified under four heads as follows:—

First. Cases involving contracts, combinations, or conspiracies, by force, or by threats of damage to the property, business, or persons of others, to restrain trade or commerce of the public, or of others than those contracting, combining, or conspiring.

Combinations of this class can never be reasonable or just, says Mr. Morawetz, and should be prohibited by an act of Congress as broad as the common law, which declares them illegal, therefore the absolute prohibition of the Sherman Act in this regard should not be qualified.

Second. Cases involving contracts or combinations among railway companies to increase or to prevent a reduction of the rates or charges to be paid by the public engaging in interstate trade or commerce upon the railways.

In the opinion of this writer, an exemption from the operation of the act would be of little advantage to the railway companies. Contracts and combinations of this class were probably illegal before the act was passed; they are prohibited by the laws of many of

the states, and the exemption could not render them lawful.

Third. Cases involving monopolies, or attempts to monopolize, or combinations or conspiracies to monopolize, any part of the trade or commerce among the several states or with foreign nations.

Attempts to monopolize were unlawful at common law and should be prohibited by act of Congress. A statutory definition of the word "monopolize" would give rise to much uncertainty and litigation. The safer and better course is to let the courts settle the meaning of the Sherman Act. While there are numerous *dicta* to the effect that combinations of this last class violate the Sherman Act there appears to be no decision in which that proposition is clearly laid down.

Fourth. Cases involving contracts or combinations that merely prevent or diminish competition among those contracting or combining, without restraining the trade or commerce of others and without constituting a monopoly, or an attempt to monopolize, prohibited by the second section of the anti-trust act.

In the opinion of the writer, it is not desirable to amend the act until the Supreme Court shall have decided whether its prohibitions apply to contracts and combinations of this last class. If they do not, no amendment of the act would be needed.

See Corporations, Interstate Commerce, etc.

Papacy. "The Papacy and International Law." By A. Pearce Higgins, LL.D. *Journal of Comparative Legislation*, no. xx, p. 252 (Apr.).

"The Papacy has not been erected into a *persona ficta* of international law by reason of the fact that Roman Catholic states have continued their intercourse with the Holy See on the same footing as before its loss of temporal power. The tacit acceptance of a situation or the continuance of a practice by a certain number of states is not sufficient to create a position legally binding on other states. The international commissions and unions neither send nor receive envoys; no state accepts their presidents as monarchs; they make no treaties. They are express creations of the Powers for the better fulfillment of certain special purposes for the common benefit of all. The Papacy is unlike these international commissions in all respects. The Pope is an *individual*."

Philippines. "The Conditions and the Future of the Philippines." By Erving Winslow. 189 *North American Review* 708 (May).

"The handwriting on the wall, as the Anti-Imperialists read it ten years ago, has been fulfilled according to their interpretation. The growth of foreign Imperialism has coincided with the militarism, centralization and arbitrary assumption of executive power at home against which protest is at last arising all over the land."

Practice. "The Organization of a Legal Business: XIX, Accounting Methods—II." By R. V. Harris. 29 *Canadian Law Times* 480 (May).

"Whatever the ability of the bookkeeper, reliable independent audit of the books should be made from time to time, depending on the size of the business—a trial balance should be a matter of great frequency, and the cash should be balanced every day."

Belgium. "The Bar in Belgium." By E. S. Cox-Sinclair. 34 *Law Magazine and Review* 257 (May).

"If one wished to institute a comparison between the bar in Belgium and the bar of the United States, one would be bound to observe the great capacity for progressive action in connection with constitutional evolution which each order has displayed. It will be recollected that the United States of America in the first half of the 19th century was emerging into a position of high international respect, whilst in the early part of the 19th century the neutralization of Belgium became effective. The bar of the United States has had its energy largely occupied by the fashioning of a Constitution and the evolution—out of a large number of sovereign states—of a world-power, and—out of a large number of separate jurisdictions—of one authority. The bar of Belgium has been devoting much of its activity to the evolution of juridical ideas, and of late, as a collateral matter of interest, to the federation of the branches of the profession throughout the world. The counterpart is perhaps found in the difference between the contemporaneous development of a system of private international law out of a conflict of laws which the peculiar position of the United States has advanced, and of a system of public international law out of a collection of rules of positive morality which the international neutrality of Belgium has assisted to forward. In each instance the bar has had a part to play—in a manner in regard to which there is no analogy in any other country."

United Kingdom. "Civil Judicial Statistics, 1907." 34 *Law Magazine and Review* 316 (May).

"Perhaps the most remarkable feature in the figures dealing with the County Courts is the large increase in proceedings under the Workmen's Compensation Acts. The number of arbitrations has risen from 2,532 to 3,330, and the memoranda registered from 5,171 to no less than 9,349."

Procedure (Criminal Remedies). "Restitution or Compensation and the Criminal Law." By Lex. 34 *Law Magazine and Review* 286 (May).

"The proposal made—at least by Sir Robert Anderson—is, that on the conclusion of every criminal trial in which the prisoner is convicted, the jury should at once proceed to

assess the damages to which the injured person is entitled. . . .

"A crime is a wrong which it is necessary to punish in the interests of the public, but I fail to see why this infliction of public punishment on the wrong-doer should render it more easy for the injured person to recover damages."

Egypt. "The Courts of Egypt, and of the Sudan." By W. R. B. Briscoe. 34 *Law Magazine and Review* 294 (May).

"In the administration of justice generally, both civil and criminal, in the Sudan, as the Judicial Commissioner has reported, no undue stress is laid on the technicalities of procedure, so that at least the reproach of the late Sir George Jessel, that 'the use of a technicality is to defeat justice,' may not be leveled against the judicial system now being there evolved."

See Comparative Jurisprudence, etc.

Public Charity. "The Poor Law Report of 1909." *Edinburgh Review*, No. 428, p. 439 (Apr.).

Two points in the problem of unemployment stand out: "The first is that our methods of dealing with distress due to unemployment must be very varied, that there is no one panacea, and that each family needs to be considered separately with a view to re-establishing it in independence. The second point is that unemployment is a risk incident to all employments, and capable of being met like other risks by insurance."

Public Finance. "German Imperial Finance." *Edinburgh Review*, no. 428, p. 269 (Apr.).

"Finance reacts on policy, and assuming as we do that the new resources will be obtained in some form or other, their recoil will impose a strain . . . which will not be without importance in the industrial and political future of Germany."

Public Service Corporations. "Public Service Commissions." By William M. Ivins. *Century*, v. 78, p. 22 (May).

A comment on "Public Morality and Street Railways," in the *Century* for March. The New York commission "has incidentally created the occasion for the declaration by the Supreme Court of the United States of certain principles of public law which mark one of the most far-reaching of evolutionary possibilities through the more complete subjugation of individual property to the welfare of the commonwealth."

"The Looting of New York." By Justice William J. Gaynor. *Pearson's Magazine*, May.

"New York City is being bled at every pore. . . . If the city is to build the subways, it should own them absolutely the day they are completed and opened, without any one having any strings on them whatever, and then be free to lease them out at public competition for the highest rent obtainable for a reasonable term of years, with conditions for the full protection at the re-letting of the capital invested by the lessee. If this is not to be done, then turn the whole matter over to private capital and enterprise."

See Interstate Commerce.

Real Property (Torrens System). "Extension of the Torrens System of Land Transfer." By Beverley Jones. 29 *Canadian Law Times* 354 (Apr.).

"It has been found by the experience of Land Title Assurance Companies in the United States, that after a title has been examined by a competent solicitor, they can submit it to their revising counsel and guarantee it in a few days. This is also the experience of solicitors who are quite solvent, and are capable of paying losses in respect of titles which they pass. Solicitors doing a large conveyancing business find that they can pass ordinary titles readily in less than a week and guarantee them, and that without loss. It, therefore, should not be difficult for a Master of Titles to take exception to any certificates of title which are filed in his office within three years."

See also Comparative Jurisprudence, Fixtures, Legal History, Wills.

Reprisals. "Reprisals and War." By J. Westlake, K.C. 25 *Law Quarterly Review* 127 (Apr.).

"So far then as contract debts are concerned, there seems to be no objection to requiring an offer of arbitration in all cases before the employment of force, whether in the shape of war or in that of reprisals.

"But what of claims not contractual made on the government of one country by that of another, whether on its own behalf or on that of its nationals? At the Second Peace Conference thirty-two states voted for compulsory arbitration in all cases not affecting vital national interests or national honor, a principle which is also embodied in a large number of treaties, some of them concluded between states of the first class in importance. . . .

"It cannot be recommended that arbitration on claims not contractural should be made compulsory without the reservation of vital interests and honor, but it does not follow that a state which in a particular case objects to arbitration ought to be allowed to enforce its claim by the easier proceeding of reprisals when the alternative of war is open to it."

Professor Westlake submits as a question for the attention of the Hague Peace Conference of 1915: "that neither reprisals nor pacific blockade shall be used against any state unless it refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any agreement of reference from being concluded, or, after an arbitration, refuses to submit to the award."

Sherman Act. See Monopolies.

Social Science. "Social Psychology." *Edinburgh Review*, no. 428, p. 500 (Apr.).

"Pure Benthamism has failed practically, and we now see that its theoretical basis was too limited and misleading for the wide deductions made from it. Shall we, with our advancing scientific knowledge and better understanding of the effects of heredity, environment, and evolutionary process, be able to replace it by some other wide theory which will form a valid basis for political reasoning? Probably not for some time to come."

"Socialism a Philosophy of Failure." By Prof. J. Laurence Laughlin. *Scribner's*, v. 45, p. 613 (May).

"Socialism is the outcome of a state of mind, rather than of a logical system of thought. . . . While idealism is an essential incentive to progress—and Americans are pre-eminently idealists—its path to definite results must lie in some direction other than socialism."

Status. "The War Amendments." By Albert E. Pillsbury. 189 *North American Review* 740 (May).

Replying to the article by M. F. Morris, formerly Associate Justice of the Court of Appeals of the District of Columbia, in the January number of the same review, wherein Justice Morris argued that the Fifteenth Amendment had been "the source and cause of untold calamity to our country," and not only that, but is really not a part of the organic law of the land. For it is not an *amendment*, but an *addition* to the Constitution, said this writer, and an addition requires the unanimous consent of the states, while an amendment has to be voted for merely by a majority of three-fourths of the states.

Mr. Pillsbury's answer to this argument is simple and effectual:—

"What is 'amendment?' The standard dictionaries appear to be agreed in defining it, in legal terminology, as a change or alteration, by way either of correction, excision or addition. There is every reason to believe that this has been the universally accepted meaning of that term, until it occurred to an ingenious mind that the Fifteenth Amendment is not an 'amendment' because it is an 'addition' to the Constitution. . . .

"The dream of annulling the Fifteenth Amendment by judicial decree will never be realized, but the political question will be a source of danger so long as it is left unsettled."

Hindu Law. "Law of Succession and Adoption Among Free Women under Hindu Law." By J. A. Saldanha. 11 *Bombay Law Reporter* 53 (Mar. 31).

"Under the Hindu system of law, as among most other legal systems, women fall under two divisions, *subject* and *free*. The normal position of a Hindu woman is of subjection. 'Day and night must women be held by their protectors in a state of dependence,' lays down Manu. In childhood they live under guardianship and are protected by their fathers, after marriage by their husbands, in their old age by their sons and in the absence of them (*i. e.*, father, husband and sons) by their agnatic kinsmen. When the husband's family is extinct or destitute, they live under the guardianship of their father's family (Ghose's Hindu Law, 2d edition, p. 290). Such is the ideal position of a female laid down by the Shastras. Outside this class, there are women pursuing various professions of singing, dancing, temple or domestic service, without the usual parental or marital restraints. This class of women I take the liberty of calling *free women* for want of a better name. They include Naikins and other similar communities."

Status. See Aliens, Conflict of Laws.

Stock Speculation. — "How to Stop Gambling in Stocks: The Legal Remedy." By Gilbert Ray Hawes. *Moody's Magazine*, v. 7, p. 373 (May).

"Various schemes such as publicity, registration, and taxation have been tried, but without avail. To get at the root of the matter, we must break up the criminal partnership between the banks and Wall Street and compel each to return to its legitimate business. Repeal this law of 1882 permitting the banks to charge usurious rates of interest on 'call loans,' and increase the penalties for overcertification by the banks and the gambler in Wall Street will find his occupation gone. . . .

"The bankers will no longer make 'call loans' on stock collateral; the brokers will be deprived of their usual accommodation; the banks will be compelled to return to their legitimate business, and shares of stock bought on any of the exchanges will not be 'washed' or put through a 'clearing house,' but certificates will have to be delivered in each instance, and thus gambling on 'margins' will be reduced to a minimum, if not completely abolished."

Subject-Matter. "Subject-Matter." By Hugh Evander Willis. 9 *Columbia Law Review* 419 (May).

"In positive law 'subject-matter' is the term used to denote the content—that is, the subjects or matters presented for consideration—of either the whole of the law or by some particular part of it, and these are always legal rights. . . .

"The subject-matter of torts is, in general, private rights *in rem*, invaded by wrongs. . . . The subject-matter of crimes is public rights *in rem* invaded by wrongs. . . . The subject-matter of contracts is private legal rights *in personam* created by agreement; of quasi-contracts, private legal rights *in personam* created by implication of law. . . . The subject-matter of damages is the remedial rights *in personam* to compensatory, exemplary and nominal damages for torts, and to compensatory damages for breaches of contract, and in quasi-contract."

Swiss Civil Code. See Codification.

Tariff. "Tariff Revision: From the Manufacturer's Standpoint." By Dr. A. R. Farquhar and H. E. Miles. "From the Importer's Standpoint." By Francis E. Hamilton. "From the Consumer's Standpoint." By Jesse E. Orton. "A Permanent Tariff Bureau." By Seymour C. Loomis. *Popular Science Monthly*, May.

"Canada and the Payne Bill." By Edward Porritt. 189 *North American Review* 688 (May).

"Since 1898, as the result of the new Crown-lands policy then adopted by the Ontario Government, numerous sawmills owned by Americans have been established in the lumber regions of the province in order that American holders of timber limits might comply with the only terms on which logs can now be cut on Crown lands in Ontario. Lumber so cut when imported into the United States has, of course, paid the high duties of the Dingley Act. The amended clause in the Payne Bill is intended to eliminate these conditions in the timber contracts for Crown lands in Ontario."

British Empire. "The Economics of Empire." *Edinburgh Review*, No. 428, p. 389 (Apr.).

"Protection for home industries is in fact incompatible with the conception of strengthening the Empire by the encouragement of inter-Imperial trade. Thus by relying upon the Protectionists to assist him in his Imperial campaign Mr. Chamberlain cut away the whole economic and moral basis of his scheme."

Taxation (State). "Some Aspects of National Bank Taxation." By Albert S. Bolles. 57 *Univ. of Pa. Law Review* 505 (May).

"The remedies to be pursued to prevent the collection of taxes improperly assessed, or, if paid, to obtain their recovery, during recent years have not been matters of much legal contention. The law provides effective relief; the states, too, are learning the lesson of the greatness of the risk incurred by changing their tax laws after their legality has been determined by adequate judicial inquiry. Nevertheless, some changes in the laws are wrought by industrious legislative tinkers almost annually, and thus fresh questions are ever arising to please the lawyer, to interest or distract the judge, and to raise or destroy the hope of the unwilling taxpayer."

Torts (Malice). "Motive as an Element in Torts in the Common and in the Civil Law." By F. P. Walton. 22 *Harvard Law Review* 501 (May).

"There is a growing body of authority in the French law in favor of the proposition that legal rights are not absolute. The maxims *nullus videtur dolo facere qui jure suo utitur*, and *feci sed jure feci* are no longer regarded with the same respect as formerly. . . . According to the expression which has now come into general use in the French law, the malicious or abnormal use of a right is a ground of damages and is spoken of as an abuse of the right. . . .

"There are *dicta* of eminent judges in England which seem to lay down as a general principle that the legality of an act is by English law to be considered as not depending upon the motive with which it was done. It was said by Parke, B., 'an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.' [*Stevenson* v. *Newnham* (1853), 13 C.B. 285].

"There may be classes of cases in which from considerations of public policy the English law will not permit any inquiry into motives. The absolute rights of the landowner, the right of bringing a civil suit and the cases in the law of libel in which there exists an absolute privilege, such as that enjoyed by a legislator or a judge, are familiar examples. . . .

"Instead of saying that malice will not make a lawful act unlawful, is it not truer to say that wilful damage done to another is actionable unless there is some just cause or excuse for it?"

Trusts. "Purchase of Trust Property by Trustee." 17 *Bench and Bar* 1 (Apr.).

An editorial on the decision in the New York case of *La Forge* v. *Latourette*, 129 App. Div. 447. The language of the prevailing opinion "certainly merits the criticism of Mr. Justice Gaynor in his concurring memorandum that, by putting the decision on the ground that the trustee purchased in his individual and not in his trust capacity, a precedent would be established which would enable trustees . . . to evade the rule of law that a purchase of trust property by the trustee is voidable *at the election* of the beneficiary."

Turkish Constitution. See Government.

Universities. "The Law of the Universities—VIII, Privilege." By James Williams, D.C.L., LL.D. 34 *Law Magazine and Review* 277 (May).

"The privileges of English universities have been continually recognized by charters and by Parliament, and are still jealously guarded by the university authorities. Delegates of privileges are annually appointed at Oxford. The privileges are based partly on immemorial usage, partly on charters and statutes confirmatory of rights existing by papal bull or usage, partly on statutes conferring new privileges."

Wills. "Legacies Chargeable on Land." By Hervey J. Drake. 17 *Bench and Bar* 13 (Apr.).

Discussing a topic of New York law. All cases fall into one of these two classes:—

"*Class A.* Where, at the time of executing his will, the testator did not possess sufficient personalty to pay the legacies thereby created.

"*Class B.* Where, at the time the testator

executed his will, he had sufficient personalty to pay the legacies, but since that time has so depleted this in various ways that at his death there is not enough left to pay them."

In cases within Class A, there is a strong probability, under certain conditions which are stated by the author, that the legacy will be charged on the realty, but in cases falling under Class B, there is little hope for the success of a legatee seeking that object.

Miscellaneous Articles of Interest to the Legal Profession

Biography. "Cleveland's Estimate of his Contemporaries." By George F. Parker. *American Magazine*, v. 33, p. 24 (May).

Kennedy. "The Rt. Hon. Lord Justice Kennedy: Portrait and Biographical Notice." *Journal of Comparative Legislation*, no. xx, p. 201 (Apr.).

Vico. Part 2. By Michael H. Rafferty. *Journal of Comparative Legislation*, no. xx, p. 223 (Apr.).

Zouche. By Coleman Phillipson, LL.D. *Journal of Comparative Legislation*, no. xx, p. 281 (Apr.).

Black Hand. "The Problem of the Black Hand." By Arthur Woods. *American Magazine*, v. 33, p. 40 (May).

"From the police point of view, certainly it would seem wise to specify that any person could be deported if he had been convicted of any crime or if he had a bad official reputation abroad, and that he could be deported not merely within the three-year limit but at any time until he becomes a citizen of the United States. Added to this should be the further provision that any alien will be automatically deported if he has served a sentence for crime committed in this country."

History. "The Diary of Gideon Welles—IV, The Mistakes of Seward." By Gideon Welles. *Atlantic*, v. 103, p. 658 (May).

Contains a comical anecdote showing Lincoln's attitude toward the fugitive slave law:—

"There was a sharp controversy between Chase and Blair on the subject of the fugitive slave law, as attempted to be executed on one Hall here in the District. Both were earnest; Blair for executing the law, Chase for permitting the man to enter the service of the United States instead of being remanded into slavery. The President said that this was one of the questions that always embarrassed him. It reminded him of a man in Illinois who was in debt and terribly annoyed by a pressing creditor, until finally the debtor assumed to be crazy whenever the creditor broached the subject.

"'I,' said the President, 'have on more than one occasion in this room, when beset by extremists on this question, been compelled to appear to be very mad. I think,' he continued, 'none of you will ever dispose of this subject without getting mad.'"

Montreal. "The Bench and Bar of Montreal." By E. Fabre Surveyer. 29 *Canadian Law Times* 357 (Apr.).

"The financial standing of the individual members of the Bar of Montreal is hard to establish. A Belgian writer once said: 'I would rather believe the woman who speaks of her age than the lawyer who speaks of his income.' In Montreal, the late Sir Francis Johnson once remarked: 'I have only known two members of the bar who died rich, and they were no lawyers.' This is hardly true of the present generation. . . . The New York *Herald*, a few years ago, fixed the average yearly earning of the lawyers in New York at $1,200 a year. If such is the case a similar calculation in Montreal would lead to appalling results."

Indians. Oklahoma and the Indian; the Story of a Carnival of Graft." By Emerson Hough. *Hampton's*, v. 22, p. 674 (May).

"The big graft can be spelled in one little word of four letters—*land*. Coal land. Oil land. Gas land. Asphalt land. Lumber land. *Nineteen million acres of it*—and all in the hands of a half-comprehending, disheartened body of one hundred thousand American Indians, unlettered, heedless as children, broken down, utterly disconsolate and bewildered. . . .

"Since the agency offices were opened, approximately twenty-four thousand cases have been brought into the courts. This tardy energy on the part of Uncle Sam has now resulted in indictment against some of the most prominent business, public, and professional men in Oklahoma. . . . On the part of the red man, however—defeated, discouraged, disappearing—it is all very much like locking the barn door after the horse is gone."

Labor Regulation. "The Industrial Dilemma—IV, The Railroads and Publicity." By James O. Fagan. *Atlantic*, v. 103, p. 617 (May).

"A young man enters the service ot a wholesale manufacturing concern. The superintendent informs him that if he takes an interest in the business the business will take an interest in him. During the busy hours he steps into the shipping-room or the salesroom and gives a little assistance here and there. Before long a man steps up to him, and says, 'What are you doing here? Don't you understand that you are probably taking the bread and butter away from some hard-up fellow who is out of employment.' The boy suddenly awakes to the situation. He is a good-natured young fellow. Later, when the boss asks him why he does not take more interest in the business, he tells his story, and only too often the superintendent is compelled to

leave him to his fate, for the business is found to be permeated with this spirit from cellar to garret."

Panama Canal. "An Answer to the Panama Canal Critics." By William Howard Taft. *American Magazine*, v. 33, p. 3 (May).

"The criticisms of gentlemen who predicate all their arguments on theory and not upon practical tests, who institute comparisons between the present type of canal and the sea-level type of 300 to 600 feet in width that never has been or 'will be on sea or land,' cannot disturb the even tenor of those charged with the responsibity of constructing the canal, and will only continue to afford to persons who do not understand the situation . . . an unfounded sensation of regret and alarm that the Government is pursuing a foolish and senseless course. Meantime the canal will be built and completed on or before the first of January, 1915, and those who are now its severest critics will be glad to have their authorship of recent articles forgotten."

Stock Speculation. "The Cost of the Wall Street Game." By Frederick Upham Adams. *Everybody's*, v. 20, p. 639 (May.).

"The approximate annual cost of the speculative game to those who patronize brokers and commission men in the United States is thus indicated in this recapitulation:—

Operating Expenses of Speculative Firms	$100,000,000
Profits to such Firms from Commissions paid by Customers	40,000,000
Paid by Customers to Banks on Interest Account	40,000,000
Cost of the Game	$180,000,000

Reviews of Books

JOYCE ON INJUNCTIONS

A Treatise on the Law Relating to Injunctions. By Howard C. Joyce, of New York City. Matthew Bender & Co., Albany. 3 v., pp. xlvii, 2075 + table of cases and index 308. ($16.50 *net.*)

THE author of this extended work has provided an up-to-date treatise of great practical utility. The lawyer who wishes to ascertain under what circumstances an injunction will lie, and how to obtain it, in any part of the United States, in a labor dispute or question of unlawful restraint of trade, to say nothing of cases under the law of patents, copyrights, municipal corporations, or railroads, will be able to find quickly the information that he needs.

This work gives the latest information on especially live subjects of the day, such as strikes and boycotts and combinations and contracts in restraint of trade. State and municipal regulation of rates, the revocation of licenses and franchises, and the powers and duties of police officers have been considered at length. Jurisdiction, dissolution of injunctions, bonds, and all the technicalities of procedure receive adequate and extended treatment. The author has arranged his treatise in successive sections headed by bold type numbered up to 1416, and has classified his matter in chapters easily apprehended by means of his table of contents. He has done his work in a thorough manner evincing a painstaking study of cases in all jurisdictions, and the scope of his researches is sufficiently indicated by the fact that his table of cases contains upwards of 10,000 different citations. We know of no work dealing with the subject of injunctions so complete, so up-to-date, so fully elaborated, and so likely to satisfy every practical need.

Our only criticism of this important work is that instead of being strictly a treatise on injunctions, it is really one on the law of such subjects as trademarks, copyrights, trusts, nuisances, corporations, etc., examined from the point of view of equity jurisdiction. The author has not seized an opportunity to assist in rendering our jurisprudence more uniform and systematic. But if his work is not notable as a contribution to legal science, it may nevertheless be considered a notable and important aid to legal practice.

THE LAW OF DAMAGES

Elements of the Law of Damages. By Arthur George Sedgwick. 2d ed. Little, Brown & Co., Boston. Pp. xxxv, 356 + appendix and index 12. ($3 *net.*)

THIS "handbook for the use of students and practitioners," as it is called in the sub-title, has been revised and enlarged by the addition of matter relating to mental suffering especially as to the bearing upon the questions of its allowance of the doctrine of proximate cause, death by wrongful act, compensation and benefits under eminent

domain statutes, interference with contract and the right to seek employment, liquidated damages, limitations of liability, damages in contracts on refusal to perform, damages on breach of manufacturing contracts, the rule in *Smith* v. *Bolles*, damages on breach of agreements to lend money, damages as affected by the conflict of laws, and pleading and practice.

This work has fully kept pace with the growth of the law in the thirteen years which have elapsed since the original edition was published, and forms a most up-to-date treatment of the subject in a conveniently arranged, well printed volume. The author has grouped his principles analytically and logically and has laboriously studied a wide range of cases, including the very latest. Lawyers will find this a useful book.

INTERSTATE COMMERCE PROCEDURE

Procedure in Interstate Commerce Cases. With illustrative Precedents and Forms. By John B. Daish, A.B., LL.M. W. H. Lowdermilk & Co., Washington. Pp. xiv, 268+appendix of statutes, etc., 128+Table of Cases and index 96. ($5 *net.*)

PRIMARILY a work serving to guide the practitioner in handling cases before the Interstate Commerce Commission and dealing with the procedure of that court, this treatise is really of broader interest and scope because it places within convenient reach the principal sources and documents of the statute and common law of interstate commerce, by means not only of the statutes and digests to which its space is allotted, but also through the full citations, and the statements of substantive law which cannot entirely be avoided in defining the jurisdiction of the Commission and the Courts. The workmanlike form in which the work has been cast cannot be too highly commended. The typographical arrangement, the full index, and the convenient tabulations of reference material, call for highest praise.

This work will admirably meet the need of a hand-book to aid in the preparation and trial of interstate commerce cases. The author points out rules for many classes of cases, and his competence is vouched for by extended study of the branches of legal and economic science relating to interstate commerce, and by his specialization in practice before the Interstate Commerce Commission.

The book will be found useful not only to the practitioner, but to the carrier, the shipper, and the student of constitutional and railroad law.

The list of chapter headings is as follows: Part I, Procedure Before Interstate Commerce Commission: Introduction; Jurisdiction of the Commission; Additional Powers and Duties of Commission Under Act to Regulate Commerce; Duties and Powers of Commission Under Acts Other than Acts to Regulate Commerce; Interpretation and Construction of the Act to Regulate Commerce; Pleading and Practice Before the Commission; Evidence Before Commission; Proceedings After Order; Part II, Procedure Before the Courts: Jurisdiction of Courts in Interstate Commerce; Pleading and Practice Before the Federal Courts in Interstate Commerce Cases; Evidence Before the Courts; Appeal and Error.

The Appendix contains the Acts to Regulate Commerce, digest of the Act to Regulate Commerce, the Act to Regulate Commerce, the Immunity Act, the Act Defining Right of Immunity, digest of Elkins Law, the Elkins Law, Expediting Act, "Street Railways in the District of Columbia," excerpts from administrative rulings and opinions, forms for use before the Commission, forms for use before the courts, rules of practice before the Commission, methods of ascertaining cost of carriage, correct titles of the leading railroads, bibliography, and table of cases.

BEAL ON LEGAL INTERPRETATION

Cardinal Rules of Legal Interpretation. Collected and arranged by Edward Beal, B.A. 2d ed. Boston Book Co., Boston; Canada Law Book Co., Toronto. Pp. lxxx, 620+appendix and index 54. ($5.50.)

THE second edition of this work enlarges an excellent standard text-book, by some revisions and the addition of an introduction which does much to clear up the subject by outlining its salient features. The work of a former scholar of Trinity Hall, Cambridge, and a barrister of the Middle Temple, marked by accurate and extensive learning and strong literary merits, this treatise has interest for American lawyers chiefly as a comprehensive statement of time-honored common law rules, the modern application of which in England is graphically portrayed.

Legal interpretation is a complicated and difficult subject to treat under a scientific classification. From the view of such a classification Mr. Beal is not successful. He has, however, concisely drawn his rules from a vast number of judicial opinions reproduced in their own identical words. Incidentally he

has introduced a great deal of material that is interesting but not indispensable to his treatise, in connection with his exposition of such subjects as the authority of various law reports, the principles of legal relevancy, the conclusiveness of court decisions, and various other subjects. He has brought in much that belongs to substantive law rather than to the law of judicial procedure. The mingling of diversified subject-matters detracts somewhat from logical clearness, and possibly presents the rules of interpretation in a more complicated aspect than was really necessary, but the adventitious material makes the book more encyclopedic as a work of reference. Attractive typography, clearness of arrangement, great wealth of quotation, painstaking research, and a good index, make the virtues of this volume outweigh any fancied shortcomings. The American practitioner will read with pleasure and profit the sagacious observations here assembled of England's shrewdest judges.

HAIGHT'S QUESTIONS AND ANSWERS

Questions and Answers for Bar Examination Review. By Charles S. Haight of the New York bar and Arthur M. Marsh of the Connecticut bar. 2d ed. Baker, Voorhis & Co., N. Y. Pp. lii, 530+index 55. ($4 *net.*)

HAIGHT'S review book for bar examinations is a standard work of great usefulness and has been brought fully up to date by the publication of the second edition, now issued ten years after the work first appeared. The original edition has been carefully revised, and has also been enlarged by the preparation of questions and answers under new titles dealing with bankruptcy, domestic relations, and suretyship, and by the addition of several pages covering suretyship, perpetuities and restraints on alienation to the section on real property. The section on the New York code, one of the book's strong features, has been modified to conform to amendments passed since 1899.

The argument of Associate Professor Albert Martin Kales of the Law School of Northwestern University, in the May number of the *Illinois Law Review*, that law schools should employ the case method for the presentation of the law of their respective states rather than that of the country as a whole, is strongly rebutted, to our mind, by the purpose which underlies and justifies such a book as Haight's Questions and Answers. From it the student gets a perspective of the law as it exists in widely different jurisdictions of the United States, and therefore not only acquires knowledge that may be useful later in active practice, but also conceives more clearly the principles that should govern the orderly growth of a scientific system of law.

Besides being an admirable text-book, this is also a useful hand-book of legal principles and leading cases. Its lucidity of arrangement enables any one to ascertain easily the common law principles and the extent to which they have been amended or added to in various parts of the country. Messrs. Haight and Marsh have prepared the new edition with skill and have also had the assistance of able experts.

FABIAN ESSAYS

Fabian Essays in Socialism. Edited by G. Bernard Shaw. Ball Publishing Co., Boston. Pp. xli, 201 and index. (50 cts. *net.*)

FOR the benefit of those innocent of any dabbling in socialism, it may be explained that the "Fabian Essays" were originally lectures delivered in London in 1889 by members of the Fabian Society, which was organized in 1884 and first made its purposes and doctrines known in this book, of which over 30,000 copies were sold.

The writers who achieved this remarkable vogue for their utopian and unscientific opinions were G. Bernard Shaw, Sidney Webb, William Clarke, Sydney Olivier, Annie Besant, Graham Wallas, and Hubert Bland, most of whom are still living. Mr. Shaw has written a new preface for this edition. He states that these essays 'are reprinted exactly as they appeared in 1889, "nothing being changed but the price." Had the essays been rewritten for the present work, they might have appealed more to bankers, lawyers and statesmen, but "they would have had much less charm for the young, and for the ordinary citizen who is in these matters an amateur."

In Mr. Shaw's naïve implication that the "Fabian Essays" may be juvenile and amateurish there is possibly something like an apology for the appearance of this new edition. They will nevertheless be read with curiosity and amusement by the riper and more hardened of our age. Their publication now can hardly prove anything but stimulating to those who long to see social science rehabilitated and firmly established on solid bedrock.

BOOKS RECEIVED.

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

Loaded Dice. By Ellery H. Clark. Bobbs-Merrill Co., Indianapolis.

Human Nature in Politics. By Graham Wallas. Houghton Mifflin Co., Boston. Pp. xvi, 296, index. ($1.50 *net.*)

The Seven Who were Hanged. By Leonid Andreyev. Translated by Herman Bernstein. J. S. Ogilvie Pub. Co., N. Y. ($1.)

Proceedings of the American Political Science Association. V. v, 1908. The Waverly Press, Baltimore. Pp. 261.

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*Latest Important Cases**

Aliens. *Right of Action for Death Claims—Construction of Treaty.* U. S.

An Italian, while a passenger on a train in Pennsylvania, was killed. His wife, a non-resident alien and a subject of Italy, brought an action in a Pennsylvania state court to recover damages for his wrongful death. The case was decided in the Supreme Court of the United States April 5, on a writ of error in *Maria Giuseppa Raffaela Maiorano* v. *Baltimore & Ohio Railroad Company*, 29 Sup. Ct. Rep. 424, L. ed. adv. sheets, Oct. term, p. 424. In its construction of the treaty made with Italy on November 18, 1871, an article of which secures equality with the natives to the citizens of each of the contracting parties with respect to protection and security of personal property, the Court concluded that this stipulation does not require a state to give non-resident alien relatives of an Italian subject a right of action for damages for his death, though such action is afforded to native resident relatives, and though the existence of such an action may indirectly promote his safety.

Automobiles. *Reasonable Care and Accommodation Rule—Highways.* N. Y.

That the general rule governing automobiles passing one another on the highway are the same as usage has established for other vehicles, unless the rule is modified by statute, was said by the New York Court of Appeals May 4 in the case of *J. Howard Mark* v. *William Fritsch* (N. Y. L. J. May 15). "The fundamental principle of conduct is that of reasonable care and accommodation measured by the immediate circumstances of each case and exercised by each traveler for the

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

purpose of affording to the other his just and reasonable rights in the highway. When two cars meet it is the duty of each so far as practicable to yield to the other the space and opportunity necessary for its safe and convenient passage. In the case of two cars traveling in the same direction the front one has the superior right and may maintain its position in the centre of the highway if there is sufficient space on its left as prescribed by statute to enable the approaching car safely and conveniently to pass." Per Hiscock, J.

Bankruptcy. *Ancillary Receivership—Assets in Another Jurisdiction.* U. S.

The United States District Court for the western district of Pennsylvania, in *Matter of Dunseath & Son Co. and Robert Dunseath, Bankrupts*, decided March 22, 1909, granted a petition for an ancillary receiver to aid the District Court for the southern district of New York in administering the bankrupts' estate, and ruled that when a receiver in bankruptcy is appointed in one district and assets of the bankrupt estate are located in another district, the District Court for the district within which such assets are located cannot, upon the petition of the receiver, stay the state officers and order them to deliver the assets within its jurisdiction to the receiver appointed in such other district. The Court said:—

"Rightly interpreted, we believe the true doctrine is that this is an effective national system of administering insolvent estates, giving to the court of the domicile full power to administer the estate and giving to other courts of like jurisdiction beyond the boundary of the primary court full authority to aid by its decrees and processes that primary court so that all the assets of the bankrupt may be at last brought into the primary court for distribution. We believe the authority of the district courts of sister jurisdictions is auxiliary and ancillary for the purpose of making the act effective. Many cases might be cited showing the ancillary powers in sister courts outside of those pertaining to bankruptcy."

Breach of the Peace. *Giving the Lie Sufficient.* Ga.

In *Rumsey* v. *Bullard*, 63 S. E. Rep. 921, the Court of Appeals of Georgia held that it was prepared to take judicial cognizance of a fact which as individuals they well knew—that in Georgia to call a man a liar, even without raising a stick, usually provokes a breach of the peace, and generally brings on a fight. Exceptions to this rule, said the Court, find meager nourishment on Southern soil and beneath Southern skies.

Building Restrictions. *Police Power—Public Health and Safety.* U. S.

The United States Supreme Court, in the case of *Francis C. Welch* v. *Building Commissioner of Boston*, decided May 17, has ruled upon a matter of concern to every city in the country having tall buildings. The Court upheld absolutely the right of a state, under the police power, to limit the height of buildings in an arbitrarily determined section of a city without offering compensation to property owners. An act of the Massachusetts Legislature, passed in 1904, dividing the city of Boston into two sections, and limiting the height of buildings in the former to 125 feet, was held constitutional. The case was the first that had come before the Supreme Court on the question of building restriction. The Court held that the restriction was reasonable and properly in the interest of the public health and safety.

"Commodities Decision." *Hepburn Act—Commodities Clause Construed—Meaning of Indirect Ownership and Interest.* U. S.

The commodities clause, so-called, of the Hepburn Act, which act was approved June 29, 1906, provides that: "It shall be unlawful for any railroad company to transport" between states "any article or commodity other than timber" which it produces, "or which it may own, in whole or in part, or in which it may have any interest, direct or indirect," except articles needed in the conduct of its business.

The anthracite railroads at which this clause was aimed got the lower courts to declare it confiscatory and unconstitutional. The case then came before the United States Supreme Court, which rendered on May 3 a decision sustaining the constitutionality of the clause, but adopting a construction of its terms which has been generally considered favorable to the defendants, the Pennsylvania, Erie, Reading, Jersey Central, Delaware and Lackawanna, Delaware and Hudson, and Lehigh Valley roads.

In construing the clause, the Supreme Court, per Mr. Justice White, decided that the prohibition applies only to the following circumstances and conditions:—

"(*a*) When the commodity has been manufactured, mined, or produced by a railroad company or under its authority, and at the time of transportation the railroad company has not in good faith before the act of transportation parted with its interest in such commodity.

"(*b*) When the railroad company owns the commodity to be transported in whole or in part.

"(*c*) When the railroad company at the time of transportation has an interest, direct or indirect, in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation because a railroad company is a stockholder in such corporation. Such ownership of stock in a producing company by a railroad company does not cause it, as the owner of the stock, to have a legal interest in the commodity manufactured, etc., by the producing corporation."

All the Justices concurred except Mr. Justice Harlan, who said, in his dissenting opinion: "In my judgment, the act, reasonably and properly construed, according to its language, includes within its prohibitions any railroad company transporting articles or commodities if at the time it legally or equitably owns stocks—certainly if it so owns a majority or all the stock—in the company that mined, manufactured, or produced the articles or commodities being transported by such railroad company."

Contempt. See Perjury.

Corporations. See "Commodities Decision," Monopolies, Railroads.

Criminal Intent. *Natural Consequences of Act.* Lower Burma.

In *Po Tu* v. *Emperor*, decided by the Chief Court of Lower Burma, and reported in 9 Criminal Law Journal Reports 5 (Calcutta, Jan.–Feb.), it was held that A's intention, in striking B with a heavy chopper, must be inferred not merely from the actual consequences of his act, but from the natural consequences likely to follow an act of the kind committed.

"Every man," said the Court, "must be presumed to intend the natural or necessary consequences of his own act. What is the natural consequence of aiming at and cutting the head of another with this formidable chopper? In my opinion it would be death. We must presume that Maung Po Tu meant to give Shwe Thin a fair and square blow on his head. His conduct was such prior to his giving this blow as is in my opinion sufficient to allow this presumption to be drawn. He was in a quarrelsome and savage mood. I cannot for a moment think that he merely meant to slice off a bit of the frontal bone, or to cut off a bit of the ear, or to strike with the flat of the chopper, in which cases it might be held he did not intend to cause death. I must hold that he meant to give an ordinary fair and square cut on the head."

Exterritoriality. *Asylum in Legations—Deserters Seeking Protection of Foreign Consulate.* Hague Court.

The Court of Arbitration at The Hague delivered its decision May 22 in the Casablanca dispute between France and Germany. The Court declared the act of the secretary of the German consulate at Casablanca wrongful, in endeavoring to bring about the embarkation on a German steamship of deserters from the French foreign legion who were not of German nationality, and found that the consul committed an error in signing their safe conduct.

The Court also ruled that the French military authorities were wrong in not respecting the *de facto* protection exercised by the German consulate, and in threatening the consular agents with revolvers and ill-treating the Moroccan troops attached to the consulate.

Extradition. *Trial for Different Offense—Perjury—Treaties.* U. S.

The Supreme Court of the United States decided May 17 that a person who has been extradited from a foreign country on a specific charge may under a treaty with that country be tried for another offense before he has been given a reasonable time to get back to that country. *George D. Collins* v. *Sheriff O'Neil of San Francisco.* Collins was extradited from Victoria, B. C., for alleged perjury and subsequently arrested on a new charge of perjury alleged to have been committed at the time he was tried on the first.

Forgery. *Material Alteration by Severance—Creation of New Instrument.* Mont.

Three trustees of a school bought supplies, signing their names to a note attached to the order blank. The payee cut the note from the order. In *State* v. *Milton*, 96 Pac. Rep. 926 appellant claimed that the cutting out of the note was not a material alteration. The

Montana Supreme Court thought that the severance of the note changed the instrument entirely, making a mere order for goods a negotiable promissory note, and that if the alteration was made with a criminal intent the defendant was properly convicted of forgery.

Landlord and Tenant. *Tenancy Created by Parol—Construction of Statute of Frauds.* N. Y.

Where there was only an oral agreement regarding a year's lease of an apartment, the lease not having been signed, and where the Statute of Frauds provided that a tenancy might lawfully be created by parol without the execution of a written lease, it was, nevertheless held by the New York Supreme Court, Appellate Division, in the case of *Sherry* v. *Proal*, decided in April (N. Y. L. J. Apr. 29), that the verbal agreement testified to fell far short of a complete lease, nothing being discussed and agreed upon except the term for which the lease was to be made, the apartment to be the subject of it, and the amount of rent. "Especially was there no agreement as to when and how the rent should be paid, or what covenants and conditions should be incorporated into the lease."

Measure of Damages. *Neighborhood Benefits—Tunnels.* Mass.

In the case of *Fifty Associates* v. *City of Boston*, decided May 19, the Supreme Judicial Court of Massachusetts held that the plaintiff should have been allowed damages due to the physical injury done its building by the construction of the East Boston tunnel. In sustaining the plaintiff's exceptions, it held that the city had been improperly allowed to have the fact of the construction of the tunnel and station taken into account as a benefit to the premises, in estimating the damages, as the station was under the statute a neighborhood benefit, and not a benefit peculiar to the plaintiff's estate.

Monopolies. *Refusal to Sell Not a Wrong—No Restraint of Trade.* N. Y.

Chief Justice Cullen in the New York Court of Appeals confirmed the judgment of the Appellate Division May 11, dismissing the complaint in the case of *Locker* v. *American Tobacco Co.* (N. Y. L. J. May 19). It is an inherent right of a corporation to refuse to sell to any particular individual, was the substance of this decision, and the refusal of the American Tobacco Co. to sell would become illegal only when offered in pursuance of a combination of several persons making illegal an act which if done by one person would be legal. A corporation cannot be deprived of the right to refuse to sell, simply because of the magnitude of its business or its wealth.

Monopolies. *Forfeiture of Corporate Charters—Missouri Anti-Trust Law.* Mo.

In *Missouri* v. *Standard Oil Co.*, 116 S. W. Rep. 902–1062, the Standard Oil Co., the Waters-Pierce Oil Co., and the Republic Oil Co. of New York were convicted of violating the anti-trust laws of Missouri (Rev. St. 1899, c. 143 [Ann. St. 1906, §§8965, 8992]). One particular point of this decision was discussed with reference to the Waters-Pierce Oil Company, which is a domestic corporation. A judgment of ouster was rendered against it, but was ordered suspended on condition that the company sever all connection with the other corporations. In attempted compliance with the judgment, the directors of the company adopted a resolution protesting that it had never consciously or knowingly violated any of the laws of the state, but that it accepted the terms and conditions of the decree. Absolute ouster was thereupon denied, Judge Woodson dissenting on the ground that this resolution was not only a failure to comply, but tended to show that the company was not able or was not inclined to sever the trust relations and in fact comply.

Patents. *Separability of Claims—Entire Domestic Patent Need Not Expire with Foreign Patent.—Combinations.* U. S.

An important patent decision was handed down by the United States Supreme Court April 19 in the case of *Leeds & Catlin Co.* v. *Victor Talking Machine Co.* (L. ed. adv. sheets April term p. 495). The Court held that all the claims of a domestic patent do not necessarily expire with a foreign patent because of the provisions of section 4887 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3382), but only such claims as are embodied in the foreign patent. Consequently, where one Emil Berliner had patented in several foreign countries a sound-reproducing apparatus, and had afterward patented it in the United States, the foreign patents having expired, but the term of the United States patent not having yet run out, and where a combination and not a function of a machine was embodied in one of the claims of the

domestic patent, the Court ruled that that part of the Berliner patent relating to such a combination of elements covered by separable claims did not expire with the expiration of the foreign patent covering such claims. The Court referred to the case of *Siemen* v. *Sellers* (123 U. S. 276, 31 L. ed. 153, 8 Sup. Ct. Rep. 117) where it was said that a patent cannot be construed as running partly from one date and partly from another, on account of an attempt to extend it by a new patent merely for a former improvement, and ruled that to treat claims as separable when some of them have expired and some have not, can produce no more confusion than may arise from their being separable because some are invalid, as in the case of a partial infringement.

Perjury. *Contempt Committed by Offering False Affidavits—Judicial Procedure in Cases of Perjury—Fine for Contempt Not Dischargeable in Bankruptcy—Civil and Criminal Contempt.* N. Y.

A coal merchant was sued for an alleged debt of $1,174 for coal supplied to him, the plaintiff taking judgment by default. He then presented four false affidavits to Chief Justice O. Dwyer of the City Court in New York, declaring that he had never been served with summons and complaint as required by the Code. A referee found that the affidavits were false, and Justice Green then established a new precedent by fining the coal merchant, Koronsky, for the contempt of court committed by his perjury. "Affidavits of the character made by the defendant," said the Court, "are offered daily in the courts with almost as much ease as the presentation of visiting cards," and asserted a determination to doing everything in its power to stamp out the evil. The defendant then avoided payment of the fine of $1,759.46, and imprisonment for non-payment by going into voluntary bankruptcy on Jan. 20, thus escaping danger of arrest on a judgment in a civil action. But Mr. Yorke Allen, the attorney for the plaintiff, took the matter before Judge Holt in the United States District Court, for the purpose of securing a ruling that the fine imposed for the contempt was for a criminal and not a civil offense. Judge Holt felt constrained to conclude that by the express terms of the Code of Civil Procedure, sections 8 and 14, the fine was for civil contempt and dischargeable. Mr. Allen did not stop there, however, but went to the United States Court of Appeals, where Judges Lacombe, Coxe and Ward in a unanimous opinion rendered May 22 reversed Judge Holt and ordered Koronsky to pay the amount in ten days or go to prison. "Manifestly the offense was one peculiarly against the Court," said the three judges, "and of the sort where the punishment of the offender is a vindication of the dignity of the Court."

Philippine Islands. *Land Titles—Spanish Law.* U. S.

"If the applicant's case is to be tried by the law of Spain, we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land," said Mr. Justice Holmes in his decision in *Cariño* v. *Insular Govt. of the P. I.*, decided by the Supreme Court of the United States Feb. 23. The question before the court was that of the validity of a native title to land on the Philippine province of Benguet, where no document of title had issued from the Spanish Crown. "Upon a consideration of the whole case we are of opinion that law and justice require that the applicant should be granted what he seeks, and should not be deprived of what, by the practice and belief of those among whom he lived, was his property, through a refined interpretation of an almost forgotten law of Spain."

Police Power. *Power of Congress Over Aliens—Reserved Powers of States.* U. S.

Congress did not have the power to enact Act February 20, 1907 (34 Stat. at Large 898, Chap. 1134) §3, making it a criminal offense for any person to harbor for immoral purpose any alien woman within three years after she has entered the United States. This conclusion was reached in the decision rendered by the Supreme Court on April 5, in *Keller* v. *United States*, 29 Sup. Ct. Rep. 470, L. ed. adv. sheets Oct. term p. 470. The alien woman, whom defendant was harboring, voluntarily came to the United States. The power to punish such an offense was reserved to the states in the exercise of their police power. Acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, but the prohibitions and limitations on such powers are to be fairly and reasonably enforced.

But Justices Holmes, Harlan and Moody dissented, on the ground that an immigrant whose calling at the time of her arrival is unlawful can be kept under the control of

Congress long enough for the latter to ascertain the facts, and Congress can make the admission of such persons conditional for three years.

Public Service Corporations. *Delay in Transmitting Telegram—Notice of Urgency Unnecessary.* Ala.

An example of the effect which the peculiar nature of a telegraph company and the duties it undertakes to the public has on the application of a general rule of law is found in *Western Union Telegraph Co.* v. *Northcutt*, 48 So. Rep. 553. The question involved was the liability of the company for special damages from delay in delivering a telegram in the absence of notice of circumstances which would apprise it that such damages would flow from the delay. The Court, while adhering to the rule laid down in the leading case of *Hadley* v. *Baxendale*, 9 Exch. 341, held that by reason of the peculiar nature of the duties of a telegraph company to the public, notice was not necessary, as the fact of sending the telegram was notice that expedition was necessary.

See "Commodities Decision."

Race Distinctions. *Injury to Negro's Reputation—Measure of Damages.* N. Y.

Judges Ingraham, Laughlin and Scott, comprising a majority of the Appellate Division of the Supreme Court, on May 21 sustained the decision of the Supreme Court in *Griffin* v. *Brady*, the lower court having ruled, per Dugro, J., that the arrest and imprisonment of a negro could not produce the shame and humiliation that a white man would endure in similar circumstances. Presiding Judge Patterson and Judge Clarke dissented from the majority ruling. It was an action brought to recover $10,000 for false arrest, the plaintiff being a Pullman car porter who had been accused of stealing a card-case. The jury had awarded $2,500 and Justice Dugro had set aside the verdict, saying in his decision:—

"In one sense a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man would have. Maybe in a colored community down South, where white men were held in great disfavor, he might be more injured, but, after all, that is not this sort of community. In this sort of a community I dare say the amount of evil that would flow to the colored man from a charge like this would not be as great as it probably would be to a white man. The jury are well aware of that fact."

Railroads. *Eminent Domain—Northern Pacific Grant of* 1862. U. S.

The United States District Court, Judges W. H. Munger and T. C. Munger, handed down a decision at Omaha, Neb., May 4, denying the right of settlers to encroach upon the right of way of the Union Pacific across school sections of land and the unused portion of the four hundred feet of right of way along the railroad track in Nebraska. The Court discussed the question of the intent of Congress in making a grant of right of way to the Union Pacific in the act of 1862, the Union Pacific at that time being a national undertaking and benefiting by many provisions outside the usual course of legislative action.

"The right, power, and authority to take from the public lands adjacent to the line of the road," said the Court, "is granted to the extent of 200 feet in width on each side of the railroad where it may pass over the public lands, including all necessary lands for buildings, stations, sidetracks, turntables, and water stations."

See "Commodities Decision."

Religious Societies. *Union of Presbyterians—Church Property.* Ky.

The coalition of the Cumberland Presbyterian and the Presbyterian Church in the United States has resulted in many legal controversies as to the status of the property of particular churches. The Kentucky Court of Appeals in *Wallace* v. *Hughes*, 115 S. W. Rep. 684, after a thorough inquiry into the powers of the respective Assemblies of the two branches of the Presbyterian organization, has sustained the union and finally silenced the disturbing minorities in that state. Comparison is made between the Presbyterian Constitution and the Constitution of the United States. When Congress proposes an amendment to the United States Constitution and it is ratified by the Legislatures of the required number of states, the people of a particular state have no voice in determining whether or not the amendment shall be adopted. So in this case, the union having been regularly authorized by a two-thirds vote of the General Assembly and their action having been approved by a majority of the Presbyteries after being regularly transmitted to them, it became final,

and was binding on all the members of the church. Those members not willing to follow the decrees of their church judicatories within their jurisdiction, must be held to have abandoned all interest in its property.

State as Defendant. *Jurisdiction of Federal Courts—Eleventh Amendment.* U. S.

The state of South Carolina passed the Winding-Up Act on February 16, 1907, providing for the appointment of a commission to close out the state dispensary business and turn over to the state treasury the surplus funds remaining after liquidating and paying claims out of the state assets. In *W. J. Murray* v. *Wilson Distilling Company*, 29 Sup. Ct. Rep. 458, L. ed. adv. sheets Oct. term p. 458, decided April 5, certain vendors of liquor to the state sought to enjoin the commission from disposing of the funds until their claims were paid, and asked for the appointment of a receiver, on the theory that the assets were placed in the hands of the commission as a trust fund. The question was whether the suit was against the state, and beyond the jurisdiction of the United States Circuit Court because of the Eleventh Amendment. The Court was of the opinion that the state, in providing for the liquidation of the dispensary system, did not intend to divest itself of its right of property, and to endow the commission with a such a right to the property as would authorize the federal courts to take the assets and by means of a receivership administer them without the presence of the state. The final conclusion was that the suit was against the state.

Statute of Frauds. See Landlord and Tenant.

Statutes. *Non-Concurrence of Federal and State Court Regarding Constitutionality.* Iowa.

In a suit to enjoin the business of taking orders for intoxicating liquors for a foreign corporation, in violation of Code §2382 as amended by Acts 28th Gen. Assem. p. 59, c. 74 (Code Supp. 1907, §2382), the Supreme Court of Iowa in *McCollum* v. *McConaughy*, 119 N. W. Rep. 539, held that though it has determined that such statute was unconstitutional when applied to one soliciting such orders as the agent of a non-resident, because in conflict with the interstate commerce clause, it will overrule its decision, the Supreme Court of the United States holding otherwise.

Water Law. *Common Law Doctrine of Riparian Rights—Appropriation.* Ariz.

The United States Supreme Court has upheld the doctrine of appropriation as opposed to that of riparian rights under the common law in the territory of Arizona, in the case of *Boquillas Land & Cattle Co.* v. *J. N. Curtis* (L. ed. adv. sheets Oct. term, p. 493). The non-existence in Arizona of the common law doctrine of riparian rights since the statute of 1887 was not disputed. Before that time the doctrine of appropriation was to some extent in force by custom, and the Supreme Court held that the general adoption of the common law by Howell's Arizona Code in 1864 cannot be deemed to have included the common law doctrine of water rights. For the Bill of Rights made streams useful for irrigation purposes public property, and provisions of the Code granted the right to divert necessary water by means of irrigating canals.

A TOAST TO THE JURY

(Delphin M. Delmas, at Annual Banquet of Kansas City Bar Association)

THE Democracy of Justice—the Jury! May this institution, which, having stood for ages as the bulwark of the liberty of Englishmen, was brought here as their birthright by the colonists who first landed upon the banks of the James, and upon the shore of Massachusetts, which they cherish with such devotion that its violation by the King was enumerated as one of the grounds justifying their rebellion against the mother country, which, as soon as their independence was achieved, they incorporated in the Constitution as a fundamental right of American citizens, and which every American state has since embodied in its organic law—may this venerable institution, which has come down to us unimpaired through the lapse of centuries, abide with us yet and remain sacred and inviolate forevermore.

The Editor's Bag

MR. JUSTICE MOODY

MR. JUSTICE MOODY'S conservatism as exhibited in his recent decision in *Twining* v. *New Jersey* (211 U. S. 78) is even more clearly defined in Mr. George Whitelock's able characterization which forms the leading article for this issue of the *Green Bag*. Mr. Whitelock will in some quarters be recalled as the author of a resolution introduced at the meeting of the American Bar Association at Portland, Me., in August, 1907, deprecating the attitude of the President toward the judiciary in the beef trust cases as "subversive of their independence and destructive of the constitutional distinctions between the executive and judicial departments of our government," and as showing "a want of proper respect for the legally constituted authority of the courts" and a disposition to transcend executive power. This resolution was tabled largely on account of the influence of Judge Parker. The opinion, however, has been expressed that an actual poll of the meeting would have shown that the majority disapproved, with Mr. Whitelock, of Mr. Roosevelt's criticism of Judge Humphrey. Mr. Whitelock's attention was first called to Justice Moody, then Attorney-General, by these cases.

The recent final decision of the *Shipp's* case just reached by the Supreme Court draws attention to the part that Mr. Moody bore in this case as Attorney-General. Mr. Moody earnestly resisted the release of the persons charged with contempt of the United States Supreme Court, on account of their participation in the lynching of a negro in whose behalf this Court had granted a stay of proceedings. The Court has thus sustained Mr. Moody's energetic championship of the writ of *habeas corpus* then, and has rendered a decision in which Mr. Moody would doubtless have concurred, had propriety admitted of his taking part in it.

MR. TAFT'S APPOINTMENTS

THERE has been a great deal of foolish adulation in the newspapers, which our admired President may deserve truly enough but which neither he nor any other thoughtful person can greatly care for, in view of his disregard of political party considerations in his judicial appointments. Was Mr. Roosevelt really as bad as that? As a matter of fact Mr. Taft's predecessor realized that the bench is superior to politics, and pursued the eminently commonplace policy of choosing judges for merit rather than for party affiliation. In making such nominations as that of Associate Justice Henry Groves Connor of the Supreme Court of North Carolina to be Judge of

the United States District Court for the eastern district of that state, President Taft is not soaring to the stars on the back of a Democratic Pegasus—he is only discharging a matter-of-fact duty to the best traditions of the bench and of his own great office.

CONGRESSIONAL DECORUM

JUDGE SMITH McPHERSON and Judge John F. Phillips of the United States District Court have been subjected to harsh and undeserved criticism in a resolution introduced in Congress which accused them of improper conduct in the Missouri railroad litigation. The mere introduction of such a resolution in Congress, even though its sponsor abstain from ranting vilification on the floor of the House, is necessarily attended with wide publicity, and is prevented only by the privileges of Congress from being contempt of court. As under the Constitution the Senate alone shall have power to try impeachments, it is difficult to see why resolutions or motions for impeachment should not be required to originate solely in the upper house.

AN EXAMPLE OF PLEADING

A government attorney sends us this curious bit of information from a far Western state.

A bill in equity was brought to abate an illegal fence, under the provisions of the act of Congress of February 25, 1885. The bill was many pages long and wound up with the usual paragraph, "Forasmuch therefore as your orator is remediless in the premises," etc. The defendant filed his answer in these words: "I have my fence all pulled. Chas. A. Dereemer, Defendant."

The government, to make the issue, filed its replication in the usual approved form, quite a page in length: "This replicant, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant," etc.

The critic of legal methods and forms might find a good deal for argument and not a little amusement to be deduced from Mr. Dereemer's answer.

REX *v.* SCIENTIST

A case reported in *Punch* is of interest to the less responsible word-slinging members of the legal profession. The trial of *Rex* v. *Scientist* occurred before Mr. Justice J. A. H. Murray. A memorial from the Royal Society was read by the Public Prosecutor, calling attention to the baleful activities of this person, who was, it is said, an American adventurer with a bad record in his own country.

The Judge: "Can one have a bad record in America?" (*Laughter.*)

Evidence was also given to the prisoner's disadvantage by a deputation from the Athenæum Club.

In his defense a long speech was made by a learned doctor who said that without the valuable and expert assistance of "Scientist" there would be no means whatever of rapidly describing a certain type of savant who had taken all learning for his province.

The Court pronounced a sentence of three years' imprisonment.

While *Punch* does not make it easy to ascertain the legal grounds upon which this decision was based, we applaud the action of the Court, except that a death sentence would seemingly have been more appropriate.

THEY WERE IN IT

Some years ago Morrison R. Waite, who was appointed Chief Justice of the United States Supreme Court in 1874, and a number of other prominent lawyers were attending court in southern Illinois.

One extremely cold night they were all sitting in a circle about the fireplace, at the hotel where they were stopping, telling yarns and enjoying themselves hugely.

A stranger rode up to the hotel on horseback, dismounted, stripped off his overcoat, leather overshoes, and was escorted, before he had a chance to get fairly warm, into the cold dining-room for supper.

After eating his supper, the stranger, who had the appearance of being a well-to-do

farmer, was invited into the sitting-room, where the lawyers were seated before the huge fire, and introduced to the party by the hotel owner. The man was cold, fairly chilled through from riding, but there was no move on the part of any member of the party to make room for him near the glowing logs in the fireplace, but they were otherwise cordial in their greeting, and evidently thought to have a little sport at the expense of the stranger. One asked the man where he hailed from. "Chicago," was the reply. Then another inquired as to the condition of the roads. "They are horrible," he said, and continuing, remarked that "the roads through the swamps between here and Chicago are the worst I ever saw—worse than hell."

The last remark struck Chief Justice Waite as an opening for the fun to begin, so he turned to the stranger and said:—

"My dear sir, you speak like one familiar with hell. How are things down there?"

To this the stranger replied:—

"Oh, it is there just as it is everywhere else, the lawyers are always nearest the fire."

The circle opened at once and made room for the shivering stranger.

THE INSANITY OF GUITEAU

The late C. B. Tillinghast, the Massachusetts State Librarian, distinctly remembered Guiteau, the assassin of Garfield, whose attendance at the state Library was constant for a period in the spring of 1881, until two weeks before the catastrophe. Whether Guiteau at that time had any idea of slaying Garfield can only be conjectured. He usually wore several days' growth of beard. His hair was cut short and brushed up straight on top. Often during the quiet hours of the day the Librarian would glance up to observe Guiteau running his fingers excitedly through his hair, his eyes fixed on space, his attention absorbed with a strange intensity upon some subject that he was revolving in his mind. He sometimes spent the whole day poring over books, not even leaving the room for lunch. He was constantly asking for obscure volumes.

During the latter part of the spring of 1881 Guiteau's attendance at the State Library became erratic, and there would be a two- or three-day interval when he would be absent, to show up again with his general appearance more disheveled than ever.

Finally in June Guiteau disappeared for good, and about two weeks later the Librarian was startled to learn that the former visitor had become the assassin of President Garfield.

Recently the sister of Guiteau, Mrs. Francis M. Norton, a settlement worker in Chicago, made the assertion that her brother was insane at the time of the murder. She stated that just before Guiteau was born, when his mother was living at Freeport, Ill., the latter was administered, by mistake, a dose of henbane by the physician attending her. This mistake resulted, Mrs. Norton declared, in brain fever to the mother, and this pre-natal influence brought about the insanity of Guiteau. Mrs. Norton also stated that she tried to testify as to Guiteau's inherited madness at the trial but was unable to do so.

After a protracted trial Guiteau was hanged for murder, although much discussion arose at the time over the insanity plea urged by his counsel.

AN ARKANSAS CLIENT'S VIEWS REGARDING THE LAW

An Arkansas lawyer writes to the *Green Bag* to relate a humorous incident. Hon. James D. Shaver, of Mena, Ark., he says, is regarded by the bar of his district as one of the ablest chancellors in the state. It happens occasionally, however, as with all the chancellors, that his decisions are reversed by the Supreme Court. And in a recent case in which Judge Jesse C. Hart wrote the opinion of that august tribunal, the ruling of Chancellor Shaver was reversed and set aside. A brief statement of the conclusion reached by the court of last resort appeared in the papers, as usual, and fell under the eyes of the losing litigant. This inspired the following letter, which speaks amply for itself:—

Alpine, Ark., 4, 28, 1909.

Hon. Chancery Judg,
Mena, Ark.

Dear beloved of the lord:—

I am limited in edication, but I hope you will understand what I mean as it is a fact Hon. Judge Hart diverced your decree in my case, and it is a fact that your decree was bast on my decree and my decree was bast on Fagan's decree, and Fagan's decree was bast on the U. S. government. questions are you going to submit to his disision and change your decree. has he got the rite to force you

to do so. the facts is I bought the land in the year 1881 and paid for it in the year 1884 after I had learned for a fact that it was improved, and I paid the tax on it in the year 1885. brother I am just an old rhumatic cripple and have been for the past 8 years. but I think I ort to have protection under the U. S. Flag: dont you. ive wrote to my eturneys to know what they think about it, and I feel to hope that you will write me as soon as possible what you can or will do. it loocks to me just like saying that Fagan never entered the land to say that I didnt pay tax on it and didnt own it. dont it look so to you. may god bless and save all his dear people is my prair for christ sake (amen

Respectfuley

W. S. M. . . . .

THREE RULES FOR PROFESSIONAL SUCCESS

Rule 1. Should a conversational opportunity appear, seize it without hesitation. Occupy it with your entire battery. Should the other fellow have seized it, be not dismayed; a few deep breaths and your loudest tones will dislodge him. Self-assertion here is the thing. This is the genius of the American. He does not wait for opportunities to seize things; he makes the opportunities—and seizes the things.

Rule 2. Should your friend be telling an incident of personal history to illustrate a point, do not suffer yourself to show the slightest interest in what he is saying. Such interest would encourage him and prolong the narrative. It would also betray weakness on your part. Even when he shall have finished (should you be unable to prevent his finishing by an interruption), do not express the slightest interest, beyond a double-reefed smile. Indeed, the smile has an element of approval that sometimes invites an *encore*, and I should not use it unless my friend looked too fatigued to *encore*.

Rule 3. Having gotten a full-Nelson hold on the conversational opportunity—proceed. State a fact, an incident, and anything, so long as it leads up to your *professional self*. Remember that *legal self* of yours must be the Rome to which all your statements lead. Allow nothing whatever lo lure you into a by-way leading from Self—from Self is Nowhere. This is a great rule.—*Stanley B. Bowdle, in Law Book News.*

COMING INTO COURT WITH CLEAN HANDS

An Ohio lawyer writes to the *Green Bag* as follows:—

I send a small item that may appeal to you. It is an actual fact. I was present in the office when he made the statement alluded to. But do not connect me in any manner with the story, because the man is a "bad man" and would probably damage my face if he discovered that he was the subject of an item sent in by me.

In a recent case before an Ohio Court, Judge K——, dismissing a bill in equity, severely criticised the complainant for failure to present a case appealing to the conscience of the Court. A few months later, another case in which the same complainant was involved came on for hearing. On the morning of the trial he applied at one of the offices in the Court House for permission to "wash up a little." After a long absence in the lavatory, he returned and remarked:—

"I'm not going to get left in this suit. Just look at them hands. The last time I was in court Judge K—— said that I got beat because I didn't come into court with clean hands and I'll be d—d if I was a-goin' to take any chances this time."

THE LAW AND THE CABINET

The Cabinet of the new President of the United States bids fair to be known, like that of our own Prime Minister, as "the Cabinet of all the lawyers." There are nine Ministers in the American Government, and of these five are active barristers. . . It is not surprising that a President who has had experience of every branch of legal work, and who has essentially a great legal mind, should choose his colleagues from men of his own profession, though it suggests the reflection that he has taken all his men from the advocates' branch. . . . Mr. Roosevelt has come to be known as the strenuous President; we can wish Mr. Taft no better fate than to be known as the legal President, and if he and his Cabinet can carry through those law reforms which the people ask for they will indeed have deserved well of their country.

—*London Law Journal.*

The Legal World

Important Litigation

Justice Hough, in a decree handed down in the United States Circuit Court May 10 in New York City, ordered a permanent injunction restraining the Fibre and Manila Association, or so-called "paper trust," from combining in restraint of trade in violation of the Sherman Act.

A lower court in Alabama having declared the provision of the Alabama corporation law annulling the charters of foreign corporations which carry cases from the state to the federal courts to be in violation of the Constitution, an appeal has been taken to the United States Supreme Court, which will review this decision.

Judge Ralph E. Campbell of the United States District Court for the eastern district of Oklahoma, overruled the demurrers of Gov. Charles N. Haskell and other prominent defendants May 8 in the land suits brought by the government to recover for the Creek Indians the lands alleged to have been obtained by the fraudulent scheduling of "dummies."

In the so-called "turpentine trust" case, five men were found guilty of violating the Sherman anti-trust law May 15, at Savannah, and sentenced by Judge William B. Sheppard, chairman of the directors and the vice-president of the American Naval Stores Company both being sent to jail for three months, and the others being fined. The case will be carried to the United States Court of Appeals.

The government is determined to pursue with vigor its policy of pushing to final determination all cases under the Sherman anti-trust law and the interstate commerce act, together with the Elkins law. There were on the docket last month about sixty of these cases, including those against the Standard Oil Company, the Union Pacific, the American Tobacco Company, and the New York, New Haven & Hartford.

Seven men have been indicted by the federal grand jury in New York for conspiracy in connection with the frauds practised by the American Sugar Refining Company upon the government. Immediately after the indictments had been found the general counsel for the Sugar Company issued a statement saying that the company desired the men punished if guilty, and that none of them were at present in the employ of the company. The criminal suits will be vigorously pushed by the government.

Rulings on the constitutionality of the Railroad Employers' Liability Act and of the Safety Appliance Act, will now be obtained. By permission of the court the government has intervened and filed a brief in the suit of *Mondon* v. *N. Y., N. H., & H. R. R. Co.* in the Supreme Court of Errors of Connecticut, for the purpose of ascertaining whether the broad assertion of federal power in the former of these acts will be sustained, and has in like manner intervened in an action to be tried in the Arkansas Supreme Court to settle questions arising under the latter act.

For the first time in the history of Massachusetts, a decree of the highest judicial tribunal has been revoked by the Probate Court. It was held by the Supreme Judicial Court some time ago that the Probate Court has the power to revise finally probate proceedings. Recently it was discovered that an appointment of an administrator with the will annexed to act with an executrix was contrary to statute law and accordingly the Supreme Court advised the bringing of a writ in the Probate Court to review their proceedings. This was done and Probate Judge Robert Grant entered a decree setting aside the appointment.

Personal— The Bench

Justice Robert S. Bean of the Oregon Supreme Court has been made United States District Judge for the District of Oregon.

Chief Justice Edward Church Dubois of the Rhode Island Supreme Court was given a dinner by the Metacomet Golf Club in Providence April 17 in honor of his election.

Supreme Court Justice Willard P. Voorhees and Circuit Court Judge Frank T. Lloyd were the guests of honor at a dinner given April 26 at Mt. Holly, N. J., by the Burlington County Bar Association.

George W. Woodruff of Philadelphia, who is to become United States District Judge for Hawaii, is noted as former football coach of the University of Pennsylvania, and as having been at one time a strong player on the Yale eleven.

John S. Coke of Marshfield, Ore., is one of the youngest men on the Oregon bench, having just assumed the position of Judge of the Circuit Court of Coos County. Judge Coke gave up a comfortable income from his law practice to accept the appointment.

The Lawyers' Club of Buffalo had a dinner April 29, among the guests being Justices Spring and Kruse of the Appellate Division and Justices Emery, Marcus, Pound and Brown of the Supreme Court.

Judge John E. Sater of the United States District Court and Governor Harmon of Ohio were given a banquet at Columbus, O., May 7 by the bar of that city. Judges Lurton, Warrington and Severance of the United States Circuit Court were special guests.

Judge Milton D. Purdy has resigned from the federal bench in Minnesota. He was assistant to the Attorney-General under the Roosevelt administration, having charge of important anti-trust cases, and Senator Knox had orignally put him in the Department of Justice.

Learned Hand has been appointed United States District Judge for the southern district of New York. He is a son of Samuel Hand who was Judge of the New York Court of Appeals, and is a graduate of Harvard Law School and a prominent member of the New York bar.

Mr. Justice Robert Smith Aikman has just retired from the bench of the High Court of Allahabad, India, to return to England. He won great respect throughout the Indian provinces and did his country a great service by his studious endeavor to bridge the gulf between two civilizations.

Chief Justice Ira B. Jones took the oath of office in the Supreme Court room at Columbia, S. C., April 15. Chief Justice Jones' former place on the Supreme Court bench has been filled by Associate Justice D. E. Hydrick, formerly judge of the seventh circuit of South Carolina, who took the oath at the same time.

Judge Mayer Sulzberger of the Court of Common Pleas of Philadelphia, who declined the ambassadorship to Turkey, was elected in 1894. Previously he had gained wide prominence as a lawyer. He is a versatile linguist and has a wide knowledge of Oriental history and customs. His private library is one of the largest in Philadelphia.

Hon. William M. Lanning, who has been appointed United States Circuit Judge for the third circuit, succeeding Judge Dallas, was the honored guest of the Mercer County Bar Association at Trenton, N. J., May 1. He advised the lawyers present to give more attention to practice in the United States courts. Judge Lanning, who is of old Colonial stock, has served in Congress, and in 1904 succeeded the late Andrew Kirkpatrick as United States District Judge. John Rellstab was nominated by President Taft to take his place as United States District Judge for the district of New Jersey.

Judge I. D. Moore retired from the Court of Appeals of Louisiana April 30 to become City Attorney of New Orleans. Members of the local bar expressed their esteem for Judge Moore by presenting him with a beautiful silver service. To fill this vacancy, Hon. John St. Paul was formally installed as judge of the Court of Appeals of Louisiana, May 1, succeeding I. D. Moore, resigned. Hon. E. K. Skinner took the oath the same day as judge of the Civil District Court succeeding Judge St. Paul, and John B. Fisher has become judge of the First City Criminal Court succeeding Judge Skinner.

Judge T. Van Clagett, who took the oath of office April 24 as Associate Justice of the Circuit Court of Maryland, was presented with a handsome solid ivory gavel by the bar association of Prince George's County, in honor of the event. Judge George C. Merrick, whom Judge Clagett succeeds, retires after thirteen years of service in this court, having reached the seventy-year age limit. The same county bar association gave him a silver fruit dish and adopted resolutions expressing its esteem, to the reading of which Judge Merrick feelingly responded in his characteristic graceful manner.

Personal—The Bar

Prof. George Grafton Wilson of Brown University gave a lecture at the University of Cambridge May 21 on "International Law and the Recent International Naval Conference in London."

R. C. Smith, K.C., has been elected batonnier, or president, of the Montreal bar. He has declared himself earnestly in favor of continuing the legislative fight against the commercial collection agencies.

Frank B. Kellogg has informed the Administration that his relations with it will close when he has done with the cases against the Standard Oil and the Harriman lines. He wishes to return to Minnesota to practise law.

The lawyer's career was characterized as the hardest in existence by George S. Munsen of Philadelphia, April 28, in the third of his lectures at Princeton University, before the Princeton Law Club on "The Study of the Law."

A Boston lawyer who went to Los Angeles to practise law, Timothy W. Coakley, expressed his motive in coming West in this remark to a friend, "Out here, my dear sir, originality is not considered evidence of insanity."

Joseph M. Sullivan of the Boston bar, has compiled a dictionary of "Criminal Slang"

which defines a large number of words and phrases used in the "underworld." The booklet is published by the Worcester Press, Boston.

Massey Wilson, for four years Attorney-General of Alabama, has been elected president of the Great American Life Insurance Co. of St. Louis. He is about thirty-eight years of age, and was one of the framers of the present state constitution of Alabama.

In recognition of the work done by Congressman R. O. Moon in codifying the criminal statutes of the United States, a dinner was given him May 8 at the Lawyers' Club in Philadelphia. Many men prominent on the bench, before the bar, and in politics were present.

Dr. Joseph I. Kelly, dean of the Law Department of the Louisiana State University, will leave at the close of the present academic year to accept a chair in the Northwestern University Law School. Dr. Kelly has been connected with the Law Department of the Louisiana State University since its establishment three years ago and has helped greatly to make it one of the recognized law schools of the South.

Bar Associations

The lawyers of Vancouver, Wash., have decided to form a bar association and have appointed a committee to take up the matter.

The Lancaster County Bar Association of Nebraska voted in favor of prohibition on April 24. The vote showed that of the forty-three Lincoln lawyers present thirty-seven were in favor of prohibition.

The Teller County Bar Association met at Cripple Creek, Colo., May 3 and elected the following officers for the term: C. W. Blackmer, president; Guy P. Nevitt, secretary; Thornton H. Thomas, treasurer.

The Hampden County Bar Association held its annual banquet in Springfield, Mass., April 22 and entertained some of the members of the Supreme and Superior Courts, Chief Justice Marcus P. Knowlton and Justice Henry M. Sheldon being among the speakers.

The Cleveland Bar Association, which has been conducting an investigation of improper practices, has found that notices simulating the form of legal process have been served on ignorant debtors by certain members of the bar. Steps to stop this and similar mispractices have been taken.

A committee of the Ohio State Bar Association will present at the annual meeting, this summer, the question whether Ohio judges should not serve for life instead of being elected for stated terms. The committee has also been considering the question of the law's delays in Ohio.

The Alameda County Bar Association attended the induction into office of Judge W. S. Wells, who on April 12 began his duties in charge of department 6 of the Superior Court of Alameda County, Cal. It was the unanimous request of the bar of Alameda County that Governor Gillett appoint him.

The biographical directory of the Omaha Bar Association for 1909 has been issued. The *Omaha Bee* remarks that "there can be no question of the accuracy of the facts given regarding the early struggles and great achievements of these Douglas County lawyers," as they themselves write the sketches accompanying their portraits.

The dates of coming state bar association meetings are as follows: Wisconsin, at Milwaukee, the latter part of June; Maryland, July 7–9, at a place later to be announced; Virginia, at Hot Springs August 10–12; Kentucky, at Paducah, July 7–8. Attorney-General Wickersham is to make an address at the Kentucky Bar Association's annual meeting.

The Westchester County Bar Association held its annual dinner April 17 at Delmonico's in New York. Speeches were made by Assistant Attorney-General Wade H. Ellis, Congressman J. Adam Beede of Minnesota, Supreme Court Justice Martin J. Keogh of New York state, Richard L. Hand, formerly president of the New York State Bar Association, and others equally prominent.

The Kansas City Bar Association at a dinner May 1, heard an address by Attorney-General Fred S. Jackson of Kansas on "The Kansas Bank Guaranty Law; a Comparison with Past and Present Guaranty Laws." This association is actively supporting bills shortening the term of administration of estates from two to one year, these bills having been endorsed by the bench and bar of the state.

The Jamestown Bar Association entertained the Justices of the Appellate Division of the New York Supreme Court, fourth department, and other prominent members of the bench and bar, at a banquet given April 16 at Jamestown, N. Y. Among the speechmakers were Hon. Peter B. McLennan, presiding justice of the Appellate Division, fourth department, and Judge Emory A. Walling of Erie, Pa.

Governor Harmon of Ohio and Hon. John W. Warrington, just elevated to the United States Circuit Court bench, will address the thirtieth annual meeting of the Ohio State Bar Association, and Attorney-General U. G. Denman of Ohio and Hon. Walter George

Smith of Philadelphia are also to be speakers. The latter will discuss "Uniform Marriage and Divorce Laws." The meeting will be held at Put-in-Bay, July 6–8.

The thirty-third annual meeting of the Illinois State Bar Association will be held at Peoria June 24 and 25. The President's address will be delivered by E. P. Williams of Galesburg, and will be a review of the legislation adopted by the present session of the General Assembly, with his recommendations for changes in the laws. The annual address will be delivered by O. H. Dean of Kansas City, Mo., on "The Making of the Constitution." Hiram T. Gilbert of Chicago, whose bill is now pending before the General Assembly to reform the entire practice and procedure of the state, will discuss the subject "The Administration of Justice in Illinois." Floyd R. Mechem of Chicago will deliver an address on "Employers' Liability." Val Mulkey of Metropolis will speak on "A Legal Injury."

The Mississippi Bar Association met early in May at West Point, Miss., for its fourth annual meeting. Recommendations were adopted favoring a constitutional amendment to admit of ten jurymen bringing in a verdict in civil cases, a restriction of the right of appeal to the Supreme Court to cases where the amount in dispute does not exceed $200, and a provision permitting testimony taken in a former trial to be read in any subsequent trial if the witness cannot be found after diligent inquiry. The Association, after some discussion, went on record as favoring legislation making "pistol toting" a crime. The Association also voted to recommend the enactment of a law providing for three Commissioners on Uniform State Laws from Mississippi. Thomas H. Sommerville, dean of the law department of the State University, was elected president, W. H. Powell, Leroy Percy, and W. A. Roane, vice-presidents, and Judge Sydney Smith secretary-treasurer. The next annual meeting will be held in Natchez in May, 1910.

Mr. William B. Hornblower, whom President Cleveland offered the position of Justice of the United States Supreme Court, discussed the Sherman Act and termed it unscientific at the annual meeting of the New Hampshire Bar Association, held at Manchester, N. H., May 10. The greatest defect in the law, he said, was the coupling of penal provisions with those affecting the legality of contracts and authorizing process of injunction to restrain their enforcement. A contract may be against public policy and may be unenforceable, he said, and yet may not involve such an element of moral turpitude as to justify punishment of the parties as common criminals. Moral turpitude in the creation of combinations in restraint of trade ought to be clearly defined by statute. According to the Sherman Act every agreement in restraint of trade is illegal. At the close of Mr. Hornblower's address, a committee was appointed to report at the next meeting upon the proposed adoption of the American Bar Association code of ethics. Mr. Edwin F. Jones, in the annual president's address, urged the inadvisability of waiting for the enactment of rules of professional conduct by some censorious legislature. The next annual meeting will be held in December. The officers elected for the remainder of the year are: president, Judge William M. Chase of Concord; vice president, Chester B. Jordan of Lancaster; secretary and treasurer, Arthur H. Chase of Concord; executive committee, William E. Marvin, Lawrence V. McGill, Walter D. Hill, Judge Oscar L. Young, Allen Hollis, Oliver W. Branch, Joseph Madden, Judge Jesse M. Barton, Ira A. Chase and Edmund Sullivan.

Necrology—The Bench

Judge L. D. Thoman has passed away at Evanston, Ill. He was twice Probate Judge of Mahoning County, Ohio.

Judge William H. Donahue, a prominent lawyer and judge of Hennepin County, Minnesota, died at Philadelphia May 2.

Judge John W. Arnold, distinguished lawyer and Confederate veteran, a county court judge, died suddenly at Monroe, Ga., April 24.

George W. Bailey, former Justice of the Colorado Supreme Court, died at Ft. Collins, Col., April 15. He was fifty-three years of age and as a young man had been a cowboy and newspaper reporter before taking up the study of law.

Hon. D. L. Hanington, Judge of the Supreme Court of New Brunswick, died at Dorchester, N. B., May 6. He had enjoyed great popularity throughout the province as a lawyer, politician, judge, and Anglican churchman.

Former Judge A. B. Carpenter died at Los Angeles April 24. He was born in New Hampshire eighty-three years ago, but passed the greater part of his life in Kentucky. He left the Union army to become public prosecutor, and was later elected to the Circuit Court of Kentucky.

George M. van Hoesen, formerly Judge of the old Court of Common Pleas, died April 18 in New York City at seventy-two years of age. He was a gallant officer in the Civil War and afterward engaged in the practice of law in New York. He drafted the first elevated railroad bill in New York state.

Judge Henry L. Palmer, for thirty-five years president of the Northwestern Mutual

Life Insurance Co., and formerly at the head of the Masonic fraternity of the United States, died at Milwaukee May 7. He had been a leading lawyer of the state, an Assemblyman, Speaker of the lower house, a state senator, and county judge of Milwaukee County.

William F. Cooper, formerly a Justice of the Tennessee Supreme Court, died in Nashville May 7 at the age of ninety. He was a classmate of the late Senator Evarts at Yale, where Alonzo Taft, father of the President, was his tutor. He was of a distinguished Tennessee family and was a brother of Duncan B. Cooper, who was recently convicted in the famous Cooper trial.

Hon. William L. Penfield, an authority on international law, died at Washington, D.C., May 9. Before 1897 he held the office of Judge of the United States Circuit Court for Indiana. He then became solicitor for the State Department, in that capacity handling arbitrations between the United States and Santo Domingo, Peru, Hayti, Nicaragua, Guatemala, Salvador and Mexico, securing awards amounting to $2,250,000 for his own country. He represented this Government in the Pius fund case with Mexico, and in 1903 he appeared before The Hague tribunal in the arbitration between the United States and Venezuela.

Necrology—The Bar

Floyd Lawson Scales, one of the ablest and most prominent lawyers of Georgia, died at Johns Hopkins Hospital in Baltimore April 26.

Henry Clay Nelson, a prominent lawyer and former state senator, died in Ossining, N. Y., April 17, where he was born seventy-two years ago.

John M. Gould, who wrote "The Law of Waters," died in Newton, Mass., April 15. He practised law in Boston and wrote books on the United States statutes and on banking.

John F. Robinson, who won a wide reputation in Maine as an all-round lawyer, died April 30 at his home in Bangor. Few lawyers at the Maine bar equaled him in resource, ingenuity, and energy. He had a large criminal practice.

The Sacramento County Bar Association has drafted resolutions in memory of the late Henry Starr, who died recently at the age of about ninety. Thirty years ago he was one of the leading lawyers of Sacramento. He had held several important offices.

Major Albert E. H. Johnson, one of the oldest practising patent attorneys in the United States, and at one time private secretary to Secretary Edwin M. Stanton, died in Washington May 12 in his eighty-third year.

Franklin A. Morris, a promising and able young lawyer of Holyoke, Mass., died recently, his death being greatly lamented by his colleagues of the Hampden County Bar, by whom his abilities were held in the highest esteem.

Henry D. Macdona, a New York corporation lawyer, Arctic explorer, and former newspaper correspondent, has just died in his fifty-fifth year. He was closely associated with the late William C. Whitney and became counsel for the Consolidated Gas Company and for the surface railway system.

The death of W. E. Bainbridge of Omaha, a leading lawyer of Nebraska, drew forth fitting eulogies from his colleagues of the Pottawattamie County Bar Association, which attended in a body the funeral held May 6, several men prominent in public life acting as the pallbearers.

James J. Walsh, a former assistant district attorney of New York, who had been elected to Congress in 1896 from the eighth district, and who became Tammany leader of the thirty-first Assembly district, died in New York May 7. He was a magistrate of the Jefferson Market court for four years before his death.

Gen. Matthew Calbraith Butler, lawyer, soldier, and a former United States Senator, died in Columbia, S. C., April 14, in his seventy-fourth year. He was a valiant soldier on the Confederate side, becoming a Major-General of cavalry. In 1898 President McKinley appointed him Major-General in the United States Army.

David Turpie, than whom Indiana is said never to have produced a more intelligent man or purer citizen, died April 21 at Indianapolis. He early took rank as a learned and skillful lawyer, and won a place on the state bench. For twelve years he served as a United States Senator and greatly distinguished himself as one of the keenest of debaters and as an authority on the law of elections.

Hon. Frank T. Brown, called by the *Hartford Courant* "beyond question the foremost lawyer in the state East of the Connecticut River," died April 17 at Norwich, Conn. A graduate of Yale, and former member of the Connecticut Assembly and Constitutional Convention, he had an extremely large practice. He was counsel for the Billard interests in the Boston & Maine, and also counsel for the New York, New Haven and Hartford Railroad.

Charles A. Gardiner, LL.D., a lawyer and author, died April 23 at his home in New York City. He was born in Canada in 1855. He was graduated from Hamilton College in 1880 and from Columbia Law School in 1884. He began the practice of law in 1885. He was a member of several prominent clubs and a director in many railway companies. Among his works were "The Constitution and Our New Possessions," "Constitutional Powers of the President," "Constitutional Discretion of the President," "Our Right to Acquire and Hold Foreign Territory," "The Race Problem in the United States" and "A Constitutional and Educational Solution of the Negro Problem."

Former Senator William Morris Stewart of Nevada died April 23. He was a native of New York State and went West at the time of the gold fever, becoming Attorney-General of California. He moved to Nevada and made one fortune as a lawyer and another as a mine owner. When he went to Washington he was supposed to be the richest man in the Senate, but after twelve years financial reverses had left him without his fortune. He announced that he would make a new fortune and re-enter politics. He resumed the practice of law and mining operations and was soon a millionaire once more. He was re-elected to the United States Senate. A few years later he again retired almost in poverty, and again he made a new fortune. He had practised law in Washington for several years before his death at the age of eighty-two years.

Miscellaneous

The Harvard Law School is to have two new courses next year, one in international patent law, under Joseph L. Stackpole, Harvard, '95, and the other in international law, under Prof. Eugene Wambaugh.

The entire amount of $500,000 needed for the construction of Kent Hall has been subscribed and work will immediately begin on the new home of the Law School of Columbia University, which will be completed by the autumn of next year.

Beginning in September, 1911, the students in the College of Law of Cornell University must have had at least one year of work in a university or college of approved standing before entering. The requirements for entrance to the four-year course will not be changed.

The hours of work required for graduation from the Columbia Law School will be reduced next year as a result of the growing desire to decrease to some extent the requirements of the school. One hour a week less, or thirteen instead of fourteen hours of classroom work, will hereafter be required during the second and third years of the course.

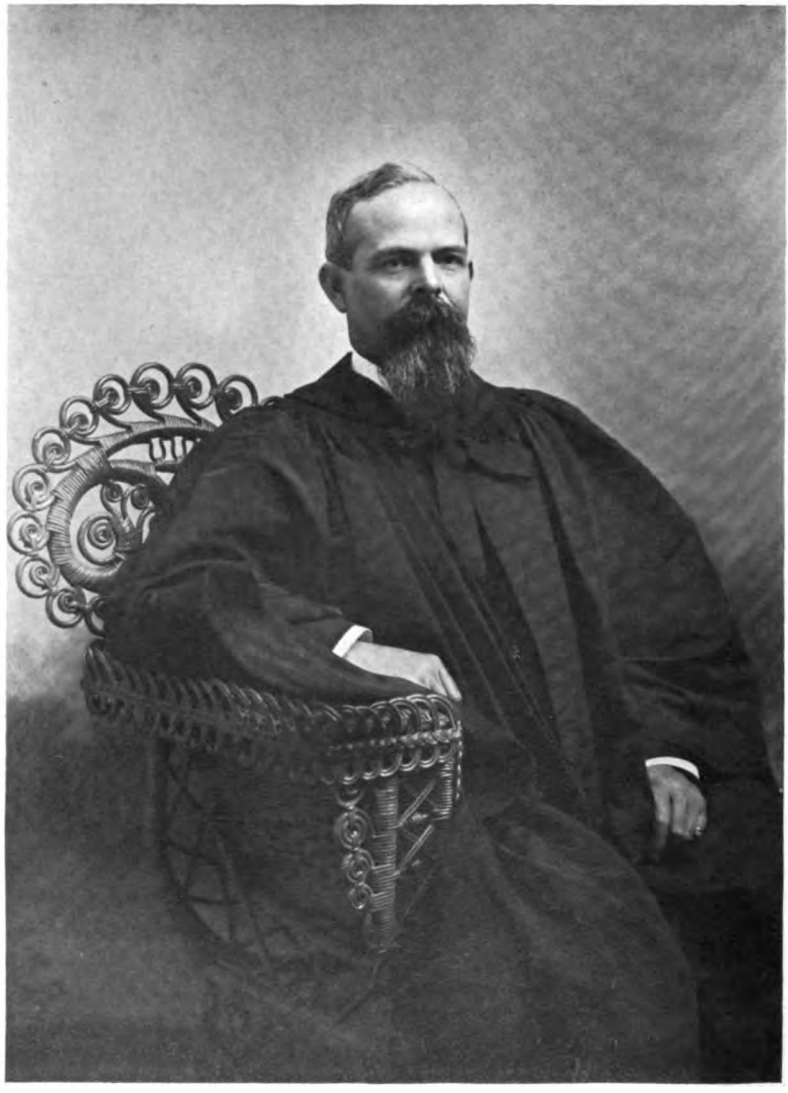
Miss Mabel E. Sturdevant, a native of Brookfield, Mo., won the Braun International Law Scholarship in competition with ninety-six contestants, eighty-four of which are graduates of European universities. She was educated in the public schools of her native place, finishing the twelve-year course in eight years, and then took the three-year law course in the State University at Columbia in two years, graduating with highest honors.

The American Peace Society held its eighty-first annual meeting at Boston May 13. The secretary, in his annual report, stated that the membership had doubled during the past year, but there was a slight deficit because of the increased activities of the organization. The principal officers for the year are: Robert Treat Paine, president; Thomas H. Russell, treasurer; Benjamin F. Trueblood, secretary, and Dr. William F. Jarvis, auditor.

The General Assembly of Rhode Island closed its session of seventy-one days May 8. The session was eleven days longer than the period for which members can draw their salaries at $5 a day. The most important measures passed were a fifty-six hours' bill for women and children; the dual amendment to the constitution providing for giving the veto power to the governor and increased representation in the House; an act requiring that hunters in the state be licensed; the revision of the statutes of the state, and the revision of the militia law.

The most notable feature of the fifteenth annual Lake Mohonk Conference on International Arbitration, held at Mohonk Lake, N. Y., May 19–21, was perhaps the appearance of able speakers from many different countries, including China and Japan. President Nicholas Murray Butler, presiding, Hon. J. A. Baker, M.P., Ambassador Bryce, Mr. Alfred Mosely of London, and Congressman Bartholdt of Missouri urged the reduction of naval armaments, and an extremely strong platform plank in its favor was adopted, and a declaration was made favoring the early establishment of a Court of Arbitral Justice at the Hague.

The Second National Peace Congress was held at Chicago, May 3–5. President Taft permitted the use of his name as honorary president, and sent a letter to be read at the opening session. Secretary Ballinger represented the Administration, and other notable speakers were Count Von Bernstorff, Dr. Wu Ting-fang, and Congressman Bartholdt. The importance of establishing a world's court of peace was the dominant sentiment of the conference, and resolutions were adopted declaring war a relic of barbarism, and advocating obligatory arbitration under a general treaty concluded at the earliest possible date, and the making of agreements to limit armaments by the great powers.



HON. IRA B. JONES

CHIEF JUSTICE OF THE SUPREME COURT OF SOUTH CAROLINA

The Green Bag

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Chief Justice Ira B. Jones

IT is with pleasure that the *Green Bag* presents this month a portrait and brief character sketch of Hon. Ira B. Jones, who was commissioned Chief Justice of the Supreme Court of South Carolina last April, succeeding Hon. Y. J. Pope, resigned.

It is not often that a man of such varied accomplishments is elevated to an eminent position on the bench. Chief Justice Jones is not only a jurist of ability, who at one time was one of the leaders of the bar of his state, but is one whose experience in legislative and political affairs and whose noble personal character fit him for the performance of his functions not only with skill and learning but with the good judgment of well balanced manhood. A characteristic instance illustrates the qualities of his temperament.

When he was Speaker of the lower House of the South Carolina Legislature, an act reducing the pay of the members from five dollars to four dollars a day was passed. The member of the Legislature who introduced the appropriation bill in 1894 insisted that the act did not take effect until a year later and that the members were entitled to the old rate of compensation. A minority of the House opposed him but was voted down. The Senate then passed a vote in favor of the lower rate. Then it was that the present Chief Justice appointed a committee of three to go into conference with the Senate, naming on it conservative men who understood and were determined to uphold the law. This committee brought in a report in favor of the House concurring with the Senate. The House refused to adopt the recommendation, and in defiance of all traditions of the Legislature and of every precedent to be found in its history proposed a free conference, and that it elect such a conference committee as it might itself select. Then Speaker Jones acted in a manner at once dramatic and dignified. He declared that the vote of the House was a reflection upon the integrity of the Speaker, who always had appointed committees, and offered his resignation as Speaker. A pandemonium broke loose. The House refused to accept the resignation, and passed a resolution expressing absolute confidence in Speaker Jones. The wise course of concurring with the Senate was then followed.

This is the sort of man Chief Justice Jones is, one with the highest conception of the duties and responsibilities of public office. When he was a candidate for Chief Justice, was it at all strange that the bar of Lancaster County should unanimously indorse him, or that he should have been elected in preference

to a rival candidate who was his senior in point of service on the Supreme Court bench?

The indorsement of the Lancaster County bar, while couched in terms highly complimentary, did not overestimate the merits of one who "by his high Christian character, his keen sense of justice, his uniform courtesy, his close attention to his duties, the clearness and logic of his decisions, has won for himself the admiration of the bar of our entire state, and a high rank among the distinguished jurists of the nation." The action of the bar association was based upon his brilliant record as "a citizen, patriot, statesman, and jurist."

The decisions of this judge have been distinguished by great clearness of reasoning and by a keen analytical faculty that delights in untangling complicated questions. Before he was elected to the bench of the Supreme Court ten or fifteen years ago, he served the state of South Carolina as chief counsel to the Attorney-General, and in the celebrated railroad tax cases which Gov. Tillman pushed so vigorously his advice was most valuable. When he left his place at the head of the state bar to take a prominent part in the deliberation of the Legislature, his ability as a lawyer was still at the disposal of his state in dealing with the more difficult problems of legislation, and when in 1895 the Constitutional Convention met, he added to his reputation as its vice-president.

His Honor's oratorical gifts are shown in a well-prepared oration delivered at the unveiling of the Confederate monument at Lancaster, South Carolina, on June 4, 1909. In this address he quoted the beautiful words of Timrod, the South Carolina poet,—

> In seeds of laurel in the earth
> The blossom of your fame is blown,
> And somewhere waiting for its birth
> The shaft is in the stone!

and added with fine poetic feeling: "God works in mysterious ways to perform His wonders. The germs of the flowers and evergreens which bedeck this monument today rested long before in the soil awaiting this hour to fulfill their most perfect mission." He continued:—

> "The sentiment which prompts a people to erect monuments in recognition of lofty character, or effort, or achievement, is noble and ennobling. No son can live a worthy life who does not honor his father. The so-called New South is great because its roots are in the Old South. All his life the Southerner had been taught that the Union was a federation of sovereign states and that any state could retire from the compact and resume its complete sovereignty when it so resolved. Many of the greatest minds of the North long held this view. What could not be settled conclusively against the Southern view in the forum of the law and reason was not settled until grim-visaged war overthrew the Confederacy and decided that this shall ever be an indissoluble Union. And though we readily grant that the Confederate soldier was wrong, considered from the standpoint of expediency and the present and future greatness of these United States, he was everlastingly right in his heart, and he defended his conception of right with unsurpassable courage and devotion. What glory could the North take in her soldiers if they merely conquered men of whom the South should be ashamed? The more we laud the chivalry of the men of the South, the more we respect the tenacity, skill, and courage of the men of the North. The gigantic struggles and achievements of both armies inspire us all, as Americans, with greater pride of race and country."

The other principal facts of Chief Justice Jones' life may be given in a few words. Descended from Scotch-Irish ancestry, he was born in Newberry, South Carolina, December 29, 1851, his inheritance being described by the person nominating him to the bench as "a good name and honest character."

He entered the Lutheran College at Newberry, leaving in two years to enter Erskine College. He then taught school

for two years, studying law in the meantime, and working on a country newspaper. He was admitted to the bar when twenty-one years of age, and in 1875 he removed to Lancaster, having foreseen the development of that town. From 1890 to 1896 he represented Lancaster in the Legislature, and from 1896 to the present time he has served on the bench of the Supreme Court. He was also for years county chairman of the Democratic party, chairman of the Congressional District Committee, and was on the State Executive Committee.

In 1875 he married Rebecca Wyse, daughter of the late Joseph Wyse of Edgefield County, and has two sons and three daughters. He is an elder of the Associate Reformed Presbyterian Church in his home town of Lancaster.

His *alma mater*, Erskine College, has just conferred upon Chief Justice Jones, at the recent commencement exercises, the degree of Doctor of Laws, an appropriate honor for one so finely representative of what is best in the life of the New South.

Mohammedan Law in Our Philippine Possessions

By Samuel MacClintock, Ph.D.

OUR Philippine possessions contain people of all degrees of development. Some of them are upon the lowest scale of savagery, some are truly enlightened. Perhaps the most interesting of these to students of government, and certainly the most difficult to handle, from an administrative standpoint, are the Moros, or Mohammedan Malays, who live in the southern part of the Archipelago.

Who the Moros Are.— The word Moro is a corruption of Moor. The people to whom it is applied are Malays of the same stock as the pagan and Christian tribes who dwell in the southern part of the Philippine Islands. Shortly before Magellan discovered the Archipelago, these southern inhabitants were given the alternative of accepting Islam or the sword. For a century afterwards the conquering faith spread rapidly and it looked as if all the inhabitants would be converted to its militant ranks, but the superior political and military power of the Spaniards finally prevailed, and Islam was confined to the southernmost islands.

Their Political System.—The Moros never effected any political organization larger than a loose confederation of small, semi-independent tribes, paying at least nominal obedience to a superior ruler called sultan. In theory, the sultan was the representative of Mohammed, and, according to the writings of the Prophet, the "Shadow of God" within his sultanate. He was enjoined to keep well versed in the Mohammedan religion, law, and customs, and to see that no injustice was done. But he was also the sole judge of what was law and justice, and therefore, in theory, an irresponsible despot. This scheme of

government was a kind of dimmed theocracy as interpreted to the Prophet, and reinterpreted by corrupt, ignorant, and superstitious priests.

In time there came to be two chief sultanates in the Philippines—that of Mogindanao, embracing much of the southern part of the great island of Mindanao, and that of Sulu, embracing the Sulu Archipelago. Under these two sultans, but often, in fact, in opposition to them, were the *datu*, or petty chiefs, each assisted in the administration by a judge and a vizier. These offices were generally filled by *pandita*, or learned men, who, in addition to performing the functions of priest, could read, write, and expound the Koran, and thus the law.

The independent power of the sultans was gradually broken by the Spaniards, and treaties were made from 1837 on, in which the sovereignty of Spain was acknowledged. Since the American occupation there have been some desperate outbreaks, but courage, no matter how fanatical, when armed only with *urises* and *lantakas*, is no match for equal courage armed with Mausers and gatling guns. At the present time, therefore, there is no serious resistance to our power, and the Moro Province, governed by our military authorities, is an integral part of the Philippines. Nevertheless, on account of their peculiar religion, laws and customs, the Moros cannot be dealt with in the same manner as the Christian or the pagan people of the Islands.

Their Legal System.—At the time of their conversion, the Moros were pagans and savages. With Islam came an element of culture that has, in time, made them superior to their pagan kinspeople. This touch with a superior civilization has given the Moros the art of writing, a form of government based on the Arabian caliphate, written codes of law, and a continuing contact, due to pilgrimages to Mecca, with the outside world.

Islam seems to have encouraged learning to an extent, and the *pandita* applied the Arabic alphabet to the native Malay tongue. The Moros came consequently to have books on religion and law, based largely on the Koran. While their law is thus of a common origin, it has been worked out somewhat differently by the different tribes. Until recently such writings as they had were guarded jealously from all foreigners and non-Mohammedans, but Dr. Najeeb M. Saleeby has recently won their confidence and has copied and published some of the *tarsila* in a document for the Ethnological Survey of the Philippines, entitled "Studies in Moro History, Law and Religion." The selections here used as illustrations of their legal ideas are taken from the Mindanao code, known as the "*Luwaran*," based on the old Arabic law, compiled and translated for the guidance of the rulers, judges, and *pandita* who do not understand Arabic.

In making this code only such laws were selected by the judges as seemed suited to the local conditions and requirements of order in Mindanao. The laws embody in a concrete form examples and incidents of common occurrence, even modifying, in places, the sense of the original so as to make it agree with the prevailing customs. Likewise, in a few instances, the judges made new articles which do not exist in the original Arabic but which conform to the tribal customs and practices. In theory, the authority of the "*Luwaran*" is universally accepted in Mindanao, and is held sacred next to the Koran. The judge is at liberty to use either of them as his authority, though an apt quotation from the Koran is generally considered the higher authority.

In general, the Moros do not distinguish, in actual practice, between law and custom. Laws are sometimes ignored as being contrary to custom, while many customs are given the force of law. But these customs themselves are so subject to individual interpretation at the hands of each *datu* that they are without uniformity, the law or custom being adapted to each individual case in a manner to suit the convenience or the itching palm of the ruler. Dr. Saleeby says: "An oath on the Koran is so firmly binding and the fear of perjury is so strong in the mind of the Moro that oaths are generally taken and are always regarded as sufficient confirmation even in the absence of evidence. The Moros are not strict nor just in the execution of the law. The laws relating to murder, adultery, and inheritance are seldom strictly complied with. Indeed, the laws of inheritance as given in the '*Luwaran*' are generally disregarded and are seldom considered at all. Mohammedan law does not recognize classes, except the slave class. But Moro law is not applied equally to all classes. Great preference is shown the *datu* class, and little consideration is given the children of concubines. The '*Luwaran*,' nevertheless, is the recognized law of the land and compliance with it is a virtue."

Extracts from the "Luwaran."—[1]

If two people disagree as to the ownership of a certain property, the actual possessor has the right to the property if he swears to that effect. In case both of them are in actual possession of the property, both ought to swear. If both of them swear to that effect, the property shall be divided between them equally. If only one person swears, the property shall be given to that person alone.

If a person borrows an ax or a button, and the ax is broken or the button lost while being used for the purpose for which it was loaned, and not on account of carelessness, the lost article shall not be replaced. But if the ax is used at a place overhanging the water or is used to cut a stock of bamboo without being well tied or fastened, and is lost, it shall then be replaced.

If a person instrusts another with his property and later calls for it and it is denied him on the plea that it has been taken back or that it was lost, and no witness can be obtained, the trustee's plea shall be sustained if he confirms it by oath.

If a person enters the house of another at night without the consent of the owner thereof, and the said owner complains of the offense, the defendant shall be fined four cuspidors.

If a man enters the house of another with the intention of holding private intercourse with a woman therein with whom it is unlawful for him to associate privately, and the woman objects, he shall be fined four cuspidors or four pesos, or shall suffer from twenty to thirty-nine lashes, or shall be slapped on his face, at the discretion of the judge.

If a man divorces his wife after the conclusion of the marriage act or ceremonies, and before any sexual intercourse has taken place, the woman shall have half of the dower only. If the divorce occurs after sexual intercourse has taken place, the woman shall have all the dower.

If a man refuses to marry a woman after having been engaged to her, the whole dower shall be returned to him, excepting the expenses for the feast incurred by the father of the woman.

If a person falsely claims another person as his slave, he shall be fined the value of one slave.

If a person defames another person by calling him *balbal* [a human being who transforms at night into an evil spirit which devours dead people] or poisoner, he shall be fined one slave or the value of one slave.

No gift given without the expectation of reward can be recovered after the receiver has had possession of it. But if the giver changes his mind before the receiver takes possession of the gift, the giver resumes his ownership of the given property.

Testimony of a slave which is detrimental to himself shall be accepted.

If a person enters a house without permission and in the absence of the owner, he shall be held responsible for and shall restore or

[1] No attempt is made to keep these extracts under their proper headings nor in their fullness. They are taken up in order, but are freely abridged.

pay for any article that may be found missing from said house.

If a person seduces or cohabits with a female slave, held by him as security for debt, with the knowledge or consent of the debtor, he shall not be held guilty; but he shall give her a dower. If it occurs without the consent of the debtor, the creditor shall be liable to a fine, or shall give the woman a dower to be paid to the debtor.

If a married woman commits adultery, both adulterer and adulteress shall suffer eighty lashes. If the lashes are changed or reduced to a fine, half the number of the woman's lashes shall be added to the man's fine.

If a man seduces a maiden, both shall suffer one hundred lashes, and the man shall marry the woman and live with her even though he is married.

If a married man commits adultery with a free woman, both shall be stoned to death. The punishment of the man may be reduced to imprisonment. The woman shall be buried up to her chest and be stoned with medium sized stones.

If a bachelor or widower commits adultery and is killed by a non-Mohammedan, the non-Mohammedan shall be put to death. But a Mohammedan who may kill such an adulterer shall not be put to death.

If a married man leaves his home on a long journey and nothing is heard of him, his wife shall not have the right to marry another; but if she learns that he has died or that he has divorced her, she shall then wait four years, after which she shall observe the customary mourning for his death; then she may marry again. The judges shall be careful not to change this decree in order that their power and influence may not suffer.

If a man orders another to shoot at a deer, believing it to be a deer, and the person shoots believing also that he is shooting at a deer, but hits a man, neither the shooter nor the man who has ordered him to shoot shall be liable to punishment, but shall pay only a light fine as blood money.

If a free man kills another free man, or a free woman kills another free woman, the slayer shall be punished.

The blood money for the life of a woman or of a hermaphrodite shall be half that of a man; so also shall the fines for wounding a woman be rated at half those for wounding a man.

If a free man divorces his wife three times, or a slave divorces his wife twice, it shall not be lawful for him, the man, to marry again before the divorced woman is married to another person.

The will of a free person shall be legitimate whether he be a non-Mohammedan or a person of bad character; but the will of an insane person or an imbecile or a child or a slave shall not be legitimate.

A son, the only child, shall inherit all of the estate of his father and mother.

A daughter, the only child, shall inherit half the estate of her father and mother. In case of multiplicity of sons and daughters, the estate shall be so divided as to give each daughter half the share of one son.

Wounds are classified as to depth, locality, and amount of tissue cut, the following fines being fixed to each class:

For wounds of the skin unaccompanied by bleeding, three pesos[2]; if accompanied by bleeding, five pesos; if the skin is cut through and the flesh exposed, ten pesos. The fine for wounds that cut into the bone is twenty-five pesos; for wounds when the brain is penetrated, three hundred pesos.

The blood money for the intentional or wilful murder of a Moslem shall be one hundred camels or one thousand three hundred and seventy pesos. The minimum amount of the blood money of a Moslem shall be eight hundred and sixty-eight and one-quarter pesos; for a heathen or pagan, fifty-seven and one-quarter pesos.

The New Legislation.—It is apparent from this survey of the Moro code that no modern civilized court could interpret and apply it so as to satisfy the fundamental requirements of liberty, justice and equality. What with us are regarded as only misdemeanors are, in this system, treated as felonies and punished with inhuman severity, while offenses that we regard as the greatest are, with them, sufficiently punished by a slight fine. Furthermore, institutions

[2]The peso is worth about fifty cents, gold.

sanctioned by their social system, such as slavery and polygamy, are abhorred by ours.

The difficulty in this situation is still further increased by the fact that we have assured the Moros in the most solemn way that we would not interfere in any way with their religious system. Now, the laws, customs and practices of the people are based so largely upon their conception of the religion promulgated by the Prophet and interpreted by the *pandita* that it is almost impossible to separate the two. To this religion they adhere with fanatical zeal, and are ready to fight to the last extremity anything that seems to involve its power and integrity.

It was not a great while after we took possession of the Islands before it began to be perceived that the Moros presented a peculiarly knotty problem. Shortly after the Moro Province was organized, a careful study was begun of the laws and customs to see if a code could be framed in accordance with our ideas of what is humane, reasonable and consistent, and that would be acceptable to people with the inherited ideas and practices of the Moros. The first step taken, as an outcome of this investigation, was in 1904, when the territory was divided into tribal wards, each under the immediate supervision and control of a district governor. The latter appointed in each ward of his district a headman, who in turn appointed deputies, the latter to constitute the police force of the respective wards. The enforcement of the law was left to a certain extent to the discretion of the district officials. In one respect it ran counter to all Moro customs in that neither the headman nor his deputies were empowered to try the slightest offense, though these same men, under the native system, had always tried and punished the gravest crimes. It was thus hoped, if it could be enforced, to put an end to the inequalities and iniquities of the Moro system. But it struck at a principal source of revenue of the headmen, and could not be enforced without the use of military power, so that offenses continue to be tried by the headmen and their deputies without any warrant of law.

General Bliss, the governor of the Moro Province, in his report for 1907[3] recommends that this fact be recognized and that headmen be invested with limited powers to try cases, and even to dispose of fines in accordance with the tribal customs, giving the convicted party the right of appeal to the tribal ward court.

This latter court was provided for by a legislative act of the Moro Provincial Government, in October, 1905. A tribal court, presided over by a justice, was established in each tribal ward, with limited jurisdiction in cases where at least one of the parties was a non-Christian. An appeal lay to a court of first instance, and on such appeal, the action was to be tried *de novo*.

It will be seen that the law as thus applied deprived headmen of their immemorial power to try cases; that no effective civil process was provided for the arrest of criminals; that crimes committed in the Moro country could be known to the authorities only if the headmen chose to report them and the criminals could be arrested only if the headmen chose to act.

In the greater part of the Moro country there are no Americans to act as justices, and the native has no notion of the procedure by which our law is applied or the processes by which it is enforced. If a person accused of crime

[3] Eighth Annual Report of the Philippine Commission to the Secretary of War, pt. 1, p. 395.

resists arrest he is likely to be killed and his head brought in as an evidence of duty done. This general condition results from the fact that we have disapproved of the Moro laws and have tried to substitute for them laws which we think more humane and reasonable but which have no meaning to the Moros because they do not comprehend the theory upon which they rest.

It may be said, by way of summarizing what has been done, that the Moro Province was divided into districts, each under an American officer as governor, and the districts redivided into tribal wards. The local *datu* were chosen headmen of each ward, and their lesser chiefs made deputies. Thus, the political elements already existing were utilized. The actual power of the *datu* was probably increased, for his authority was upheld by the strong arm of the American government, but he was required to rule his ward according to law. The *pandita* were appointed tribal ward justices with power to decide petty disputes, subject to appeal to the American district governors. Thus, in outward semblance, at least, the native rulers were left in authority, and the customs of the people respected.

General Bliss has further recommended that a native court, or board of arbitration, be established in each district with power to decide according to the native customs all disputes between Moros involving property and family relations, if no crime of violence is involved, and giving to the losing party a right of appeal. In making this concession involving the great mass of cases, and in which the government as such has no interest, it would be expected that when the people realize that the American system has, in part at least, become their own, their unwillingness to assist the government in enforcing the laws relating to graver crimes would disappear.

Chicago, Illinois.

Laws that Work Injustice to Women and Children

By Judge McKenzie Cleland

THE order of the captain of the steamship *Republic*, when the transfer to the *Baltic* was about to be made, "the women and children first," was merely the practical expression of American chivalry towards those always under its protection.

Thirty days in the workhouse, in comparative comfort, for the brutal husband, while the already wronged wife and children are deprived of their only means of support, is merely the unpractical and mistaken expression of the same sentiment.

It is about time for our inland chivalry to give way to the salt-water variety, and if anybody is to be fed, clothed and housed out of the public treasury, let it be "the women and children first," for there can be no doubt that as between

loss of liberty and loss of the necessaries of life most people would choose the former.

Among the greatest wrongs done to wives, mothers and children are those perpetrated by legislatures and courts in the sacred name of Justice. One has but to watch the proceedings in the ordinary police court for a brief while to be led to exclaim: "O, Justice! what crimes are committed in thy name!"

Recent years have witnessed an extraordinary increase in legislation. Nearly fifty legislatures and innumerable city councils, township boards and other law-making bodies are piling up enactments to such an extent as to make more difficult day by day the art of living. By a stupendous fiction of the law not only is every individual above the age of ten years, or thereabouts, conclusively presumed to know every law of the United States and of the state in which he lives, and every ordinance of the city or village in which he resides, but to know also their legal meaning and effect as construed by the courts. A shipload of immigrants arriving in New York before breakfast are required to know not only the provisions of every ordinance passed by the common council the night before, but how the Court of Appeals will construe them after they have run the gauntlet of the lower courts. It is, perhaps, not surprising that under the circumstances there are many violators of the law.

The Chicago City Council has passed a law requiring ladies to remove their hats in theatres, under a penalty of three weeks in the House of Correction. Should it, with equal propriety and with the approval of the Mayor, enact that men must wear their headgear at breakfast, a million offenders who would sit down hatless at their tables the following morning could not plead in defense that the law had been passed while they were asleep.

Of these multitudinous laws many are trifling in the extreme, but their violation may bring ruin to the offender and untold suffering and privation to his family. In Chicago, among much other valuable legislation, are the following enactments, with the penalties which may follow inability to pay the fine and costs assessed:—

Trampling upon the grass in front of your own house—four months in jail.

Leaving nail projecting half inch or more above the railing on porch—four months in jail; and the same penalty for each day it is allowed to remain after notice.

Making any mechanical noise to advertise goods—four months in jail.

Making, aiding, countenancing or assisting in making "any improper noise"—six months at hard labor.

Making a chalk mark on a water hydrant or sewer pipe—four months.

Placing on window-sill any object whatever without being securely fastened—four months.

Mutilating any theatre poster—two months.

Throwing any fruit-skin on sidewalk (no prohibition of vegetable skins)—two months.

Refusing to pay fare to hackman—six months.

Refusal by hackman to give name to passenger—six months.

Carrying in one's pocket a knife of any description—six months.

Leading a dog through a park—six months.

Wheeling a baby carriage on the street after dark without one or more lights on it—two months.

Eight thousand three hundred and twenty-three persons who were fined

for the violation of some one of our Chicago laws last year and were unable to pay such fines were imprisoned in the workhouse for terms ranging from fourteen days to six months. Eleven hundred and seventy-three of these were too poor to raise the small sum of $1.00 and the court costs. Twenty-seven hundred and fifty went to jail in default of $5.00, or less, and costs.

Four thousand fifty-seven men and women found their resources unequal to the task of raising $10.00, or less, and costs, and were dumped into the "Black Maria," hauled across the city in company with burglars, pickpockets and "stick-up" men, stripped of their clothing and robed in prison garb, locked in cells with professional criminals, instructed in the ways of crime, turned out at the end of their term, in the heat of summer or cold of winter, without employment, broken in spirit, their reputation damaged, their homes often broken up, compelled to bear through life the stamp of a jail-bird and the memories of a prison cell,—certainly a severe punishment for their inability to raise a few dollars.

If the defendant is unfortunate enough to be fined $50.00 or more (which, with the consequent costs means not less than four months in jail), he is, under a police regulation, taken before imprisonment to the Bureau of Identification, where he is photographed and his picture placed in the "Rogues' Gallery." He is then measured by the Bertillon system, and these measurements, after being carefully indexed and filed, are open to the public. Should his friends succeed in raising the money and obtaining his release the next day, the record nevertheless remains for all time to come, a never-ending menace to his future welfare, a ready weapon for his enemies, and, in the event of his subsequent arrest, an effective aid to the prosecution.

It must not be supposed that such conditions are peculiar to Chicago. They prevail generally, and even where modern laws have been enacted to remedy the situation, our natural and inherent savagery has had a tendency to minimize their efficiency. In New York City, for example, where more than one hundred and four thousand cases were tried in one year, according to the last annual report, many of them at the rate of one per minute, and many thousands being certainly those of tender years, and trivial offenders, less than seventeen hundred were given the benefit of the probation law, which was passed for just such cases.

Incredible as it may appear to some, the prison industry of our country has become a huge political asset, which demands its share of prosperity. Any considerable lessening of prison population would necessarily reduce to the same extent the appropriation and expenditure of public funds, which means fewer "jobs" for the faithful, and less commission and "rake-off" on contracts and supplies.

To this same general cause is chargeable the disgraceful convict-lease system, under which prisoners are sold into slavery to the highest bidder and taken in chain-gangs to work in mines and turpentine camps and other places where ordinary laborers will not work. The usual price received by the state was formerly about $7.00 per year for each convict, but this has been advanced to about $140.00, and it is frequently and openly charged by the opponents of this system in one of the Southern states where it is in operation that judges are able to materially strengthen their political influence by imposing long sentences upon convicted persons, thus re-

ducing the rate of taxation by the income from this source. It has been even charged that records are falsified for the benefit of the contractors and the state. One woman convict was kept in the chain-gang for nearly twenty years, until she died from the suffering and hardships of her sentence. It was then discovered that her sentence should have ended in twenty months instead of twenty years, and the state has been called upon to make some reparation to her aged mother.

Recent investigations of this inhuman and barbarous system, where leased convicts are shamefully beaten and tortured by their brutal bosses, have shown that we have some things in our country which are popularly supposed to be confined to the northeastern portion of Europe.

Imprisonment as a corrective of the criminal and a preventive of crime has proven itself to be the most colossal failure ever invented for any purpose—and the burden of its failure falls most heavily upon the innocent wives and families of the offender.

Probation for the accidental transgressor and deprivation of liberty for the incorrigible, appear to furnish the only hope of equal justice for the guilty and the innocent. The criminal deprived of his liberty for the protection of society should be required to labor, and an equitable proportion of his earnings should by the state be turned over to his family for their support.

Chicago, Illinois.

The Beacon Lights of the Law*

A Biographical and Bibliographical Sketch

By Frank E. Chipman, of the Minnesota Bar

PROFESSOR MAITLAND tells us, in his introduction to Bracton's Note Book, that "twice in the history of England has an Englishman had the motive, the courage, the power to write a great, readable, reasonable book about the English law as a whole."[1] The two that he refers to are Bracton and Blackstone, and we have called them the beacon lights of the law.

BRACTON

The biographical details about Bracton are very meager. The place and year of his birth are unknown, though he was probably born in one of the small villages in Devonshire. The date of his death is in doubt, and the place of his burial in dispute. At the time of his death he was chancellor of Exeter Cathedral and is supposed to be buried there, although Collinson states that he was buried in the village church, at Minehead, with his effigy in long robes.[2]

*An address delivered before the American Association of Law Libraries, meeting at Bretton Woods, N. H., June 28 to July 4, 1909.

[1] Bracton's Note Book, I.

[2] Somersetshire, II, 32.

Foss tells us that he died about 1267, as in that year his judicial duties evidently terminated. He will always be known by the name of Bracton, but his true name was Bratton, or perhaps Bretton, as is shown by entries of his name on various rolls. The claim that he studied at Oxford, where he took his degree of Doctor of Laws, and where he lectured on the canon law, is apparently unfounded.

We do find that in 1245 he was an itinerant judge and from 1248 until his death he was a judge of assize for the southwestern counties, during a part of which time he heard pleas before the King, but there is nothing to show that he ever became chief justiciary of England.

"*DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ*"

His fame rests on his treatise, the "De Legibus," so-called, which has been characterized by one writer as "the crown and flower of English mediæval jurisprudence," and by another as the "great ornament of the reign of Henry III." This treatise was written at some time between 1240 and 1256, after which date he apparently did no serious work on it, though he may have added an occasional note or case. As a judge of assize he was undoubtedly very busy traveling from place to place in his jurisdiction as occasion required. He must have done a vast deal of preliminary work. The manuscript discovered in 1884, which has since been edited and published as Bracton's Note Book, must have been a part of that preliminary work. The actual work must have been done during the intervals when he was not holding court. The progress must have been slow and much time must have been spent in examining rolls and writs and consulting such treatises as were at his command. The exact date is immaterial.

Bracton never saw his work in print. He left it in manuscript, which was copied again and again, with the result that there are many differences in the text of the various copies. Just which one is the original cannot be stated conclusively, though the Digby MS. in the Bodleian Library seems to come nearer to Bracton's own autograph than any other.

The first edition was printed as a folio by Tottell in 1569, and is said to be full of gross errors.

The second edition was printed in 1640, in quarto. In printing this some pains, the preface states, were taken to correct and improve the text, by collating it with various manuscripts. This was apparently not carefully done, as at that time several manuscripts were accessible that were more correct than the printed second edition.

The *Law Magazine and Review* for August, 1872, contained, under the heading, "A Plea for a New Print of Bracton," an article dwelling strongly on the fact that there was no reliable text of the chief mediæval treatise on English law. Since then the Twiss edition has appeared in six bulky volumes, presumed to contain the original text with a translation, side by side. "Of the present 'standard edition' of Bracton, it is difficult for any one who has worked with it to speak with patience. It was undertaken as part of the Rolls Series, a national work; a presumably learned and certainly titled editor purported to have labored at it; and the result is merely a reprint of Tottell's edition with nearly all the old corruptions, a few misprints, and many new and ingenious mistranslations."[3] Another reviewer sarcastically remarks that "the result has been the production of something rarely equaled in the history of learn-

[3] *Law Qr. Rev.* I, 426.

ing."[4] It is hoped "that the failure of the Rolls edition will not deter English scholars from the arduous task of preparing another one more worthy of the great thirteenth-century lawyer," as "there is yet no edition of his work which can be considered as even moderately reliable."

Reeves tells us that the treatise is a finished and systematic performance, giving a complete view of the law, in all its titles, as it stood at the time it was written. This statement is incorrect. Bracton undoubtedly intended to write a complete treatise on the laws of England, but he leaves off in the middle of the discussion of the writ of right. It consists of 450 or more folios. After a brief introduction, it treats of the law of persons, the law of things, of actions, jurisdiction, pleas of the crown and of various writs. In it we see two great typical traits of English law, its dependence on writs and on decided cases. Wherever possible Bracton cites or comments on cases taken from the Rolls, there being then no reports, and in this respect was in advance of the writers of his time.

BRACTON AND THE ROMAN LAW

The treatise is written in a style both clean and expressive, though not always polished. This must be attributed to his acquaintance with the writings of the Roman lawyers, from whom "he adopted greater helps than the language in which they wrote."[5] Later writers have sought to discredit Bracton as an authority on English law. Maine, in his work on "Ancient Law," says that it is "one of the most hopeless enigmas in the history of jurisprudence that an English writer of the time of Henry III should have been able to put off on his countryman, as a compendium of pure English law, a treatise of which the entire form and a third of the contents were directly borrowed from the *Corpus Juris*."[6]

Reeves, on the other hand, claims that the passages excepted to, if put together, would perhaps not fill three whole pages, and seem to be alluded to for illustration and not as an authority.

The opinion of a student of the Roman law would seem to be worthy of respect. Scrutton has gone into this carefully and thoroughly, and he sums up the matter clearly. He divides Bracton's work into three parts:—

I. The part in which Azo, the Institutes, or the Digest, is copied with almost verbal accuracy, and covers some twenty-five folios. The matter taken is in several places modified to represent the law of England and frequent omissions of unsuitable parts show an intelligent copying.

II. The part where Roman principles are the framework, with large masses of English matter moulded on them. Embedded in the English matter are some unacknowledged citations from the Roman law, but they are not very frequent or of great importance. Sometimes their only effect is to give form to English matter.

III. The remainder of the work shows very slight, if any, traces of Roman influences. About two-thirds of the work is of this character, English in its matter with some slight traces of scholastic form.[7]

Roman law was as much the special creation of the lawyer as our common law is the creation of the judge, in other words the former was a system of reasoning, while the latter is one of precedent. Bracton was well acquainted with the Roman law, then well settled, and was dealing with a system till then

[4] *Law Qr. Rev.* I, 189.
[5] Reeves' History of Roman Law, II, 88.
[6] Ancient Law, p. 82.
[7] *Law Qr. Rev.* I, 429, 430.

lacking in form and precision, and well might he adopt the form of the old system, in order to give expression to the new system he was helping to create.

"Whoever claims that Bracton was never regarded as an authority on English law," Thayer says, "we know makes a shallow and ignorant remark, that the sober Reeves was much nearer right when, in composing his 'History of the English Law,' he praised Bracton so highly and adopted him as the basis of all legal learning."[8]

BLACKSTONE

Five hundred years after Bracton wrote the "De Legibus," Blackstone published his Commentaries, the second great work referred to in our opening paragraph.

Sir William Blackstone was born in London on July 10, 1723. His father having died before his birth, his education was provided for by an uncle. At the age of fifteen he went to Oxford. In November, 1741, being then eighteen, he became a member of the Middle Temple, and was called to the bar on November 28, 1746. At the bar he at first failed to attract notice or to acquire practice. In 1753 he went to Oxford, where he delivered a series of lectures on the law of England. In 1758, he was appointed the first Vinerian professor of English Law at the University of Oxford, filling the chair endowed by the author of Viner's Abridgment. The first case of any interest in which he appeared was that of *Robinson* v. *Bland*, in Trinity Term, 1760. He entered the House of Commons in 1768. On February 9, 1770, he became a Judge of the Common Pleas, but on the 16th of the same month rose to the King's Bench, but retired again to the Common Pleas on June 22, of the same year. He remained on the bench until his death, on February 14, 1780, at the age of fifty-seven.

[8]Thayer's Legal Essays, 356.

THE COMMENTARIES

The fame of Blackstone rests entirely on his Commentaries. His reputation as a pleader or judge was not such as to outlive him, though our biographer states that his judgment in the case of *Perrin* v. *Blake* (1 W. Bl. 672) "is one of the most valuable pieces of legal reasoning on record."[9]

The first edition of the Commentaries was published in quarto form from 1765 to 1769. They passed through eight editions during the author's life. The last edition was the 23d, by Stewart, published in 1854. There have been American editions by Tucker, Reed, Wendell, Sharswood, Cooley, Hammond and, last and best of them all, the admirable edition of Lewis, published in 1898.

While the Commentaries were not published until 1765, their form and scope must have been in the author's mind when he prepared his first lectures, for it was in 1754, before he was appointed Vinerian professor, that he published an Analysis of the Laws of England, as a guide to those who had attended his lectures. This work, which ran through six editions, has been styled the Genesis of Blackstone.

In 15 Leg. Bib. n. s., can be found a bibliography of the various editions, prepared by that eminent authority on legal literature, Mr. Charles C. Soule. It may be interesting to note that since this bibliography was published but five other editions have been discovered, of which two were pirated editions. As yet there has been no explanation of the confusion in the numbering of the editions from the early part of the nineteenth century.

[9]Welsby, Lives of Eminent English Judges, 347.

The opinions on the merit of the work differ widely. One writer tells us that "like a bee among the flowers, Blackstone has extracted the sweet essence of all former writers, and left their grosser matter. We find in the Commentaries the copious learning of Coke, the methodical arrangement of Hale, Gilbert and Foster, combined with the smooth and pleasing style of Addison and Pope. The publication of them formed an era in legal literature."[10] Another states that as long as he confined himself to the accurate statement of what had been buried in the cumbrous language of lawyers like Littleton, he was unsurpassed, but was not qualified to explain the reasons for the law, its merits and defects. The method was unscientific, and not original.

"Notwithstanding its defects, the positive merits of the work—its systematic character, its comprehensiveness, the accuracy of its exposition, and the dignity and charm of its style—have made it the best known, and in many respects the most influential, treatise in English law."

The publication of the Commentaries certainly did mark an era in law literature. Even now it cannot be said that their purpose has been served, because of the alterations necessary to adapt them to the present state of the law. The underlying principles of the law have not changed since Blackstone wrote. The change has been in the application of those principles to modern conditions. There is probably no better means of learning about this gradual development than in the study of the various editions of the Commentaries from the first to the last, and continuing through the Commentaries, founded on Blackstone, by Stephen, the first edition of which was published from 1841 to 1845, and the last, the 15th, in 1908. With this idea in view, the Harvard Law Library and the Yale Law Library have made practically complete collections, not only of the authorized and pirated editions, but also of the abridgments, and works founded on Blackstone. Most of the other law schools have collections more or less complete.

In 1882, Professor Ewell made an abridgment by eliminating nearly every thing but the bare principles, adding no original matter. It has been necessary to run off nineteen impressions of this little book, and it is selling today more readily than when it was first published. Thus it will be seen that the student of today is building his knowledge of the law on the foundation of Blackstone.

In giving the highest places to Bracton and Blackstone, we have not forgotten Glanville, Fleta, Littleton, Fearne or Hale. The greatest name to pass over was Coke. John Marshall Gest, under the title of the "Writings of Sir Edward Coke," in the *Yale Law Journal*, for May, 1909, tells of the merits of this great master of the English law. We agree with him when he says that Coke was "a judge of perfect purity, a patriotic and independent statesman and a man of upright life." He did more than any one before him to place the common law on its firm foundation, but he based his conclusions on Bracton's statement of the law, and followed his methods. We doubt if Coke had "more influence on the law than any other law writer—certainly in England—who ever lived"! His influence was not as permanent or far reaching as that of our leaders, but he must be considered as the greatest of the lesser legal lights.

Bracton was the father of the common law system, but he was not the

[10] Welsby, Lives of Eminent English Judges, 341.

creator of the common law. We have said that the Roman law was the special creation of the lawyer, as the common law is the creation of the judge. Can we not say that the Roman law system grew out of the code of rules prescribed by the sovereign for the government of his subjects, while the common law system developed from those regulations formulated by the people for their own observance and for the government of their sovereign?

The Anglo-Saxons had developed a system of their own before they were conquered by the Normans, but so great was their force of character that they soon absorbed the Normans, adopting such of their characteristics as were good and rejecting the rest. They could not accept complaisantly their system of jurisprudence, though they did adopt such features of it as were better than their own.

Bracton was the originator of that distinctive feature of the common law system, the dependence on decided cases as precedents. Out of his method grew the doctrine of *stare decisis*. Because of this maxim we are blessed, or cursed, with the vast accumulations in our libraries of the volumes of reported decisions. Nor are we satisfied with the printed opinions of our own judges, but must collect those of Great Britain, and those of other lands beyond the seas, wherever the common law system prevails.

At the opening of this twentieth century, because of our blind devotion to precedent, we hear the criticism that in the practice of law,—in our own country at least,—we aim not to establish substantial justice between the parties to an action, but to play the game according to the rules, to observe the forms regardless of inherent rights; that the court is no longer a dispenser of justice, but an umpire in the professional game played by the opposing counsel.

Such has been the far-reaching influence of Bracton on the common law system.

The influence of Blackstone extends in an entirely different direction. He made the study of the law popular. Before he gave his first lectures the law was studied only by those who were to take up its practice as a profession. From the beginning, we are told, his lectures "were attended by a very crowded class of young men of the first families, characters and hopes." Upon the publication of the Commentaries, written in his comprehensive style, his following became greater. If Blackstone had not written, Stephen would probably not have written his Commentaries, which are now so popular and, in England, have so largely superseded Blackstone; nor would Kent have written his Commentaries on American law, at least in the style which he adopted, and which have largely become, in our own country, the first books of the law. The making of the study of the law popular, and comparatively easy, has resulted in the gathering together of that vast army of legal practitioners, which can exert so great an influence in the affairs of life. Indirectly this can be traced to Blackstone's influence. His name will be as intimately connected with the common law, so long as that system shall endure, as is the name of Justinian with the civil law.

A Leading Question

By George D. Talbot

Author of "A Unique Answer to a Bill in Equity," etc.

Z. DUNFORTH & Y. DANFIELD, a firm of Attorneys and Counselors-at-Law (?) in the early days of Leadville, Colorado, were noted for the uniform success with which they met in trials before Justices of the Peace. Abraham Lincoln Bummell, Daniel Webster Mansfield or even the late lamented William Wallace Crook, of Denver, shining marks as they were in the realm of Shysterdom, could never in their palmiest days trot in the same class with Dunforth and Danfield.

Citizens of the mining district generally, and especially reputable lawyers, soon learned to know, and were forced to realize that when they had a case before a J. P., the only thing to do was to retain Messrs. D. & D., and the client who reached their office first was conceded to be the victor and the one slower of foot had left only one recourse,—an appeal to the County Court.

These worthies waxed rich in purse and portly of body on fat fees, high living and poor whisky, and ever increased in pomposity and baywindows.

Finally, however, they disagreed over the division of fees and dissolved partnership. The mining camp, yea the whole county, breathed freer, easier; litigants could have a fairer show; one could employ Dunforth and the other Danfield, and it was dog eat dog.

Finally Dunforth brought a forcible detainer suit for Dennis Moriarty *v.* Dunfield's client, Olie Olesen, and won the case before the Justice, because Danfield had won the last case in which they were contestants; the Justice having adopted the equitable rule of giving a victory alternately to each.

Danfield promptly took an appeal to the County Court, at that time presided over by a lawyer of the old school, Judge Bunnell, a Missourian, well versed in the law and inclined in his adjudications to brush technicalities aside and give judgment according to horse sense and what appeared to him to be justice between man and man.

Judge Bunnell was a friend of the late Senator O. E. Wolcott, who at that time was counsel for the railroad running from Leadville to Denver, and he kept the Judge well supplied with railroad passes and it was Bunnell's habit to go to Denver every Friday afternoon or evening, arranging his business so that he might spend Saturday and Sunday at the capital and return in time for court Monday morning.

It so happened that the case of *Moriarty* v. *Olesen* was called Friday morning.

Dunforth did not succeed in putting in his evidence in chief until noon, although he, as well as Danfield, had assured the Judge that the case would be concluded by that time. The Judge began to be nervous and restless, fearing that he would not be able to take the afternoon train for Denver, and asked to consent for the case to go over until Monday morning; neither of them, however, was willing to postpone it, but

agreed not to interpose any technical objections and to conclude long before train time.

At two o'clock Danfield called his client and interrogated him thus:—

Q. "Your name is Olie Olesen, I believe?"

Quick as a flash Dunforth was on his feet.

"I object! I object! May it please your Honor, *I object!*"

"State your objection, please, Mr. Dunforth," said the Court.

"Why, may it please your Honor, the question is leading! It is *suggestive!* Why, the counsel is putting the answer in the mouth of the witness! Counsel *knows*, or perhaps I had better say, *should* know that such examination is not proper—is grossly unprofessional! In the name of fair play and decency I object to the question and demand that the rules of law be enforced in the examination of this, an interested witness!"

The Court said mildly, a smile creeping over his features:—

"Your objection, Mr. Dunforth, as I understand it, is, that the question is leading. Am I correct?"

"Yes, your Honor!" bawled the counsel, "It is leading and suggestive and puts the answer in the mouth of the witness! A most *willing* witness, your Honor!"

The Judge smilingly replied, "It certainly does suggest to the witness his name. I will hear from the other side. Mr. Danfield, have you anything to say in response to the argument of counsel?"

Mr. Danfield sprang to his feet, ran his hands through his locks, and shouted at the top of his voice:—

"Much! may it please your Honor, *much!* I will show to your Honor that I know what I '*should*' know about this question, and moreover, I will demonstrate to your Honor's satisfaction, before I get through, that the *learned* (?) gentleman is ignorant of the elementary principles of law! I will show your Honor on principle and by authority that the question, though suggestive and perhaps leading, is merely preliminary and hence admissible! I shall read, first, may it please your Honor, from Greenleaf on Evidence. That learned author (whom the astute counsel may have heard of, though he evidently has never read him), says at page 233, vol. —"

Here the Court, seeing a chance for his Denver trip, broke in:—

"Gentlemen, this is a most important question. Counsel for the plaintiff contends that the question propounded to the witness is leading and suggestive and in effect tells the witness what answer to make. Counsel for the defendant admits that the question is suggestive and perhaps leading, but alleges that it is merely preliminary and therefore admissible, and is apparently prepared with authorities to support that contention. In order that you may both be heard you are each permitted to prepare and file written briefs covering the point and present them to me when court next meets.

"Mr. Bailiff, adjourn court until Monday morning at 10 o'clock."

. . . . . .

That night, in a Pullman, *en route* for Denver, the Judge got into a game of "Draw" with some experts (in the law, I mean) *viz.*, a U. S. Senator, an eminent Judge of the Court of Appeals, and the recognized leader of the Colorado bar, whom we shall call "Charlie," and was so elated concerning his triumph over the hitherto invincible D. & D., that he recklessly—a Jack Pot being

up—called a $100.00 bet under the impression that "Charlie" held a Bob-tailed Flush, and when instead he showed up a full hand, he regretted, temporarily, until he played even on the Senator later in the game, that he did not rule on the admissibility of the "Leading Question" on oral argument.

Denver, Colorado.

A New Use for the Constructive Trust

By Alvah C. Hough

THE recent decision of the Supreme Court of Missouri that a widower who has murdered his wife cannot take the one-half of her property given him by statute, re-opens a question that every one was inclined to regard as settled; and throws the question out again as an "apple of discord" for the courts to scramble over. The question had been decided the other way by a clear majority, when the latest holding in *Perry* v. *Strawbridge* (Mo. 1908, 108 S. W. 641) showed that even the courts are not friendly to a strict statutory construction that abets iniquity.

The history of the controversy is brief. In 1889, the court of last resort in New York decided that a youth of sixteen, who, knowing that he was residuary legatee under his grandfather's will, in order to prevent a revocation, which he apprehended, and to hasten his enjoyment, killed his ancestor, could take neither as legatee nor heir. (*Riggs* v. *Palmer*, 115 N. Y. 506.) The year before, North Carolina had held oppositely in a case involving a widow's dower right. (*Owens* v. *Owens*, 100 Nor. Car. 240, 1888.) This decision the New York court declined to follow. The pendulum swung the other way in 1894, when Nebraska, in turn, declined to follow the New York holding, and decided that the murderer took absolutely. (*Shellenberger* v. *Ransom*, 41 Neb. 631, 1894.) With these conflicting views confronting him, the unbiased lawyer might fairly be said to be "at a stand"; but in 1895, Pennsylvania in *Carpenter's Estate* (170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 1895), in which they reviewed all the authorities, added another chapter to the contorversy by holding with *Shellenberger* v. *Ransom* and against *Riggs* v. *Palmer*. Since then the pendulum has swung back and forth in *Deem* v. *Milliken* (6 Ohio Cir. Ct. R. 357, affirmed in 53 Ohio St. 668, 1895), Ohio; *Box* v. *Lanier* (112 Tenn. 93, 1903), Tennessee; *Kuhn* v. *Kuhn* (125 Iowa 449, 1904), Iowa; and, finally, in *Perry* v. *Strawbridge*, Missouri, 1908. It is not surprising to find, also, strong, dissenting opinions on both sides.

Only in a later New York case, is any middle ground suggested. (*Ellerson* v. *Westcott*, 148 N. Y. 149, 42 N.E. 540, 1896). It is there intimated that equitable relief might be had though it does not specifically mention the constructive trust.

While the typical case is that of an heir who murders his ancestor, thus involving the statute of descent, other cases are referred to that present varia-

tions of the same general question; such as, murder by a devisee or legatee and its effect upon the construction and enforcement of the will; or murder by the holder of an insurance policy, and its consequent effect upon the contract. The variant cases are valuable as affecting the general principle; and no attempt is made to characterize each case as it is cited.

Unless some device of equity is resorted to, the question is mainly one of statutory construction. *Riggs* v. *Palmer*, and the supporting case of *Perry* v. *Strawbridge*, have recourse to what opposing courts derisively call "rational interpretation." Since the legislature could not have meant what they say had they contemplated the given case, the court supplies their real meaning in the interest of "a sound public policy." *Shellenberger* v. *Ransom*, on the other hand, rejects such a method of construction, and insists that what the legislature meant in the statute of descent is to be determined, "not by hypothetical resort to conjecture as to their meaning, but by a construction of the language used." Mr. Justice Gray, who dissented in *Riggs* v. *Palmer*, thinks that "the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime." And, generally, those courts that allow the murderer to take say that when the legislature has spoken "it becomes the courts to be silent." To amend a bad law or to enact a good one is "beyond the province of the courts."

There is merit in both of these views. The doctrine of *Riggs* v. *Palmer* seems better to subserve the ends of "substantial justice." It is, in fact, almost a necessity in point of morals, and certainly does not do any great violence to the meaning of the statute. "We are not satisfied," says the Missouri court, "with the reasoning of those cases [referring to *Shellenberger* v. *Ransom* and others], and have been unable to reach the conclusion that a mere prospective legal heir, or devisee, can make certain that which was uncertain, by his own felonious act. . . ." This criticism is especially pertinent where a testator is slain, since the will is ambulatory until death. To prevent the result alluded to is not a "judicial usurpation," since the court only determines what the legislature could not possibly have determined beforehand; namely, whether the law applies to the given case. This the court may have to decide with respect to any statute. "Shall we stick in the bark?" exclaims the Missouri court, "and adhere to the strict letter of the law, or shall we say that whilst the case may fall within the letter of the law, yet it does not fall within the presumed legislative intent?" " . . . the pathway of judicial literature," it continues, " . . . is literally strewn with cases which, like beacon lights, have guided the hand of justice in preventing unjust, unrighteous, absurd, unreasonable, and abhorrent results from the use of general words and expressions in statutes. . . ."

The court was evidently aroused. Many judges hew to the line, and thus leave behind them consistent decisions, monuments of their legal acumen, and reputations as great jurists; but do we not need more judges who are sometimes willing to sacrifice the form if only they may preserve the substance; and who are content to win the encomium that was paid to Chief Justice Shaw,—that of being a great magistrate?

Shellenberger v. *Ransom*, on the other hand, insures certainty in the interpretation of statutes, and in the fixing of legal rights, or at least a certain and untroublesome rule for that purpose.

I am not so sure that the results of applying that rule *are* so certain. They are liable to be as disastrous to sound justice and equity as were the results to the occupant of the Procrustean bed, which was never accommodated to suit the length of the individual. Nor is the hard simplicity of the rule an unmixed benefit; for the attainment of justice, rather than the convenience of the court, ought to be the touchstone whereby to determine whether or not a given doctrine or rule should be adopted. Still, the strict rule, as we have said before, goes upon the theory that when the legislature has spoken, it becomes the court to be silent. It is less liable to incur the charge of "judicial legislation" because it ventures less and, so, risks less in the interests of justice;—and, I may add, it accomplishes less. It treats the word of the legislature as the final and sufficient criterion of what public policy requires.

None of the courts seem to have seen that there was a middle ground wherein they could have permitted the statute to operate, and thus let the murderer take the legal title but compel him to hold as a trustee for other heirs. This expedient would have escaped both the charge of judicial legislation and the iniquity of letting the wrong-doer keep the fruits of his crime. Of course, where the murderer had sold the property to an innocent purchaser for value without notice, the purchaser would necessarily take the property free from equities, and in preference to other heirs, just like any other purchaser in good faith from a trustee. The decided preponderance of cases that permit the murderer to take absolutely shows how reluctant are the courts to take any liberties with statutory provisions. The equitable solution, therefore, would seem to be a necessity.

Ellerson v. *Westcott* seems to be the only case in which equitable relief is even hinted at; and, yet, even in that case, the court does not openly propose the expedient of establishing a constructive trust. Mr. George P. Costigan, Jr., and Mr. Roscoe Pound were among the first, if not the first, lawyers and publicists to suggest the trust specifically as a way out of the difficulty. Mr. Costigan says that "it is called for by sound public policy."[1] Mr. Pound, participating in the same discussion, says: "The overlooking of the equitable solution of these cases . . . is a striking instance of what I have ventured to call the decadence of equity. . . ."[2]

Perry v. *Strawbridge* shows that the majority view is by no means satisfactory; and that there is a strong desire upon the part of the courts themselves to avoid an iniquitous and abhorrent result even at the risk of incurring the stigma of "judicial legislation." The Missouri holding is all the more significant when it is recalled that the murderer himself died hy his own hand three hours after he had killed his wife; so that he would have reaped no benefit himself but would have been only the conduit through which the property descended to his heirs, who were innocent. Nor is that all. The court refused to let him take notwithstanding their avowed conviction that the particular statute under which he would have taken "was for the very purpose of making provision for a husband in the event he was not entitled to curtesy," which was the precise situation of the murderer in that case.[3] Surely it is preferable to adopt a middle course, which will prevent the murderer from carrying away the fruits of assassina-

[1] Symposium in "*Green Bag*," July, 1906.
[2] *Idem*. See also 5 *Columbia Law Review* 20.
[3] *Cf.* Missouri Statute of Descent, Sec. 2938, Rev. St. 1899.

tion without going the full length of denying all effect to the statute.

The question is a momentous one and involves far more than the particular problem, since it concerns nothing less than the whole matter of statutory interpretation in general. And even beyond that, it affects the larger problem as to how nearly the courts are going to meet and realize the growing public demand for a legal system, and administration of it, that shall get substantial justice.

But equity lawyers may object, that to apply the constructive trust in this case is out of line with the true nature of a constructive trust and of equitable relief in general. First, there is the alleged difficulty of finding *cestui que trust*. But let us not expect one made so by any conventional arrangement. A constructive trust arises, necessarily, by intendment of law, and *cestui is* such by reason of his unvoluntary relation to the trustee and to the property. It is enough if he be in equity entitled to the property. The other heirs, devisees, or legatees, *are* so entitled.

Again, it may be urged that equity seeks to protect individual rights only, while here it is sought to be used, primarily, in the interest of the public. But equity had its origin in public policy, and is today often invoked in that behalf. For example, the recent use of receiverships of monopolistic corporations, while ostensibly to preserve their solvency, is really designed to effect their dissolution.

It is even said that to require the murderer "to surrender his ill-gotten title," directly the statute gives it him, is only a polite way of judicially nullifying the statute. But it is really only interpreting and applying it, It is idle to say, "Let the legislature mend the defect." The trouble is, that the "defect" will never recur, in that jurisdiction, as a live problem with respect to that statute; but will crop out as some other discrepancy in connection with some other law. The fact is, that no legislature can effectively anticipate anomalies. We must give the court almost *carte blanche* to deal with them. In short, our judges, in such cases, must be magistrates first, and jurists afterwards.

If we do not want the assassin to take we must choose between withholding from him even the legal title, and letting him take the title but holding him as trustee. To justify withholding the legal title, you must say that he is not an heir. Why? Because he slew his ancestor. But the law does not recognize any such qualifications in its law of descent. This, then, is "judicial legislation" with a vengeance. The constructive trust, on the contrary, respects the statute by allowing the title to pass, while it also recognizes the equities that arise simultaneously. The court is bound by the statute; but, it is no less bound by equities that it did not create and cannot control. There is, therefore, less of "judicial legislation" in the constructive trust theory than in the theory that the murderer is not an heir at all. If it be said that the equity arises before the passage of the legal title, and, so, ought to prevent the title's passing, the answer is, that an equity may be strong enough to accompany the legal title as a sort of "rider," and yet not vigorous enough to stop the passage of that title.

Two collateral advantages would flow from embracing the theory of the constructive trust in this instance. First, it would help to make our legal system more satisfactory to the layman by increasing its flexibility, and making it more adaptable to the requirements of the given case. For, once the courts

begin intelligently to determine whether or not a given case falls within the fair meaning and operation of the statute, they have begun to be familiar with an instrument that will be of incalculable utility in statutory construction and interpretation, and in forestalling those anomalous results that are, to some extent, unavoidable in any legal system, and are inherent in one that has become a fetich, and, so, an object of too inevitable execration to the uninitiated. Second, it would tend to encourage the more frequent use of equity by showing its possibilities. Those beneficent powers have never been fully exploited.[4]

[4] Since this article was written, the author has had his attention drawn to the case of *Wellner* v. *Eckstein*, in 117 N. W. Rep. (1908), a Michigan case, in which this question of a constructive trust was raised though the case was decided upon other grounds; and the preponderating opinion of the Court was in favor of holding the murderer as a trustee *ex maleficio*. This, though *dicta*, is the latest pronouncement upon the subject.

Lincoln, Nebraska.

An Affair of Arms

FRANCOIS de SCÉPEAUX, Sire de Vieilleville and Marshal of France, tells in his *Mémoires* of this curious "affaire" in which at its close he bore a part.

In 1540 M. le Maréchal de Mont-Jan died in Piédmont, leaving a very interesting widow, the Madame Philippes de Montespedon, who soon was surrounded by eager suitors, for she deserved these attentions, being a very honest and virtuous dame, adorned with great beauty, in the flower of youth, rich beyond measure, which gave a color to her perfections, for she had in her own right sixty thousand *livres* of income.

The Marquis Jehan-Loys de Saluces was the first who offered his services, and to whom she seemed to listen, especially, as having to return to France he offered to escort her and to defray all the expenses, surely expecting to recoup himself out of her *rentes* after the wedding.

It would not be difficult to construct the details of a journey which would be but a succession of joltings over wretched roads in lumbering coaches; of villainous lodgings at the inns; of strange and varied fare; of risks from highwaymen; and delays from bad weather. However these might have followed each other, the journey from Turin to the gates of Paris was at last ended. There Madame la Maréchale kissed M. de Saluces, and then said: "Adieu, Monsieur, your *logis* is at the Hostel des Ursins, and mine is at the Hostel de Saint-Denis near the Augustins."

The Marquis was stung to the quick at such treatment, and did not hesitate to publish everywhere what he called the faithlessness of the fair Maréchale, and to claim that there was a formal promise of marriage between them. Nor was this all, for he succeeded in interesting Madame la Dauphine, and even the King, who appeared to favor the marriage in pity of his sad case. Yet all this powerful influence availed him but little, for on his daily visits to her Hostel, he always found the Prince de la Roche-Yon, who was as the Sire quaintly puts it, "a sharp thorn in his foot." As he was unable to dislodge his favored rival, by all the ordinary means at his disposal, he persuaded the King to summon a session of the High Court of the Parliament of Paris: the Presidents and Councilors of the Great Chamber.

On the day appointed, M. de Saluces was present of course. Madame Philippes de Montespedon appeared, supported by the Sire Vieilleville, and attended by a number of noble Seigneurs, gentlemen and demoiselles.

The First President, directing her to raise her right hand, "*pour dire la verité*," asked her if she had not promised to marry the Marquis de Saluces there present. To this she replied: "Upon my faith, no!" The President was about to question her further and the Greffier was arranging his papers, ready to take notes, when the Dame proceeded thus:—

"*Messieurs*, never before have I found

myself in the presence of Justice, and I fear that I shall but stammer in my words. But to break through the subtle ties that you can weave around a single word, I say and declare before you Messieurs and your assistants, that I swear to God, and to the King—to God on the eternal damnation of my soul, and to the King on the forfeiture of my honor and my life—that I have never promised marriage to M. le Marquis Jehan-Loys de Saluces, and furthermore, never in my life even thought of it. And if any one wills to assert the contrary, here," and she took M. de Sire de Vieilleville by the hand, "is my Chevalier, whom I present, to maintain my word which he knows to be most true and to be proffered by a dame of honor, if ever there was one, and a noblewoman of rank, hoping in God and my right. He who says the contrary, saving the honor of the Court, villainously lies."

"*Quel revers!*" exclaimed the First President. "You may as well fold up your papers. Greffier, for aught I can see, this is no question of documents. Madame la Maréchale has taken another road and a much shorter one." And turning to M. de Saluces he said: "*Eh bien*, Monsieur! what say you to this turn?"

The Marquis replied: "I want no wife by force. If she will not have me, I will none of her." And, making his obeisance, he withdrew. The Sire adds: "His pulse fell suddenly; an indisposition not of body but of nerve seized him, for he knew too well the courage of her Chevalier to enter into a too long dispute."

Madame la Maréchale evidently had not been the wife of a Marshal of France in vain. For coolness in using others to her advantage, and for self-possession before such an assembly, in uttering a challenge based on a disused privilege she deserved the title she gave herself, as "*une fort femme de bien.*"

The Lawyer's Bride

OR

The Suit of William Styles

("BILL"-FOR-SHORT)

BEING THE PLEADINGS OF A YOUNG LEGAL PRACTITIONER TO THE FAIR PHYLLIS, AS SUNG BY H. F. VON HAAST AT THE DINNER TO THE JUDGES, GIVEN IN NEW ZEALAND MAY 4, 1909

WILL you come with me, my Phyllis dear, and be a lawyer's bride?
Drawn up is my conveyance, so to the church let's ride:
Oh, don't reserve your judgment, but say you'll marry me!
And do not let your answer be merely C. A. V.

Refrain—List to me Phyllis, grant my petition,
Come with me Phyllis dear and be a lawyer's bride.

The best man, Thomas Smiles, is a fellow that you know,
And I shall have as groomsmen, John Doe and Richard Roe;
Away you shall be given, if discover him we can,
By the *bonus paterfamilias* or the average prudent man.

The jovial six carpenters shall build our house, I trow,
And never fear a suit for trespass *ab initio*.
Our goods the common carrier shall bring from divers places,
And wedding presents many packed in Smith's Leading Cases.

If you lack an occupation, in my office you shall work,
You'll find it most engrossing, so the task you needn't shirk;
And when you're feeling thirsty, we'll both go to the bar,
And there we'll take refreshers, that so customary are.

Be tenant of my heart for life, O, Maiden fair and chaste,
And let my arm encircle your voluntary waste;
Don't let me be nonsuited, but listen, pray, to reason,
Oh, grant to me your hand in fee and let me have the seisin!

I ask for an attachment, distress is all I get,
Sweet, enter satisfaction of Cupid's judgment debt.
You'll drive me p'raps to murder, if you will not be my wife,
And then an execution will terminate my life.

Your Bill you won't dishonor, accept him, do, at sight,
"Protest for non-acceptance" must never be my plight;
But to your sweet indorsement, Oh, let me have recourse,
And let me take delivery as holder in due course.

Upon my skill in pleading you'll surely cast no slur,
Then to my declaration why do you thus demur,
In Cupid's Court, my darling, be quick and prove your will,
And none with infidelity shall ever tax your Bill.

Sustaining my appeal, you, blushing, answer, "Yes"
And now I'm plainly guilty of embracery, I guess;
But, as you know, *volenti injuria non fit*,
You waive my tort, my darling, when my kisses you permit.

Refrain—List to me Phyllis, grant my petition,
Come with me Phyllis dear and be a lawyer's bride.

M. V. H.

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Agency. "Undisclosed Principal—His Rights and Liabilities." By Dean James Barr Ames. 18 *Yale Law Journal* 443 (May).

"The doctrine that an undisclosed principal may sue and be sued upon contracts made by his agent, as ostensible principal, with third parties, is so firmly established in the law of England and of this country that it would be quixotic to attack it in the courts. Nevertheless, whenever an established doctrine ignores, as this doctrine of the undisclosed principal ignores, fundamental legal principles, it is highly important that it should be recognized as an anomaly, to be reckoned with of course, but not to be made the basis of analogical reasoning. . . . The failure to see how the desired justice could be brought about in any other way is the true explanation, it is believed, of the rule permitting the undisclosed principal to sue and be sued upon contracts made by his agent. . .

"There is a mode of legal procedure which, without any departure from legal principles, would give the third person whenever he needs and, in justice, is entitled to it, the power to compel the undisclosed principal to make good the contract of his agent. . . . This right of the agent to exoneration by the principal is a thing of value, is property, a part of his assets. . . . Such a right can be realized only by specific performance, and it is well settled that equity will compel specific performance of the obligation to exonerate. . . .

"If the reasoning of this article is sound, the anomalous, but established English and American rule is open to these three objections. First, it violates fundamental principles of contract. Secondly, it gives the third person no relief against the principal upon the agent's contracts under seal, his negotiable contracts, or his liability as a shareholder, although, in point of justice, relief is demanded as much upon contracts in these forms, as upon simple contracts. Thirdly, as a practical working rule in the case of simple contracts, it frequently operates unjustly, sometimes putting unmerited burdens upon the principal and sometimes denying the third person merited relief.

"The doctrine of equitable execution upon the agent's right of exoneration, on the other hand, has these three merits. It accords with legal principle, it applies uniformly to all forms of contract, and produces just results."

Aliens. "Aliens Under the Federal Laws of the United States; IV, Rights of Resident Aliens." By Samuel MacClintock. 4 *Illinois Law Review* 95 (June).

This, the fourth and last paper of a series (see 21 *Green Bag* 166, 228, 284), treats of the rights given resident aliens by existing treaties, of the means for the protection of such rights, especially in the form of legislation enacted to carry out the treaty provisions, and of exclusion and expulsion of aliens and the laws enacted for that purpose.

Armaments. See International Arbitration.

Banking and Currency. "The Proposal for a Central Bank in the United States: A Critical View." By O. M. W. Sprague. *Quarterly Journal of Economics*, v. 23, p. 363 (May).

"A central bank does not appear to be either required or well suited to relieve our financial ills. . . . Branch banking is an essential preliminary, if we are to have a central bank of anything like the European type, and there are powerful objections to such a change the discussion of which does not fall within the scope of this essay. . . .

"A more definite recognition of the responsibility incurred by the banks who hold bankers' deposits is needed. They should hold larger reserves in ordinary times, but this will avail little unless it is accompanied with a more intelligent understanding of the policy required in time of crisis. If this is too much to expect, the immediate remedy would seem to be a reduction in the proportion of reserves which may be deposited by outside banks in reserve and central reserve cities. . . . Some provision for an emergency circulation under conditions which would make resort to it reasonably feasible might possibly prove useful; but, above all, it should be repeated, a more intelligent conception of the purposes of a banking reserve is required."

Bankruptcy. "The Effect of a National Bankruptcy Law upon State Laws." By Prof. Samuel Williston. 22 *Harvard Law Review* 547 (June).

"A system can hardly be considered uniform when in some states a wage-earner or farmer is subject to involuntary bankruptcy while in other states he is not. Though the national law itself may still be uniform and the words of the Constitution thus be literally observed, their real intent is violated. . . .

"Whether it be held that a federal bankruptcy law totally suspends all state bankruptcy laws, or suspends them only so far as they apply to the same persons, for the same causes, another question still remains: What state laws are to be regarded as in-

cluded under the general designation of bankruptcy laws, and therefore are suspended altogether, if the view here contended for is sound; or are at least partially suspended, if the view upheld by the courts of California and Maryland is to be accepted? . . .

"There is no reason to suppose that in this country the mere fact that Congress has passed a bankruptcy law should suspend the ordinary equity powers of state courts to appoint receivers; and such seems to be the generally accepted view. But in much the same fashion that state legislation in some jurisdictions has annexed incidents of bankruptcy legislation to assignments for the benefit of creditors, so statutes have been passed regulating receiverships, and in some instances adding rules of law in regard to them appropriate for bankruptcy legislation. Such statutes must be suspended at least to the extent to which they infringe upon the field appropriate for bankruptcy legislation, and it has been held in Maine, Pennsylvania, and Rhode Island, that local statutes of this sort were suspended. It does not follow, however, that the ordinary equity jurisdiction to appoint a receiver is lost because a federal bankruptcy statute has been passed."

"The Law Concerning Foreign Receivers." By Albert S. Bolles. 18 *Yale Law Journal* 488 (May).

The author views his subject in broad perspective and throws much light on its various phases.

Basis of Law. "A Recent Development in Political Theory." By J. M. Matthews. *Political Science Quarterly*, v. 24, p. 284 (June).

The writer of this most interesting review tends to over-emphasize the divergencies of Duguit's theories from those of the analytical school, but admits: "Perhaps, after all, the conflict between the Duguitian theory and analytical jurisprudence is more apparent than real. . . Both are perhaps necessary in order to obtain a complete and well-rounded view of the main concepts of political science."

Bill of Rights. See Socialism.

Bill of Rights. "Liberty of Contract." By Prof. Roscoe Pound. 18 *Yale Law Journal* 454 (May).

That liberty of contract is a principle widely misinterpreted, and that it means not simply the juridical capacity of one citizen to make his contracts upon the same terms as every other citizen, but rather his social or economic capacity to enjoy an equality of his physical opportunities and facilities for contract, wholly apart from an equality of legal right, seems to be the radical contention of Professor Roscoe Pound in this thoughtful and striking article. He condemns the position of the courts as illustrated in the *Julow* case (129 Mo. 163), *People* v. *Marcus* (1906; 185 N. Y. 257), and the *Adair* case (1908; 208 U. S. 161), as perniciously expounding the doctrine that—

"The public have no interest in bringing about a real equality in labor-bargainings, even though thereby strikes and disorders may be obviated, and have no concern with contracts for labor except where the safety, health or morals of the public at large may be concerned!"

This is probably the most strikingly radical proposition advanced in this article. Another position, closely allied to the first, is that constitutionality is often a question purely of fact. The courts often make mistakes in pronouncing upon the question of constitutionality, for—

"The court has no machinery for getting at the facts. It must decide on the basis of matters of general knowledge and on accepted principles of uniform application. It cannot have the advantage of legislative reference bureaus, of hearings before committees, of the testimony of specialists who have conducted detailed investigations, as the legislature can and does. The court is driven to deal with the problem artifically or not at all, unless it is willing to assume that the legislature did its duty and to keep its hands off on that ground. More than anything else, ignorance of the actual situations of fact for which legislation was provided and supposed lack of legal warrant for knowing them, have been responsible for the judicial overthrowing of so much social legislation."

It will be observed that this writer has chiefly in mind, in the foregoing, "social legislation," legislation, in other words, designed to improve the physical, as opposed to the legal status, of certain classes in the community, and that he deems it the province of the courts to sustain the constitutionality of legislation promoting such physical equality —a duty which if it did rest upon them, would limit their inquiry to questions of fact almost wholly, and would often require a searching investigation under competent expert assistance.

Apart from these dubious positions, Professor Pound has some good things to say about that extinct theory of natural rights which still influences, to a great extent, many judicial opinions. Freedom of contract, as a natural right, is bound up with the "individualistic ethics and economics" with whose high tide "the growing period of American law coincided":—

"As a result of our legal history, we exaggerate the importance of property and of contract, as an incident thereof. A leader of the bar, opposing the income tax, argues that a fundamental object of our polity is 'preservation of the rights of private property.' Text writers tell us of the divine origin of property. The Supreme Court of Wisconsin tells us that the right to take property by will is an absolute and inherent right, not depending upon legislation. The absolute certainty which is one of our legal ideals, an ideal responsible for much that is irritatingly mechanical in our legal system, is demanded chiefly to protect property. And

our courts regard the right to contract, not as a phase of liberty—a sort of freedom of mental motion and locomotion—but as a phase of property, to be protected as such. A further result is to exaggerate private right at the expense of public interest. Blackstone's proposition that 'the public good is in nothing more essentially interested than in the protection of every individual's private rights,' has been quoted in more than one American decision; and one of these is a case often cited in support of extreme doctrines of liberty of contract. It is but a corollary that liberty of contract cannot be restricted merely in the interest of a contracting party. His right to contract freely is to yield only to the safety, health, or moral welfare of the public."

The learned author rightly maintains that our jurisprudence suffers overmuch from the vestiges of a false theory of natural rights. He seems, however, to overrate the practical mischief arising from this fact. The bill of rights of our American Constitution owes its accurate interpretation to the sound common sense rather than to the doctrinal foibles and failings of judges. An eminently sensible judgment may be framed in strange and eccentric terminology, and yet may be fundamentally sound and capable of being expressed in language unexceptionable from a scientific standpoint.

A social philosophy of law, this writer apparently would say, would commit one to the view that the rights of the individual, as regards freedom of contract and security of property, are limited not only by the health, safety, or morals of the public, but by the right of society to relieve the necessitous classes. This seems to be the position to which he is led, either by a false deduction or by something wrong in his fundamental theory that social rights are superior to individual rights rather than co-ordinate with them. If they are co-ordinate in ethics, why not in law? At all events, this is how he states his theory:—

"The sociological movement in jurisprudence, the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America. Perhaps the dissenting opinion of Mr. Justice Holmes in *Lochner* v. *New York* (198 U. S. 45, 75, but see also Holmes, "The Path of the Law," 10 *Harvard Law Review* 457, 467, 472), is the best exposition of it we have."

Conflict of Laws. "The Personal Law in Marriage." By Th. Baty, D.C.L., LL.D. 11 *Bombay Law Reporter* 69 (April).

In marriage cases the conceptions of status and contract are so closely interwoven that the personal law finds itself on insecure ground, but "it seemed fairly certain that the strong tendency of jurisprudence was to admit the personal law as decisive of capacity to enter into the marriage status." Westlake laid down this general rule.

Chetti v. *Chetti* (see 21 *Green Bag* 286, June) goes a long way toward repudiating the authority of the personal law in matters of marriage, but—

"In *Chetty's* case, it may be possible to make the decision consistent with a maintenance, in principle, of the authority of the personal law. For the personal law, if, as alleged, it prohibited him from marrying outside his caste, contemplated a particular sort of institution—Hindu marriage—which is quite a different institution from and incommensurable with European or Christian marriage. Polygamous marriages have often been held to be no marriages at all by the English courts, *i. e.*, they do not constitute the same relation, and the rules applicable to the one do not apply to the other. Consequently, the incapacity to contract a proper Hindu union with any one not a Hindu is irrelevant to the question of capacity to enter into a relation of so different a type as Christian marriage. And a personal incapacity to enter into Christian or European marriage at all would certainly not be recognized by the law of England."

Conservation of Natural Resources. "The Future of Man in America." By President Charles R. Van Hise. *World's Work*, v. 18, p. 11718 (June).

"It is in order that humanity itself may be given an opportunity to develop through millions of years to come, under the most advantageous conditions, that we should conserve our natural resources."

Distribution of Wealth. "The Variability in the Distribution of Wealth and Income." By Warren M. Persons. *Quarterly Journal of Economics*, v. 23, p. 416 (May).

"Before there can be any general agreement concerning the tendency in the distribution of wealth and income, two conditions must be fulfilled: first, adequate and reliable statistics; and, second, a scientific and generally understood method of measuring concentration. At the present time neither of these conditions is fulfilled."

European Politics. "The Achilles Heel of Germany." By Archibald R. Colquhoun. *North American Review*, v. 189, p. 801 (June).

"Will the Slavs respond to the 'call of the blood'? Whether or no, it is plain that the Polish question, the pivot on which Russo-German and Austro-German relations depend, is by no means settled, and still remains the Achilles heel of Prussia and of the Teutonic hegemony."

Evidence. "Compulsory Exhibition in Personal Injury Suits." By T. Hall Shastid, M.D. *Lawyer and Banker*, v. 2, p. 35 (June).

The federal rule, and that of some of the state courts, is that in personal injury suits, including those for medical malpractice, the plaintiff cannot be made to exhibit his injuries without his consent whether to the jury or to a committee of physicians appointed by the court.

"Medical Expert Testimony." By A. T. Clearwater, LL.D., *North American Review*, v. 189, p. 821 (June).

Judge Clearwater was chairman of a committee of the New York State Bar Association which prepared a bill authorizing the designation of medical experts by the courts of New York State. (See 21 *Green Bag* 66). This measure was rejected by the New York Senate after it had passed the Assembly, and will be presented again to the New York Legislature next year.

"The Legislature cannot prohibit a party to an action from calling such witnesses to the facts of the case as he chooses although it is within the discretion of the trial court to limit the number of expert witnesses; this discretion must always be judicially and not arbitrarily exercised, and unless it affirmatively appears that it was abused its exercise is not reviewable.

"It should always be borne in mind that the competency of a witness to testify to an opinion is a question of fact for the determination of the Court, but there must be a limit to the reception of expert testimony, for an army may be had if the Court will consent to their examination, and if legal controversies are to be determined by the preponderance of voices, wealth in all litigations in which expert evidence is important may prevail almost as a matter of course. . . .

"It is within the power of judges at *Nisi Prius* to require a greater degree of competency upon the part of persons claiming to be experts by the simple but effectual method of defining to a jury, with force and precision, the distinction between a witness proven to be thoroughly qualified to speak upon the subject regarding which his testimony is offered, and one whose claim to speak is predicated principally upon the fact that he is paid to do so.

"If trial judges will pursue this course and are sustained in so doing by the Appellate Bench, courts of justice will be rid of corrupt and worthless so-called experts, provided the judges themselves are animated solely by a wish to see justice properly administered."

Foreign Relations. "Les Etats-Unis et le Pan-Américanisme." By Achille Viallate. *Revue de Deux Mondes*, v. 51, p. 419 (May 15).

"Le pan-américanisme, . . ambitieux seulement de conquêtes économiques et morales, deviendra de plus en plus un des articles capitaux de la politique extérieure des Etats-Unis. Malgré les obstacles qui se dressent devant lui, il n'apparaît nullement comme irréalisable."

"America and the Far Eastern Question." By Ex-Judge L. R. Wilfley. *Outlook*, v. 92, p. 282 (May 29).

A review of the new book by Thomas F. Millard (Moffat, Yard & Co., N. Y.), bearing this title.

Government. Address of Judge Peter C. Pritchard before the Richmond Bar Association, "The Constitutional Power and Relation of the State and Federal Courts." 15 *Virginia Law Register*, 89 (June).

"The individual who insists that the courts have no power to declare an act of the national or state legislature invalid, proclaims a doctrine no less dangerous to the public welfare than the conduct of him who by corrupt means seeks to pollute the fountain of justice so as to prevent a fair and impartial consideration of questions which may be presented to the courts for consideration."

"The Method of Amending the Federal Constitution." By Justice William P. Potter. 57 *Univ. of Pa. Law Review*, 589 (June).

"The authorized method of amending the federal Constitution should permit the people to signify and enact with reasonable ease, as part of the fundamental law, any permanent change in the form of their political thought. And in doing this, I can conceive of no safer way than to follow the general system which has been well tested by and has given wide satisfaction to the same American people, in performing the same office in the various states of the Union.

"But whatever the method of amendment may be, I am sure we will all agree that loyalty to the Constitution, the supreme law of the land, demands that every lawyer, at least, shall stand fast in support of its plainly expressed provisions until they are altered in the legitimate and authorized way set forth in the instrument itself."

"The Growth of Judicial Power." By W. F. Dodd. *Political Science Quarterly*, v. 24, p. 193 (June).

The author of this article asserts the doubtful propositions that the courts declare unconstitutional whatever they happen to disapprove, and continually trespass on the field of legislative action.

International Arbitration. "Allegiance to Humanity." By Rt. Hon. James Bryce. *Outlook*, v. 92, p. 317 (June 5).

Prepared for delivery at the Lake Mohonk Conference held in May.

"Our country is not the only thing to which we owe our allegiance. It is owed also to justice and to humanity. Patriotism consists not in waving a flag but in striving that our country shall be righteous as well as strong. A state is not the less strong for being resolved to use its strength in a temperate and pacific spirit."

"Naval Defense by Panic." By an Admiral of Fifty-one Years' Service. *Blackwood's*, v. 185, p. 735 (May).

"The present naval 'panic,' as it has been called, is the natural and inevitable result of reducing our output of battleships during the last three years in order to save money for so-called social reforms."

That England with such Admirals as this one is as much to blame as Germany for obstructing the limitation of naval armaments seems to be in the mind of this writer:—

"Is English Supremacy Worth a War?" By John Foster Carr. *World's Work*, v. 18, p. 11684 (June).

The writer answers the question in the negative, and says that the thing desirable above everything else is that Great Britain and Germany should understand that neither can destroy the other, and that war could only benefit their rivals. "Disarmament for Germany is an impossible question as long as any power has within its pleasure to destroy the sea-trade of Germany."

Injunctions (Labor Disputes). "Judicial Decisions as an Issue in Politics." By William Howard Taft. *McClure's*, v. 33, p. 201 (June).

"I was characterized as the 'father of injunctions.' This attributed to me something that I did not deserve, for injunctions had already been issued in labor disputes by Vice-Chancellor Malins in England; by the Supreme Judicial Court of Massachusetts in the case of *Sherry* v. *Perkins;* by Judge Sage in the case of *Casey* v. *Typographical Union;* by Judge Beatty in the Cœur d'Alene strike troubles, and by other judges.

"It had fallen to my lot, because of the number of cases that I had subsequently to consider, to write rather more elaborate opinions on the subject and perhaps state the principles more at length than other judges, but I was not entitled to either the credit or discredit of having introduced a new equity jurisdiction in labor troubles. There was no new jurisdiction. It was merely an application of plain equity principles to novel situations. The character of the injury in cases of boycott when business is injured is such that it is impossible to estimate what the injury is. This is palpable. Moreover, the injury is a result of a series of acts combined together, each one of which would not justify a suit for damages, but all of which taken together with their recurrent effect bring about the injury which can only be remedied adequately by an injunction to prevent the carrying out of the combination. This has always justified the issuing of an injunction in equity, and its use is not an enlargement of equity jurisdiction but a mere application of the oldest and most well-known principles. . . .

"I was very reluctant to go on the stump and discuss my own decisions. I knew no precedent for it, and I felt that if the decisions themselves did not support the conclusions reached, there was little use in my attempting to supply additional explanation or defense. I found, however, that Mr. Bryan was constantly referring to me as the father of injunctions, and that the Democratic managers were making as much of this part of the issues of the campaign as possible, and I concluded, therefore, that the only thing for me to do was to seek an opportunity to tell what I had decided to audiences composed as largely of labor men as possible, and then leave it to their sense of justice whether the attacks upon me as an enemy of labor were justified."

Interstate Commerce. "Local Discrimination in Transportation." By W. Z. Ripley. *Quarterly Journal of Economics*, v. 23, p. 470 (May).

"Who else but the federal government could ever hope to disentangle the almost hopless snarl of competition involved in the controversy over differentials to and from the Atlantic seaboard? This controversy is at bottom one of local discrimination. And yet, how is the Interstate Commerce Commission to aid in the solution of these intricate problems under present conditions? Its hands are tied in two ways. It cannot prescribe minimum rates, and the long and short haul clause remains as much a dead letter since the Alabama Midland decision as it was before the recent revision by the Act of 1906. . .

"It is indubitable that commercial competition as a 'compelling' factor has been somewhat over-emphasized by the railroads. Too often conditions in part brought about by themselves, or in which at least they have acquiesced, have been set up as a defense for rates favoring certain points."

"The Obligations of Public Services to Make Connections." By Prof. Bruce Wyman. 22 *Harvard Law Review* 564 (June).

"The statutes are going further than to make the common law more intensive; they are making the legal obligation more extensive. The common law right of the initial company to make through traffic arrangements with some one connecting line and throw all the business which it will take at the through rate into the hands of that one line, notwithstanding the wishes of the shipper, has, of late, caused such fears that statutes are being passed giving the power to the regulating body to compel the making of a joint rate. This power was given to the English Railway and Canal Commission in 1888, and to the Interstate Commerce Commission in 1906. The federal legislation had been foreshadowed, as usually has happened, by some legislation in the various states, Minnesota and Texas for example. It will be noticed that the Commission by these statutes is to judge as to whether public convenience requires the additional through routes asked. The shipper, therefore, now as before

has no rights in the matter until the through rate has been duly established; then, of course, he may demand it, as a Texas case holds. The question has been raised as to whether such statutes are constitutional; but in view of the modern notion of obligatory connection for proper service for all concerned, there seems to be little doubt."

"The Story of the Wonderful Watermelon Patch, III." By Charles Edward Russell. *Hampton's*, v. 22, p. 818 (June).

Dealing with the financial methods employed by James J. Hill and those associated with him in the management of the Great Northern and Northern Pacific. The recent Spokane case before the Interstate Commerce Commission, and the arguments of Brooks Adams and other counsel in favor of Spokane and against the railroads, receive much attention.

See Railroads.

Labor and Wages. "The Sliding Scale of Wages in the Cotton Industry." By Jonathan Thayer Lincoln. *Quarterly Journal of Economics*, v. 23, p. 450 (May).

"Because Fall River [Mass.], is the largest centre of the cotton industry in America, that city has long held an unenviable reputation for strikes and every other form of industrial unrest.

"The plan for a sliding scale of wages, first tried and found wanting, but afterwards perfected, is still in force and meeting with the approval of both parties to the agreement. . . . The plan has brought vividly to the attention of both the manufacturers and the operatives a realization of their common interests, and has revived, in a measure, that sense of partnership between the man who buys labor and the man who sells it which once existed in the earlier stages of our industrial development."

See Injunctions.

Legal Education. "The Dignity of the Maxim." By W. T. Hughes. 4 *Illinois Law Review* 87 (June).

"Numberless decisions of courts show that both bench and bar are groping in the dark. Attempting to teach the law by erroneous definitions and in disregard of the maxims of old has made of jurisprudence in American states a jargon, and practically at least fifty tribes, each following its own wild orgies, in clamorous acclaim for its own ghost-dance to exalt above the greatness of antiquity the ever-questionable output of 'native sons', and of literature that has been characterized as the product of book-factories."

Legal Ethics. "Legal Ethics." By Chief Justice James F. Ailshie. *Lawyer & Banker*, v. 2, p. 7 (June).

"There is no reason why a lawyer should not acquire wealth, as well as another, if he does it honestly and legitimately; but as his temptations, in the way of opportunity, are greater than others, so are his obligations to keep strictly within the lines of probity and integrity. And that in so doing he is adopting the course best calculated to insure success, all experience verifies."

Legal History. "The Genesis of Roman Law in America." By William Bennett Munro. 22 *Harvard Law Review* 579 (June).

A scholarly article in which the modern application of the Roman law to be found in the civil jurisprudence of the Province of Quebec is keenly analyzed from a historical standpoint.

Legislative Procedure. "Defective Methods of Legislation." By Ernest Bruncken. *American Political Science Review*, v. 3, p. 167 (May).

"This almost entire absence of machinery to promote discussion and detailed consideration of bills is, in my opinion, the principal cause of the poor quality, as well as the excessive number of American statutes. The wonder is, not that the result of these methods is so bad, but that it is not worse. . . . The lack of thorough discussion, which characterizes the drafting of bills and their committee stage, also follows them on the floor of the house. A vast majority are not the subject of debate at all; not a few, however, are amended, and rarely are these amendments given any intelligent consideration by any member except the one proposing it. . . .

"Turning now to the possible remedies for these evils, I would suggest three feasible reforms, which I believe would go far towards improvement. The first is to give very much greater facilities for thorough discussion of all measures coming before the legislature. The next is some device for the establishment of legitimate leadership within the legislature itself; and the third is provision for expert workmanship in the preparation of bills."

On the subject of the third of these reforms, probably that which would be deemed by readers of the *Green Bag* the most important, this writer refers to the legislative reference bureau which has recognized and to some extent supplied the need of more careful draftsmanship in several states, and adds:—

"The work of the bureau, both in drafting bills and the gathering and collating of information, falls in admirably with the proposition of dividing the legislative session into one for the introduction and one for the disposal of bills. For during the recess the bureau will have time to re-draft crudely drawn bills, as well as collect data for discussing them."

"The Speaker of the House of Representatives." By Asher C. Hinds. *American Political Science Review*, v. 3, p. 155 (May).

"One familiar with the procedure of the House for the last fifteen years cannot be otherwise than surprised at the confidence of the assertions that the House has ceased to be a deliberative body or an efficient legislating

body. Those who know well its practice will rather believe that no other legislature of its size, as to membership and quorum, has a system equaling it in fairness, liberality and efficiency. On the great questions of revenue and appropriations, which are the first questions among all free peoples, its system is famous for the unrivaled manner in which it concentrates searching and intelligent deliberation on every item, without discrimination between members as to party or length of service. And its more formal debates are regulated with equal liberality and fairness. The statement that no member speaks without securing prior consent of the Speaker has hardly a shred of truth by which to hang. The Speaker recognizes for debate, it is true, and there is no appeal from his recognition because the House cannot afford time for such a process; but the Speaker recognizes, in the great majority of instances, not arbitrarily, but according to certain usages which have the force of rules. And these usages secure recognitions to those members who, by the arrangement of committees and business, are presumably best informed on the subject, for and against the pending proposition. Of course every egotist in the House may not intrude himself into the first place in every debate."

Literature. "The Writings of Sir Edward Coke." By John Marshall Gest. 18 *Yale Law Journal* 504 (May).

"He was the oracle and ornament of the common law; a lawyer of prodigious learning, untiring industry and singular acumen, with an accurate knowledge of human nature. He was a judge of perfect purity, a patriotic and independent statesman and a man of upright life; and, to bring us to the subject of this paper, his writings have had more influence upon the law than those of any other law writer—certainly in England—who ever lived. And yet there are some who, while admitting his learning, would deny every other claim just made for him. It is indeed hard to estimate correctly even after three centuries, those mighty men who then occupied the centre of the stage. Everyone who reads the fascinating Elizabethan story becomes insensibly a Baconian or a Cokian, a partisan of one or the other of those wonderful men."

Medical Jurisprudence. See Evidence.

Mines. "Placer Mining Law in Alaska." By Thomas R. Shepard. 18 *Yale Law Journal* 533 (May).

"To the lack of statutory regulation of the subject-matter is largely due, as we shall see, the excessive litigation over titles to mining claims, which has made the uncertainty of Alaskan investments a reproach and has operated as a serious drag upon the energy of its mining enterprise. Hence, this discussion of the subject must inevitably take on, to some extent, the aspect of a criticism of the non-action of Congress."

Poverty. "The Abolition of Poverty." By Prof. J. Laurence Laughlin. *Scribner's*, v. 45, p. 752 (June).

"If we are able to reach a steadily increasing number of the willing poor by means of our economic methods and are able to get them moving towards permanent self-maintenance, we shall have done all that is humanly possible."

"The Causes of Unemployment." By H. Stanley Jevons. *Contemporary Review*, v. 95, p. 548 (May).

"At present we spend about fifteen and a half millions sterling per annum on education, and sixty millions on the army and navy. We may perhaps rest satisfied when we have come to spend altogether on education as much as we now spend upon defense."

Practice. "The Law as a Profession for Women." By G. Flos. Greig. 6 *Commonwealth Law Review* (of Australia) 145 (Mar.–Apr.).

The writer is the first woman barrister and solicitor to practise in the courts of Australia. "Are women capable of performing legal work?" she asks. "Well, why not? Personally I have never heard one rational reason against it, though I have listened to heaps of twaddle."

Probation. "A Court That Prevents Criminals." By Judge McKenzie Cleland. *World's Work*, v. 18, p. 11689 (June).

"I believe the only way to deal with accidental offenders, whether juvenile or adult, is to place them on probation during good behavior, upon their promise to obey the law and provide for their families—suspending over them meantime the maximum penalty of the law, and requiring them to serve it out on their failure to make good. During a period of thirteen months, I released on these conditions nearly 1,300 men and women, of whom more than 1,100, or ninety-two per cent became law-abiding and industrious citizens. While on probation, they were required to report to me at night sessions of the court held once a fortnight, and about 400 business men assisted as volunteer parole officers in helping them to reform. This plan received strong support from the police department, which declared that it had reduced crime in the district fifty per cent."

Procedure. "Oral Instructions to Juries." Editorial by R. P. [Roscoe Pound] in 4 *Illinois Law Review* 140 (June). Referring to a communication written by Andrew R. Sheriff of Chicago, in the same issue (p. 144), in favor of written instructions to juries, an opinion is editorially expressed tending to sustain Mr. Gilbert's bill before the Illinois Legislature providing for an oral charge.

"The grounds on which written instructions are advocated today are (1) that written

instructions are more accurate expositions of the law, and (2) that the average judge cannot give an oral charge.

"With reference to the first proposition it may be observed that written instructions lose in effectiveness what they gain in technical accuracy. They are no real guide. Jurors are mostly men who get impressions through the ear and not through the eye. They are not in the habit of critical study of books and papers. . . .

"With respect to the second point, we may note, in the first place, that trial judges do in fact charge orally in many jurisdictions to the satisfaction of all."

"Statutory Appeal in Illinois." By Dean Oliver A. Harker. 4 *Illinois Law Review* 81 (June).

"The conclusions reached by the Appellate Court on questions of fact in certain classes of cases are never disturbed by the Supreme Court; in other cases but rarely disturbed. In the great majority of them an affirmance in the Appellate Court is followed by an affirmance in the Supreme Court, even where the mooted questions are ones of law. Would it not be wise to so change the law as to make appeals to the Appellate Court final except in those cases which may be certified to the Supreme Court because they involve important questions of law?"

"Receiverships and Injunctions." By Prof. John P. Hoyt. *Lawyer and Banker*, v. 2, p. 24 (June).

Referring to the elementary rule that "the rights of no one shall be interfered with without his having had his day in court," this writer declares that—

"Courts should not attempt to save time by a superficial examination of *ex parte* applications. If the business to be transacted requires extreme diligence let time be economized in the trial of cases when both parties are present and can be heard. If Courts of Equity will act as above suggested in the granting of restraining orders and injunctions, and will refuse to appoint receivers without notice, except when it is made clearly to appear that irreparable injury will be suffered if the appointment is delayed until notice can be given, and that such injury cannot be prevented by a restraining order, little reason for criticism will remain."

See Evidence.

Race Distinctions. "The Separation of the Races in Public Conveyances." By Gilbert Thomas Stephenson. *Political Science Review*, v. 3, p. 180 (May).

A comprehensive monograph, dealing with the origin of "Jim Crow" laws, and treating of the federal civil rights bill of 1875 and state legislation growing out of it, describing race legislation of the states in three divisions, the separation of the races (1) in steamboats, (2) in railway cars, and (3) in street cars. The last of these is at present the field of most active legislation.

The following is an interesting and perhaps to some extent valuable document on the negro problem:—

"The Unknowable Negro." By Judge Harris Dickson. *Hampton's*, v. 22, p. 729 (June).

"Our first problem here in America is to develop the negro into a self-sustaining, wealth-producing, law-abiding member of society. . . A levee camp beside the Mississippi river will completely disorganize the labor of neighboring plantations. The contractor cannot get labor, unless he provides whisky and cocaine in plenty."

Railroads. "The Minnesota Railway Valuation." By G. O. Virtue. *Quarterly Journal of Economics*, v. 23, p. 542 (May).

"Already the valuation made by the Commission [of the state] has become of the greatest importance in the cases now pending in the federal Court. The Legislature of 1907 enacted a two-cent fare law and a commodity rate law, both of which, it was 'understood' at the time, the railways would accept without a contest. These laws have, however, been attacked, as well as the merchandise rates put into force by the Commission in the fall of 1906."

Socialism. "Private Property and Personal Liberty in the Socialist State." By John Spargo. *North American Review*, v. 189, p. 844 (June).

"Could anything be more grotesque than the application of the word Individualism to the Rooseveltian policies? . . . If Socialism represents one side of the issue fought out in our national politics last year, the other side is not Individualism, but Capitalism with its privileges, its invasions of personal liberty, its artificial inequalities and its economic servitude of class to class."

"Socialism and the Class War." By John Martin. *Quarterly Journal of Economics*, v. 23, p. 512 (May).

"American society is divided not into two classes, but into scores of classes,—divided by economic interest, sentiment, temperament, training. . . . America is not a country; it is a continent. No more can uniform lines of political action be laid down than they could for England, France, Spain, Italy, and Russia. . . . It is a misguiding assumption that we are divided, here in America, into goats and sheep, with the sheep on the right hand of Karl Marx, and the goats on the left."

"The Socialism of G. Lowes Dickinson." By Paul Elmer More. *Atlantic Monthly*, v. 103, p. 845 (June).

"With the true socialist Mr. Dickinson has only one thing in common,—the feeling of supreme discontent."

Statute of Frauds. "A New and Old Reading on the Fourth Section of the Statute of Frauds." By Crawford D. Hening. 57 *Univ. of Pa. Law Review*, 611 (June).

"No action shall be brought upon any special promise to answer for the debt, default, or miscarriage of another person," really signifies, in the light of history, this writer contends, that no action shall be brought upon a parol assumpsit or special promise dependent upon consideration, but the statute left untouched parol debts, and also parol accountabilities dependent upon bailment. This distinction, he further contends, should be observed today for the effective suppression of perjury.

Status. See Aliens, Conflict of Laws, Race Distinctions.

Wills and Administration. "Powers of Executor before Probate of Will and Issuance of Letters." 17 *Bench & Bar* 59 (May).

Showing to what extent the common law rule has been modified by statute in various states, particularly in New York.

Miscellaneous Articles of Interest to the Legal Profession

British Empire. "The Canadian Emigration Problem." By J. Hall Richardson. *Fortnightly*, v. 85, p. 948 (May).

"Should this importation of American stock (and dollars) continue, simultaneously with the immigration of the Scandinavians, Gallicians, and others from foreign lands, it is not difficult to predict the period when Canada will be no longer predominantly British in blood origin. If that time should come, what kinship bonds of sympathy will exist to maintain the Dominion as part of the Empire?"

Biography. "John Hay: The Making of a Great Diplomat." By Charles W. Moores. *Putnam's*, v. 6, p. 297 (June).

"His diplomatic career is extraordinary, and the triumphs he won by his clear vision, his tact, and his patience, and his understanding of the temper of the nations, have never been equaled."

"Mr. Wickersham and His New Job." *Current Literature*, v. 46, p. 615 (June).

A vivid character sketch.

Cleveland. "Cleveland and the Insurance Crisis." By George F. Parker. *McClure's*, v. 33, p. 184 (June).

Dickinson. "The New Secretary of War." By Elbert F. Baldwin. *Outlook*, v. 92, p.167 (May 22).

Ewell. "Dr. Marshall D. Ewell." By David L. Toole. *Lawyer and Banker*, v. 2, p. 46 (June).

Eugenics. "Eugenics." By W. I. Thomas. *American Magazine*, v. 68, p. 190 (June).

"In a profound sense all races are selected stock, very rigorously selected in the struggle for existence. . . . The mind may remain ignorant and the body underfed for centuries, and yet come to their own finally with proper education and feeding. And it is fortunate that, like Job, they can wait until their change cometh—until institutions become as truly democratic as the mind itself."

Machine Politics. "Tammany's Control of New York by Professional Criminals." By George Kibbe Turner. *McClure's*, v. 33, p. 117 (June).

"The professional criminals and politicians, whose whole careers are concerned in the control of the city, will make the most desperate fight of their lives to carry New York this fall."

Stock Speculation. "The Tricks of the Wall Street Game." By Frederick Upham Adams. *Everybody's*, v. 20, p. 804 (June).

"A real stock boom, with the public crazy to purchase any form of security at dictated prices, is worth from $100,000,000 to $500,000,000 to the Wall Street powers that prey. Why not bait a hook occasionally with a mere million? The suckers will begin to bite again sooner or later."

"The New York Stock Exchange." By W. Martin Swift. *Outlook*, v. 92, p. 128 (May 15).

Dealing with the harmful results of its policy of privacy.

STEALING, says a writer in Lippincott's, is an old-fashioned way of getting what belongs to another. Society visits its severest penalties on those who are old-fashioned. Don't steal. There are better ways. See a lawyer.

Reviews of Books

THREE WORKS ON INTERNATIONAL LAW

International Law. By John Westlake, K.C., LL.D., Whewell Professor of International Law in the University of Cambridge. Part 1, Peace, 1904; Part 2, War, 1907. Cambridge University Press. Pp. 352, 331; indices. (9*s*. per v.)

The Law of War Between Belligerents; a History and Commentary. By Percy Bordwell, Ph.D., LL.B., Professor of Constitutional Law in the University of Missouri. Callaghan & Co., Chicago. Pp. xxiv, 351 + index 20. ($3.50 *net*.)

The Elements of International Law, with an Account of its Origin, Sources, and Historical Development. By George B. Davis, Judge-Advocate-General, United States Army, and Delegate Plenipotentiary to the Geneva Conference of 1906 and to the Second Peace Conference at The Hague, 1907. 3d revised and enlarged edition, 1908. Harper & Brothers, New York. Pp. xxx, 501 + appendices 139 + index 31. ($3.)

PROFESSOR WESTLAKE'S short work on international law is intended primarily to give students and the general public a knowledge of the most important topics. The first volume, dealing with "Peace," was published in 1904, and the second, dealing with "War," in 1907. This scholar's reputation rests not simply upon his learning but upon a faculty of independent analysis which elicits warm admiration, and a literary style distinguished for logical cogency and lucidity.

The general principles of international law, including the nature of such law, its sanction, greater and lesser territorial rights, leading rules of private international law, the nature of war and its laws, and the duties of neutrals, are subjects upon which Professor Westlake throws much light. The results of the Second Peace Conference, though not incorporated in the treatment of special subjects, are stated in a supplementary chapter, so that the work is to be commended as fairly up-to-date apart from other conspicuous merits.

Professor Westlake believes in broadening the field of international arbitration so that gradually differences arising from questions of national policy or honor may gradually come more and more to be included in it, but in spite of this attitude he is somewhat too conservative. The reluctance of nations to submit every possible difference to arbitration under all circumstances is due not so much to national pride and independence as to the uncertainty of international law and the absence of an independent tribunal of acknowledged authority. Nations are not opposed to arbitration because they do not respect the law, but because of uncertainty and disagreement as to what the law is. Gradually the content of substantive international law should be extended by such agreements among the powers as the Declaration of Paris adopted in 1856, and the Declaration of London adopted this year, which bids fair to become an equally important landmark. As the conventions of this international law spread themselves over a steadily increasing subject-matter, enforced by the sanction of practical unanimity of opinion, they will provide an international tribunal with definite rules of growing comprehensiveness and utility to apply to the solution of all international disputes. There will ultimately be no occasion for excepting even the slightest portion of "questions of politics and honor, questions affecting independence in the large and true meaning of the term," to use Professor Westlake's words, from compulsory arbitration. The Anglo-Saxon countries are not the only ones imbued with a profound natural respect for the law. Wu Ting-fang, the Chinese minister, speaking at the Chicago Peace Congress last May, said : "If general disarmament should be proposed, you will not find China indisposed to accept it. We believe that right makes right, and not might makes right, and I am sanguine enough to believe that the whole world is coming around to adopt that view." Respect for international justice is shared by the whole civilized world, and the problem of the future is rather to define the law than to cultivate respect for it.

The reservation in the Anglo-French treaty, whose form has been copied in our own treaties and most others, has proved of incalculable mischief, as Mr. Edwin D. Mead of Boston has pointed out. This treaty excepted from its provisions for arbitration what it chose to call questions of "honor" and "vital interest." It may be that Austria-Hungary has "a vital interest" in Bosnia and Herzogovina, that Japan has "a vital interest" in Korea, and that the United States

has "a vital interest," under its applications of the Monroe doctrine, in South American states. If so, it is the problem of international law to define a legitimate "vital interest" as distinguished from one wholly improper, instead of leaving to each nation full liberty to sit in judgment on the propriety of its own acts and acquit itself of guilt whenever, in the protection of "vital interest," it may overstep the bounds of international justice.

We have seen that Professor Westlake is not an uncompromising advocate of international arbitration, being properly classed with those who desire conditional arbitration, notwithstanding the fact that he would gradually broaden the sphere of conditional arbitration. Professor Bordwell of the University of Missouri is likewise a writer of militarist tendencies—tendencies somewhat more pronounced, as appears from his approval of Sherman's march of devastation and of the confiscation of cargoes.

Professor Bordwell's work is addressed to much the same sort of audience as Professor Westlake's; attempting a treatment of general topics rather than a comprehensive scientific treatise. Professor Bordwell confines his attention to the laws of war between the belligerents and treats war on land with greater fullness than war on the sea, as the Prize Law Conference was impending when his book was written. He thus chooses a much more restricted field than that of Professor Westlake's second volume, but hopes in future to supplement his work by second and third volumes dealing with neutrality and arbitration. If this aim is fulfilled, the result will be an introductory treatise marked by lucidity both of thought and of statement. The author acknowledges his indebtedness to Professor Westlake, particularly with respect to the latter's clear analysis of modern law and his comments on the Second Peace Conference. He sets forth and criticizes the results of this Conference and of the Geneva Convention.

By dividing his subject into two parts, the first a history of the practice and law of war, the second a commentary on war practice annotated with reference to the Hague conventions, the author has chosen a dramatic form in which to cast his subject-matter, and the non-technical character of a large portion of the text will help to make it read with enjoyment by many readers possessing no technical knowledge.

The standard text by Judge-Advocate General Davis covering the entire subject, and including the results of the Second Peace Conference, is exceedingly useful. Its third edition, thoroughly revised to date, includes the results of the Second Peace Conference, and the book contains in an appendix the more important recent documents. General Davis, like Professor Bordwell, approaches his subject from the practical rather than the scientific point of view, but his method is one of accurate analysis and skillful presentation, and his treatise in its latest form covers with vast thoroughness the leading principles, while compendious citations and bibliopraphical notes add to its utility as a work of reference.

The diversity of treatment to be found in these works is well illustrated in their way of dealing with such a topic as Blockade. One desiring to understand the topic thoroughly would do best to turn to the chapter in Professor Westlake's second volume, to which the indebtedness of Professor Bordwell and General Davis is apparent, but the reliable summary of the law of blockade given by General Davis is perhaps more serviceable for purposes of reference. But these chapters will have to be rewritten on account of the great progress made in the needed codification of international law by means of the Declaration of London, in which ten of the leading powers joined last February. This document goes a long way toward surrounding the world's commerce with additional safeguards and immunities, and toward restricting the baleful consequences of war to the actual combatants in accordance with justice. While it has been denounced by jingoes (see for example article in *Nineteenth Century*, May, 1909, p. 744) as interfering too much with the rights of belligerents, it will doubtless be greeted by the better judgment of mankind as a step toward higher civilization. The law of blockade has now been simplified by the agreement reached with regard to the doctrine of notice. According to the Continental view, an actual notice to each incoming ship was essential to the condemnation of the particular ship committing breach of the blockade. The French rule, which has also been accepted by Italy, has been, as Pillet states it: "*La pratique maritime commune exige, pour la validité de la saisie, qu'elle ait été précédée d'une notification speciale au navire qui en est l'objet.*" It was this rule

that the delegates from France consented to give up in favor of the Anglo-American doctrine of notice, according to which such notice is inferred from the general notoriety of the blockade, if it has been notified by the government diplomatically. The London Conference came to the agreement that notice through diplomatic channels is sufficient, implying that notice to the commander of the ship is unnecessary. If the reactionary attitude of the minority, rather than the progressive temper that prevailed, had controlled the action of the Conference, a growing uniformity of the law of blockade in harmony with British traditions would have had to be sacrificed, together with that respect for the rights of neutral commerce which the Conference, acting in many instances contrary to British precedent, sought successfully to encourage.

The action of the London Conference, with reference to contraband, was not in line with Professor Westlake's views, who would abolish contraband altogether wherever possible by means of conventions to that effect between powers engaged in war. The entire exemption of the goods of a neutral from seizure, whether they be designed to aid the enemy in warfare or not, would seem to be in harmony with the customs of an advanced civilization. There is no logic in allowing the capture of contraband and forbidding the capture of the persons engaged in carrying it; neutral goods have morally the same rights as neutral citizens. The Conference might well have abolished conditional contraband, in line with the American proposal offered by Admiral Sperry at the Second Peace Conference, if unwilling to abolish absolute contraband, but did not do this. The idea of a free list of articles immune from capture under all circumstances is somewhat pernicious, as the legitimate purpose of a contraband agreement is to restrict the contraband articles rather than to define the free articles. It will be admitted, however, that just as the next best thing to the abolition of absolute contraband would have been that of conditional contraband, so the next best thing to complete abolition of the doctrine of continuous voyage, with reference to contraband, is the exception of conditional contraband from its application, which the Conference wisely decided upon, limiting its application to absolute contraband.

Enough has been said, perhaps, about the action of the London Conference to suggest that the point of view of international jurisprudence may gradually be shifting from the militarist to the juridical position, and that future writers on international law may be called upon to lay greater stress on uniformity and system and to devote less space in their pages to anomalous rules and irrational and irregular doctrines which furnish a convenient pretext but no proper justification for acts of war. Professor Bordwell wisely rejects the German doctrine of necessity as an overruling factor in war, but that is by no means the only doctrine that must be given up, and we can perhaps look to these writers for progressive modification of some of their views is subsequent editions.

BOOKS RECEIVED

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

Human Nature in Politics. By Graham Wallas. Houghton Mifflin Co., Boston and New York. Pp. xvi, 296 + index 6. ($1.50 *net*.)

The Government of American Cities. By Horace E. Deming. G. P. Putnam's Sons, New York and London. Pp. 304 + index 19. ($1.50 *net*.)

Popular Government. Four essays. By Sir Henry Sumner Maine, F.R.S. Popular ed. John Murray, London. Pp. 254 + index 17. (2/6 *net*.)

The Methods of Taxation compared with the Established Principles of Justice. By David MacGregor Means. Dodd, Mead & Co., New York Pp. 360 + appendices 20. ($2.50.)

Report of the Thirty-First Annual Meeting of the American Bar Association. V. xxxiii, 1908. American Bar Association, 215 N. Charles St., Baltimore, Md. Pp. 1107 + index 13.

Tiffany's Persons and Domestic Relations. 2d ed., revised by Roger W. Cooley. Hornbook series. West Publishing Co., St. Paul, Minn. Pp. 551 + table of cases and index 105. ($3.75.)

The Power of Eminent Domain. A treatise on the constitutional principles which affect the taking of property for public use. By Philip Nichols. Boston Book Co., Boston. Pp. 422 + table of cases and index 57. ($5 *net*.)

The Law and Practice in Bankruptcy, under the National Bankruptcy Act of 1898. By William Miller Collier. 7th ed., revised and enlarged by Frank B. Gilbert of the Albany bar. Matthew Bender & Co., Albany. Pp. lxvii, 854 + 455 (General Orders, Forms, Statutes, etc., and index). ($7.50.)

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*.)

*Latest Important Cases**

Bankruptcy. *Common Law Assignment a Preference—Debts so Discharged are Unpaid Claims.* U. S.

An important decision was handed down at Boston May 29 by Judge Dodge of the United States District Court, who sustained Referee Olmstead of the Bankruptcy Court in his contention that debts paid off and discharged under a common law assignment must be added to the claims as unpaid when the assignor is petitioned into bankruptcy. The Court, in adjudicating Abram Jacobson a bankrupt, took the view that under such circumstances the whole common law assignment is a preference. Such an assignment was held to be a constructive fraud upon the Bankruptcy Act. It attempts to hinder and evade the workings of the federal courts and has a tendency to deprive them of their jurisdiction over bankrupt estates. The Court ruled that all debts preferentially paid may be proved in bankruptcy after adjudication of the debtor. The petitioning creditors are entitled to a distribution of the property without regard to the assignment or to any distribution under it by the voluntary assignee.

Commutation of Sentence. *Death Penalty and Life Imprisonment—Degrees of Punishment.* N. Y.

The Appellate Division of the Supreme Court of New York, second department, denied Albert T. Patrick's application for a writ of *habeas corpus* June 4, at Brooklyn, N. Y., the Court expressing its inability to find any force "in the contention that there cannot be a commutation of the punishment of death to that of life imprisonment, because commutation implies a less punishment, but life imprisonment is a greater punishment than death. The degree of punishment is not determined by the individual preference of a convict. . . . It is the common judgment of man that to deprive the criminal of his life is the greatest punishment known to modern times." *Per* Jenks, J., *People* v. *Frost*, N. Y. L. J. June 9.

Contempt. *Sheriff's Conspiring with Mob to Lynch Prisoner Granted Stay of Execution.* U. S.

The United States Supreme Court rendered its final decision May 24 in *Shipp's* case (see 203 U. S. 562), thus disposing of the question originally presented in 1906, when Sheriff J. F. Shipp of Hamilton County, Tenn., upon whom notice had been served by telegraph of the Supreme Court's order for a stay of execution, removed from the jail the usual guard, leaving only the night jailer in charge, and afterward, in the evening of that same day, a mob stormed the jail, got out Johnson, the negro in whose behalf the *habeas corpus* proceedings had been set in motion, and hung and shot the culprit. The opinion of the Court, read by Chief Justice Fuller, reviewed the facts of the case, declaring that "Shipp not only made the work of the mob easy but in effect aided and abetted it." Five other defendants were also found guilty of contempt of court. This decision set a new precedent, that of the Supreme Court proceeding on its own motion to punish for contempt under such circumstances as those of this case. Justices Peckham, White and McKenna, however, dissented, holding that there was no evidence that the sheriff participated in any such conspiracy with the mob as charged. A spectacle unprecedented in the history of the Supreme Court, probably, occurred on June 1, when the defendants personally appeared at the bar of the Court for sentence. It is believed to be the first time that august tribunal has ever undertaken to mete out grave punishment upon a defendant appearing in the Court's own presence. The Court postponed the passing of sentence to allow the prisoners to file petitions for a rehearing. Consequently the cases go over till next term.

Contracts. *Alteration on Typewriter—Presumption of Validity Exists.* Neb.

Where a contract prepared by the use of a typewriter appears to have been changed after the first impression was made, it is held,

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

in *Stromberg-Carlson Teleph. Mfg. Co.* v. *Barber* (Neb.) 116 N. W. 157, 18 L.R.A. (N.S.) 680, that the presumption is that such change was made before execution and delivery.

Contracts. *Parol Stipulations Erroneously Admitted—Statute of Frauds.* N. Y.

In reversing the judgment in the case of *Lossing* v. *Cushman* June 1, the New York Court of Appeals held that in an action for the construction of a dwelling-house under a written contract and specifications calling for the completion of the house with cellar, wherein the plaintiff sought to excuse performance within the time specified by showing a change of plans increasing the amount of work, it is error to permit him to introduce parol evidence to show that, before the contract was signed, it was orally agreed between the parties that the cellar should extend under only a comparatively small portion of the building. His introduction of such evidence, said the Court, "violated the rule that parol evidence cannot be received to vary the terms of a written contract, which is presumed to express the final agreement of the parties, regardless of what had previously been said upon the subject (*Thomas* v. *Scutt*, 127 N. Y., 133, 137; *House* v. *Walch*, 144 N. Y., 418, 421; *Murdock* v. *Gould*, 193 N. Y., 369.)" (Reported in N. Y. L. J., June 8.)

Corporations. *Powers of Directors—Lease Rendered Invalid by Failure to Perform Conditions.* Mass.

By a deed made in 1888, the Boston & Providence Railroad Company granted the Park Square railroad station property in Boston to the Old Colony Railroad Company and subsequently transferred it to the New York, New Haven & Hartford Railroad Company, which leased the Old Colony. D. M. Little *et al.*, trustees, owners of stock in the Boston & Providence, sought to have the deed canceled, on the ground that the Old Colony had failed to perform the conditions imposed by the lease. The Supreme Judicial Court of Massachusetts, in deciding that the deed should not be canceled, said that the sale of unused land on Dartmouth street, after the Back Bay station was built, was not a violation of the lease. It was proper for the Providence company to sell this unused property, with consent of all interested, and if this was proper for the corporation the directors might also do it as managing officers. There was nothing in the lease that limited their power in this particular, and the lease could not be set aside as improperly executed and contrary to law. Not yet reported.

Employer's Liability. *Master's Duty to Inspect Machinery Personally—Res Ipsa Loquitur Rule Inapplicable.* N. Y.

In *Griffin* v. *Flank*, decided by the Appellate Division of the Supreme Court of New York County in May, the decision of the Court below in favor of the defendant employer was reversed, the Court holding that where an employee was injured and entitled to recover damages from her employer, it was the master's duty to inspect the machinery, and he cannot delegate this duty so as to escape liability; the question of proper inspection should, then, have been submitted to the jury. (*Byrne* v. *Eastman's Co.*, 163 N. Y., 401; *McGuire* v. *Bell Tel. Co.*, 167 N. Y., 208). (Reported N. Y. L. J. June 8.)

Evidence. *Speed of Car—Objection Going Merely to Weight of Testimony.* Ill.

In *Annie Fuhry* v. *Chicago City Railway Company*, 239 Ill. adv. sheets p. 548, the Supreme Court of Illinois held that when a witness in a street car collision case testifies as to the rate of speed the rear car was running, an objection to such testimony on the ground that he did not see the car until about an instant before the collision goes only to the credibility of his testimony and not to its competency, and is properly overruled. The fact that a witness has made former statements inconsistent with those made by him upon the trial affects the credibility of his testimony and not its competency, and is not ground for excluding such testimony.

Guardianship. *Court Will Set Aside Appointment when Necessary for Good of the Child.* Ind.

The Supreme Court of Indiana, in *Shoaf* v. *Livengood*, just decided on appeal, holds that the welfare and interest of a child are paramount in determining who is entitled to its custody as between two rival claimants, and the claim of a guardian is subordinate thereto. Consequently, where a boy of six years of age was living with his paternal grandparents who were able and willing to care for him as their own son, the child's maternal great-grandfather, eighty years old, whose wife was dead, whose health was feeble, and who had no home except as he lived among his children, was not necessarily entitled to the custody

of such child by reason of having been appointed its legal guardian.

Illegitimate Children. *May be Legitimized Without Mother's Consent.* Okla.

The right of a father to legitimize his illegitimate child without the consent and against the will of the mother is sustained in *Allison* v. *Bryan* (Okla.) 97 Pac. 282, 18 L.R.A.(N.S.) 931.

Interstate Commerce. *Shipments of Intoxicants—State Cannot Control Interstate Consignments.* U. S.

The Supreme Court of the United States rendered a decision May 24 in favor of the Adams Express Company. The company had received a shipment of liquor purchased at Nashville, Tenn., forwarded it through New Albany, Ind., and delivered it to the consignee at Bonnieville, Ky. A statute of Kentucky prohibits railroads from delivering liquor to known inebriates. The express company was prosecuted by the state of Kentucky, and the Hart County Court adjudged the shipment not to be of an interstate character. The express company then sued out a writ of error, and the United States Supreme Court, in a decision rendered by Justice Brewer, held that the federal government alone had the power to regulate interstate liquor shipments. Justice Harlan dissented.

Intoxicating Liquors. *Municipal Ordinance—Municipal Offense Distinct from State Crime.* Ga.

The Georgia Court of Appeals upheld on May 18 section 1537 of the Atlanta city code, holding that Atlanta has the right to enact an ordinance subjecting to a fine not exceeding $500 all persons keeping spirituous, fermented, or malt liquors for unlawful sale. The headnote of the decision reads: "A municipality may, under its ordinances, punish the offense of keeping intoxicating liquors on hand for the purpose of illegal sale; and it makes no difference in a particular case that the keeping of the liquor for this purpose was at a place of business or other public place. The municipal offense is distinct and separate from the state crimes which may have been incidentally committed in connection with it."

See also Interstate Commerce, Women's Rights.

Marriage and Divorce. *Decree Obtained by Perjured Testimony will not be Vacated.* Mass.

A decree of divorce secured through fraud practised on the Court cannot be vacated, is the ruling of the Supreme Judicial Court of Massachusetts in the case of *Grace R. Zeitlin* v. *Adolph Zeitlin*. The petitioner sought to have the decree vacated on the ground that the case for a divorce had been made out at the hearing by perjured testimony, knowingly procured by the libellant. Judge Fessenden, on being satisfied that fraud had been practised on him, had vacated the decree. The Supreme Court reverses the decision of Judge Fessenden, and says: "It is against public policy to open cases on no other ground than this. In *Greene* v. *Greene*, 2 Gray 361, Chief Justice Shaw pointed out clearly the objections to setting aside a decree for divorce upon an application in subsequent proceedings. One of the facts to which he referred, namely, a marriage upon the faith of the decree and birth of a child of the marriage, exists in the present case."

Municipal Corporations. *Duty as to Streets—Ordinary Travel Includes Bicycling.* Ill.

A fifteen-year old boy rode a bicycle into a hole in a Chicago street and permanently injured his hip. The hole in the pavement was from ten to fifteen inches deep and full of water, and the lower court instructed the jury that "a city is not bound, under the law, to keep its streets absolutely safe, nor is it bound, under the law, to keep them in reasonably safe condition. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety." The request of the defendant, the city of Chicago, for an instruction that ordinary travel did not include the riding of a bicycle, and that the jury would have to find for the defendant if convinced that the street was reasonably safe for ordinary travel, was refused. The Supreme Court of Illinois, in affirming the judgment, which was hostile to the city, upheld the instructions given by the lower court and ruled that riding a bicycle on a street is an ordinary mode of travel. "A highway in the country need not be of the same character as a street in a large city," said the Court. "Just what degree of care the rider of a bicycle, the driver of a team or the chauffeur of an automobile must exercise must depend very largely upon the character of the road and the surroundings in each special case." *Molway* v. *City of Chicago*, Chicago Leg. News, May 29, p. 348.

Municipal Corporations. *Power to Grant Public Franchises—Ministerial Officers.* Mass.

The Supreme Judicial Court of Massachusetts on May 27 held invalid an order passed by the Boston Board of Aldermen, granting the Metropolitan Home Telephone Company the right to build, equip, and operate a conduit system in Boston. The Court said the statutes of the state contemplated no such pre-emption of public ways as would enable a corporation to locate above and below all present and future streets in Boston. "The conception," said the Court, "of granting to any telephone or street railway company, or any other public service corporation at once, and in advance of its practical operation, the right to occupy all the streets of a municipality is repulsive to our theory of local and state supervisions and regulation in detail of construction in public ways by such corporations.

"The power is vested in selectmen and boards of aldermen, not as representatives of the cities and towns, but as independent boards of public offices, who act in a judicial or quasi-judicial capacity respecting the subject-matter."

Municipal Corporations. *Gas Rates—Power to Fix by Contract—"Reasonable Regulations."* Mich.

A municipal corporation is held, in *Boerth* v. *Detroit City Gas Co.* 152 Mich. 654, 116 N. W. 628, 18 L.R.A.(N.S.) 1197, to have authority to fix by contract the rates which shall be paid by its inhabitants for gas furnished by a public-supply corporation, under statutory authority to consent to the laying of the gas mains in its streets under such reasonable regulations as it may prescribe.

See also Intoxicating Liquors, Sunday Observance, Unfair Trade, Women's Rights.

Perjury. See Marriage and Divorce.

Riparian Rights. *Ownership in Foreshore Limited by Public Rights—Colonial Grants are Conditional.* Mass.

The Supreme Court of Massachusetts, in *Home for Aged Women* v. *Commonwealth*, decided June 1, held that the establishment by the state of a dam in connection with the improvements in the Charles River Basin was a lawful exercise of the power of the Legislature for the improvement of navigation and other purposes. Another case arising from the same improvements in Charles River was decided by the Court, at the same time, namely, *Crocker* v. *Charles River Basin Commission*. In rendering the latter decision the Court held that the extension of the boundaries of private ownership below high water mark, in the Colonial ordinance of 1647, did not take away from the state the right to make a change for the improvement of navigation which would deprive the riparian owner of access to the land below high water mark, but on the contrary, reserved that right. In the Colonial grant, "the rights of the public to have the benefit of the waters for navigation, fishing, and fowling were reserved." Citing *Commonwealth* v. *Alger*, 7 Cush. 53, 89–91, the Court referred to the doctrine embodied in the statutes of the United States as well as in Massachusetts law, and applied the rule enunciated by Mr. Justice Gray in *Boston* v. *Richardson*, when he said: "Even a title in flats granted from the Colony or Commonwealth is subject, so long as they have not been built upon, to the authority of the Legislature, for the protection of the harbors and of the public right of navigation, to prohibit the taking of sand or gravel from the shore or the erection of wharves beyond certain lines."

Steamship Companies. *Removal of Passenger Supposed to have Trachoma—Burden of Proof on the Company.* Mass.

Defendant's exceptions were overruled by the full bench of the Supreme Judicial Court of Massachusetts May 25 in the suit of *Mountford* v. *Cunard Steamship Co.*, Ltd. The plaintiff sued for damages for having been removed from the steamship Ivernia, on which she had secured passage from Liverpool to Boston, because the ship's surgeon held the opinion that she was suffering from trachoma. Judge Sanderson, in the lower court, ruled that the burden was on the company to show the justification which it had set up in defense to the suit. The Court holds that the ruling was correct, and the plaintiff was not obliged to show that she did not have the disease.

Sunday Observance. *Sunday-closing Law Invalid—Municipal Ordinance Abortive.* N. Y.

Supreme Court Justice Greenbaum on May 27 dismissed the suits brought by the city of New York against the Alhambra Theatre Company and Hurtig & Seamon, and held invalid the ordinance forbidding performances

on Sundays except those of an educational or sacred character. The ordinance was declared "a futile and abortive effort and of no validity," being a reiteration of the provisions of section 277 of the Penal Code, and violating section 44 of the charter and section 728 of the Penal Code.

Trademarks. *Sale of Goods in Original Packages—Police Power.* N. Y.

In a case arising under section 364 of the New York Penal Code, known as the Trademark Law, the New York Court of Appeals decided May 20 that a barkeeper who sells or exposes for sale whisky which he has placed in a bottle containing a private trademark is guilty of a misdemeanor. The fact that the whisky was manufactured by the party whose trademark appeared on the bottle is no defense, for it is the purpose of the statute to prohibit the sale of goods represented to have been made by the owner of a trademark, except as contained in the original package and as put up by him. The statute in this respect violates no constitutional right of property, but is a reasonable exercise of the police power. "The enactment of statutes to prevent fraud is a proper exercise of the police power of the state, which is under the control of the Legislature. . . Legislation which interferes only to a reasonable extent with the enjoyment of property, in order to promote the general welfare, and which in fact tends to promote the general welfare, violates neither Constitution." *People* v. *Luhrs*, N. Y. L. J. May 28.

See also Unfair Trade.

Unfair Trade. *Rights of Municipal Corporations in Asking for Bids—Michigan Rule Adopted.* Ore.

The right of a city council to specify that any patented article shall be used in a street improvement, in asking for bids, was upheld by Judge Gantenbein in the circuit court at Portland, Oregon, May 10. The Court said: "Judge Cooley stated a sound legal principle when he said that in all these cases there was and is in contemplation of law opportunity for competitive bidding. The license necessary for the third person may be secured either before or after the third person has submitted his bid. If such third person has failed to secure a license before he has submitted his bid, he then runs the risk of obtaining a license from the patentee. It is, however, apparent that his success or failure in obtaining a license does not as a matter of law prevent him from bidding, and competitive bidding is not destroyed by the fact of the article being patented."

Wills and Administration. *Expenses of Administration Not Chargeable to Residuary Estate.* N. Y.

Where a testator had bequeathed general legacies amounting to $127,000, leaving the remainder of his estate in trust for life tenants, specifying the amount as $173,000, and had then provided that in case the entire estate, as valued by his executors, amounted to less than $300,000 the general legacies should abate proportionately, it was found that, the expenses of administration and commissions amounting to $28,000, there was left only about $254,000 for distribution. On the question whether the commissions and expenses should be borne by the general legatees or be paid out of the remainder, the New York Court of Appeals held May 11, in *Matter of Frankenheimer*, N. Y. L. J. May 21, that, in view of the provision for the abatement of the shares of general legatees and that the life tenants were the chief objects of the testator's bounty, the general rule that such expenses were chargeable to the residuary estate did not obtain and that in this case they should be charged to the general legacies. The estate being insufficient to pay the general legacies in full, interest should not be allowed thereon, but the income earned by the estate during administration should be distributed pro rata between general and residuary legatees.

Women's Rights. *No Discrimination in Exclusion from Saloons—Municipal Ordinance Constitutional.* Mich.

A municipal ordinance prohibiting keepers of saloons from permitting women to be in or about their places of business, and from selling intoxicants to them, is held, in *People* v. *Case*, 153 Mich. 98, 116 N. W. 558, 18 L.R. A.(N.S.) 657, not to be an unconstitutional discrimination against women, or to deprive them of their equal rights, privileges and immunities.

The Editor's Bag

THE LAW AS A SCIENCE

IN vacation time the lawyer who has worked hard all the year through, so hard, in fact, that he may have compared himself, like Dr. C. W. Eliot, to a factory operative, rejoices in the serene consciousness of a versatility that has been forgotten for many months, and suddenly wakens to the fact that he is, after all,—or might so be described by a dispassionate observer,—a flower of American professional life, with a broad and kindly outlook on his fellowmen, and talents always ready for active service and sufficiently brilliant to achieve that golden reward far more to be desired than wealth, a life combining noble philanthropy and the cultivation of all that is finest, with efficacious leisure and unselfish luxury. Lolling in a hammock with the Sunday newspapers, he reads the illustrated articles on "Radium" and "Our Grinding Divorce Mills," and resolves to consecrate his free moments during the coming year to the study of natural science and sociology. A stanza in a ten-cent magazine by one of those who deserve to be classed as our minimum rather than our minor poets awakens in his breast a slumbering thirst for Tennyson and Browning. A glimpse of an Italian laborer whom he would not have had time to see on his way to his office in the city stirs in him smouldering fires of human sympathy, and begets a passionate longing to know more of the time of Mazzini and Cavour, and the hopes and fears of the Young Italy that they inspired. Even so does the refreshed lawyer forget the tedious, contracting effects of his ill-paid vocation in the glorious freedom of natural impulses his vacation brings him, and even so he forgets his own personal limitations, after the fashion of those who are too liberally provided with the world's goods and attentions.

After all, what is there in the lawyer's vocation distinctly dignified and worth while? Good answers to this question have frequently been given, and the profession of the law is by common consent one of honor and usefulness, but it is not our purpose to dwell upon the more banal aspects of the subject. The lawyer who is worthy of his profession and of his hire will cultivate uprightness in the practice of his calling, he will endeavor to conduct himself as an instrument of justice and good order, and he will associate himself with sound public and social movements. But this is not all. He owes to his profession and to himself something more, and that something is frequently overlooked by those who discuss the opportunities and rewards of the lawyer's career.

The law, it must not be forgotten, is a science. As in the case of the science

of medicine, the general level which the science will attain, the extent to which it will advance or recede, depends not simply upon the ability of a scant minority of trained specialists concentrating their energies on independent research, but in equal or possibly greater measure upon the intelligence and diligence of the general practitioner. Lawyers, like doctors, cannot afford simply to rely upon what is written down in the books; they must themselves become investigators and collaborators. The advancement of science was formerly the concern only of the few; now there is scarcely a single topic of current popular discussion in any field which can be cleared up without recourse to the methods of science. The lawyer's full social duty is not discharged until he has qualified himself to discuss with some degree of confidence and authority the leading topics of the hour which depend for their solution largely upon legal principles.

Lawyers are very apt to fall into the perfunctory habit of treating the law as an isolated science, instead of regarding it in its true light as a branch of political science and as closely intertwined with ethics, economics, and social science in general. In consequence of this tendency the lawyer is too often a sceptic or a misguided radical, and therefore an unfit leader of public opinion. A remark was recently made, by Professor Dicey we believe, that we have all become socialists, or something akin to that, already. Surely an accurate definition of socialism would show the indiscretion of such a statement. The decisions of the Supreme Court of the United States are frequently attacked, on the ground either that they are too radical or too reactionary, but if those lawyers who advance these exaggerated views were more firmly grounded in the principles of political and social science, there can be no doubt that their attitude would be one of greater moderation. A lawyer's opinions on the fundamental problems of government and society are absolutely valueless if they are based only on a knowledge of the law. The lawyer to be truly worthy of his profession must familiarize himself with the important teachings of allied sciences.

One of these fundamental problems is that of the relative rights of individuals in organized society, with respect to property, contract, and conditions of living and employment. Are the rights of all men, in these respects, equal or diverse? The answer is to be found not in a purely legal inquiry, for the field presented for investigation is much broader, and satisfactory results can be obtained only by an unprejudiced discussion of the subject-matter of several different sciences.

In this scientific age, conscience, or a desire to see justice done to all men, should not make sceptics or socialists of us all, neither should it force us back upon the line of retreat of a bloodless, unsympathetic formalism. Rather let the lawyer endeavor to make the most of his profession as an agency of human progress, and strive always to discover the scientific defects of the law that require mending, and to lead his fellow men in the paths of a more enlightened civilization.

THE BERTILLON SYSTEM

A RECENT bent of the French mind was illustrated in a Paris fad, that of *dactylographie*. A peculiarly French sense of humor was shown in introducing police methods into the drawing room, and initiating the vogue of finger print autograph albums, patterned after the Bertillon records of police courts for the identification of criminals.

A singular example of the Bertillon system is referred to in the *London Globe*, which speaks of the suspected author of a London burglary who was once arrested and declined to say whether he was innocent or guilty.

"It's your business," he said to the police, "to establish my identity. I've been in jail before, and when I was last arrested, not so very long ago, I was submitted to all sorts of photographic operations, and an imprint of my thumbs was taken. It ought to be at Scotland Yard, with my real name. I haven't got much confidence in your new-fangled systems for the identification of criminals, and I wish to put them to trial. I defy the police to discover my name, my surname, and antecedents. For the moment, and because you must have a name of some sort, I'm John Smith. You can find out the rest for yourselves."

The police, put on their mettle, determined not to be beaten. Three days later an inspector entered the prisoner's cell, and said:

"You are not John Smith. You are Robert Mills, and you have three previous convictions against you. Here are the imprints of your fingers, taken eight years ago, and in every respect identical with those taken the other day, when you were arrested."

The accused examined with a magnifying glass the enlarged digital records presented to him, and verified their identity by comparing the various designs. Then he declared himself satisfied with the success of the test to which he had subjected the "new-fangled" system.

A STORY OF J. BROWN HOVEY

THE Pickwick of the Missouri bar was J. Brown Hovey, whose "shingle" rattled in the winds of Independence, the seat of justice in Jackson county. In those days lawyers rode the circuit. Hovey's nag, that was known for miles around, was of the species called among horsemen the flea-bitten type. Mounted on this steed, with his eyes magnified by gig-lamp spectacles, with his trousers tucked in red-top boots, and his saddle-bags bulging with law books, Hovey was a sight that would have focused the attention of Dickens. Lawyers in Hovey's days rode miles to consult clients and witnesses.

Hovey was bundle of nerves. He talked faster than a cyclone travels. On one occasion he rode forty miles to see one of his retainers, for Hovey had learned of a new phase in the case that was the first on the next docket. Reaching his destination he dismounted, threw the reins over a gate post and rushed to the entrance of the house. A husky darky met him. In reply to Hovey's question for the master the darky replied that no one but himself was at home, and that the master would not be back until the next day.

"Tell your master when he returns that I called on important business connected with his case, and for him to see me as soon as possible," said Hovey in a rapid manner which no arrangement of type could adequately describe.

"Yes, suh, yes, suh," replied the man at the door, who was shivering like a leaf in a gale. "And who is you, suh; who shall I tell massa you is, suh?"

"Tell him," exclaimed the lawyer in a rage, "that J. Brown Hovey, attorney at law, was here, you black scamp, do you hear?"

Bang went the door, down to his mount strode Hovey, the tails of his coat fluttering in the wind.

The master of the house returned soon after, before he was expected. On entering the house he found his servant on his knees weeping and wailing. In broken sentences he explained to his master:—

"Oh, massa, yo' time am sholy come, an' I wanter ax yoo befo' yoo done gwine, dat yoo maik me free."

After many threats and some promises the darky explained, "Well, massa, he was done heah, and he tole me for to tell yoo dat yoo wus to come to him, right off. Hi wus ridin' a white hoss, and dat sholy mean def [death], and he done tole me dat Brown J. Hovey, de eternal Lord, was come for to see you."

"Get up, you kinky-headed son of a sea-cook," roared the master, "and get me my dram. You come pretty nigh being a free nigger, only I happened to think that the Lord ain't traveling on a white horse to round up his people, and he ain't riding round under an alias, and especially the alias of that d——d red-headed lawyer of mine."

THE WITNESS'S AGE

"IT is a hard matter to get a woman on the witness stand to state her age," a Chicago judge remarked the other day, "but the young man who is our prosecuting attorney just now did it recently in a manner that

I call decidedly neat. The woman had evidently passed the springtime of life by some years, but was still making quite a bluff.

" 'What is your age?' the prosecuting attorney asked simply.

"The witness blushed, hesitated, and stammered.

" 'Just remember, madam, each minute that passes makes you that much older,' the attorney suggested casually, as if he had all the time in the world on his hands.

" 'Thirty-nine!' the witness exclaimed, jumping as though she had been frightened."

LAW STUDENTS OF OLDEN DAYS

THE young men of today who make up the classes in the law schools seem to think, judging from their remarks, that they have a particularly hard road to travel, and that if their brains were not so surprisingly massive, they would be overtaxed by the load put upon them. For their comfort these young gentlemen should read the "Memoirs of Henri de Mesmes," an extract from which will give an idea of a law student's day in the sixteenth century.

"We used to rise from bed at four o'clock," he says (*four* o'clock!), and, having prayed to God, we went at five o'clock to our studies, our big books under our arms, our inkhorns and candles in our hands. We heard all the lectures till ten o'clock rang; then we dined, after having hastily compared, during a half hour, our notes on the lectures.

"After dinner we read, as a recreation, Sophocles, or Aristophanes, or Euripides, and sometimes Demosthenes, Cicero, Virgil, or Horace. At one o'clock to our studies; at five back to our dwelling place, there to go over and verify passages cited in the lectures until six. Then supper, and after supper we read Greek or Latin.

"On holy days we went to high mass and vespers; the rest of the days, a little music and walks."

THE VERDICT

A CASE came to trial in a small Georgia town in which a highly respected and much liked young man was charged with assault and battery, and the evidence showed most unmistakably that upon a certain day he met upon the public street the prosecuting witness, one Jones, and that he had then and there worn out a buggy whip upon the said prosecuting witness, thereby causing grievous bodily pain to the aforesaid Jones.

If ever a man had deserved a thrashing, it had been this same Jones, a fact well known both to the judge and the jury, but the law was explicit, the facts undeniable, and judge and jury did their duty.

"Have you found a verdict, gentlemen?" the court asked, when the jury filed into its box from the jury room.

"We have, your honor," the foreman responded.

"Do you find this defendant guilty or not guilty?"

The foreman rumpled his hair nervously.

"Well, your honor," he replied, "I ain't a lawyer, so can't jest put her in reg'lar law talk, but what I want to say is: we finds the defendant guilty and acquits him!"

A PARTITION SUIT

TWO typewriter-girls were talking in a tone easily overheard despite the rumble of the car.

"Why did you leave that old lawyer?" the black-haired one asked. "You said the work wasn't hard, and you got good pay."

"There was a woman in the office one day," the other replied, with an injured intonation, "and they were talking about a 'partition suit,' and I just knew it must be something new, as she said she had just got back from Paris, so when she left I just asked him if it was made anything like a regular divided skirt, and he got just furious!"

LIKE SOME OTHER EPITAPHS

"I WAS called in by a close-fisted old merchant the other day," a Boston lawyer remarked, smiling. "He wanted me to draw his will, and this I proceeded to do, following his verbal instruction. Presently he said:—

" 'To each and every clerk who has been in my employ continuously for ten years I give ten thousand dollars.'

"This seemed like a considerable sum to me, and I ventured a slight protest, as he had a number of daughters, and his entire fortune was not large.

" 'Oh, that's all right,' he said, with a little crooked smile. 'You know people have always said that I was close and hard, and I want them to think well of me when I'm gone.'

"I was a little touched, and said something, but he waved it aside, and we continued with the draft. When it was finished and as I was about to leave the office, the old fellow smiled again his little crooked smile.

" 'About those ten thousand dollar legacies,' he said, 'there isn't a clerk in my place who has been with me over two years—but it will look well in the papers!' "

A RECONSTRUCTION JUDGE

RECENTLY the Charleston *News and Courier* published in connection with his death a sketch of the career of Judge Thomas J. Mackey, who sat on the bench during the reconstruction times in South Carolina. Mackey, though a native of Charleston, was at that time a Republican and was one of the most brilliant and reckless of the unscrupulous adventurers developed by the reconstruction period.

To this day, says the New Orleans *States*, South Carolina is full of the stories of this remarkable man. It was he who announced from the bench that after a careful investigation he had discovered that Franklin J. Moses, Jr., was a lineal descendant of the impenitent thief of the crucifixion. On another occasion, in discussing the habit of "Tharsaparilla" Wright, the lisping Philadelphia negro, who was an Associate Justice of the Supreme Court, of getting drunk and preaching in the barrooms of Columbia, Mackey said he had investigated Wright's ancestry and accounted for his drunken piety by the fact that his remote ancestor on the banks of the Congo, had, single-handed, eaten a very devout Wesleyan missionary, thereby acquiring religious tendencies which he transmitted to his posterity.

In the year 1876, when the political revolution occurred in South Carolina, he went over to the Democrats and became one of Wade Hampton's most daring and effective supporters. He announced his change of heart by riding into a public meeting at Edgefield on an ox and wearing a red shirt. Once when on his way to appear in the Supreme Court in support of one of his opinions favoring the Democrats he told the people who gathered at a station to hear him talk that he would present to the Court thirteen conclusive reasons in support of his position, which reasons he had then on his person, whereupon he produced two six-shooters and a Bowie knife. He was the originator of the assertion that the Republican party had seven distinct principles—five loaves and two small fishes.

It is said of Mackey that no more brilliant man ever sat on the bench in any state. When he was made a judge he had never practised law, and so far as can be ascertained never had studied it, yet he was able to find law for any decision he desired to make, and in the event that he could not find it invented what was needed as he went along, but nevertheless he had a way of arriving at substantial justice.

USELESS BUT ENTERTAINING

The Client—How much will your opinion be worth in this case?

The Lawyer—I'm too modest to say. But I can tell you what I'm going to charge you for it.—*Cleveland Leader.*

"Convicted?" exclaimed the prisoner in disgust. "Well, I'm not surprised. My lawyer made a fool of himself."

"I tried to represent you faithfully," remarked the lawyer, mildly.—*Judge.*

Lawyer—"Did you take the prisoner apart?"

Witness—"Yes, sir."

Lawyer—"What happened then?"

Witness—"He told a disconnected story."

—*Baltimore American.*

Upgardson—"Isn't a lawsuit over a patent right about the dullest thing you ever saw?"

Atom—"Not always. I attended a trial of that kind once that was too funny for anything. A tall lawyer named Short was reading a 6000-word document he called a brief."

—*Chicago Tribune.*

A prisoner at the sessions had been duly convicted of theft, when it was seen, on "proving previous convictions," that he had actually been in prison at the time the theft was committed. "Why didn't you say so?" asked the judge of the prisoner angrily.

"Your lordship, I was afraid of prejudicing the jury against me."—*Home Herald.*

The burly prisoner stood unabashed before the judge. It was his first time in a court and before a jury, says a writer in the *Argonaut.* "Prisoner at the bar," asked the clerk, "do you wish to challenge any of the jury?"

The prisoner looked them over carefully and with a skilled eye.

"Well," he replied, "I'm not exactly wot you calls in training, but I guess I could stand a round or two with that fat old geezer in the corner."—*Youth's Companion.*

A New York publisher, having business at the Capitol connected with pending legislation with reference to international copyrights, was hurrying through a corridor of the building when he encountered a "Hop o' my Thumb," scurrying along with an armful of papers larger than himself.

"Hello, son!" cried the publisher. "And what may be your position in this establishment."

"I'm a page, sir," answered the lad.

"A page! Why, my boy, you're scarcely large enough for a paragraph!"—*Lippincott's.*

Several decades ago there lived in Charleston, W. Va., a judge noted for his boorish manners. A very finical lawyer whom he especially disliked was once trying a case before him and all the while the barrister spoke the judge sat with his feet elevated on the railing in front of him, hiding his face.

Exasperated by this the lawyer queried:

"May I ask which end of your Honor I am to address?"

"Whichever you choose," drawled the Judge.

"Well," was the retort, "I suppose there is as much law in one end as the other."

—*Philadelphia Public Ledger.*

An earnest plea was made by Attorney Charles Pettijohn to Judge Pritchard of the criminal court for leniency to a client who had entered a plea of guilty to larceny. The burden of the attorney's argument was that his client was the father of twins and was tempted to theft in order to feed the mouths of the infants.

"Your Honor, I will say frankly, " said Mr. Pettijohn in closing, "that if I were the father of twins and needed food for my family I would not hesitate to go and steal it."

"Mr. Pettijohn, when you are the father of twins I will consider your proposition," said Judge Pritchard.—*Indianapolis News.*

The jury had filed into court and returned a verdict of not guilty, although the counsel for the prisoner was not present. It was a clear case, the man's guilt was perfectly apparent, and the judge looked up somewhat surprised, leaned over and conferred with the clerk, who later informed the defendant that he was discharged. Counsel for the prisoner then appeared, learned of the apparent surprise of the Court at the action of the jury, and had something of an argument with the Court, which was conducted, however, in a whisper. "Mein Gott!" exclaimed a little Dutchman who stood outside the door. "That lawyer has von his case, and now he's going to lick the judge!"—*Boston Record.*

The newspapers recently told the story of a bad small boy, who had come up before the juvenile court charged with incorrigibility. A number of little girls had been called in to testify, and while the lawyers were arguing the case before the probation officer the judge took them into his private office.

"Now, little girls," he said, gravely, "most of you came here in behalf of the defendant. I have written my decision on a slip of paper. I want you each to take one of these slips of paper, and write on it your opinion as to what the punishment should be—a good whipping by his mother, or several long years in the house of correction."

The judge left the amateur jury to their deliberations for a few moments, and returned to find that they all favored the thrashing.

"That is exactly what I had written," he said, triumphantly. "The jury is dismissed."

The sentence was carried out on the back porch immediately.— *Youth's Companion.*

On a recent jury day in the First District Court a stolid-looking German presented to Justice Joseph a certificate from the Commissioner of Jurors. After a rapid glance at the document the Justice ordered the man to raise his right hand and administered the oath.

"Your name is Herman Kaufman?"

"Yes, your Honor."

"This paper," continued the court, "requests me to excuse Herman Kaufman from jury duty on the ground that he is dead. Now, remember that you have sworn to tell the truth, and think well before you answer: Are you dead?"

"No-o, your Honor," was the bewildered reply, "I don't think I am."

"You claim that you are alive?"

"Y-e-s, your Honor."

"That will do. Now take this paper back to the Commissioners of Jurors."

The man did so. When the Commissioner examined the certificate it bore the following indorsement in the Justice's handwriting: "The deceased, appearing before me in open court, insists, under oath, that he is not dead. Please investigate, and, if his testimony be false, have him indicted for perjury."

—*New York Times.*

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

The Chesapeake & Ohio Railroad Company filed a petition in one of the state courts of West Virginia May 26, charging that the West Virginia two-cent fare law is confiscatory and asking that the prosecuting officials be restrained from further enforcing the law.

The Interstate Commerce Commission has decided to investigate the charges of B. E. Sundberg of Minnesota against the United States, American, and Adams Express Companies. The charges are that these companies are violating the interstate commerce law and monopolizing the express business by means of arbitrary rules and exorbitant rates. Mr. Sundberg also charges that they earn more than one hundred per cent, and are rich and powerful enough practically to defy legislation. If the Commission finds, after hearings, that the charges appear to be sustained, the Department of Justice may take action.

Attorney-General Wickersham congratulated United States Attorney Gregg and Special Assistant Rush for their success in obtaining new indictments against Governor Haskell and others at Tulsa, Okla., May 27, in the Muskogee land fraud cases. He said they were deserving of great credit for the ability with which they handled the situation. This was the third time the matter had been presented to a federal Grand Jury. Governor Haskell, in giving bond, announced through his attorneys that an effort would be made to have the indictments quashed on the ground of improper influence exerted on jurors and witnesses.

The Missouri Supreme Court issued a writ of prohibition June 8, forbidding Judge Williams of the state circuit bench to proceed with an injunction restraining certain railways from putting three-cent passenger fares into effect. This decision follows the example set by the United States District Court in Kansas City several weeks ago which enjoined a similar proceeding, and the state court has thus shown itself to be acting in harmony with the United States District Court, which recently enjoined a similar proceeding hostile to the railways. This action left but two cases pending in the state courts, in this railroad litigation, the state's appeal from federal Judge McPherson's decision that the Missouri statute was unconstitutional, and the *quo warranto* proceedings instituted by the Attorney General for the purpose of revoking the charters of fifteen railroads.

A decision was handed down at Washington, D. C., May 21, by the Interstate Commerce Commission, ordering the Western and Northwestern railroads, the Northern Pacific, the Union Pacific lines and the Chicago Northwestern Railway, to join in the sale of through passenger tickets between Seattle and other points in the Pacific Northwest and Eastern destinations, via Portland, Ore., and to accord through facilities, like the checking of baggage, over this route. The Commission itself had received many complaints that the present through rates were unsatisfactory. Chairman Knapp and Commissioner Clark dissented from the majority opinion of the Commission, maintaining that satisfactory through rates and joint rates already are in existence.

In a decision against the New York, New Haven & Hartford Railroad, the New York Public Service Commission for the first district laid down the rule May 15 that its jurisdiction over the railroad corporations took precedence over that of the municipal board of health in regard to the sanitary laws. The commission last April issued a final order restricting the railroad company from utilizing certain alleged unsanitary methods in loading freight cars. The railroad raised the point of jurisdiction. The substance of the commission's ruling is that when there is a conflict between the local ordinance and the general law of the state, embracing in this instance the public utilities act, the general law prevails.

As a result of the disappearance of fifteen books of the United Copper Company, needed by United States Attorney Wise, in his inquiry into the doings of F. A. Heinze in the Mercantile National Bank, and the disappearance of Tracy Buckingham, formerly transfer agent of the United Copper Company, Sanford Robinson, F. A. Heinze's personal counsel, and Arthur P. Heinze, were indicted on charges of obstructing the administration of justice and interfering with a federal process server. Their cases have recently been on trial. Another indictment charges Robinson and A. P. Heinze, along with F. A. Heinze, and two others, with a conspiracy to put the books out of the way, to mutilate some of them, and to send Buckingham to Canada. This indictment will come to trial in the autumn.

Delavan Smith and Charles R. Williams, owners of the *Indianapolis News*, appeared before Judge Anderson in the United States District Court at Indianapolis June 1, to resist removal to the District of Columbia for trial for criminal libel, in connection with

the Panama affair. Judge Anderson ruled against the Government's contention that it was not essential for a committing magistrate to hear evidence, and heard the argument of counsel for the defendants that the indictment was baseless. The Court called attention to the fact that malice in a prosecution for criminal libel must be express rather than implied, and refused to make an order that the defendants should be removed for trial before it was satisfied that there was probable cause for the indictment for criminal libel. While the owner of a newspaper might be held civilly for anything that appeared in his paper, the Court seemed to be of the opinion that he could not be held criminally for a vicious article printed during his absence on a yachting cruise. Despite the protests of the defense Judge Anderson consented to a continuance, and the Government will introduce its witnesses in court at Indianapolis on October 11.

The Pennsylvania Sugar Refining Company sued the American Sugar Refining Company for $30,000,000 damages in the United States Circuit Court at New York City before Judge Holt. Segal built the new plant of the plaintiff company in 1903, and secured a loan from Gustav Kissell, a broker, which was made on condition that the holders of collateral should name the directors of Segal's company. Kissell was acting as agent for the defendant company, and named as directors himself and three clerks, who voted not to open the plant. When the evidence was ready to go to the jury, seeing that the jury might assess damages up to $10,000,000 under the Sherman Act, the defendants thought it advisable to make a settlement out of court by a huge payment. It is believed to be the first case on record where a business has recovered from a competitor cash wherewith to start active competition. A suit in connection with the same matter also for damages was brought in the state of New Jersey and is pending on appeal in the Court of Errors of New Jersey from the decree dismissing the suit. Other phases of the matter are pending in the courts of Pennsylvania.

The compromise of the civil suit of the Pennsylvania Sugar Refining Company against the American Sugar Refining Company, which is stated to have been made on the basis of the return of $7,000,000 par value of securities held as collateral, the cancellation of a loan of $1,250,000, and the payment of $2,000,000 in cash as damages for the loss due to the closing of the plaintiff's plant by the defendant in pursuance of an unlawful restraint of trade, drew the attention of President Taft and Attorney-General Wickersham to a possible criminal violation of the Sherman Act, in view of the defendant corporation's practical confession of civil guilt. Receiver George H. Earle of the Real Estate Trust Company of Philadelphia, who declared that

"THE EASIEST WEIGH."

—From the *Boston American*.

the federal government refused to act when similar evidence to that now available was laid before President Roosevelt in 1906, offered to give the government all the evidence in his possession if it was desired, and Mr. Earle, with his counsel and eleven other witnesses, was subpœnaed to appear before the United States grand jury in New York, which began its investigation June 21, under the direction of Assistant United States Attorney Crim. Attorney-General Wickersham had asked United States Attorney Wise and the other officers of the Department of Justice to push the criminal prosecution of the corporation for violation of the anti-trust act with all possible speed. Adolph Segal, who got the $1,250,000 loan which lies at the basis of the federal investigation, testified before the grand jury June 22.

Personal—The Bench

Judge Richard E. Sloane, the new Governor of Arizona, formerly Associate Justice of the Supreme Court of Arizona, was born in Ohio, and is a graduate of the Cincinnati Law School.

Judge Emory Speer, of the United States District Court for the southern district of Georgia, on account of official duties, had to decline invitations to speak in June at the annual meetings of three of the great state bar associations.

Frederick W. Gnichtel has succeeded Judge John Rellstab as Judge of the Court of Common Pleas of Mercer County, N. J. When the senate re-convenes it is anticipated that he will be named for the full term.

A painting of Judge William E. Fuller, hung in the probate court room at Taunton, Mass., June 2, was given by the Taunton bar in commemoration of Judge Fuller's twenty-fifth anniversary.

Associate Justice Henry A. Melvin of the Supreme Court of California was the chief speaker at a banquet given in honor of Dr. Hall, Dean of the Law School of Chicago University, at Oakland, Cal., May 19.

Horace E. Deemer, Chief Justice of the Supreme Court of Iowa, made an address on "The Social Cosmos" at the commencement exercises of the Creighton College of Law held at Omaha, Neb., May 15. Seven young men were graduated.

The appointment of Hon. Charles B. Elliott, formerly of the Minnesota Supreme Court, has been confirmed, as Associate Justice of the Supreme Court of the Philippines, succeeding Judge Willard. Justice Elliott is the author of several legal text-books.

Justice L. O. Loranger, who has completed his twenty-seventh year as Judge of the Superior Court of Montreal, made his last appearance on the bench May 17, when he presided over the Court of Review. His colleagues took appropriate notice of the event.

Reports from Shanghai say that Hon. Rufus H. Thayer, the new Judge of the United States Court for China, successor to Judge Wilfley, has been well received socially in Shanghai, and has succeeded in giving a favorable impression of judicial fairness and ability.

The great work being done by the American International Law Association, the project of which, if accepted, will control the action of the next International Peace Conference, was described by Judge Daniel G. Taylor, May 28, at the quarterly meeting of the St. Louis Bar Association.

Senator Edward F. Blewitt of Pennsylvania declares that Judge George Gray of Delaware is the only man on the political horizon of the Democratic organization for President, and predicts that he will be nominated without opposition and elected in 1912.

A large portrait of Judge James G. Jenkins was presented to the United States Circuit Court at Milwaukee on May 15. Federal Judges Landis, Baker, and Grosscup and members of the Milwaukee Bar Association attended the presentation service. The intention is to have portraits of all former judges hung in the court room.

United States District Judge George Gray of Wilmington, Del., agreed to become the fifth member of a board selected to arbitrate the differences between the Scranton Railway Company and its employees. The motormen and conductors demanded a flat rate of twenty-five cents an hour, instead of twenty, twenty-one and twenty-two cents.

Judge Sydney M. Smith took his seat on the bench of the Mississippi Supreme Court, to which he has just been appointed, May 11. Judge Smith is the son of a Confederate soldier, was graduated in 1893 from the law department of the University of Mississippi, served in the legislature, and was appointed to the circuit bench of his state.

Prosecutor Crossley of Mercer County, N. J., paid a high tribute to Judge John Rellstab, when the latter sat for the last time in the Mercer County Court on May 21. Judge Rellstab's appointment as United States District Judge for the district of New Jersey, which was confirmed by the Senate, has been favorably received by the New Jersey bar.

Associate Justice R. V. Fletcher of Mississippi, who relinquished the Attorney-Generalship in order to serve the unexpired term of Justice Calhoun, has begun the practice of law in Jackson in partnership with Hon. J. N. Powers, former assistant Attorney-General, and Mr. A. H. Whitfield, Jr., son of the Chief Justice of the Supreme Court of Mississippi.

Rear Admiral Samuel C. Lemly, U.S.N., retired, is suffering from a complete mental and physical breakdown, which is understood to have had its origin in the strain to which he was subjected in the celebrated Schley case. He was the Judge Advocate-General who conducted that case, and was widely caricatured and criticised in view of the popular excitement over it.

Walter F. Frear was Chief Justice of the Hawaiian Supreme Court before he was appointed Governor of Hawaii. A native of

California, he went to the islands in early life, and was educated at Oahu College, Honolulu, at Yale, and at Yale Law School. He taught Greek, mathematics, and political economy at Oahu College for two years, and entered judicial life in 1893 as a circuit judge of Hawaii.

Judge Ignatius C. Grubb retired from the state bench of Delaware June 12, after twenty-three years' service. He has had a distinguished and active career, holding many public offices in Delaware, and performing arduous duties in the constitutional convention of 1897. In 1893, he declined the office of Chief Justice, and in 1895, that of Chancellor. In length of service he is the dean of the Delaware bench.

The Senate has confirmed the appointments of the following to be United States District Judges: Edward E. Cushman to be District Judge for the third division of Alaska, William I. Grubb for the northern district of Alaska, Charles A. Willard for the district of Minnesota, and A. W. Cooley for the district of New Mexico. The appointments of Ernest W. Lewis and Edward M. Doe to the Arizona Supreme Court bench have also been confirmed.

Personal—The Bar

William Curtis Gulliver, Yale '70, a prominent New York lawyer, died May 25 at his home at 8 East 56th street.

John B. Morrill of Gilford, N. H., a former member of the Legislature, and a member of the constitutional convention in 1889, has been appointed Judge of Probate of Belknap County, N. H.

W. W. Fuller of New York, general counsel for the American Tobacco Company, and formerly a student of the University of Virginia, has given $10,000 to the law library of that institution.

Francis M. Fogarty has been appointed Clerk of the United States Circuit Court of Appeals at Boston. He has been first assistant clerk for the past four years, and is twenty-eight years of age.

J. Herbert Denton, K.C., of Toronto, J. McKay, K.C., of Sault Ste. Marie, G. M. Rogers, K.C., of Peterborough, and C. Russell Fitch, K.C., of Toronto, have been appointed to the county bench of Ontario.

William R. Harr of the District of Columbia has been appointed Assistant Attorney-General of the United States, to succeed Alford W. Cooley, whose appointment as Associate Justice of the Supreme Court of New Mexico was confirmed by the Senate June 2.

Judge David W. Doom, one of the foremost lawyers of Austin, Texas, died there May 24. He was born in 1848, served in the Confederate army, and acted as special district judge and special judge of the appellate courts on several occasions, and handled a large amount of land litigation.

President Taft has appointed William Williams, a practising attorney of New York, to succeed Robert Watchorn as Commissioner of Immigration at that port. Mr. Watchorn was a graduate of Yale in 1884, and was Immigration Commissioner for two years during the Roosevelt administration.

Mr. Frederick W. Lehmann, president of the American Bar Association, has been tendered by Governor Hadley the position of Judge of the St. Louis Circuit Court of Missouri, to succeed Judge Matt. G. Reynolds, on the latter's retirement, but has stated that owing to his business relations he can not accept the honor.

The fiftieth anniversary of the admission to the Vermont bar of Gilbert A. Davis was celebrated at Woodstock, Vt., June 1, by about fifty of his friends, including prominent lawyers and judges. Mr. Davis has been assistant clerk of the Vermont House of Representatives, Register of Probate, state senator and State's Attorney.

State's Attorney Hugh M. Alcorn on June 7 announced the appointment of Theodore G. Case of Hartford, Conn., as Assistant State's Attorney, beginning his duties July 1. Mr. Case is about thirty-four years of age, and is a brother of Superior Court Judge William S. Case of Hartford. He is a graduate of Trinity College, and studied at the Yale Law School.

Mr. Charles F. D. Belden, who is a member of the New York bar, has been appointed librarian of the State Library of Massachusetts It is expected that he will make the State Library invaluable to the Legislature, because of the particularly appropriate experience he has had not only as librarian of the Boston Social Law Library but in that of the Harvard Law School.

George Donworth, a prominent lawyer of Seattle, was sworn in as United States District Judge for the western district of Washing-

ton May 27. Judge Donworth was at one time attorney for the Stone & Webster syndicate and had represented other large interests. Judge Donworth was banqueted by the Pierce County Bar Association May 19, at which he was jovially introduced by Judge J. A. Shackleford as "the only federal judge of the state of Washington who has never been reversed."

Prof. Roscoe Pound of the Northwestern University Law School, formerly dean of the University of Nebraska Law School, will join the faculty of the University of Chicago Law School next October. As its editor-in-chief, he has made the *Illinois Law Review* one of the ablest law journals in the country. Prof. Pound is a man of wide learning and keen intellect who has devoted painstaking attention to fundamental problems of political and legal science and has made a special study of the reform of procedure, and is one of the best informed men on that subject in the United States. He was organizer of the National Conference on Criminal Law and Criminology which just met in Chicago to mark the fiftieth anniversary of the Northwestern University Law School. The University of Chicago is to be congratulated on its good fortune in securing the services of so gifted a scholar.

Bar Associations

Congressman S. W. McCall of Massachusetts will deliver the annual address before the Ohio State Bar Association July 7.

Dr. James Parker Hall, the English jurist, was one of the principal guests at the large banquet of the San Francisco Bar Association May 20.

The Rhode Island Bar Association held its annual summer outing at the Pomham Club on the afternoon of June 5, when they enjoyed a luncheon and clambake.

The New Jersey Bar Association held it eleventh annual meeting in Atlantic City June 11 and 12, the principal address being delivered by Associate Justice David J. Brewer of the United States Supreme Court.

The Berkshire Bar Association held its annual meeting and dinner at Pittsfield, Mass., May 17. Former Attorney-General Herbert Parker and District Attorney Taft of Springfield were the speakers. Charles E. Burke of Pittsfield was elected president.

Ernest W. Hardy at a meeting of the Multnomah County Bar Association held May 25 at Portland, Oregon, spoke on "The Necessity of Judicial Construction of the Laws Passed by the Legislature," and urged the adoption of the Wisconsin plan whereby an expert assists the legislature in drafting bills.

Judge Howard T. Sanford of the United States Court for the eastern district of Tennessee read a paper on "The Establishment of the Federal Judiciary," and Clarence S. Darrow of the Chicago bar spoke on "The Adherence to the Precedents in the Law" at the monthly meeting of the Cincinnati Bar Association June 5.

The State Bar Association of Arkansas met June 1 at Hot Springs, Ark., for its twelfth annual convention, and listened to a paper by the president, John M. Moore of Little Rock, on "The Development of the Law and Private Corporations." Cummings Ratcliffe of Little Rock read a paper on "Mining Law," and S. H. Mann of Forest City one on "Special Legislation."

Hon. Hannis Taylor of Washington, D.C., delivered the annual address before the Georgia Bar Association, which opened its twenty-sixth annual convention at Warm Springs, Ga., June 2. One of the most important matters considered was the report of the committee on jurisprudence, law reform, and procedure. This report recommended the passage of an act with reference to the probate and execution of foreign wills, and favored in earnest terms action by the association to induce the legislature to adopt and publish a new code.

The fourteenth annual meeting of the Maryland State Bar Association will be held at Old Point Comfort, July 7–9. The Virginia State Bar Association meets at the same place at the same time. The Maryland association will consider the Torrens land system and the divorce question. Justice Henry B. Brown, retired, of the United States Supreme Court, will speak on the latter topic, and Herbert Noble will make an address on the trust problem. Hon. Simeon E. Baldwin, lately Chief Justice of the Supreme Court of Connecticut, is also on the list of speakers.

Louisana Bar Meeting

The annual meeting of the Louisiana Bar Association, held at Alexandria, La., May 28–29, was the largest and most successful in its history. In the attendance were to be found the Governor, four Justices of the Supreme Court, and other prominent officials, including the full membership of two commissions on the revision of the Civil and Criminal Codes. Interest centred chiefly

in the discussion of the proposed changes in the Civil Code, and of the proposed Criminal Code. Mayor J. P. Turregano offered the hospitality of Alexandria in an opening speech, and Hon. Ralph S. Thornton extended the welcome of the Alexandria bar. Gov. J. Y. Sanders, referring to the fact that the most perfect system of law devised by the human mind, the civil law, was to be revised, said that there was also great need of the revision of the Criminal Code. The former received chief attention, a symposium on it being opened by Hon. R. E. Milling, chairman of the Commission for the Revision of the Civil Code, who outlined the changes that the Commission had tentatively agreed upon. He said that while he and his associates were at first "strongly of the opinion that many defects existed in the Code, and that many radical changes should be made therein," they finally concluded that it was better as it was, in the main. J. P. Blair of New Orleans discussed the question "Should the Community Laws of Louisiana be Repealed or Modified?" and Hon. Henry L. Favrot of New Orleans made an address on "The First Governor on the First Code." Hon. J. C. Theus considered the topic "What Laws Should be Required to Compel Registry of Changes in the Title to Real Estate, When the Title Comes Through Succession or Through the Community?" and Henry P. Dart discussed the subject, "Should the Laws Requiring the Convocation of Family Meetings for Certain Purposes be Repealed?" Mrs. Jessie Benedict Gessner, in the discussion which followed, warmly advocated the abolition of family meetings. M. H. Carver read a scholarly paper on "The Divorce Laws of Louisiana." Sentiment was practically unanimous against any material changes in such laws. In the symposium, the discussion of live topics connected with the revision of the Civil Code continued on the second day, when H. Garland Dupré, Speaker of the House of Representatives, discussed the disabilities of married women, Miss Florence Loeber joining in the helpful discussion, and Hon. E. H. Randolph followed with a scholarly paper on "Should the Rights of Illegitimate Children be Increased or Diminished?" There was much general discussion on all the topics, in addition to the regular addresses. The trend of the debates indicated a sentiment predominantly in favor of the retention of the civil jurisprudence of Louisiana substantially in its present form, without other changes than those necessary to adapt it to contemporary conditions. The closing hours were made interesting, not only by the presentation of the president's address, by Hon. W. S. Parkerson of the New Orleans bar, but by the reading of a paper by Attorney-General J. B. Stirling of Mississippi on "The Relation between Interstate and Intrastate Commerce." The subject of a new court house received some attention. Amendments to the constitution were adopted, providing for committees of three members each on jurisprudence and law reform, on legal education and admission to the bar, on publication, on state laws so as to promote uniformity of legislation, on local bar associations and on obituaries. The meeting came to a close with a banquet. E. H. Randolph of Shreveport was elected president, the other officers being: vice-presidents, Joseph W. Carroll, Frank P. Stubbs, Jr., Philip S. Pugh, Edward T. Weeks; secretary-treasurer, Charles A. Duchamp.

Necrology—The Bench

Ex-County Judge David Millar died at Lockport, N. Y., May 4. He was prominent in the Democratic party.

John J. Fruit, Presiding Judge of the sixth judicial circuit of Wisconsin, died at La Crosse, Wis., May 27, after an illness of six months.

Irwin William Schultz, a leading lawyer of Warren County, New Jersey, former Mayor of Phillipsburg, and former Judge of the County Court, died in Phillipsburg, N. J., May 17.

Judge George R. Pryor died at Nicholasville, Ky., May 20. Early in life he taught school, having James Lane Allen among his pupils. He was one of the best known lawyers of his section.

Charles Alexander Weller, County Court Judge of Peterborough, Ont., died June 5, in his seventy-ninth year. He was widely known in Ontario and held in the highest esteem.

Judge Henry L. Henderson, who was formerly United States Judge in Utah, died in that state early in June. He was at one time law partner of the late Judge Brown of Washington.

Judge R. H. Lee, who had long been prominent in the public affairs of his section of the state, died at Sanford, Miss., May 17. In earlier days he had taken an active part in local politics.

Samuel Ashton, who forty years ago was Justice of the Supreme Court in Chicago, died in New York City June 3, at the age of eighty-five. He was a personal friend of Chief Justice Fuller.

Judge W. P. Green, who died at Fulton, Ky., May 9, was the prosecuting attorney for Washington County, Ky., forty years ago, later becoming county judge. He left the law to engage in journalism.

Judge Horatio Wildman, one of the oldest and best known lawyers of Ohio, died May

16 at his home in Sandusky, O. Going west in 1848 from Connecticut, he was prominent in Ohio politics for half a century and held various public offices.

Judge William C. Hall, who died at Long Beach, Cal., May 7, was one of the most prominent lawyers of Salt Lake City. He fought in the Civil War on the Confederate side. He made a specialty of mining law, and was twice elected city attorney.

Judge Edwin H. Wooley, a leading lawyer of Kansas City, Kan., and one of the oldest members of the Wyandotte County Bar Association, was stricken with paralysis May 13. He had formerly enjoyed a large practice in the highest courts of Nebraska.

The memory of the late Judge William H. Donohue was honored by the Minneapolis bar May 15. Five judges who had been his colleagues on the bench presided, and voiced the sentiments of the profession in the presence of one hundred or more members of the Minneapolis bar.

Former Judge William Waugh of Mercer County, Pa., died at Greenville, Pa., recently, being ninety-one years old. He was graduated over seventy years ago from the law school of the Western University of Pennsylvania. He received the degree of LL.D. from the University of Pittsburgh last February.

The Bar Association of Fairfield County, Conn., paid an admiring tribute to the late Judge Charles A. Doten, who died May 15. Judge Doten held the offices of corporation counsel of Bridgeport, Judge of the City Court, and County Coroner, and was a well-informed and faithful lawyer of honorable character.

Walter L. Weaver died May 26 at Springfield, O., in his fifty-eighth year. He was educated at Wittenberg College, afterward studying law and engaging in newspaper work. He practised law, and then became a member of the Fifty-fifth and Fifty-sixth Congress, and in 1902 was appointed by Mr. Roosevelt Associate Justice of the Choctaw and Chickasaw citizenship court, in which capacity he served for three years.

Judge William H. Hulsey, a progressive citizen of Atlanta, and a Confederate colonel in the Civil War, died May 17. He had served in the legislature of his state and as Ordinary of Fulton County for several terms. Judge Hulsey as Atlanta's "Boy Mayor" in 1869 displayed exceptional enterprise, and as a criminal lawyer he ranked with the most eloquent and successful in his part of the country.

Justice Guy C. Scott of the Illinois Supreme Court died at Galesburg, Ill., May 24, after an operation for appendicitis. He was forty-six years old. For one year he served as Chief Justice. When he first went on the bench he was considered the best trial lawyer in Mercer County. His service on the bench was marked by incessantly studious and conscientious labor.

Judge Henry Perry Henderson of Salt Lake City, Utah, died there June 3. He was born at Otisco, N. Y., and was sixty-five years of age. He had filled many minor offices, having been clerk of the Supreme Court of Michigan, county attorney for Ingham County, and Mayor of Mason. In 1886 he was appointed one of the Justices of the Supreme Court of Utah, later returning to his law practice.

Judge Denis O'Brien, who retired from the New York Court of Appeals two years ago, died May 18, at his home in Watertown, N.Y. He had served as Mayor of Watertown in 1878, as Attorney-General from 1883 until 1887, and as Judge of the Court of Appeals from 1889 to 1907. He was the friend of Tilden and Cleveland. On the bench he served with conspicuous ability, rendering many important decisions, including that wherein the Alien Labor Wage Law was held unconstitutional. His decisions were characterized by marked learning and independence.

Necrology—The Bar

W. H. Reece, a prominent lawyer of northern New York, died suddenly in Watertown May 26.

Bryan L. Oliver, a prominent lawyer and Republican leader of Los Angeles, died in Mexico May 15.

Major Horatio K. Tyler, a successful pension attorney and a prominent Civil War veteran, died at Pittsburgh June 7.

Edward T. Lovett, a lawyer of Nyack, N. Y., died May 23. He was a member of the Westchester and Rockland County Bar Associations.

Charles Gibbs Carter, who died May 14 in Pittsburgh, had been connected with many large suits, principally oil and gas cases.

Erastus P. Jewell, a leader of the bar of Belknap County, N. H., died at Laconia, N. H., June 3, after an active and useful career.

L. F. Fryer, a prominent and respected attorney of Fort Worth, Tex., was accidentally killed May 19 by a fall from the window of his office.

Jacob P. Solomon, founder and editor of the *Hebrew Standard*, who died May 26 in New York, had practised law from 1865 until seven years ago.

William H. Ely died at New Haven, Conn., May 26. He was graduated from Amherst College in 1877, and ranked with the best known and most popular lawyers of Connecticut.

Major H. Frank Wilson, a prominent member of the Sumter, S. C., bar, a polished orator and gentleman, tragically shot himself May 18. He had been in ill health for several years.

Charles H. Reed, a prominent lawyer and Republican, died at Dufur, Ore., May 17. He had at one time practised law in Idaho, and had been prominent in Idaho as well as in Oregon politics.

Robert O. Bascom, District Attorney of Washington County, New York, died at Fort Edward, N. Y., May 18. He was a prominent Republican, and was secretary of the New York State Historical Society.

Francis A. Bolles, the oldest lawyer in practice in Bellows Falls, Vt., died May 23. A graduate of Tufts College in 1890, he became a member of the Legislature, and was afterwards State's Attorney for Windham County.

Smith L. Lindsley, president of the Oneida County Bar Association, died at his home in Utica, N. Y., May 17, after a long illness. He was admired and respected for his ability and integrity, which had won him success at the bar.

Jonas Guilford, who in former years was counsel in much important litigation, died May 15 at Minneapolis. A native of Massachusetts, he was graduated from Amherst College in 1864, and had resided in Minneapolis for forty-two years.

Walter Alexander, a prominent graduate of Harvard, died in New York City May 21. When in college he stroked the 'Varsity crew of 1887, in which year he was graduated. He was a member of the Board of Education, and president of the Missouri Society.

John H. Bird, formerly a prominent lawyer and clubman of New York City, died at Peekskill May 25 in his seventy-third year. In his prime he had been an enthusiastic yachtsman and amateur actor, and had also had charge of some important litigation.

Governor Stuart and all the judges of the Supreme and Superior Courts of Pennsylvania attended the funeral services for Col. Alexander K. McClure, the veteran journalist and prothonotary of the Supreme and Superior Courts, at Wallingford, Pa., June 10.

John M. Poston, who was for years one of the most prominent lawyers in California, died May 12. Habits which he could not master had steadily driven him down to abject poverty from the position of one of the most skillful masters of pleading in the state.

A memorial to Thomas G. Kent of Worcester, Mass., was entered on the records of the Superior Court on June 3. Chief Justice Aiken and a number of lawyers spoke feelingly of his high integrity and his marked ability. Mr. Kent was for years one of the leading lawyers of Worcester.

Hugh H. Hamill, whose father had been head-master of Lawrenceville School, died in Trenton, N. J., May 14. He was graduated from Princeton in 1871, admitted to the bar in 1874, and practised until 1890, when he became President of the Trenton Trust and Safe Deposit Company.

The late Walter L. Granger stood high in the legal fraternity of Cincinnati. He was known as an indefatigable worker in lucrative practice until three years ago. To his habit of severe study in leisure hours is ascribed the chief cause of the failing health that compelled him to give up active practice.

James M. Williams, well known in the political and legal life of Cleveland, and former Lieutenant-Governor of Ohio, died in Cleveland May 22. He had been a member of the Legislature and was state senator for four terms, until a year ago. He had also done much work in the way of securing a revision and codification of the Ohio laws.

Charles H. Burns, a prominent New Hampshire lawyer, died at Wilton, N. H., May 22, at the age of seventy-four. He was a graduate of the Harvard Law School, and served as state senator, and later as United States Attorney. For many years he was senior counsel for the Boston & Maine Railroad in southern New Hampshire.

The memory of the late John G. Stetson, who died March 30, 1908, for many years Clerk of the United States Circuit Court of Appeals, has been honored by the Boston Bar Association, which has just adopted resolutions paying tribute to his excellent work and fine talents, a beautiful eulogy being delivered by Judge Colt.

Ex-Governor Thomas T. Crittenden of Missouri died at Kansas City, May 29. After the Civil War Col. Crittenden formed a law partnership with Gen. F. M. Cockrell, and was elected to Congress five years later, afterwards becoming United States Senator from Missouri, and later Governor. He afterward resumed the practice of law, and then served for four years as Consul-General to Mexico.

John Noble, who not long ago retired from the position of Clerk of the Supreme Judicial Court of Massachusetts, which he had held for thirty-three years, died June 10. He was educated at Phillips-Exeter Academy, Harvard College, and the Harvard Law School, and successfully practised law before his appointment. He was a man of considerable legal learning, and belonged to numerous societies.

Miscellaneous

A new edition of Judge Dillon's invaluable Law of Municipal Corporations is now being prepared and will be published shortly.

Diplomas were awarded to sixteen graduates of the Washington College of Law, Washington, D.C., May 24. Six of the class were women.

The Idaho State University at Moscow, Idaho, will establish a law school, and Mr. John F. MacLane, Assistant Attorney-General, will begin his work as its head next fall.

Mayor Malone, acting under the provisions of the Tennessee law creating a juvenile court, has selected a committee of three to investigate its requirements for the city of Memphis.

The largest class of law students that has ever appeared before the Missouri Board of Law Examiners, consisting of 139 students, took their examinations a month ago at Jefferson City.

The commencement exercises of the Pittsburgh Law School, which is the law department of the University of Pittsburgh, were held on June 9. A class consisting of thirty-one young men was graduated.

Dr. Theodore Barth, the eminent publicist of Germany, who died June 2, was not a lawyer, but was a close student of political and economic institutions, and wrote easily and temperately on American affairs.

The new session laws passed by the last legislature direct the judges of the Supreme and Superior Courts of the state of Washington to appear in open court "in gowns made of black silk of the usual style of judicial gowns."

Miss Amy Wren, a practising lawyer of Brooklyn, has the distinction of being the first woman ever appointed to a receivership in the United States, having been designated to close up the business of a Brooklyn shoe firm.

The Bar Commission of Oklahoma adopted a rule June 3, that attorneys will be admitted to the bar of that state when they have been admitted in other states on motion and have practised five years, or when they have been admitted in other states on examination and have practised one year.

The Williamette College of Law held its commencement exercises at Salem, Ore., May 21. Circuit Judge George H. Burnett addressed the graduating class on the professional career opening before them, while Speaker C. N. McArthur discussed their future duties as lawyers and citizens.

Judge Emory Speer of Georgia, Dean of the Law School of Mercer University, Macon, Ga., delivered the annual address to the forty young men of the graduating class, June 2. Prizes were won by George Alexander Adams for excellence in constitutional law, and by John Burke Harris for the highest grade in law studies.

The class day exercises of the Boston University Law School were held June 1. John H. Cogswell was class orator, and Jacob Berman was class historian, while Joseph Klein made an address on "Boston in 1915" and Samuel Markell gave a "miniature horoscope." of the class as it would appear ten years hence.

The closing of the 46th session of the Illinois Legislature was marked by the triumph of local option over the saloon element, the contest being a close one. The liquor interests, finding that they could not secure a majority in the Senate, although they nearly had one, surrendered as gracefully as they could.

Judge William H. De Lacy, Judge of the Juvenile Court in Washington, D.C., Judge Mack, Judge of the Juvenile Court in Chicago, and Judge Emanuel Devine, Judge of the Juvenile Court in Cleveland, are some of the speakers who are to appear at the National Charities and Conference of Corrections to be held this year at Buffalo.

The Supreme Court of the United States closed its October term June 1, and adjourned until the second Monday in October. With the exception of Justice Moody, who had been suffering from rheumatism, all the members of the Court were in attendance. Justice Harlan observed his seventy-sixth birthday on the closing day, declaring that he felt "just as spry as he had felt any time for many years."

Sam Lima, said to be the leader of the Black Hand gang in the United States, and several of his fellow conspirators, were arrested early in June in Columbus and Marion, Ohio, where much evidence has been gathered against the organization. The work of the Cincinnati officers tends to show that there is a national Black Hand organization in the United States allied with a similar one in Sicily, and working in connection with the Mafia.

The Superintendent of Prisons for New York proposes to ask the next legislature of that state to take the initiative in deporting to their own countries alien criminals. It is now a federal law that aliens can be deported who within three years after their arrival in this country have been convicted of crime. Some of the leaders of the New York legisture are understood to be in sympathy with the project, which would relieve the state of considerable expense.

Professor A. V. Dicey now retires from the Vinerian Chair of English Law at Oxford after twenty-seven years' tenure of office. While he is in his seventy-fourth year, retirement is not due to ill-health. Professor Dicey, before taking the professorship the traditions of which his scholarly gifts have so nobly upheld, was a Fellow of Balliol, then a Fellow of All Souls', and Honorary Fellow of Trinity, and was called to the bar at the Inner Temple in 1863.

Ambassador Bryce attended the session of the Massachusetts House of Representatives June 10, and in response to a request for a speech expressed the greeting and good will of the mother country. "The state legislatures in America," he said, "have followed the ancient traditions of Parliament—even more closely than has your national Congress. This is especially true of the legislatures of Massachusetts and Virginia. Here you have the principle of requiring the filing of bills, the reference to and consideration by committees, the three readings that all may know and understand each matter, and the two branches that everything may be properly heard and the liability of mistakes lessened."

In the election of Cook County judges at Chicago June 7, all of the sixteen judges of the Superior Court and Circuit Court were re-elected except three. To succeed these three, Judges Edward O. Brown, R. W. Clifford, and Francis Adams, who were all Democratic candidates for re-election, Kickham Scanlan, Adelor J. Petit, and Jesse A. Baldwin, all Republicans, were chosen. The complexion of the Circuit Court has thus changed from a Democratic to a Republican majority. The defeat of the able Judge Adams, and probably the election of the inexperienced Scanlan, were due to the efforts of the labor unions. Six of the judges elected had failed to receive the indorsement of the Chicago Bar Association.

The fiftieth anniversary of the founding of the Northwestern University Law School was observed at Chicago June 7–8, by a National Conference on Criminal Law and Criminology, which was attended by specialists, judges, and lawyers gathering from all parts of the country. Prof. Roscoe Pound, who had been chiefly instrumental in organizing the conference, stated its aims in an opening address and introduced Gov. Deneen, who greeted the visitors. James Hagerman of St. Louis was elected chairman of the conference. Prof. E. A. Ross of the University of Wisconsin predicted that the near future would see a comprehensive anthropological survey for the purpose of securing more accurate information regarding criminals by means of laboratories conducted in a systematic manner. This proposal elicited some discussion; as did also that regarding police training, some delegates urging the advantages of a school which should give policemen some understanding of what legal evidence of crime implies. Clark Bell of New York, editor of the *Medico-Legal Journal*, contributed a paper on "The Indeterminate Sentence." As a result of the action of the conference a permanent body to be known as the American Institute of Criminal Law and Criminology was organized, with Dean John H. Wigmore of Northwestern University Law School as president, and Prof. Edwin R. Keedy of the University of Indiana as secretary. This organization will immediately give its attention to the revision and alteration of the criminal jurisprudence of this country. Congress will be asked by a committee of the Institute to establish a bureau to collect criminal statistics, and a committee was selected to investigate criminal laws in foreign countries to guide in the reform of our own criminal law. Sixteen topics were turned over to various committees for investigation during the coming year. These were culled from one hundred and thirty-four topics submitted to the conference for consideration, and reports upon them will be offered at the next annual meeting. The topics are divided into three classes, bearing on offenders against the law, on the organization and training of officers of the law, and on criminal law and procedure. The conference was closed by a banquet at which Supreme Court Justice Orrin H. Carter presided as toastmaster. The deliberations of the conference are to be published in the form of a treatise on criminology and widely circulated. The following are the committee chairmen: permanent organization committee, William E. Mikell, professor of criminal law in the University of Pennsylvania; periodical committee, Adolf Meyer of New York; criminologist affiliations committee, Joseph P. Byers of New York; statistics bureau, John Korne of the United States census bureau.

THE LATE EMMET FIELD

OF THE COMMON PLEAS BENCH OF KENTUCKY

A wise and able judge
An upright and fearless man

[See page 398]

The Green Bag

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The Police Power in its Application to the Regulation and Limitation of Hours of Labor

By S. J. Wettrick

Formerly of the Cleveland Bar, Now of the Seattle Bar

IN taking up this subject it is not our intention to enter into a discussion of fundamental social, political or economic theories as to the wisdom, policy or constitutionality of the exercise of the police power to regulate and limit the hours of labor. To do so would involve us in the abstractions suggested by such titles as "Paternalism *v.* Individualism" and "Governmental Interference *v. Laissez faire*," all of which we wish to carefully avoid.

It may be that governmental interference has gone, or is going, too far. As early as 1886, Prof. Tiedeman was so alarmed about this tendency that he felt it his duty to point out the exact limitations of the police power in the United States, in the hope that he might "awaken the public mind to a full appreciation of the power of constitutional limitation to protect private right against the radical experimentation of social reformers." It is interesting to note the anxiety of this author in regard to this matter at a time when legislation under the police power had not gone to the extremes of today, and when its application to the regulation and limitation of hours of labor was yet a novelty. In the preface to his treatise on the "Limitations of the Police Power in the United States" he says:—

> For many years after popular government was established in the English-speaking world there was no marked disposition manifested by the majority to interfere with the like liberty of the minority. On the contrary, the sphere of governmental action was confined within the smallest limits by the popularization of the so-called *laissez faire* doctrine, which denies to the government the power to do more than provide for the public order and personal security by the prevention and punishment of crimes and trespasses. Under the influence of this doctrine, the encroachments of government upon the rights of the individual in the past century have been comparatively few. But the political pendulum is again swinging in the opposite direction and the doctrine of governmental inactivity in economic matters is attacked daily with increasing vehemence. Governmental interference is proclaimed and demanded as a sufficient panacea for every social evil which threatens the prosperity of society. . . . . Contemplating these extraordinary demands, ... the conservative classes stand in constant fear of the advent of an absolutism more tyranical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.

Thus wrote Tiedeman in 1886. Since

that time the range of legislation with respect to the subject of governmental control in the exercise of the police power has been much extended. The reasons for this extension are obvious. Modern social life has called into being many agencies not before existing, and it is only natural that there should be a continuous and progressive development of governmental functions with the increased application of science to the business of life. The changing conditions of society, the evolution of employment, and the expansion of trade and business along all lines make a change in the application of principles absolutely necessary.

Many people now hold the view that, all things considered, the general welfare of employees, mechanics and workingmen upon whom rests a portion of government will be best subserved if the hours of labor are restricted. This is shown by the many laws upon this subject passed within recent years, such, for instance, as the law of Congress limiting the hours of labor upon public works, regardless of whether there are any special circumstances calling for such a law.

But, however that may be, we shall not discuss fundamental theories, such as the quotation above suggests. At least we shall not join with Prof. Tiedeman in his opposition to the evident tendency of the law. To do so would avail us nothing. To take a stand opposed to governmental interference, except in this restricted sense, would be to differ with the overwhelming authority of both state and federal statutes and cases. Our only purpose, therefore, shall be to review and classify the cases which have considered laws relating to hours of labor, to the end that we may know just where we stand upon this important subject in its present state of development.

If we were to classify the police power with regard to the instances in which it has been exercised within recent years, one of the main divisions would be that as to the regulation and limitation of hours of labor. Indeed, so important have become the statutes and decisions upon this subject that the Digests and Encyclopædias have incorporated a distinct head under which to treat them, which, no matter what the number of hours to which labor is limited may be, is entitled, for the sake of brevity and uniformity, "Eight Hour Law."

While laws providing that a certain number of hours shall constitute a day's work have become quite general within recent years, the adjudications upon this subject are as yet comparatively few. The terms of the statutes vary in the different states. In some the only purpose seems to be to define a working day, while in others provisions are made for recovering compensation for working over hours, or penalties are enacted for their violation.

The principal ground upon which such statutes have been attacked is that they restrict the constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States which reads as follows:—

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the law."

The police power, which is inherent in the states, relates to the health, safety, morals and general welfare of the public. It is hardly necessary, therefore, to say that any law limiting hours

of labor which clearly and directly conserves the public health, safety, morals or welfare is valid and will be upheld in any court. Such a law is designed primarily to protect the public, as distinguished from the individual, and clearly falls within the requirements of the legal maxim, "*Sic utere tuo, ut alienum non laedas*," upon which the police power rests and to the detailed enforcement of which it is generally confined.

I. Laws Regulating and Limiting Hours of Labor Which Directly Affect the Public.

It is difficult to conceive of labor laws which directly affect any one but the laborer himself, or, perhaps, the employer. To limit the number of hours a person shall work generally does not concern the public, at least not directly. We need not expect, therefore, to find many such laws. The cases in which such laws are considered are still fewer for the reason that their validity is seldom attacked. The only case in which the constitutionality of such a law was considered is that entitled, *The Ten Hour Law for Street Railway Corporations*, 24 R. I. 603, 1902, in which an act providing that a day's work for employees on street railways should not exceed ten hours' work to be performed within twelve consecutive hours was held valid. The Court said in substance that the purpose of the act is to guard the public (safety) from service too prolonged for alertness in the exercise of reasonable care. A similar statute applicable to railroads was involved in *People* v. *Phyfe*, 136 N. Y. 554, 1893, but the case turned upon another point and the question as to its constitutionality was not decided. The Court said, however, that "in view of the great danger to, and even destruction of, life and property, which might result from an attempt of men who have become enfeebled by prolonged and exhausting effort to control engines and cars in motion," it might well be regarded as a reasonable exercise of the police power. The federal eight hour law, limiting the hours of employees engaged by interstate railroads, which went into effect a little over a year ago, is another similar law and is undoubtedly sustainable on the same ground, namely, on the ground that it directly protects the public.

These are perhaps the clearest illustrations of such a law. There are none beside these in which the hours of employees have been limited primarily for the welfare of the public, and which so directly affect the public. As soon as we leave clear instances like those above, we approach the border-line between those laws which directly affect the public and those which do not, and become involved in the difficulty of determining to which class the particular law in question belongs, upon which determination, of course, depends the validity of the law. Here there is room for great differences of opinion, depending entirely upon the view which the court takes, and hence the conflict between the decisions of our best courts in passing upon the validity of the same law. To illustrate, a few years ago the legislature of New York passed a law making it a misdemeanor to employ a person in a bakery for more than ten hours in any one day. This law was sustained as a valid exercise of the police power by both the Appellate Division of the Supreme Court, *People* v. *Lochner*, 73 App. Div. 120, 1902, and the Court of Appeals, *id.*, 177 N. Y. 145, 1904, of the State of New York. This case properly falls under a later

division of our subject and we notice it here only to call attention to that phase of it which touches the point we wish to illustrate. One of the reasons given by the New York courts for upholding this law was that it directly affects the public health, because bread is more likely to be clean and wholesome if the workman is not fatigued by long hours of work, and clean and wholesome bread is conducive to the public health. The case later went to the Supreme Court of the United States, *Lockner* v. *New York*, 198 U. S. 45, 1905, but that Court could see no such direct relation between the law and the public health. It said, in substance, that it is impossible to discover any connection between hours of labor and healthy bread, and that, if it exists, it is "too thin and shadowy to build an argument on it." The conclusion, therefore, was that the law could not be sustained on that ground.

II. Laws Regulating and Limiting Hours of Labor Which do Not Directly Affect the Public. General Rule.

Let us now see what the situation is with regard to laws which admittedly have no such direct relation to the public health, safety, morals or welfare. The broad, fundamental rule undoubtedly is that such laws are invalid because they restrict the inalienable right of every citizen to contract as he pleases concerning his labor and property. But there is another principle as firmly established as the preceding one, to the effect that both liberty and property, including the right to contract, are subject to reasonable regulation by the state when there are particular circumstances which require it. A few courts, though recognizing this principle in other connections, seem to forget it when they are dealing with laws limiting hours of labor, and, adhering strictly to the main rule, absolutely refuse to sustain such laws. A large majority of the courts, however, recognize and apply this principle in considering laws limiting hours of labor as they do in considering other laws, with the result that there are now three well established exceptions to the broad, fundamental rule first above stated. The cases which absolutely deny the right of the legislature to make such laws under any circumstances, we will take up in connection with, and as denying, the exceptions which naturally furnish the classification for the rest of this article.

III. Exceptions to the General Rule That Laws Regulating and Limiting Hours of Labor Which Do Not Directly Affect the Public are Invalid.

1. LAWS WHICH LIMIT THE HOURS OF LABOR OF PERSONS ENGAGED ON PUBLIC WORKS.

A common form of statutory regulation of the hours of labor is the provision that workmen on public works shall not be required to work more than a prescribed number of hours each day. These laws indicate a general belief on the part of the legislators that restricting the number of hours of work is conducive to the general welfare, because they are often passed regardless of whether there are any special circumstances connected with the situation they are to govern calling for such laws. Most courts sustain legislation of this kind. This is not because it has such a direct relation to the public welfare as is required in other cases, or even because it has any relation to it at all, but because laws of this kind are regarded as in the nature of a direction

from a principal to his agent. As was said by the Court in *United States* v. *Martin*, 94 U. S. 400, 1876,—"We regard the statute chiefly as in the nature of a direction from a principal to his agent, that eight hours shall be deemed to be a proper length of time for a day's work, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent in which a third party has no interest." In *Atkins* v. *Kansas*, 191 U. S. 207, 1903, the Court said that "It is within the power of a state, as a guardian or trustee for its people and having full control of its affairs, to prescribe the conditions upon which it will permit public work to be done on behalf of its municipalities." A typical statute of this kind is that considered in the case of *In re Dalton*, 61 Kan. 257, 1899, which provided that eight hours shall constitute a day's work for laborers, workmen and mechanics employed by or on behalf of the state, or by or on behalf or any county, city, township or other municipality of the state.

The theory of these cases is that no employee is entitled as of absolute right and as part of his liberty to perform labor for the state, and that no contractor of public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly forbids. In the case last cited it is said: "The position which the state has taken in no wise differs from that of the individual who, in the employment of labor, refuses to allow any one to work more than eight hours. It certainly is lawful for one to refuse to employ men to work more than a given number of hours."

The tendency of the decisions undoubtedly is in favor of upholding this class of statutes. Thus in *In re Broad*, 36 Wash. 449, 1904, the Court expressly overrules a former decision which was against the constitutionality of such a statute. The case overruled was *City of Seattle* v. *Smythe*, 22 Wash. 327, 1900.

But the decisions upon this class of cases are by no means unanimous. The cases which hold the contrary repudiate the agency idea and hold that while cities and counties are auxiliaries of the state for the purpose of local government, they are so far independent of the state that it is not within the power of the legislature to prescribe the terms and provisions of the contracts that may be made by a person contracting therefor. *Ex parte Kubach*, 85 Cal. 274, 1890. *City of Cleveland* v. *Construction Co.*, 67 O. S. 197, 1902. In the latter case the Court said, "The fallacy of the contention (that it is a direction from the principal to his agent) lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which it may contract although such contracts may relate only to matters of purely local improvements." It would seem from these cases that the real conflict between the courts is not so much on the principal-and-agency idea as it is on the question whether the law is so broad as to cover not only contracts which a municipality makes in its governmental capacity, but also those which it makes in its private capacity. In the former case the municipality acts as agent, in the latter as principal. Applying the principal and agency test, then, it follows that while the legislature has the right to prescribe the rules which shall govern in the exercise of purely governmental functions of public corporations, it has no such right

as to those which shall govern in the exercise of their private functions.

As further indicating the real conflict in these cases, we cite *People* v. *Construction Co.*, 175 N. Y. 84, 1903, and *United States* v. *Ollinger*, 55 Fed. Rep. 959, 1893. Other cases opposed to the general rule are: *Wheeling Bridge & Terminal Co.* v. *Gilmore*, 8 O. C. C. 658, 1894; *Vogt* v. *Milwaukee*, 99 Wis. 258, 1898; *Fiske* v. *People*, 188 Ill. 206, 1900.

2. LAWS WHICH ARE DESIGNED TO PROTECT WOMEN AND CHILDREN.

That laws regulating and restricting the hours of labor of children are valid is now too well settled to admit of dispute. We shall, therefore, do no more than state the reason for so holding, which is that children are wards of the state and as such entitled to protection. Laws thus affecting women engaged in certain occupations are in force in some sixteen states of the Union, but the adjudications are few. The earliest reported case is that of *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Mass. 383, 1876. The statute prohibited the employment of all persons under age and of all women in any manufacturing establishment for more than ten hours a day or sixty hours a week. This was upheld, but the decision is somewhat peculiar. The substance of the opinion is that it does not forbid any person to work as many hours as he pleases and that it merely provides that in an employment which the legislature evidently deemed dangerous to the health of children and women they should not labor more than so many hours, the idea presumably being that persons might engage in other work if they wished to work more than sixty hours.

The next case in point of time was *Commonwealth* v. *Beatty*, 15 Sup. Ct. Pa. 5, 1900. The statute was similar to that in the preceding case except that the number of hours was twelve. The Court makes some very strong and sweeping remarks which could with equal propriety be applied to all classes of persons. Thus the Court says, "A prohibition upon physical exertion which is likely to result in enfeebled and diseased bodies, and thereby directly and consequentially affects the health and safety of the community, cannot in any just sense be deemed a taking or appropriation of property." And again, "The public good is entitled to protection and consideration, and if in order to effectuate that object there must be enforced protection to the individual such individual must submit to such enforced protection for the public good."

This seems to be sound doctrine which recognizes that the welfare of the individual tends to become the welfare of the public. The legislature of Pennsylvania undoubtedly felt that this is true where numerous women and children are employed in occupations not becoming their kind. We can readily conceive of an entire community of miners, for instance, engaged in dangerous and unhealthy employment, and in such a case the individual welfare certainly approaches and tends to become the public welfare. And this applies as well to men as to women.

In *Wenham* v. *Nebraska*, 65 Neb. 394, 1902, a law was considered which was taken from, and was practically a reenactment of, the statute in the last case. Here the Court said that it was only a fair and reasonable exercise of the police power which the physical differences between man and woman justify, and that it does not prohibit the right of contract but merely regulates it in a reasonable manner. In the case of *State* v. *Buchanan*, 29 Wash. 602, 1902, a law forbidding the employment

of women for more than ten hours during any one day, in any mechanical or mercantile establishment, laundry, hotel or restaurant was held constitutional. As showing the development of the reasons given for such legislation, we quote the following: "It is a matter of universal knowledge with all reasonable and intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which deleteriously affects so great a number of women who are mothers of succeeding generations must necessarily affect the public health and morals." A like statute was considered in *State* v. *Muller*, 48 Ore. 252, 1906, and the Court said it was plainly enacted to conserve the public health and welfare by protecting the physical well-being of women. This case went to the United States Supreme Court, *Muller* v. *Oregon*, 208 U. S. 412, 1908, and the decision of the Oregon Court was affirmed. The plaintiff in error strongly urged the view that women are no longer wards of the state, but citizens in full possession of all civil and political rights, and that any law which regulates their labor and interferes with their freedom of contract is as arbitrary and void as a similar law for adult men. The Court, however, declined to take any such view as this. The opinion refers to the removal of restrictions and the legal equalization of the sexes, but attaches no controlling significance to that tendency. Even, it says, if all political and civil differences should disappear, there would remain the differences of function and structure, affecting woman's capacity for labor and endurance. And this difference justifies discrimination between men and women. In reasonably restricting the labor of women the state exercises the police power of protecting the public health and caring for the vigor of the race. In the words of the Court, "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for existence is obvious. . . . . By abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race."

Opposed to these decisions there are only three cases, which we shall take up in the order of their time. The first one is *Ritchie* v. *People*, 155 Ill. 98, 1895, in which the hours were limited to eight in one day and forty-eight in a week. The courts of Illinois, as well as those of Colorado, tenaciously adhere to the doctrine that no laws of this kind are valid unless they clearly and directly affect the public health and welfare. It was held, therefore, that this law is unconstitutional. The Court said that sex alone will not justify the exercise of the police power because woman has practically the same political and civil rights as man, and that it is doubtful whether in any case such a law can be sustained for the benefit of the individual himself. In *People* v. *Williams*, 116 App. Div. N. Y. 379, 1906, the act prohibited the employment of women after nine p. m. and before six a. m. Its primary object undoubtedly was to prevent women from being out late at night and in that way to protect their morals. The Court, however, seems to overlook this entirely. If the object of the statute had been solely to limit the number of hours

there would be better reason for declaring it invalid, for as the Court said, it is so drawn as to prohibit labor even for so limited a period as an hour during the time. The Court does not condemn what might be regarded as a reasonable limitation. On the contrary, it intimates that if it were considering a statute limiting the number of hours per day during which a woman might work, the arguments put forth to sustain it would be appositive and persuasive. Upon this phase of the law, the case seems clearly distinguishable from others we have called attention to, but the Court seems to have overlooked that phase which, it seems, should have been controlling. In *Burcher et al.* v. *People*, 41 Colo. 495, 1907, the Court declared an act limiting the hours of employment in certain establishments invalid for the reason that the legislature had not, pursuant to a provision of the Colorado constitution, declared that work in such establishments was dangerous or unhealthy. The Court seems to have regarded this as an evasive attempt to throw a legislative duty upon it, whereas it would seem to have been more in accord with rules of construction to hold that the fact that the hours were limited implied the fact that the labor was unhealthy when pursued for too many hours.

3. LAWS WHICH ARE DESIGNED TO PROTECT PERSONS ENGAGED IN DANGEROUS AND UNHEALTHY EMPLOYMENT.

Most courts now hold that laws which are confined to the protection of those laborers who are engaged in work which is dangerous and unhealthy are not repugnant to the Constitution. It is no longer open to question that the legislature can make rules for the regulation and management of a business which is attended by danger to the health or safety of employees. *State* v. *Cantwell*, 179 Mo. 245, 1903. This has been done in most states. In some, where manufacturing is carried on to a large extent, provision is made for protection against dangerous machinery, for cleanliness and ventilation of working rooms, for the use of sanitary appliances, etc. In others, where mining is the principal industry, provision is made for ventilating shafts, for safe means of hoisting and lowering cages, etc. These statutes have been usually enforced by the courts of the states as constitutional measures. They clearly show that the police power may be exercised to protect the welfare of the employee himself. If it is within the power of the legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be made for the protection of their health and morals. As was said in *Commonwealth* v. *Beatty*, *supra*, "The length of time a laborer shall be subjected to the exhaustive exertion of physical labor is as clearly within the legislative control and discretion as is the governmental inspection of boilers, machinery, etc., to avoid accidents, or of sanitary conditions of factories and the like, to preserve the health of the laborers."

The leading case upon this subject is that of *Holden* v. *Hardy*, 169 U. S. 366, 1897, which affirmed the decision of the Utah court in *State* v. *Holden*, 14 Utah 71, 1896. The act provided that the period of employment for all workingmen in all underground mines and all other institutions for the reduction and refining of ores or metals shall be eight hours per day except in cases of emergency, and it was held constitutional. The Court said, "While the general experience of mankind may justify us in believing that a man may engage in ordinary employments more

than eight hours per day without injury to his health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is subjected to foul atmosphere and a very high temperature, or the influence of noxious gases, generated by the process of refining or smelting." The decision was based chiefly on the ground that the statute was a regulation of the public health and partly on the ground that the laborer and employer do not stand on an equality and that the former needs protection.

Other cases in accord with the general rule are *Short* v. *Mining Co.*, 20 Utah 20, 1899, and *In re Boyce*, 27 Nev. 299, 1904. In the last case the Court said that it is within "the power and discretion of the legislature to enact the statute for the protection of the health and the prolongation of the lives of workingmen affected and the resulting welfare to the state."

Here, at the dividing line between the cases, we wish to call attention to that phase of the case of *Lochner* v. *New York*, *supra*, not before considered. In that case it was stated *arguendo* that the law limiting the hours of a baker was valid because the conditions under which he works are unhealthy. But the Court said that the trade of a baker is not unhealthy to that degree which would warrant interference on his behalf. The Supreme Court, as we have seen, had previously, in the case of *Holden* v. *Hardy*, *supra*, recognized the exception we are here considering, and its decision in the bakery case in no way contravenes that holding. The Court simply found, whether rightly or wrongly, that there are no circumstances connected with the work of a baker calling for such a law, and that it would therefore be a "mere meddlesome interference with the right of the individual."

The following cases are opposed to the affirmative rule in whole or in part. The act considered in *Low* v. *Rees Printing Co.*, 41 Neb. 127, 1894, was declared invalid because it discriminated against farm and domestic laborers and because it violated the right of the parties to contract with reference to compensation for their work. Finally we have the case of *In re Morgan*, 26 Colo. 415, 1899, confirming an opinion given to the legislature in *In re Eight Hour Law*, 21 Colo. 29, 1895. The statute was one affecting miners and was similar to the one considered in the case of *Holden* v. *Hardy*, *supra*. The whole opinion of the Court rests upon the narrow view that the police power cannot be extended to protect the individual himself. It says that this kind of labor visits its consequences upon the laborer himself and not the public; that the law infringes the right of contract in private business from which no possible injury can result to the public; and that it is class legislation.

This brief review of the cases dealing with laws regulating and limiting hours of labor shows that the courts recognize the necessity for a progressive application of new rules to the rapidly changing conditions of modern social, political and industrial life. The police power must expand as the complexity of our social system increases. The accident of our finding certain laws novel ought not, therefore, to conclude our judgment against them. The tendency of the courts is to keep abreast of the times, and we can only hope that the gradual expansion and development of the police power will be along the lines that will secure the best interests of the public and the individual.

Cleveland, Ohio.

The Ethics of Solicitation

By Frederic Cunningham, of the Boston Bar

To paraphrase Mr. Dunning's famous resolution in the House of Commons, "the tribe of bores (not South African) has increased, is increasing, and ought to be diminished." The well-to-do American citizen of today is often confronted with the questions how far he ought to allow himself to be approached, interviewed, browbeaten, cajoled, to talk, to buy, to subscribe, to give, to insure his life, to sign petitions, etc., to join societies, clubs, to act as officer or patron of this or that, to allow the use of his name,—in a word to have his privacy so intruded upon, his time so preoccupied, his purse so depleted by others, that he wonders whether he has not lost his identity and volition and longs to be a pelican in the wilderness, an owl of the desert, or to take the wings of the morning and dwell in the uttermost parts of the sea.

"Where, then, ah, where! shall 'affluence' reside,
To 'scape the bore who will not be denied?"

Social activities have increased to such an extent and competition among them in every branch, whether it be commercial, political, economic, benevolent or religious, has become so keen, that the individual is no longer allowed to work out his own salvation and act according to his own will and judgment and knowledge, but he is more or less the victim of circumstances, and acts not according to his own ideas but as he is pulled or influenced this way or that by others. The modern word "pull," as used in the political sense, is significant of the tendency of modern conditions in all the social activities.

The difficulty is so to act that we may feel that we have done those things which we ought to have done and not done those things which we ought not to have done. It often becomes not so much a question of what is our duty towards our neighbor as our duty towards ourselves; we are almost persuaded sometimes to think that our time and money are not our own, but most of us still cherish the idea that we have a right to direct these things ourselves, since they have been placed in our hands and keeping. The idea that God has given us everything, that we hold it merely as trustees, that we have no right to do with it as we think best, but are bound to use it according to certain rules prescribed by others who assume to be the interpreters of God's wishes, though still sometimes heard from the pulpit, will hardly find much favor in the world of today; nor does it seem to be the best way of stimulating people to generosity, to tell them that in doing a certain thing they will be doing no more than their plain duty, for which they are entitled to no credit.

Let us assume then that we are entitled to direct our own time and money and that we are to get credit or the contrary for the way in which we use them just as we do for the use or misuse of our other opportunities for good or evil.

We may also safely assume that there are very few people in the world who do not know what to do with their money, or who have more money than they know what to do with; there are some, certainly, but not many. There are, no doubt, many who use their

money as we would not have them use it, and some who use it as all sensible people would agree that they should not use it. When this is carried to such a point, by excessive drinking, gaming, idleness, etc., that the person is liable to become a public charge, the law steps in and puts a stop to it by appointing a guardian. Short of this point, however, the theory of the law is that a man has the right to dispose of his property as he chooses, and that would seem to be common sense.

To use your money, your talents, your influence, your time in the most judicious way is one of the most difficult things in the world; no man has ever accomplished it; every one would do it differently; to accomplish it would require omniscience. We must certainly acknowledge that it is not always the most deserving things that succeed, but those that are taken up and pushed by men of the greatest brains, will, energy, influence and perseverance. Unfortunately such men do not always recognize the great responsibility upon them to use their power and influence fairly.

Solicitation of any sort is permissible only on the ground that the person to be approached is not aware of what you intend to propose or of the arguments in its favor. If he knows as much about it as you do, and does not choose to act, solicitation at once becomes improper. The moment pressure or importunity of any sort is brought to bear, you have crossed the limits of propriety and your conduct cannot be justified, and it must not be forgotten that the proper time and place for bringing forward your proposition and arguments must be carefully sought or else you may properly be classed among the bores. Many a busy man has yielded to a temporary weakness and given, bought or subscribed, contrary to his conscience, and will, in order to get rid at once of an importunate visitor. Indeed, this undue advantage is often deliberately counted upon and practised by those who make a business of solicitation, and unblushing impudence and artifices of all sorts to gain admission are resorted to.

Such practices of themselves disentitle the solicitor to a hearing. It is certainly a sound ethical rule that solicitation should never become importunity or coercion of the free will of the person approached. Yet it must be admitted by those who know, that a good many of the most laudable objects, and particularly in the line of philanthropy and religion, have been attained by methods hardly less reprehensible, excepting the motive, than those of the "stand and deliver" of the old-fashioned highwayman.

There are many persons in the highest positions in the community who use their influence and position without compunction, as a means of obtaining money for what they consider good objects, which they know would not be forthcoming if asked for merely on the merits of the object itself apart from their personal solicitation.

Americans from their political system are very bright in finding out how to approach a person and in sending one to ask whom it will be difficult, if not impossible, to refuse. To use the very expressive slang, they know how "to pull" the wires and how to make a man "cough."

A committee of gentlemen to some of whom, perhaps, you are under obligations of some sort, and who are highly respectable in the community, and to whom you have no alternative but to give a respectful hearing, walks into your office and, showing you a list of your friends and neighbors whom they have already intimidated and corraled, wishes

to know if you will be one of twenty-five to give a certain large sum, generally about ten times what you would otherwise have thought of giving, to some object which they unfold to you with great gravity and seriousness, to which they are going to give you the privilege to subscribe; they merely wish to lay it before you, and of course if you do not wish to subscribe they will not press the matter in the least (the pressure comes in other ways than in their words).

It takes a very strong man to decline to do what is brought forward by men of that sort, and especially if his reason is that he cannot afford it; other people are pretty sure to take rose-colored views of your resources, especially if they want something, and one does not wish to be set down as meaner than his neighbors, nor does it do your credit any good if you are obliged to confess, or it is suspected, that your refusal is due to a lack of means.

To put a man in this position is not fair or proper. It may be a privilege to give, there is certainly a luxury in doing good, but it is neither a privilege nor a luxury to have anything dragged out of you. This is a comforting reflection, and it is also comforting to remember, when you feel inclined to say no yet have qualms of conscience about it, that your instinct is probably right, for it is certainly easier to say yes than no; it is easier to give than not, if you have the wherewithal.

There is no doubt in every community a floating fund or surplus over and above what is applied to the every-day necessities; this fund is in the hands of comparatively few persons, however. Aside from the ordinary investments in new enterprises, and savings, both of which are necessary things if there is to be any progress, it is largely employed for pleasure, as well as charity, and legitimately so. So much of this fund as is not needed for necessary recreation, and which can by proper means be turned from useless luxury to useful benevolent purposes, should perhaps be so turned; but it will be generally acknowledged by those who have had the most experience that this fund is limited, and that when it has been largely drawn upon for some purpose which has appealed very strongly to the emotional feelings of the community, other objects more deserving, but perhaps having less immediate interest, suffer. For instance, the large and very general subscription all over the country to the sufferers by the San Francisco earthquake and fire largely decreased subscriptions for the support of hospitals, churches and other institutions of the country regularly dependent upon the community for support. We must not, as President Roosevelt once well said, let largeness of heart degenerate into softness of head. It is very questionable whether it would not be better for the country if this floating fund were allowed to flow in its natural channels without being driven hither and thither by the forces of solicitation to the aid of such objects as may be able to secure the support of the most aggressive and influential men. Undoubtedly less would be given and less would be accomplished, but what was given would be applied to better purposes and what was accomplished would be better worth accomplishing, since it would be the result of the sober sense of the community and not of undue pressure. It would be more steady, even and reliable, and as the resources of the fund would not be continually pushed to the last limit there would be more in reserve for great emergencies, without diminishing the resources of more important things which need constant support.

How far a man should isolate himself and exclude all forms of solicitation and approach depends upon circumstances, and no general rule can be laid down. Goldsmith's picture in "The Deserted Village" where "the surly porter stands in guilty state to spurn imploring famine from the gate" is certainly not a pleasing one, but there are times and places for everything; we do not eat our dinner in church, nor say our prayers on the Common, and we may affirm without much fear of contradiction that business hours, being those for which we are paid, and during which our time usually belongs to others, are not the proper times for solicitation, and that we may properly during those hours shut ourselves up and rigidly exclude all solicitors. This has been generally recognized, and in many business buildings solicitors are excluded by notices posted at the entrance, and it will become more and more necessary as time goes on.

The following communication to the *Boston Transcript* a year or two ago, which may perhaps be properly quoted to preserve it from oblivion if for no other purpose, humorously but truly describes the feelings of many of our best citizens:—

"GOD HELP THE RICH! THE POOR CAN BEG."

To the Editor of the Transcript:—

Can nothing be done—nothing—to dam the overwhelming deluge of begging letters and circulars by which the community is flooded?

They come in every conceivable form—great and small—general and special—involving everything on earth from the destinies of races to the infinitesimally specialized demands of fractional groups of individuals—from preaching the Gospel to the heathen to founding a rest-cure for the janitors of day-nurseries for the babies of club-footed Chinese women.

Of course, it is all admirable, and the janitors and heathen, etc., appeal to our highest and tenderest emotions—but—is there no end to it?

In old times "tithes" were a nominal limit—but nowadays if a man can keep one tithe of his own for himself he is lucky. Trying to fill the maw of Boston charities is like the bluejay's trying to fill the empty log cabin with acorns in Mark Twain's story. Of course we all strive not to "be weary with well-doing," but when one has given away every red cent one can scrape together it is discouraging to find the flood of begging letters rising higher than ever.

I am merely a representative case—a quiet, law-abiding citizen with a moderate fixed income, heavily depleted by taxation; but apparently the charitably disposed have vowed my extermination. I have wondered whether it would satisfy them if I should advertise in the *Transcript* that all my worldly goods would be at their disposal at a certain hour and day, and then should hang myself to the chandelier. But it would do no good. The first charitable person who got there would cut me down—not to save me, but to get the chandelier.

MINUS ZERO.

It is perfectly true that applications to many people by letter and circular are becoming so numerous that it is impossible without a private secretary to even read them to find out whether an answer is necessary, much less to answer them.

The Story of a Hangwoman

By Andrew T. Sibbald

WHAT travelers tell of the King of Dahomey's Amazonian body guards, gaunt grim viragoes, every one of prodigious strength, courage and ferocity, impresses one with African barbarity more forcibly than perhaps any other institution on the "Dark Continent."

Even among savages, one looks for some leaning towards mercy on the woman's part. It is natural to expect a Pocahontas even on the coast of Guinea, but the idea of a female executioner, strange and dreadful when narrated in the annals of an African tribe, becomes horrible, grotesque, incredible, when transported to a spot within a few hours' journey of London, England. And yet a hundred and twenty years ago, flourished in Roscommon, flogged, branded, hanged, and pocketed fees for such services, one whose memory still lingers round the old jail and in the minds of the peasantry—the famous "Lady Betty."

Roscommon is an eminently uninteresting Irish town, romantic as are some of its legends. It is composed of straggling streets, a jumble of shops and private houses, large and small, receiving different names throughout their length, and forming a figure resembling an irregular Z. To the north are the ruins of a castle, once the stronghold of a baron of the Pale, often taken and retaken before its final destruction. In an opposite direction are those of a Dominican monastery, founded by Felim O'Conor in the thirteenth century, and containing his tomb. In the centre of the town stands the present Roman Catholic Church, once the "Court House" or "Town Hall," its domed steeple visible from afar, and behind it the old gaol, where Betty ministered, now turned into dwelling houses, whose quaint dark corridors and strangely shaped rooms I often longed to explore. Those frowning walls chilled the soul of more than one Croppy, or Whiteboy, or Ribbonman, as the case might be.

How the poor wretches must have shivered in the cold gray dawn when they saw their prison looming dark against the sky, heard the doors creak harshly back and clash behind them with grating of keys, knowing that they would never return by the way they came, never feel again the pure, fresh air blowing straight from the Atlantic over moor and mountain on their face, lifting their floating hair. Most of them were young, many were led into trouble, some deserved their fate, but was not the thought of grim "Lady Betty" enough to chill any man's blood? A woman unsexed, a woman who was said to revel in the sufferings she inflicted, an embodied Northern Saga, with all of the wild and terrible such legends hold.

How she became to be hangwoman may be briefly narrated. She was of peasant origin, early left a widow with one child, a boy, in the latter part of the eighteenth century. Her disposition was silent and brooding—what the Irish call "dark"—unsociable with her neighbors, having no friends, all her dull affections concentrated in her son. She was superior to her class in many ways, could read and write, an unusual accomplishment in those days, and in these arts she had early instructed the lad. She was crushed by bitter, hopeless

poverty, lived with difficulty by the labor of her hands, and privation seemed to act like frost on her soul, chilling and freezing the fount of kindliness that springs in every human heart. In truth an unlovable creature, when allowances are made for circumstances. The boy was lively and warm-hearted, full of merry, affectionate ways, winding himself round his mother's heart and returning her love with interest, the one bright spot in her obscure, monotonous life. Then, as now, the tide of emigration flowed westward, but America seemed vastly further off. Before the boy's imagination it fluttered, a shimmering phantom, like the magic isle of the blest that shines in the midst of the sunset off the coast of Arran—a country full of riches, with virgin soil that gave abundantly on the smallest cultivation, an El Dorado where fortunes were to be had for the taking, a land where willing hands could make their way, a land of sunshine, of marvels. So old men said whose sons had prospered beyond the seas. He saw American letters at intervals bring good store of money to aid his neighbors, his mother said money was all one needed to be happy, and he resolved to seek it where, by all accounts, it was to be found. The idea became fixed and matured in his mind as he approached manhood. Gradually he won Betty to his way of thinking. Though it wrung her heart to let him go, she agreed that there was no opening for him at home, nor hope of fortune, so it came to pass that he stood one morning at the cross roads, pockets empty, courage high, with a group of intending emigrants, while his mother, choking with tearless grief, hung round his neck as if she could not let him go, strained him in a last passionate embrace, then turning without once looking back, ran blindly to her lonely cabin, locked the door, and flung herself down by the fireless, desolate hearth, in an agony of grief. This was, I should think, a few years after the Declaration of Independence.

The mother did not hear from him for months, then a letter reached her. He was safe, liked the new country, and was doing well. He wrote at intervals, always giving good accounts of his prospects and seeking to cheer her, sending her moreover all he could spare from his earnings, a blessed relief to her ceaseless toil. About two years passed, then he wrote saying he intended pushing West to a wild tract of country uncolonized by Europeans, where he expected to make his fortune. The climate was unhealthy, and the Indians were said to be hostile, but he did not fear them, and believed if one were kind and honest towards them, there was nothing to fear. Still, the undertaking was dangerous, but he risked his life to be able sooner or later to have her with him, and repay her for all her care and love. Such was the substance of the last letter she ever received from him. Whether he wrote others which never reached her, or fell a victim to the climate, to hard work or to Indian treachery, she did not know. Sometimes she thought bitterly, perhaps he lived, and had forgotten her, but to do her justice, she dismissed the idea. No! her boy would never act so. Again she broke into wild upbraidings against that Providence which had deprived her of her only comfort, but generally her mood was one of darkest gloom. The remittances from America failing, and her boy not being now at hand to help her as he used, she became poorer than ever, and at times scarcely earned enough to keep soul and body together.

And thus the years passed; her dark hair turned grayish, the lines hardened

round her mouth. Happier far if she had died thus, poor and alone, rather than lived to earn the price of blood! One winter evening she sat alone by her fire of dry sticks, and crouched over the feeble blaze. Outside the dark rack sailed across the sky, the trees swayed their heavy branches with a dismal creak, gusty showers had fallen all day, soddening the roads and grass, now the wind was rising, portending ominously a storm, and driving the smoke back into the blackened kitchen, which with "the room," as the Irish peasants call it, composed her dwelling. Feeble jets of light danced on her bent head or shone on the brown dresser behind, with its scanty store of plates and "noggins," or wooden drinking vessels, with a couple of stools, a chair, and a broken table, the sole furniture. The storm grew louder, the rain came swishing against the window with every gust, and its heavy monotonous patter was heard in the lull of the blast. It found its way through weak places in the thatch, and dripped slowly on the earthen floor, filling the uneven places with pools of water. A half-starved black cat rubbed against its mistress's knees. It was past nine when a loud knock was heard at the door. The woman started violently and listened, it was repeated. Lifting the one candle the house afforded, she advanced and asked who was there.

"A stranger seeking shelter," replied a strange voice, and opening the door she saw a tall man with a long black flowing beard, holding the bridle of a powerful horse; he strode into the cottage, the wet gleaming on his clothes and the coat of the animal.

"A terrible night," he said, in hearty tones. "They told me I'd reach Roscommon before night, but my horse cast a shoe, and it took so long a time to get it replaced that this confounded storm overtook me. I am wet to the skin, and if you can give me a bed and some supper, I will stay here—if you have no objection, of course."

"'Tis not a night for a dog to be out, let alone a Christian, sir; but this is a poor place for the likes of yer honor," said Betty, who had been eyeing the fine cloth of the gentleman's clothes, his splendid fur cloak, and other signs of wealth.

"Oh, I'm contented," he said, his smile disclosing the whitest and most regular teeth.

"I've put up with worse in my time," and he proceeded to fasten the horse, while Betty barred the door against the intrusive blast. She hastened to throw more sticks on the fire, drew a seat to the blaze, took the gentleman's heavy coat from him, and made him sit down. He placed the rushlight in its queer "arm-and-socket" candlestick, to one side, saying it pained his eyes, and stretching out his feet to the fire, asked, "Could you give me anything to eat?"

"No! there is nothing in the house—and no money, neither," she added, with a kind of defiance.

The stranger looked sadly and earnestly at her—perhaps the idea of any one wanting money seemed strange to a rich man,—his lips moved as if he were about to speak, but changing his mind he drew out a heavy purse, and laid a gold piece on the table.

"Buy something with this, then," he said, "I will pay you well tomorrow for your trouble."

She took it in silence, wrapped a dark cloak about her and passed out into the wild night, cautioning her guest to bar the door. In less than half an hour she tapped for readmittance, and entered laden with bread, meat, eggs and spirits, not forgetting a bundle of hay upon her

shoulders for the horse. The stranger rubbed down and foddered the horse, while she prepared his frugal meal, which he insisted on her sharing. When he was refreshed and warmed she gave him up her bed, saying she would sleep by the fire, and he unwillingly consented to deprive her of her couch. He retired, and his regular breathing soon announced that he slept.

She resumed her place by the hearth. I know not if it was then, or at the first sight of the gold, that temptation to the blackest treachery entered her mind—treachery that she now broodingly matured. It is painful to dissect a mind like hers, cold, callous, covetous, soured by a hard life and disappointment, longing for the ease from her daily toil that money alone could bring, without moral sense, or fear—save of death; so let me pass as quickly as may be this most shocking part of a true story.

She resolved to do away with the unknown traveler. As far as she knew he was not an Irishman, certainly not a native of Roscommon; no one had ever seen him enter her cabin; she could unfasten the horse and drive it forth before dawn; the money she spent in food could easily be accounted for by a pretended letter from America; she had seen the purse filled to bursting with gold; in short, she argued with herself, there was everything to gain and little or no risk. "The woman who deliberates is lost," says Rousseau, and so it proved in this instance: she murdered the unhappy man as he slept, possessed herself of his papers and valuables, set the horse free, and sat by the dim rushlight to examine the treasure. It was now nearly dawn; was it the cold wind that blows before sunrise that chilled her to the bone and made her shiver as if in an ague fit?—or—what did these papers contain? Unhappy, wretched mother! she had slain her son!

He had come back successful, rich beyond his expectations, to take her by surprise, to make her sharer in his good fortune. She did not recognize in the dark-bearded man the slender youth of years gone by. The temptation was irresistible to his laughter-loving disposition; he would pass himself off as a grand gentleman until morning, then reveal himself. How they would laugh together when they knew all. Alas! the morning never dawned for him!

The woman's mind was unhinged by the appalling discovery. She shrieked and laughed aloud like a maniac, then rushing wildly out into the cold gray light, by her awful cries drew terrified neighbors round her, to whom she yelled she was a murderess, had killed her only child! They thought she was mad, or possessed of a devil, but one bolder than the rest having ventured to enter the cottage rushed back horror-struck to confirm her broken utterances. She was secured, tried, found guilty and condemned. Roscommon was fixed for the execution. These were the good old days when it was penal to steal a sheep, to rob a coach, or take a horse, so the cart that drew Betty to the gallows contained a goodly number of wretches, all her inferiors in guilt. Every available foot of ground was thronged by a yelling, hooting crowd, every window looking on the jail was filled with sightseers, joking, laughing, chattering; but when the tumbril stopped at the gallows foot silence fell like a pall, and the multitude held its breath. There was a long pause, officials hurried to and fro. There were whispered consultations—what had happened? The news soon spread. The executioner was absent, he had been taken suddenly ill, and had sent an excuse at the last

moment. All was confusion. It was the sheriff's duty to carry out the sentence, but the gentleman flatly refused, saying he would forfeit all he possessed first. What was to be done? Even the criminals raised their heads, a kind of dull hope dawning on them, and got more or less animated. Suddenly from their cart broke a woman's voice, shrill and harsh:—

"Spare me loife, yer honor, spare me loife, an' I'll hang 'em all!"

The sheriff grasped at the unexpected offer, Betty was unbound by a warder, descended from the tumbril, amidst a murmur of horror, and with awful callousness proceeded to her task. Never was an execution better performed. In a few moments she stood the only living being on the scaffold, whilst around her hung the ghastly bodies of her late companions. The hangman died, she was nominated his successor, at a yearly salary, lived alone, generally despised, till her death, and all during the rebellion exercised her avocation.

A Picturesque Missouri Lawyer

By F. G. Moorhead

AMONG the pioneer lawyers of the Mississippi Valley there was none better known or more famous in his generation than Henry Clay Dean, "the great unwashed," of Missouri. Dean died a few years ago, after a decidedly picturesque career.

Dean was related to Henry Clay and named after him, although he declined to consider this any honor. He was so uncleanly in his personal habits that he was picturesque, and was noted for this aversion to water, both internally and externally. During his lifetime he he was lawyer, preacher and lecturer, and there were few important law cases, forty years ago, in the Mississippi Valley, in which Dean was not involved.

He was a master of invective, and did not hesitate to indulge liberally in profanity when speaking, either to a jury or a public gathering. In making an address to a jury, when he was denouncing the opposition the very windows would rattle under his storm. In one of his arguments he denounced an enemy thus: "If I had my way with him I would load him naked into a red-hot cannon and fire him head first through a thorny hedge fence into hell, as far as a pigeon could fly in a year."

Dean had the reputation of never having paid railroad fare, despite the fact that he frequently prosecuted cases against the pioneer railways. His method was to inveigle the conductor to sit beside him after he had returned from collecting tickets, and by seductive talk make him forget all about Dean's obligation to the company. Dean would inquire about the conductor's salary, tell him it was entirely too little for such an enormous job, and promise to have a personal interview with the president of the road, who always happened to be Dean's particular friend,

and have his wages raised. Or he would express such sincere affection for some of the conductor's relations, whom he "knew like a book," that it looked like ingratitude to bother the friendly passenger for such a little thing as money for transportation.

Twenty years ago, a friend of Dean's was about to migrate to a new country to start life anew. He went to the famous man for parting advice. "Benjamin," said Dean, "I want to say, mankind will respect you most when it sees the ivory handle of your pistol sticking out of your pocket."

Dean was about five feet, ten inches tall, weighed two hundred pounds and trimmed his whiskers identically like General Grant. But politically he was on the other side from the great Union soldier. The wonderful range of Dean's voice did as much for his reputation as an orator as his forcible language. He could roar like a lion or drop it to a sweet and tender cadence that thrilled his audience, and many a time it wrenched a verdict from the jury.

It was at Leon, Iowa, that Dean had his memorable debate with Francis Varga, who had been Judge Advocate-General in Louis Kossuth's provisional Hungarian government and had fled to America for shelter after the disastrous revolution of '49. Dean argued long and forcibly for the secession of Iowa, as a slave-holding state, saying that the United States Constitution favored the holding of slaves.

"Let us have a new Constitution, then," declared the Hungarian revolutionist, and he saved Southern Iowa to the Union, and incurred the mortal enmity of Henry Clay Dean as a result.

It was of Varga's band of faithful Hungarians that an interesting story is told. The exiles were marching westward hunting a safe haven, and heard of Decatur City, a little town in southern Iowa, where they hoped to locate. Near Decatur City was a large nursery, which enjoyed the distinction of a huge signboard. It was on the near approach of the Varga party to this nursery that one of the number arose, and by the glimmering light cast by his lantern read the sign: "Decatur City Nursery." The Hungarian read it this way: "Decatur City, No Sir-ee," and the disappointed exiles turned back to wander on the prairies all night.

Hon. Eugene F. Ware, Commissioner of Pensions, was a personal friend of Dean's, and in conversation recently concerning the eccentric old character had this to say:—

"I remember Dean very well, especially after the war was over, when the question of the colored people voting was a new one. Dean went into the office of Hon. J. C. Hall at Burlington, Iowa, where I happened to be then, and he said:—

" 'I have just had a talk with the editor of the Chicago *Times*, and he is inclined to take the situation and carry it to the farthest extent and gobble the colored vote right from the start, because the Democrats are the natural persons to handle that vote.'

"Then bringing down a great, big, malformed cane which he carried to the floor, he said that the editor said, 'From now on I am a buck nigger man.'

"This statement was made with great emphasis to show the perfectly bewildered condition in which the Democrat mind was at that period."

Just where Dean secured his education has long been a mooted matter. He was possessed of a wonderful array and amount of facts, remembering everything he read. Dr. J. M. Shaffer of Keokuk, a personal friend of Dean's, claims the Missourian was educated in

Uniontown Academy in Uniontown, Penn., and adds, "He was a well-educated man; his writings show that. His printed arguments before our courts show that. His widely interesting public lectures, for which men paid a fee of a dollar to hear, show that."

But Mark Twain does not incline to this theory. He knew Dean when young Clemens was a resident of Keokuk in 1857 and on to the early 'sixties. Dean was then a familiar character on the streets. Twain claims that Dean secured his education by reading in the Keokuk gutters, moving when a passing wagon compelled him to crawl away and then returning to the filth, regardless of nothing but his book. Twain avers his wonderful memory retained all that he read and that all his learning was self-acquired in this manner. It was about this time in his career that Dean was described by Mark Twain in his "Life on the Mississippi" as follows:—

"His clothes differed in no respect from a wharf rat's, except they were raggeder, more ill-assorted and inharmonious, and therefore more extravagantly picturesque, and several layers dirtier."

Clemens tells the story of how Dean's fame as an orator began. It was in 1860 when a famous lecturer was billed to speak at the Keokuk opera-house on the slavery question. The hour arrived for the speech and the house was completely packed, with a waiting audience. But the distinguished speaker did not arrive. The distracted manager waited until the auditors began to howl for their man and then in a frenzy he rushed out upon the street. Seated in the gutter in front of the opera-house was Henry Clay Dean, perusing a dirty, well-thumbed book. There was a few minutes' conversation, then a clutch at the arm, a pull, and a minute later a figure emerged from the wings of the theatre and walked out upon the stage. Mark Twain tells the rest in this manner:—

"It was the scarecrow Dean, in foxy shoes, down at the heels, socks of odd colors, also down, damaged trousers, relics of antiquity, and a world too short, exposing some inches of naked ankle, an unbuttoned vest, also too short, and exposing a zone of soiled and wrinkled linen between it and the waistband; shirt bosom open, long black handkerchief wound round and round the neck like a bandage; bobtailed blue coat, reaching down to the small of the back, with sleeves which left four inches of forearm unprotected; small stiff-brimmed soldier's cap, hung on the corner of the bump of—whichever bump it was. This figure moved gravely out upon the stage and with sedate and measured step down to the front, where it paused and dreamily inspected the house, saying no word."

Dean's appearance was the signal for a terrific shout and laugh from the angry audience, waiting for the distinguished speaker. Dean stood unmoved while the spectators rocked in a paroxysm of amusement. Then, Mark Twain continues:—

"And now the stranger stepped back one pace, took off his soldier cap, tossed it into the wing and began to speak with deliberation, nobody listening, everybody laughing and whispering. The speaker talked on unembarassed and presently delivered a shot which went home, and silence and attention resulted. He followed it quick and fast with other telling things, warmed to his work and began to pour his words out instead of dripping them; grew hotter and hotter and fell to discharging lightnings and thunder, and now the house began to break out into applause, to which the

speaker gave no heed but went hammering steadily on, unwound his black bandage and cast it away, still thundering; presently discarded the bobtailed coat and flung it aside, firing up the higher and higher all the time, fiercely flinging the vest after the coat, and then for an untimed period stood there, like another Vesuvius, spouting flame and smoke and lava ashes, raining pumice stone and cinders, shaking the moral earth with intellectual crash upon crash, explosion upon explosion, until the mad multitude stood upon their feet in a solid body, answering back with a ceaseless hurricane of cheers, through a crashing snow storm of waving handkerchiefs."

According to former Judge Claggett of Keokuk, who was Mark Twain's authority for his description:—

"When Dean came the people thought he was an escaped lunatic, but when he went away they thought he was an escaped archangel."

Dr. Hiram W. Thomas, of the People's Church of Chicago, and of international fame, told the following story of Dean:—

Dean was a circuit rider in the old days and while circuit riding in the wilds of West Virginia (then Virginia) he rode up to the door of a cabin and called for the inmates. A lone woman appeared. Said Dean, "Madam, did you ever hear me holler?" The woman had not had that pleasure. "Wait a minute," said Dean; and then shouted "Jerusalem," once, twice, so that it could be heard a mile. The woman rushed into the house, shut the door, and thought him an escaped lunatic. Shortly afterwards the man of the house arrived, heard of the occurrence, recognized Dean and, overtaking him, took him back and entertained him royally.

Dean knew how to "holler," and to utilize it on the public platform. In a lecture at Des Moines, before the Library Association, about 1862, he read from Acts, chapter 25, verse 27, "For it seemeth to me unreasonable to send a prisoner," etc. There was a large audience in the Methodist Church and Dean was in his element. He read the passage and caught on the word, "Unreasonable." It was a yell. It filled the church and went out into the streets through doors and windows; repeated, there was nothing else to hear, all was dead silence. Then in a voice hardly above a whisper, he said, "Yet John C. Fremont, commander of the forces in Missouri, did"—so and so.

At another time he preached in Fairfield, Iowa, declares Dr. Shaffer of Keokuk, on the immortality of the soul. He was invited there to oppose the soul sleepers, so-called at that time.

"The old brimstone church was crowded to the doors, for all the people recognized the ability of Dean. He carried with him a Bible which Uncle Alexander Fulton gave him, and had the pages turned down that he wanted to use. His text was from the tragic death of Rachel: Genesis xxv, 'and it came to pass as her soul was departing (for she died)', verse 18. Rev. Dean impersonated for the moment the rich man in hell. Dives called on Abraham. So did Dean. He yelled 'Abraham,' once, twice, thrice, so that it might have been heard a mile away. And no one has yet answered or come to controvert any argument as to immortality that Mr. Dean presented."

"He used no notes," declares Mark Twain, "for a volcano needs no notes."

Another story which Dr. Shaffer tells of Dean and his religious tendencies is as follows:—

"Dean was a Methodist, and abominated Calvin. On one occasion he spoke of a man who was bewailing the way God governed the world. This man

said with unction that the world was bad, the people were wicked, there was no truth or godliness or righteousness anywhere.

" 'And,' said Dean, 'how do you manage to live and enjoy yourself in all these surroundings of evil and wickedness? Why don't you get up and out of it? Why don't you reform these people and make them over again?'

" 'Oh, Mr. Dean,' replied the man, 'when I look at the sins and the sinners I think of hell and I feel refreshed.' "

Dean died some years ago, carrying his eccentricities to the grave. His widow still resides on the Putnam County homestead in Missouri, and may be seen there any fine day, seated under a great shade tree, in the yard, puffing contentedly on an old cob pipe.

Des Moines, Iowa.

The Uncovering of a Spanish Swindle

A RATHER singular instance of the so-called "Spanish swindle" was lately exposed by Mr. Edgar O. Achorn, a Boston lawyer. Mr. Achorn received a letter October 1, 1908, postmarked Madrid, signed Luis Rodriguez Achorn, who claimed to be a relative of his. The writer said he was dying in a Madrid prison and that he would will Mr. Achorn over $100,000, one-quarter of his fortune, if he would redeem his personal effects and act as guardian for his fourteen-year-old daughter. The strictest secrecy was enjoined:—

"If you accept my proposition you will answer me by cable at the name and address of the inclosed card and the cable must say as follows: All right. I beg of you not to name me for anything in the cable.

"It is not convenient that any letter will come to me because it is very easy that it shall be intervened and in danger so to whom receives it and also because my illness do not allow me to wait much longer and I wish to have all my business arranged."

From the outset Mr. Achorn realized that this letter was a fraud, but he decided to see the affair to a finish. He sent a cablegram and two days later got a reply that the cablegram could not be delivered, as the addressee could not be found. Then was revealed the craftiness of these swindlers, for a few days later a letter came from the Spanish prisoner thanking Mr. Achorn for the cablegram and asking him to redeem the luggage in the custody of the court, including the trunk in the secret drawer of which lay the entire fortune of Luis Rodriguez. The prisoner also besought Mr. Achorn to accept the appointment as guardian in his last will, one Chaplain Garcia, a man of "immaculate honesty," being named as executor.

Mr. Achorn sent word that he would do what lay in his power. As the correspondence progressed, the Spanish prisoner wrote, rather tardily, that in the scuffle when he was arrested he wounded a policeman as well as receiving a wound himself. He explained that the court demanded that sixty pounds of the money taken from him be turned over to the maimed officer, also that his life was fast ebbing away.

Then typewritten letters began to come from the good Chaplain Garcia, whose letter heads were graced by symbols handsomely engraved and sufficiently elaborate to inspire confidence in almost any one.

Under date of Nov. 3, Chaplain Garcia in a long communication announced the death on Nov. 2, of his esteemed friend, Luis, claimed to have been malignantly persecuted. Inclosed with this was what was purported to be a legal document in Spanish, namely, a copy of the resolution of the tribunal concerning the requirements for redeeming the seized luggage.

In his next typewritten letter, dated Nov. 14, Garcia warned Mr. Achorn not to think of coming to Spain, as all concerned were

under the closest police surveillance, and he would be in danger. He claimed the French consul in Madrid had started an investigation following Luis Achorn's death and that matters had become badly complicated.

Furthermore he complained that the tribunal had given notice that unless the expenses, including the injury to the police officer, were paid within forty-five days the luggage would be confiscated. This, he added, would mean the end of the fortune hidden in the trunk and ruin to all. He asked Mr. Achorn to forward the money in United States bank notes by registered letter as early as possible, so that he might be enabled to carry out the mission entrusted to him by Luis on his death bed and depart for America with the wealth and Maria as speedily as possible.

The letter last mentioned contained the will of the prisoner in Spanish, an official looking document with numerous seals.

Later a letter came from the daughter, in dainty hand and on stationery deeply bordered with black. She spoke of her father's great suffering and of her grief and urged Mr. Achorn to hasten the money, which would amount to about $1000, so that they might hurry their departure.

She thanked Mr. Achorn for his interest and kindness and said she carried in her breast a letter which her father had commissioned her to deliver to him in person. She sent him a lot of love, affection and high estimation and a picture of a damsel with a sweet face, which she said was a likeness of herself.

Then Mr. Achorn thought the time had arrived to have a little fun, and sent the following letter:

"Nov. 10, 1908.

"Chaplain Pedro Garcia:

"My Dear Chaplain—I learned with extreme regret of the tragic end of my relative Luis Rodriguez and of the deplorable position in which he has left his poor daughter Mary. It is evident that you have done all that could be done in his behalf and I appreciate the delicate position in which you have placed yourself in befriending him and his daughter.

"Will you kindly advise me as to the amount of money necessary to pay the expenses at the tribunal, and I will take the matter under advisement. Would it not be more advisable perhaps to allow the luggage to be sold by the court at auction, as I suppose will be done if the costs of the tribunal are not paid, and could we not bid in the property and secure it in that way? The luggage and effects would be presumably of more value to us than to any other person and I suppose that they will be sold to the highest bidder even if the sum offered for them does not amount to the sum that Luis has been sentenced to pay.

"Do you think it would be more advisable for you to escort Miss Mary to my house in America or for me to come over to Madrid and get her? Would you have any difficulty in getting leave of absence from the church or from your position in the hospital long enough to take the voyage to America? You have already indicated in your letter the jeopardy in which you are placed by reason of your good offices toward these dear people and I should be very sorry to accept still greater sacrifice for fear that it might endanger you who have already done so much.

"I should not greatly mind the trip to Spain, as I have crossed the ocean many times, and I might deal directly with the court authorities and thereby relieve you of having to do with any part of the money end of this affair. I know how reluctant one under Holy Orders is to have to do with such matters. If, however, you are disposed to make the further sacrifice, kindly advise me how much money it would take to redeem the baggage and how much will land you and dear little Mary safely in America.

"Please give her my sympathy in her hour of affliction and accept for yourself my profound regards.

"Very sincerely yours,

"Edgar O. Achorn."

They must have thrown up their hands upon receiving that letter, for Mr. Achorn has heard nothing more from them and has not had to spend any more cash on stamps and cables.

The Late Judge Emmet Field of Kentucky

AT Louisville, Kentucky, there died on Monday, June 21, a Judge of whom, in view of his sterling character and fine attainments, the *Green Bag* is pleased to publish a short sketch.

Judge Emmet Field, who was stricken with acute heart disease shortly after opening court, at the age of sixty-eight, had presided over the first division of the Common Pleas branch of the Jefferson Circuit Court of Kentucky since 1886. He handed down the decision in the Goebel-Taylor election case. The Court of Appeals and the United States Supreme Court sustained every point of law laid down by Judge Field. Even in the decision in this case, Judge Field was never subjected to adverse criticism. He was absolutely fair to all.

He was proud of having spent his early youth upon a farm, for, he was wont to say, "it makes a man of a fellow to dig his living from the soil." The freedom of life with which he became imbued while a boy remained with him throughout his career. He was a loyal son of his state, and used to say that he was prenatally akin to Kentucky —that he was the offspring of ancestry who did a share in the original peopling of Kentucky from the sturdy manhood of old Virginia.

Despite the pressing exactions of his profession, Judge Field was notably calm and serene under the most trying circumstances. He possessed the happy faculty of leaving business cares at his office and in the court room. His private library of general literature was one of the best in Kentucky. His family life was ideal. He married Miss Susan McElroy, a member of an old and excellent Missouri family, and was the father of five children.

Though a native of Louisville, Judge Field received his education in Missouri. He was in Westminster College, at Fulton, Mo., at the outbreak of the Civil War and enlisted in the 2d Missouri Cavalry of the Confederate army. He saw service as a private in the trans-Mississippi campaigns. His father was killed early in 1861 by Union soldiers for having expressed sympathy for the cause of the Confederacy, though he was never enlisted. Judge Field came back to Kentucky and took up the study of law. He was graduated from the University of Louisville and became a member of the Louisville bar about 1868, practising his profession with diligence and ability for many years, till he was called to the bench. He had also, since 1884, been a member of the faculty of the Louisville Law School.

Judge Field was highly esteemed in Louisville, and the Republicans paid him a singular compliment recently when they offered to nominate Judge Field on their ticket, as an expression of their desire for a non-partisan judiciary made up of men of this Judge's type, but the latter said that, while he appreciated the offer greatly, the Democratic party had bestowed upon him all the favors it could and he preferred to cast his lot with it alone.

A joint meeting of the Louisville bar and the Louisville Bar Association was held for the purpose of paying honor to his memory, at which speeches marked by genuine sorrow were made by Judge W. O. Harris, Charles Seymour, J. T. O'Neal, Judge Thomas R. Gordon, Col. Bennett H. Young, Judge Samuel Kirby, Judge Matt O'Doherty, Judge Alex Humphrey, Judge Joseph Pryor and John S. Jackman.

Judge Shackelford Miller offered appropriate resolutions, which were adopted, and from which we quote:—

"We might say many things in praise of Judge Field—of his knowledge of the law, of his industry, of his patience, of his fairness, of his kindness—words of affection and of admiration; but we turn from these because the man and the occasion demand something that shall fairly strike the mark.

"Many young men have been taught by him; many lawyers have practised before him; many litigants have heard him try their cases; many witnesses have testified in his presence; many juries have had him as their guide and instructor; these many men, of every rank, of much or little education, of every variety of employment, of every disposition—kindly or critical, of little or of great influence, have told many men like them what manner of man Judge Field was, and the one strong, predominant note in this chorus of opinion is character. When we thus speak of character, we mean that in a Judge

which is the one thing needful—high over all, and all including, as charity is to the Christian."

The admiration and esteem shared by so many were well voiced by Col. Bennett H. Young, who said:—

"It was my privilege to have been upon terms of close and intimate friendship with Judge Field. After practising before him for more than a quarter of a century I can say, without limitation, that he had every quality that a judge could possess. He was firm, yet courteous; he was always kind and considerate; he was patient and painstaking. He was a thorough student of the law. His sense of justice rose higher than technicalities and forms. His conduct toward the bar was ideal; his deportment on the bench was always dignified and upright.

"In my long experience I never heard one human being question Judge Field's absolute fairness. He was remarkable in that he did not permit his friendships in the least to affect his treatment of every lawyer at the Louisville bar. He was particularly kind to young men. If an inexperienced practitioner was getting a little the worst of it Judge Field held the scales evenly and saw that no wrong was done. He had as complete a sense of right and wrong as any man I have ever known.

"He had become a great Judge, and in this connection I mean a man who knew the law. There was no question or matter that any member of the Louisville bar would hesitate to submit to Judge Field's opinion. Neither fear nor favor moved his opinions or conduct as a Judge.

"The death of a man of such splendid character is an irreparable loss to Louisville and Kentucky. There are no words that can overstate his qualities as a man and a Judge and his courage as a soldier."

The Chief Justice of the old Commonwealth, Hon. Henry Barker, left the bench at Frankfort to preside at this bar meeting, and said in accepting the honor:—

"You all know we have met here to take the necessary steps to express our respect for the memory of one we all loved, and one who was in every way worthy of that love.

"No house ever had a nobler head; no state ever possessed a more faithful servant; no bench or bar ever had a member whose life more fully exemplified its highest standards and ideals. He lived righteously. He served faithfully. He died gloriously.

"The ending of such a life calls for neither sorrow nor tears, but rather for the bugle notes of triumph—the plaudits of victory. This world is nobler and more beautiful because he has lived. The next is richer because he has died."

The Democratic city and county convention which met at Louisville July 2 nominated William H. Field to succeed his father on the Common Pleas bench. Judge Matt O'Doherty, in presenting this nomination, declared the son to be in every way worthy of his honored father, and to be one in whom his father had "instilled those principles of rectitude, of integrity, of the highest honor and the highest citizenship which shone so conspicuously in his own character."

When he placed the name of Judge Shackelford Miller in nomination for Chancellor, Morton K. Yontz referred to the late Judge Field in these terms:—

"The Democratic party is proud of the men it has given to the bench. It gave to the bench that sweet-spirited, gentle man, that just judge, Emmet Field, of glorious memory.

'I cannot say and I will not say
That he is dead; he is just away.'

"His loved form is laid away in the quiet tomb, but his splendid influence goes marching on. He was content to be a Circuit Judge; that is to say, he was content to sound the shoals of honor. In him no vaulting ambition o'erleaped itself. But as Macbeth was made to say of Duncan: 'Oh, he was so clear in his great office!' "

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Bankruptcy. "Bankruptcy Law and the Peaceable Settlements of Business Failures." By Harold Remington. 18 *Yale Law Journal* 590 (June).

"The Bankruptcy Law has been in quiet but efficient operation all the time in the midst of the commercial failures of the last year, staying the hand of the creditor from the effort to gain advantage over his fellows and bringing about a rational and business-like settlement of affairs between the debtor and his creditors; yet, during all that time the courts have not been called upon materially to increase their operation on this account, so certain and well recognized are the prohibitions of the Bankruptcy Law.

"The true place of National Bankruptcy Law in the community has been little understood by the people at large; although it is true that the different associations of business men of the country have been most widely awake and keenly appreciative of its influence and operation, through whom a more adequate conception of its benefits to the commercial world is gradually being developed."

Bill of Rights. "The Anthracite Coal Industry, and the Business Affected with a Public Interest." By Prof. Andrew Alexander Bruce. 7 *Michigan Law Review* 627 (June).

"To what extent does American individualism extend? Is there any legal foundation for the statement so often made by the business man, that his business is his own and he has the right to run it as he pleases? Is the right of the laboring man to strike a right which is inalienable? Prior to the year 1892 there was in America but one answer to these questions. It was to be found in the case of *Godcharles* v. *Wigeman* (113 Pa. St. 431, 6 Atl. 354; decided in 1886) and in a long line of decisions which followed its reasoning. . . . It was not until 1892 and 1899 respectively, that the supreme courts of West Virginia and Tennessee made a complete change of front and took a radically different position, and not until 1901 that the Supreme Court of the United States sustained them in so doing. (*Harbison* v. *Knoxville Iron Co.*, 103 Tenn. 421, 53 S. W. 955; *Dayton Coal & Iron Co.* v. *Barton*, 103 Tenn. 604, 53 S. W. 970; *Knoxville Iron Co.* v. *Harbison*, 183 U. S., 13, 22 Sup. Ct. 1; *Dayton Coal Co.* v. *Barton*, 183 U. S. 23, 22 Sup. Ct. 5.) . . .

"The matters which were in dispute in the coal fields of West Virginia and Tennessee were, to all intents and purposes, the same matters as those which were in dispute in the recent anthracite coal strike in Pennsylvania, and in the strike which is now threatened. They were disputes over the method of weighing coal, the method of paying wages and the paying of such wages in orders on the company's stores or truck-shops. In the opinions the courts take the broad position that every business man and every man who seeks the protection of society in order that he may live and do business, and who calls upon that society for protection from physical harm and upon its courts for the enforcement of his contracts, must be willing to yield to that society some measure of regulation and control when that control is necessary for the preservation of the public peace and the public welfare."

Prof. Bruce adds the comment, with which not every one will agree, that "This is socialism no doubt—or looks like it."

"The Supreme Court and the Fourteenth Amendment." By Edward S. Corwin. 7 *Michigan Law Review* 643 (June).

"The alleged issue between state power and federal power is largely imaginative, and in this connection at least quite pointless. The real issue is far different and traverses both state and federal governments. It is the issue between two theories of government, one of which, centering around the notion of sovereignty, regards government as the agent of society; the other of which, centering around the notion of natural rights, regards government as somewhat extrinsic to society. It is the issue also between two theories of law, the one of which regards law as an emanation from authority and as vested with a reformative function, the other of which holds that law ought to be conservative and ought to represent no more than a ratification of the custom of the community. . . .

"The Court in its early fear for the federal balance denied the Fourteenth Amendment practically all efficacy as a limitation upon state power, save in the interest of racial equality before the law. Subsequently, however, the Court found reason to abandon its early conservative position and in the interest of private and particularly of property rights to take a greatly enlarged view of its supervisory powers over state legislation. As we have seen, the history of this change is the history particularly of the development of the phrase 'due process of law.' But now an interesting thing is to be noted. The *Berea College* decision makes it perfectly plain that the enlarged view of 'due process of law' is not available against legislative classifications based on racial differences, such classifications being deemed *prima facie* reasonable. Thus it comes about that property, or, calling to mind the *Santa Clara* case (118 U. S. 394), the corporations, succeed to the rights which those who framed the Fourteenth Amendment thought they were bestowing upon the negro. This outcome is not entirely devoid of irony, but neither on the other hand, as I have above emphazized, is it devoid of his-

torical justification, from our constitutional jurisprudence antedating the Fourteenth Amendment."

"Ethics and the Law." By Prof. George Trumbull Ladd. 18 *Yale Law Journal* 613 (June).

"From the point of view of one who is a layman and so interested chiefly in the moral aspects of our problem, the following considerations which bear upon its solution, seem undoubtedly to be true: First, very important and even radical changes in the existing system of laws are demanded, and will be insisted upon in the near future by the public conscience of the body of the people then living under the law. Second, the tendency to invade and restrict the territory of individual rights—uniformly in the alleged interests of the whole people, but far too often, in ways either ignorant, if altruistic, or skillfully and designedly planned to promote the interests of a corporation or a class—must either reach its natural limit or else be checked by legal methods. And, third, and above all else, these changes in legislation and in the enforcement of the laws by the courts must secure to the minority their rights as against the majority, and to the humblest and poorest individual his rights as against the richest and most powerful corporation. Only in this way can the truest and highest social good under the law be realized and maintained; and only thus can the essence of our Constitution and of our hitherto existing system of law be preserved, in the good conscience and respectful obedience of the people of the land."

See Government.

Capital Punishment. "Does Capital Punishment Prevent Convictions?" By Maynard Shipley. 43 *American Law Review* 321 (May–June).

"From the facts already presented with reference to the administration of justice before and after abolishment of capital punishment in Michigan, Wisconsin, Rhode Island, Maine, and Colorado, it seems evident that convictions followed murders with greater certainty after life imprisonment was made the supreme penalty. Perhaps we may well agree with Professor John Dewey, of the Chicago University, that while there may be circumstances under which the death penalty is necessary, on the other hand, 'where the moral opinion of the community is highly developed and where scientific penology has made considerable progress, it is likely to be more harmful than helpful.'"

Conflict of Laws. "Individual Liability of Stockholders and the Conflict of Laws." By Wesley Newcomb Hohfeld. 9 *Columbia Law Review* 492 (June).

The first portion of a paper to be concluded next month. The topic was suggested by the decision in the important English case, *Risdon Iron and Locomotive Works* v. *Furness*, which the same author has also discussed in an earlier article in the same journal ("Nature of Stockholders' Individual Liability for Corporation Debts," 9 *Col. L. Rev.* 285–320, reviewed 21 *Green Bag* 229).

"In *King* v. *Sarria*, the analogous principles and authorities thus far considered point clearly to the *lex loci contractus* as the general rule for determining the obligations of the special partner to third persons. This would seem to be particularly true of the agency cases, *Maspons* v. *Mildred*, relating to an undisclosed principal, and *Arayo* v. *Currell*, bearing on the limitation of a principal's obligation. So, too, special emphasis may be placed on *Baldwin* v. *Gray*, for that case is almost a 'converse' to the one immediately to be considered. Of the authorities directly in point *King* v. *Sarria* is the leading case. . . .

"The stockholders in a foreign, limited liability corporation contracting in New York do not, in general, become subject to the obligations of ordinary partners; but no case has been observed in which it is suggested that this is due to any absence of power on the part of the *lex loci contractus*. On the contrary, the opinions in the New York cases expressly indicate that the New York law, if so declared by the legislature, might legitimately impose such partnership obligations, and in other jurisdictions there are actual decisions which have held that, independently of statutes, such obligations result under some circumstances."

Copyright. "Copyright at Home and Abroad." By W. Morris Coles. *Nineteenth Century*, v. 65, p. 1056 (June).

"'*Vraisemblablement fort complexe*' is the phrase in which M. Henri Morel, the Director of the International Copyright Bureau, has aptly characterized the Berlin Convention, 1908. . . . It is much in a peddling age for the powers in conference to strike boldly at making intellectual property more and more valuable, and surrounding it with a ring fence shall ensure its full and free enjoyment to its rightful owners. . . .

"The new Convention is, however, unhappy in its method. It attempts too much. It is framed with too lofty a disregard for the difficulty of working it in the several countries. . . The position may be briefly stated. The Berne Convention of 1886, with the Additional Act of Paris, 1896, and the Declaration of Paris, 1896, with all their imperfections, established a working international body of law. Round this in all the signatory countries a formidable weight of statutory and judicial authority has grown up, until we have arrived at some sort of certainty as to the rights of copyright owners, in the main, throughout the Union and, in part, throughout the civilized world. A network of protection has been created which, for all its drawbacks, is not the less capable of being practically worked, so far as the great mass of intellectual property is concerned. . . .

"The framers of the Berlin Convention,

1908, were, however, ambitious in their aspirations. With a sublime indifference to the conditions which govern the reform of the domestic laws of many of the Unionist and Non-Unionist countries, they elected to aim at a code which should at once comprehend much of the old machinery, tinkered a little here and there, and much that was wholly new. There is every danger that, as a result, they will retard instead of advancing the realization of their aims, and complicate instead of simplifying the international system."

Corporations. "Jurisdiction of the Federal Courts Based upon Diversity of Citizenship in an Action Brought by an Individual Against a Corporation which is Incorporated in or Adopted by Two or More States, Where the Plaintiff is a Citizen of One of Such States." By P. J. Altizer. 43 *American Law Review* 409 (May–June).

"To summarize, it is well settled that a citizen of one state can go into another state and sue in the federal courts there, on the ground of diverse citizenship, a corporation actually created, whether by original incorporation or by the consolidation of different corporations, under the laws of the state of the forum. And this is true, notwithstanding the fact that there may be in the state of plaintiff's domicil a corporation of the same name as the corporation sued, both having one set of officers, incorporated by the concurrent legislation or consolidated under authority of the two states, and acting and doing business as a single corporation.

"In cases where the defendant corporation has not actually been incorporated as an original corporation by the state in which the suit is brought, under the holding in *Railway Company* v. *James* (161 U. S. 545; 1896), the suit cannot be maintained in the federal courts in that or in any other state by a citizen of the state granting the original charter, where jurisdiction is based on diversity of citizenship.

"And, finally, a suit cannot be maintained in the federal courts on the ground of diversity of citizenship, in the state of plaintiff's residence, against a corporation actually incorporated under the laws of that state, whether by original charter or by reincorporation. If there be no reincorporation in the state of the forum, then the federal court has jurisdiction; and the question of whether or not there has been reincorporation is to be determined by judicial construction of the statutes and acts done thereunder."

See Bill of Rights, Conflict of Laws.

Criminology. "How Thieves Live." By Charles Somerville. *Everybody's*, v. 21, p. 101 (July).

The writer is criminal reporter for the New York Journal.

"For twenty years a certain male shoplifter had eluded not only capture, but even suspicion. His well-furnished apartment in the upper west side of New York City—in a neighborhood of the highest respectability—had known him as a tenant for more than fifteen years. Every one of the pretty ornaments in the home had been filched. The great rolls of silks that he brought home from time to time aroused no suspicion in his wife's mind, for she understood that he was a buyer for a large drygoods house. His trips away from home, when he disposed of his goods in distant cities, were all accounted for by the same explanation. The man was very fond of children, and planned a big Christmas party to which his two young sons were to invite their friends, big and little. He was arrested while attempting to steal toys which were to have been gifts from his children to their playmates."

Defamation. "Absolute Immunity in Defamation: Judicial Proceedings." By Van Vechten Veeder. 9 *Columbia Law Review* 463 (June).

The first portion of a paper to be concluded next month.

"The rule of absolute immunity is founded upon the principle that on certain occasions it is indispensable, or at least advantageous, to the public interest that persons should speak freely and fearlessly, uninfluenced by the possibility of being brought to account in an action for defamation. This class of cases is naturally a comparatively narrow one. It is strictly limited to judicial proceedings, legislative proceedings, and certain official proceedings of executive officers of state.

"The common law doctrine has been little disturbed by statutory enactment. Although the common law doctrine of absolute privilege is recognized, with slight variation in details, in all the states, this familiar term is not once mentioned in any of the statutes. It is always clear, however, whether absolute or qualified privilege is referred to by the absence or presence in the statute of reference to the term malice. . . .

"The rule applies to and includes every publication which constitutes a step in, or arises out of, a judicial proceeding, or which has some relation thereto, whether such proceeding be *ex parte* or *inter partes*, in open court or in private, or of a preliminary, interlocutory or final character. But it does not apply to or include any publication of defamatory matter before the commencement, or after the termination of the judicial proceeding (unless such publication is an act incidental to the proper initiation thereof, or giving legal effect thereto); nor does it apply to or include any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings. The requirement that the publication must have some relation

or reference to the proceeding in which it is made is fundamental."

European Politics. "The Balance of Naval Power and the Triple Alliance." By Archibald S. Hurd. *Nineteenth Century*, v. 65, p. 1068 (June).

"We have become familiar with the rapid progress of the German Fleet. Now Austria-Hungary, hitherto possessing a fleet of insignificant proportions, has prepared a programme of naval expansion, and Italy, the least prominent and possibly the least enamoured of the signatories to the Triple Alliance, has decided to follow the Austrian lead. The Triple Alliance has had the breath of life breathed into it."

"The Future of the Balkans." By Mil. R. Ivanovitch. *Fortnightly Review*, v. 85, p. 1040 (June).

"The Balkan Confederation will be realized, and it will be realized because it is an absolute necessity and indispensable to all Europe. . . . Since England, France, Italy, and Russia can not, jointly or severally, allow Germany the hegemony of the Balkans and the Mediterranean, they must build a rampart against her. Their task is not hard."

"Turkey: Developments and Forecasts." By Edwin Pears. *Contemporary Review*, v. 95, p. 707 (June).

"The best men in the country, its leaders, both Moslem and Christian, have proved themselves loyal to the Constitution, and look to it as the only means of saving Turkey. The Chamber of Deputies is again working steadily, and sees the necessity of quickening its pace. A little more trust among the members in the good faith of those who differ from them in opinion, and its debates will furnish an invaluable education to the people."

"A Clue to the Turkish Tangle." By Dr. E. J. Dillon. *Contemporary Review*, v. 95, p. 743 (June).

"We should not forget that the bloodless victory over the Hamidian *régime* was won not by the political Young Turks but by the non-political revolutionary army. It was a military revolt that inaugurated the movement, and a military triumph that put an end to the misrule that was breaking up the Empire."

Foreign Relations. "Elihu Root as Secretary of State." By Gaillard Hunt. *Putnam's*, v. 6, p. 471 (July).

"John Hay had rendered the so-called spheres of influence held in China by European powers harmless to the material welfare of the United States by extracting from them a promise that they would keep the door open to the trade of all nations upon an absolute equality; but no one had guaranteed that the huge but helpless empire should preserve her political existence. For obvious reasons the United States desires that she shall do so, and Secretary Hay had not hesitated to declare this fact.

"It remained for Mr. Root, however, to render the desire of the United States effective by obtaining a declaration of an identical wish from Japan, the great power of the East. The American Secretary of State and the Japanese Ambassador simply exchanged notes in which each stated that his country desired the continued independence of China, and each promised to communicate to the other any action which he might contemplate in the future with reference to China. The agreement is not a treaty, nor even an alliance having binding force for any longer period than suits the pleasure of the parties to the transaction; and either Japan or the United States can terminate it to-morrow; but until it is terminated it is as effective for its purposes as a treaty of alliance would be, and China may rest from her fears of being sliced among greedy foreign nations. The importance of this concerted action in its effect on the destiny of the countries of the Orient has been fully recognized; but it has a more far-reaching significance, for it marks a turning-point in our development as a world-power, and has made a precedent which is likely to have a vital influence upon the history of the world."

Government. "Little Englandism." 45 *Canada Law Journal* 422 (June 15).

"Some people appear to think that the political opinions which are known as 'Little Englandism' are confined to certain inhabitants of the British Isles. . . . This is a mistake. It invades our provincial politics, and our Dominion politics. To the 'Little Englander' the Province, or the Dominion, as the case may be, is the limit of his political horizon. . . . Let us not forget that our chief glory and pride is not that we are Canadians, but that we are also the citizens of a world-wide Empire. . . .

"What should we think if the state of New York were to get up an agitation within its borders to prohibit all appeals to the Supreme Court of the United States; or to claim to make treaties for itself, or to be constantly putting the stars and stripes in the background, and putting the state flag of New York in the foreground, and trying to make the people of that state think more of the flag of the state, than of the flag of the Union?"

Government. "The Constitutionality of Statutes Prohibiting Resort to Federal Courts." By Frank R. Lacy. 43 *American Law Review* 335 (May–June).

"The court in the *Prewitt* case states the reason for this decision as follows: 'This Court held that the agreement was void, inasmuch as, if carried out, it would oust the federal courts of a jurisdiction given them by the Constitution and statutes of the United States. It was said that the statute of Wis-

consin was an obstruction to the right of removal provided for by the Constitution of the United States and the laws made in pursuance thereof.' (202 U. S. 250.) Thus it seems to be recognized that the reason for the Morse decision (20 Wall. 445) was that obstructions to a foreign corporation's right of removal are unconstitutional. . . .

"To conclude, the writer believes he has shown that no sufficient reason has been given, nor, so far as one is able to see, can be given, for the exception made by the *Prewitt* case to the general principle which forbids interference with resort to the federal courts. As it has never been thought that any other exception could be made, it seems that it ought to be established as a universal rule that no state can constitutionally interfere with the resort of any person to a federal court."

"The Relative Rights of the State and Federal Governments at the Present Day." By Joseph L. Hull. 43 *American Law Review* 397 (May–June).

"Certain functions of government were originally reserved to the states; those functions are still the object of the state's existence. In the execution thereof they are limited to an extent as above outlined by the War Amendments. But the prohibitions upon the states in those amendments were not made in favor of the federal government. Centralization of power was not their object. The rights withdrawn were, for the most part, either withdrawn at the same time from the federal government or else had been previously withheld therefrom. They became a portion of that class of rights, which in the words of the Constitution, 'are reserved to the people.'"

See Bill of Rights, Legislative Procedure, Public Health.

Interstate Commerce. "The Commodities Clause Decision." Anonymous. 9 *Columbia Law Review* 523 (June).

"Probably very few lawyers who followed this case closely, and few of those who have been cognizant of the leading authorities on this point in recent years, anticipated any different result from that announced in the prevailing opinion of the court. . . . If the statute had been given its natural meaning, a decision upon the second, third and fourth constitutional questions raised by the defendant's brief would have been inevitable. That decision would have involved almost as inevitably distinguishing,—and perhaps even qualifying to some extent,—broad principles announced in the *Lottery*, *Northern Securities* and *Union Bridge* cases. One cannot refrain from suspecting that it was easier to convince eight judges that they should subscribe to the dissertation on syntax than it would have been to persuade four to allow Justice White to express their several reasons for holding the act unconstitutional or the reverse when given its natural meaning. . . .

"As one surveys the field of battle after the smoke has cleared away it would seem as though the bar and business interests of the country would unite in deploring the abortive results attending the statesmanlike efforts of the Department of Justice and counsel for the defendants in seeking to construe the statute in accordance with its natural meaning and then seeking a definitive pronouncement as to the constitutionality of the act thus naturally construed."

See Bill of Rights.

Law Reform. "Demoralization of the Law, XII." By Ignotus. *Westminster Review*, v. 172, p. 651 (June).

"The *Times* has again called attention to the extraordinary uncertainty of the law (as instanced in the result of cases which come before the appellate tribunals) and of the high percentage of reversals and dissents. According to our contemporary the explanation is to be sought chiefly in the difficulties of interpretation of Acts of Parliament 'drawn up ambiguously, loosely and with remarkable ignorance of the effect of the words used. The judges are left to spell out of barely intelligible words the policy of the legislature in regard to matters of national importance.' After giving some recent instances, to which we cannot refer from considerations of space, our contemporary sums up thus: 'The uncertainty of the law often means the silence of the legislature or the obscurity of its utterances.' Our neighbors across the Channel have long ago surmounted this difficulty, and in the simplest possible way. Legislative enactments are handed over to trained experts whose duty it is to find a direct and unmistakable form of words in which to clothe them. If it is impossible to find similar experts in this country inside the legal profession, they must be found outside. For it is extremely improbable that the public is sufficiently lawyer-ridden to tolerate the present state of things indefinitely; whether due to natural imbecility or professional artifice, it provides a happy hunting ground for the special pleader and costs the country vast sums in litigation."

Legal Education. "American Remembrances of a German Teacher of Roman Law." By Dr. Rudolph Leonhard. 18 *Yale Law Journal* 583 (June).

"As I was sent to America in order to work for a spiritual approximation of the ideas of Europe and of America, and as I knew that nothing brings two peoples nearer to a mutual understanding, I made up my mind to compare the different laws as much as possible.

"But no comparison is fruitful if the two things compared have not a common element which gives a point of view from which they can both be contemplated and understood.

"Reflecting, too, that the common influence of Roman terminologies, exercised on the one side upon the Continental Laws, and on the other side upon the English-American Law,

is such a point of view, I came to the result that the 'Institutes' of Justinian must be explained as the common source of fundamental ideas of the two branches of European culture, *viz.*: the continental and the English-American Law.

"I did so. I explained the texts in this way, unhappily not having had the full time for preparation, which was desirable in every case. But I preferred to perform an incomplete work rather than doing nothing in such a favorable situation as could never return to me."

Legislative Procedure. "New Responsibilities of Citizenship." By Charles H. Carey. 18 *Yale Law Journal* 596 (June).

The author thus summarizes his conclusions suggested by a study of the initiative and referendum:—

1. There is a marked tendency in the United States and in other countries toward enacting sweeping legislation on novel principles.
2. The evils that apparently give a reason for these changes are not more serious than have been experienced and dealt with before.
3. The plan of vesting the law-making power in the people at large is not new in history, and was expressly rejected in favor of the representative plan by the founders of the United States Constitution.
4. The recent changes in the Oregon Constitution, and the facility with which it may now be amended, put new and serious responsibilities upon the electorate.
5. The initiative system of law making in the form now under experiment in Oregon requires the exercise of an extraordinary degree of intelligence, impartiality, and devotion on the part of those having the right of suffrage, and is open to certain criticisms that suggest limitations upon the exercise of the power.
6. These suggestions embody the following changes in the present plan:

(*a*) Limitation of the number of constitutional amendments, and of initiative measures that may be submitted to vote at any one election.

(*b*) Limitation of the subject-matter of any such measure to a single proposition, in concrete form.

(*c*) Confining the use of the initiative to bills that have been introduced and failed to pass in the legislature, and those that have been vetoed by the governor.

(*d*) Modifying the referendum to require a larger number of petitioners.

Liquor Problem. "The Future of the Public-House." By Edwyn Barclay. *Nineteenth Century*, v. 65, p. 994 (June).

"I am very confident that it would be far wiser and would do more for temperance if we aimed to make our public-houses more respectable and useful, and so foster a strong public opinion against drunkenness, rather than to decry them and do all that is possible to make them disreputable and mere drinking shops, as is at present only too much the case."

Marriage and Divorce. See Race Discrimination.

Practice. "A Story of Law Enforcement." By Thomas Lee Woolwine. *World's Work*, v. 18, p. 11828 (July).

"When I became Prosecuting Attorney in Los Angeles, I determined to enforce all the laws upon the statute books, to enforce them with absolute impartiality, and in their enforcement to strike at any private individual or office-holder who might attempt to block the way. Mine was not a campaign of morals, but simply a fight for equal law enforcement."

After a prolonged fight with the political machine, including the District Attorney, who twice removed him from office for his determination to enforce the law, he was successful in awakening public opinion, which overthrew the machine and demanded the conviction of two of the offenders, allowing the chief culprits to escape.

Procedure. "Criminal Appeals in England." By Theodor Megaarden. 13 *Law Notes* 46 (June).

The facts of the notorious Beck case, in which an unfortunate Swede named Adolf Beck was positively identified with one John Smith, a previously convicted swindler, by the police officer in charge of the case, and the examining officer denied the defendant's right to introduce evidence on the point of his identity, are here reviewed—facts of a case which, because of the revolting injustice of the affair, led to the establishment of criminal appeals in England:—

"Beck was sentenced to seven years' penal servitude, and, although he had not been identified with Smith at the trial, his clothes were marked to show a former conviction. Beck objected to this, and after several petitions the Home Office finally ordered the removal of the signs of a former conviction, but declined in any way to enter upon the accuracy or otherwise of the conviction. So poor Beck had to stay in prison until the expiration of his term. After coming out of prison he settled down to a quiet and industrious life, when it was suddenly reported to the police that the crimes of 1877 and 1896 were being repeated with all their peculiarities of method and names. Beck was again arrested, tried, and convicted. Mr. Justice Grantham, before whom he was tried, respited sentence until the following session, and during that period the John Smith of 1877 was arrested. The facts of the case being presented to the Home Office so forcibly, the Home Secretary beneficially granted Beck a 'free pardon.' Moreover, the treasury offered him £2,000 as a *solatium*. Beck refused to accept that amount, and the offer was increased to £5,000.

"No better demonstration of the inadequacy of the machinery of the Home Office to correct even the grossest errors in the

trial of criminal cases could be needed. The Home Office, had it been a reviewing tribunal, could easily have prevented the carrying out of the sentence of Beck on his first conviction, and would probably have thereby prevented the second arrest and trial. And there can be no doubt that the existence of a judicial tribunal with power to review criminal trials on questions of law and fact, or even on questions of law alone, would have prevented the miscarriage of justice which occurred in this case. . . .

"When we look back upon the long struggle in England to secure a right of appeal in criminal cases, when we recall the terrible wrong done in the Beck case, which outraged the sense of justice of every right-thinking person not only in England but throughout the civilized world, and when we are confronted with this act of the British Parliament, constituting as it does a virtual admission that the old plan was wrong, we cannot but feel that, until this new system has been fully and fairly tested and found wanting, all proposals, no matter how eminent their sponsors, to strike the right of appeal from our criminal procedure must fall upon unheeding ears."

"The Denial of Justice." By Samuel Scoville, Jr. *Outlook*, v. 92, p. 359 (June 12).

Some objectionable and out-of-date customs clogging the procedure of the United States Supreme Court are thus indicated in this article:—

"The Court sits four hours a day for five days in the week, sitting every week day except Saturday, from 12 noon to 4.30 in the afternoon, with a recess from 2 to 2.30. One of these days each week is practically occupied by reading aloud the opinions handed down by each judge—a custom smacking of the time when there were town criers instead of newspapers and quill pens instead of typewriters. Its official term for the year 1907 comprised thirty-three weeks out of the fifty-two, and officially it worked thirty-three weeks and rested nineteen. This official schedule, however, does not take into consideration the recess habit, to which the Supreme Court has fallen a victim, . . . unofficially dividing the year as follows: Sessions, nineteen weeks; recesses, thirty-three weeks."

The remedy for delays in the federal and state courts is simple; it is to be found in "simplicity, industry, and publicity. The procedure must be pruned of all the undergrowth of useless formalities and outworn methods. The bench must be composed of men who can and will work. Finally, there must be that publicity about the quality and quantity of work done which will make for the highest standard."

Public Health. "Federal Quarantine Laws." By Prof. Edwin Maxey. 43 *American Law Review* 382 (May–June).

"We hear a great deal in these days about the centralization of power in the federal government, but the fact is that the federal government has been slow in developing its powers. The only exceptions to this tendency have been at the very beginning when the influence of Hamilton was at its height; during and immediately after the Civil War; during the present decade. But even during these periods there has been evident something of the tendency which we have noted in federal quarantine legislation—a tendency to refrain from assuming the full extent of its constitutional authority until the exercise of such authority is forced upon it by the necessities of the case.

If this conclusion is correct, those who really consider the protection of the public health a matter of importance can render a valuable service by doing their share toward developing a public sentiment which will force upon Congress a realization of the fact that the question is considered important and that the people are convinced of the expediency of the exercise by the federal government of the quarantine powers which under the Constitution it has a right to exercise."

Race Discrimination. "Race Distinctions in American Law, V–VI." By Gilbert Thomas Stephenson. 43 *American Law Review* 354 (May–June).

This installment deals with "The Reconstruction of the Marital Relations of Negroes," "Remarriages," "Certificates," "Slave Marriages Declared Legal by Statute," "Marriages Between Slaves and Free Negroes," "The Intermarriage of the Races." "The Effect of an Attempted Intermarriage," "The Punishment of Intermarriage," "Cohabitation without Intermarriage," etc.

Socialism. "French Labor Unions *v.* the State." By Alexander Ular. *Contemporary Review*, v. 95, p. 647 (June).

"The public sympathized with the post office strikers. Nobody doubts that in case of brutal provocation, the large labor federations would join in a general assault on the state. Nobody doubts that if the Radical Government dared to apply the military code to strikers by mobilizing on paper the whole of the reserve army, and to sentence revolutionaries by exceptional courts, the whole country would rise against them. In a word, the postmen have proved that nothing can be done against well-organized and self-confident state employees."

Taylor's Science of Jurisprudence. Dr. Hannis Taylor's side of the controversy growing out of the alleged plagiarism committed in his work on "The Science of Jurisprudence" (for previous chapters of this discussion see 21 *Green Bag* 75, 173, 239) is stated in a communication addressed to *Law Notes* for June (13 *Law Notes* 59).

Dr. Taylor here charges Dr. Goudy of Oxford with resorting to "unlawful and unprecedented expedients in his mad effort to defame me." To convict Dr. Goudy,—

"You have only to compare the false copy of the extract, republished by you from the London *Times*, over his signature, with my printed pages 265–266. It thus appears from the printed record (1) that he removed the figure 3 from the face of my text, and with it note 3 at the foot of the page; (2) that he falsely represented the extract as appearing on p. 265, when, in fact, it is on pp. 265–266; (3) that he deliberately suppressed the note at the foot of p. 266: 'See Pollock and Maitland, 'History of English Law,' 2d ed., i, 80–87.' These three acts are affirmative acts, and part of a deliberate design. The moment the suppressed notes appear, the falsity of his charge is fixed. His charge is that I used the matter in question without citations, and then he suppresses the double citations. When, in his first article, he censured the Universities of Edinburgh and Dublin for giving me their honors, after declaring that he had not read a single one of the books on account of which those honors were bestowed, I raised the question as to whether or no his mind is normal. This last performance makes that inquiry still more serious."

It is to be regretted that Dr. Taylor's sense of provocation leads him to express himself in bitter terms regarding "a small coterie at Oxford that despises everything American." Certainly it is not the sentiment of able American scholars, taken as a whole, that they cannot look to Oxford for as fair treatment as that to be expected from another enlightened quarter.

Unfair Trade. "The Development of Secondary Rights in Trade Mark Cases." By Wallace R. Lane. 18 *Yale Law Journal* 571 (June).

"The law is following business more closely all the time. Whether a man's trade is country-wide, state-wide, or world-wide, the law should and does in an increasing degree protect him in that trade. We can now congratulate ourselves that no other development of any branch of the law is based so much on the business integrity, common honesty and justice as this climax of trade-mark law, known as the law of unfair competition, particularly in its secondary sense. . .

"In this state of the development of the law of unfair trade, it is sincerely to be hoped that there will be no suggestion made that the law be codified. We have at present a broad, general, elastic doctrine. It is being adapted to the needs of modern business in a reasonably successful manner. As the needs of business change, so may this doctrine be changed. The law of unfair trade should be allowed to take its normal course of development, being applied, as each case arises, by careful, well-informed judges, who are alive to the truth of the saying: 'The law should follow business.'"

Wills and Administration. "The Doctrine of *Cy Près*." By Jnanendranath Dutt Chaudhri, B.L. 6 *Allahabad Law Journal* 129 (June 4).

"The personal law of the Hindus is intimately connected with their religion, and therefore allows of gift in perpetuity to religious objects to a much greater extent than the English law. Thus, absolute gifts of land or money in perpetuity to an idol, and for other religious purposes, have been recognized by many decisions. Neither the English law, which forbids bequests for superstitious uses, nor the rule which prohibits the creation of perpetuities, is applicable to gifts to idols by Hindus. So the Muhammadan law of *wakf* or appropriation founded on the Muhammadan religion allows of the appropriation of property in perpetuity for the performance of religious services, the maintenance and repair of tombs, and other purposes not held to be charitable by the English law. It is therefore clear that in the case of Hindus and Muhammadans there is a relaxation, to a certain extent, of this rule against perpetuities."

Women Suffrage. "Votes for Women." By W. I. Thomas. *American Magazine*, v. 68, p. 292 (July).

"It is custom, not reason, that women have had to face first of all in their fight for the ballot. But another powerful and more reasonable cause for the opposition to woman in this connection lies in the fact that she was as a class reduced at one time to a position of ornamental inactivity, where her chief charm consisted in complete and ductile submission to the will of man, and that she herself accepted this condition as an ideal one."

Miscellaneous Articles of Interest to the Legal Profession

Biography. "The Boyhood of John Hay." By A. S. Chapman. *Century*, v. 78, p. 444 (July).

"At a time when his family wished him to take up the study of law, begun with Colonel Hay at Pittsfield, he said to a friend: 'They would spoil a first-class preacher to make a third-class lawyer of me.' . . .

"From Pittsfield John Hay went to Springfield. He found his uncle in the midst of the political struggle leading to the nomination of Abraham Lincoln for the Presidency. The association of Milton Hay with Lincoln was so close that John Hay was thrown into relations with Lincoln, and his assistant secretaryship to Lincoln was a natural step."

Aldrich. "Aldrich, Boss of the Senate." By Judson C. Welliver. *Hampton's*, v. 23, p. 39 (July).

"Aldrich is not omniscient. He is hopelessly ignorant about basic economics, or else utterly perverted; more likely both. He is the bluffer who has been caught and exposed. Senator Dolliver caught him and showed his hand; proved his bill to be a mass of deceit and sham, of fake and dishonesty; proved that it sought by hidden tricks to raise rates while pretending to lower them."

Vanderbilt. "The True Story of the Great Vanderbilt Fortune." By Charles Edward Russell. *Hampton's*, v. 23, p. 64 (July).

"Mr. Vanderbilt had quietly organized a little pool composed chiefly of members of his own family. He deposited in London $7,000,000 of New York Central stock as security for a loan wherewith to work his purposes. He then drove down the price of the stock from one hundred and thirty-five to eighty-four. This shook out the small holders and he picked up what they dropped, his total purchases being made at an average of ninety. When all the timid ones had fled, he held his secret meeting, declared the cash dividend of seven and two-tenths per cent and the stock dividend of eighty per cent, grabbed his certificates and locked them up in his safe. Up bounded the stock like a balloon."

Foreign Relations. "Our Representative in London." By E. S. Nadal. *Century*, v. 78, p. 467 (July).

"Is money essential to the success of an American Ambassador?" asks this author, and answers the question by saying that "The kind of man our representative in London is matters more than the amount of his money." He adds that "perhaps the chief attraction" of the Ambassadorship to England "is the consideration with which the office is regarded in this country.

"Many years ago I was talking with the late John Hay about this place and remarked that it was not a particularly great one in England. 'No,' said Hay, gazing reflectively out of the window, 'but it looks very glittering from over here.' The greatness of the office in England depends chiefly on what the man makes of it."

"Cleveland's Venezuela Message." By George F. Parker. *McClure's*, v. 33, p. 314 (July).

"After President Cleveland had sent his famous Venezuela message to Congress in 1895, he wrote a letter in response to an invitation to deliver an address in Birmingham on Shakspere's birthday, which did much to allay public feeling in England. . . . The reception of this letter by the press was generous and high-minded; *Punch* joined the chorus with a page cartoon; and it is safe to say that the ghost which had been raised by the Venezuela message was laid by the Shakspere letter written by President Cleveland on March 30, 1896."

Investments. "The Little Man and the High-Priced Bond." By C. M. K. *World's Work*, v. 18, p. 11760 (July).

"The truth about this matter is that the education of Americans in matters of finance is badly neglected. While the German, French, or English boy learns in school, as it were, that investment is a necessary science, and even gets a smattering of it in his courses, the American never learns it until he becomes a comparatively wealthy man. In New York, the savings-bank is held up before his eyes as the one proper means of saving money. He gets to call such amateur processes as the buying of mining stocks through newspaper advertising 'investment,' and regards it as the one outlet for his slow-growing funds. In a great many cases, he learns the truth only when he loses his money, and goes to a friend to get things straightened out.

"A bond dealer in Wall street, who used to laugh at the small investor, and regard it as rather a joke when one of them came into his office to see whether he would help invest a little fund, went to Europe in the summer of 1906, with his eyes open. He came back with an idea that he did not know the banking business. At a lunch with a banker in Paris, he was told something about the way the Frenchman buys. He did not regard his host as nearly so important a banker as himself; yet he learned that he had twenty-eight clients to one in the American house. He also learned that the French banker was never 'hung up' with any bonds he bought, for he had a list as wide as the country, and there were thousands who would buy a few bonds on his advice."

Negro Problem. "Black and White in the South." By William Archer. *McClure's*, v. 33, p. 324 (July).

Mr. William Archer, the English dramatic critic, believes that the only practical disposition of the negro question is to segregate the negro in a negro state. In such a state—

"It might be necessary at first to establish some provisional government like that of an American territory or English crown colony; but as soon as the country was sufficiently settled, and the mechanism of life in full swing, there could be no difficulty or danger in admitting the new community into the Union, with full state rights. Negro education has enormously progressed since the bad old days of Reconstruction; and there is no reason to doubt that the population could furnish a competent legislature, executive and judiciary. Legislative aberrations would be checked by the Supreme Court of the United States."

Porto Rico. "Porto Rico under the American Flag." By Lyman Abbott. *Outlook* v. 92, p. 447 (June).

"That the islanders are in a more prosperous condition than they have ever been under Spanish rule was the testimony of every one with whom I talked; there was not a single exception. . . .

"The old-time sugar mills have been supplanted by those of newer and better construction, one of them being said to be the largest sugar mill in the world. The one monthly Spanish steamer has been replaced by fourteen monthly American steamers. In some agricultural sections land has risen in value from ten to one hundred dollars an acre; in the vicinity of San Juan the increase has

been much greater; nowhere have land values fallen. Wages have generally increased."

Progress. "Some Obstacles to Progress." By R. Gunn Davis. *Westminster Review*, v. 172, p. 638 (June).

"Let us, for a little, look at the attitude of the middle-classes towards culture, and social improvement, and progress. . . . When we find people who have mostly solved the serious question of bread and butter, and who are favorably situated as regards opportunities for the acquirement of the higher tastes, treating education merely as a means of securing comfortable positions in life, and prostituting culture by using it, not to inspire and elevate, but simply to give them a veneer of the dilettantism which they are satisfied to call superiority, it is impossible to regard them as other than hopeless reactionaries. The middle classes have pressed culture into the same services as their tailors and dressmakers, and they are too dull in perception to observe that they are committing a serious wrong against mankind at large, too selfish to see that they are monopolizing what might be agreeable and advantageous to others, as well as themselves. All this the middle classes have done, and are doing on the ethical side. But this is not all. They are responsible for the greatest barriers to progress on the material side. Modern industry and modern commerce, and modern town conditions are largely the results of a century of the free exercise of middle class activities."

Railroads. "Railway Nationalization." By George B. Lissenden. *Westminster Review*, v. 172, p. 611 (June).

"Salvation lies not in nationalization, because that is a retrograde step, and one which involves grave financial risks, but in the intensive and extensive co-operation of both trader and carrier. And that is the end which must be hastened with all speed."

This new road, built in three years, the Chicago, Milwaukee, and Puget Sound Railway, "shortens the railroad distance between Chicago and Puget Sound, and it has easier grades. The latter point is of the utmost importance in operation."

San Francisco Graft Prosecution. "The Story of a Reformer's Wife." By Mrs. Fremont Older. *McClure's*, v. 33, p. 277 (July).

"Members of the prosecution were not bidden to entertainments. Where people of fashion gathered, old friends fell away; an indictment opened doors of exclusive houses. Men in the clubs and judges of the higher courts fraternized with the corruptors of the city's government; women reserved their sweetest smiles for the candidates for state's prison."

Standard Time. "Daylight Saving in the United States." By Commodore W. H. Beehler, U. S. N. Comment on the foregoing article, by William F. Allen. *Century*, v. 78, pp. 441, 443 (July).

At least sixty millions of people would save the use of artificial light one hour every day in the year, says Commodore Beehler, if the time of the 75th meridian should be used throughout the United States.

The promoter of the present standard time, commenting on this proposal, declares that numerous state laws and city ordinances would have to be repealed or amended, and it would be hopeless to achieve the result desired by simultaneous action. If confusion may arise in the transmission of naval orders—

"A simple remedy would be to provide that the name of the standard used should always accompany the time mentioned. If a single standard is necessary, Greenwich time, which is kept by every chronometer on shipboard, could be used by the navy in all parts of the world. . . .

"A common-sense expedient is employed by the people to adjust the working hours to standard time at points where the latter differs as much as half an hour from mean solar time, as at Detroit. When central time was adopted there, one merchant says, 'We changed our closing from 6 sun time to 5.30 standard time. In every shop that I have heard of, this was done, if the men wanted it.' Another states that 'the factories have their noon-hour from 11.30 to 12.30 o'clock.' Experience has shown that the extent to which this adjustment can be made without inconvenience is about thirty minutes."

Taft's Administration. "Taft—So Far." By "K." *American Magazine*, v. 68, p. 309 (July).

"Mr. Taft is very much the type of the civil lawyer. This instinct of the legal mind comports, moreover, with the inclinations of Mr. Taft's large, easy peace-loving nature. . . . He will give no comfort to insurgents, he will not oppose Speaker Cannon, he will work on terms of harmony with Senator Aldrich. . . .

"A civil lawyer placates as far as he can and then fights doggedly. He does not like to fight, but, forced to it, he fights hard. . . .

"Another characteristic of the civil lawyer is his dislike for publicity. He wants everything carried forward quietly, according to the rules of the court; he dislikes emotional appeals to the jury. . . .

"I have now said enough, perhaps, to show that a very different sort of legal mind is in control at Washington than that which coruscated during the seven years previous to the fourth of March. It is the traditional legal mind, dealing with property and emphasizing the rights of property; it is the placating, order-loving mind which finds it far easier under pressure to say 'Yes' than 'No.' It shrinks from publicity, and if it glances forward, it also takes long looks backward. It longs to have, and will have, all things reasonably set down in books and finally decided."

Reviews of Books

BALANCE OF POWER IN EUROPE—FRANCE AND THE ALLIANCES

France and the Alliances, the Struggle for the Balance of Power. By André Tardieu, Honorary First Secretary in the French Diplomatic Service. The Macmillan Co., N. Y. Pp. x, 309 Q index of names.

M. TARDIEU states in the preface that this book covers in developed form the subject explained in a series of eight lectures given in 1908 under the auspices of the Cercle Français of Harvard University.

As he himself says, a Frenchman could not treat such a subject otherwise than from a French point of view. His view, nevertheless, has enabled him to express with apparent perfect frankness the *raison d'etre* of the numerous alliances and agreements. He does not hesitate to point out what he deems to be the weaknesses of the French diplomatic service in several important crises, neither does he attempt to veil his belief in the inimical policy of Germany towards France. From time immemorial France, with a "badly protected northeastern frontier, has been obliged to seek allies in Europe." And this ancient conflict of interests seems to have influenced and to continue to influence every diplomatic arrangement in Europe. This and Germany's aggressive commercial actions demanded this balance of power, which is mainly sustained by the Franco-Russian Alliance. Out of these fundamentals M. Tardieu builds up a very interesting history of French diplomatic relations covering the period from the early 'seventies to the present moment.

Russia, blind in attempting the Manchurian acquisition, and France, weak in allowing the attempt, with Russia's subsequent defeat, temporarily lightened the weight of the Franco-Russian Alliance as a balancing power, allowing Germany's Moroccan policy in the crisis of 1905–1906 to assume an independent quality. By her demand for an international conference in the matter of agreements concerning Morocco, and forcing France to accept it, "Europe was to be shown that Germany had only to oppose a certain policy for it to be altered in accordance with her wishes." He points out the failing in judgment of M. Delcassé, Minister of Foreign Affairs,—"who, being aware that German opposition would be made sooner or later, not to his Moroccan policy, but to his general policy, however did not perceive that a France half disarmed both materially and morally was fatally condemned to yield. He willed the end, without willing the means." These facts, he says, are well proven when "Germany demolished the minister who had vaunted of holding his own against her without, indeed, his doing anything to render himself capable of such action."

Expressing his belief that financial, commercial, or circumstantial influences are most potent in developing understandings between countries, this author points out that the French loans to Russia of twelve billions of francs are a strong bond of mutual interest, and that England's interest in a French-English Alliance, which he does not believe at present to be advantageous, is born of a fear of German colonial aggression. He quotes English consular reports showing Germany's predominance in England's natural markets, which reports also accuse German manufacturers of misuse of foreign trademarks and other doubtful business methods.

In a chapter on "Asiatic and European Understandings", in which he explains the diplomatic interest of Europe in Japanese policy and Chinese commerce, the author expresses regret at the want of clear-sightedness on the part of the French and Russian Ministers when Marquis Ito, the Japanese Envoy, visited their respective capitals in 1901, in neglecting the opportunity "to conclude with him a piece of business advantageous" to themselves, leaving to England the opportunity for agreements which, but for want of promptness, might have been theirs.

In the chapter on France and the United States a little more of the value of "sentiment" is expressed: "Franco-American relations have been developed in an atmosphere of reciprocal sympathy. . . . To exaggerate the action of this 'imponderable' would be to expose one's self to errors. To deny it would be to run into them." An interesting, readable chapter.

In the concluding chapter, "France and Peace," the author says: "France has accom-

plished the duty which history marked out for her to perform. By means of the Russian Alliance, she has broken out of the circle of solitude in which Bismarck confined her. By means of her understandings with Great Britain, Italy and Spain, she has restored the balance of power which the German hegemony had destroyed in 1871. By means of the Russo-Japanese, Franco-Japanese, and Anglo-Russian *rapprochements* she has secured complementary guarantees to her reconquered liberty."

THE SOUL OF THE CRIMINAL READ AND INTERPRETED

The Seven Who were Hanged. By Leonid Andreyev. Translated by Herman Bernstein. J. S. Ogilvie Pub. Co., N. Y. ($1.)

IN a recent book dealing with "Criminal Types in Shakspere" (published by Methuen, London) Dr. August Goll, a Danish magistrate, discussing Brutus, Macbeth, and other interesting figures, observes that the criminal is far more interesting than the crime, that he must have his own point of view and way of thinking, and that the criminologists must study him individually rather than as the element of a mass.

This is the method applied by the Russian author, one of the most remarkable and unique men in the world of contemporary letters, Leonid Andreyev, in his graphic portrayal of the effects produced by a sentence of death upon seven of his compatriots. His object in writing was to tear aside the veil which obscures a general understanding of human beings snared in the toils of capital punishment. It is an eloquent and beautiful reading of the human soul, written by one whose striking imaginative gifts, wondrous literary charm, and simple and passionate reserve, because of his whole-hearted sympathy with the suffering and oppressed, stamp him as one of the world's greatest living authors.

The only fault that could easily be found with this story by Andreyev lies in the possible fact that his exquisite sympathy with the miserable beings of whom he gives us so truthful a picture, his almost feminine tenderness, may at times carry him too far in the direction of blurring, after the feminine fashion, the ethical values upon which society relies for its stability. He cannot help producing the impression which he himself experiences, that those of whom he writes are undeserving of capital punishment. But in Russia progressive men are prone to regard reform less hopefully than revolution, contrary to the spirit of other nations of stronger legal traditions, and positive morality must be admitted to be undergoing such singular vicissitudes and committing such strange vagaries there at the present day, that it is really hard to determine who are the defenders of the true social order, those who represent the state or those who would undermine its very foundations.

Andreyev declares in his preface that his task "was to point out the horror and iniquity of capital punishment under any circumstances." His view is that it is not only wrong in the case of the righteous and innocent, whether they be ignorant and timid, or enlightened and determined, but that it "is still more horrible when it forms the noose around the necks of weak and ignorant people." Consequently the pitiable Esthonian peasant who in cold, dense brutality murdered his master stands out from his pages with haunting, symbolical vividness. The tragedy of Werner, an educated man of iron will, is terrible, but the awe of it all comes from his thrilling vision of the significance of his own life hidden obscure in the abyss of time rather than from the hideousness of his fate. To quote one of many striking passages:—

> The fatigue that had tormented Werner during the last two years had disappeared; the dead, cold, heavy serpent with its closed eyes and mouth clinched in death had fallen away from his breast. Before the face of death, beautiful Youth came back to him physically. Indeed, it was more than beautiful Youth. With that wonderful clarity of the spirit which in rare moments comes over man and lifts him to the loftiest peaks of meditation, Werner suddenly perceived both life and death, and he was awed by the splendor of the unprecedented spectacle. It seemed to him that he was walking along the highest mountain-ridge, which was narrow like the blade of a knife, and on one side he saw Life, on the other side—Death,—like two sparkling, deep, beautiful seas, blending in one boundless, broad surface at the horizon.
>
> "What is this? What a divine spectacle!" he said slowly, rising involuntarily and straightening himself, as if in the presence of a supreme being. And destroying the walls, space and time with the impetuosity of his all-penetrating look, he cast a wide glance somewhere into the depth of the life he was to forsake.
>
> And life appeared to him in a new light. He did not strive, as before, to clothe in words that which he had seen; nor were there

such words in the still poor, meager human language. That small, cynical, and evil feeling which had called forth in him a contempt for mankind, and at times even an aversion for the sight of a human face, had disappeared completely. Thus, for a man who goes up in an airship, the filth and litter of the narrow streets disappear and that which was ugly becomes beautiful.

Unconsciously Werner stepped over to the table and leaned his right hand on it. Proud and commanding by nature, he had never before assumed such a proud, free, commanding pose, had never turned his head and never looked as he did now,—for he had never yet been as free and dominant as he was here in the prison, with but a few hours from execution and death.

Now men seemed new to him,—they appeared amiable and charming to his clarified vision. Soaring over time, he saw clearly how young mankind was, that but yesterday it had been howling like a beast in the forests; and that which had seemed to him terrible in human beings, unpardonable and repulsive, suddenly became very dear to him,—like the inability of a child to walk as grown people do, like a child's unconnected lisping, flashing with sparks of genius; like a child's comical blunders, errors and painful bruises.

"My dear people!" Werner suddenly smiled and at once lost all that was imposing in his pose; he again became a prisoner who finds his cell narrow and uncomfortable under lock, and he was tired of the annoying, searching eye staring at him through the peephole in the door. . . . "My dear comrades! My dear, dear comrades!"

In this man, who was bitterly weeping and smiling through tears, no one could have recognized the cold and haughty, weary, yet daring Werner—neither the judges, nor the comrades, nor even himself.

"LOADED DICE"

Loaded Dice. By Ellery H. Clark. Bobbs-Merrill Co., Indianapolis.

REALISM is but another name for that which is possible, and if the story of the hero of "Loaded Dice" were possible, a novel which traces the career of a man who has committed several murders without being found out and occupies a prominent position in the public esteem, becoming Governor of his state, might rank as sound fiction. As it is, however, Richard Gordon is without a single redeeming grace or virtue. The tale in no way caters to a legitimate demand for truth and reality, and a novel that might under other circumstances, because of some real merits of technique, be classed otherwise and is tolerably readable, must be described as in honesty and candor nothing more than trash.

ONE OF THE WORST BOOKS.

I have a book which for forty years has adorned the centre-table of a New England parlor. I feel sure that Dr. Crothers would accord it a prominent place among his "hundred worst books." His test that a book should not be readable is met by the fact that it still retains its ornamental, centre-table appearance, and though published in 1854 shows no signs of having been read.

In the preface the author avows his purpose to give comfort to the mourner. The first five chapters are devoted to these subjects:—

"Death of a Brother."
"Death of a Sister."
"Death of a Mother."
"Death of a Father."
"Death of a Child."

Here is a sentence from one of these comforting (?) discourses. "When you see the hearse rolling along to the sepulchre, to deposit its burden there—when you see whole communities stricken with grief, you can say, 'O sin, thou hast done this.'" A few sentences like this are enough to make one doubt the author's hearing. One ought to have unusually acute ears who essays to give us "Angel Whispers, or The Echo of Spirit Voices."

But the gem of this series of comforting addresses is the one on "The Advantages of Consumption." Such a timely topic ought to be interesting and possibly surprising. Few have seen its advantages. To such we submit the four points of this discourse which will no doubt be convincing.

"First. Consumption gives time for reflection and thought."

"Second. Consumption is seldom, to any great extent, accompanied with pain."

"Third. Consumption seldom dethrones the reason."

"Fourth [and what a delightful climax!]. Consumption ends in death."

These points are amply argued, and even illustrated and proved by the story of a young girl who was so fortunate as to have contracted this desirable disease, and through the benign dispensation was able in the "time given for reflection and thought," to prepare herself for the "fearful scenes of eternity."

The last essay has the cheerful title, "The Six Deathbeds." We submit that this book is worthy of the "bad eminence" accorded to the "hundred worst books," and ask if it is not a comment on the sentiment of a day gone by to find inscribed with many a flourish on the fly leaf this appropriate sentiment:—

"Philopena or viel liebchen, 1854. From Nettie."—*Atlantic Monthly.*

*Latest Important Cases**

Agency. *Duty of Agent to Inform Principal before Purchasing Inferior Goods.* N. J.

In an action brought by Edmund Lissburger, a New York merchant, against David M. Kellogg and others, wool brokers at Buenos Ayres, the New Jersey Supreme Court handed down an opinion June 9 written by Justice Swayze, which sustained a large verdict for damages recovered by the plaintiff. Lissburger ordered from the defendants 300 bales of wool of certain grades, but the agents, being unable to secure the grades ordered, shipped an inferior quality. The Court held that an agent buying goods abroad, if he cannot procure the goods desired, is required to inform his principal, and if he buys and ships inferior goods in filling the order he is liable for damages.

Automobiles. *Unregistered Machine a Trespasser on the Highway—Reasonable Care Rule not Applicable.* Mass.

Unregistered automobiles are outlawed, and have no other rights in the highway than that of being exempt from wanton or willful injury, according to a decision of the Supreme Judicial Court of Massachusetts sent down June 22 in the suit of E. L. Dudley, a wholesale liquor dealer of Bridgeport, Conn., against the Northampton Street Railway Company, with whose trolley car he collided. The fifteen days allowed for the use of the highways by non-residents without having their machines registered had expired. The Court ruled:—

"The plaintiff, as a mere trespasser upon the highway, was there not only against the right of the owner of the soil and so liable to an action by him, but also against the rights of all persons who were lawfully using the highway. He was violating a law made for their protection; accordingly, he was a trespasser as to them. It follows that the defendant, which was lawfully using the highway with its cars, owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property, that is not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or gross negligence."

Barratry. *Statute Forbidding Lawyers to Solicit Business Not Outside Police Power—Right to Liberty and Happiness.* Wash.

In Washington, an attorney is prohibited from soliciting employment either directly or indirectly. A breach of these restrictions is termed barratry for which the offender may be disbarred. Appellant in *State* v. *Rossman*, 101 Pac. Rep. 357, had been charged with slander, perjury, fraud upon those employed to solicit business and barratry. He contended that the right to practise law was a natural right guaranteed by the Constitution and the barratry statute deprived him of his right to liberty and the pursuit of happiness in that he was forbidden to use his faculties as he chose in his vocation. The Washington Supreme Court thought the disbarment proper, remarking that the practice of law is not a constitutional right, but one granted by the state, which may surround it with reasonable restrictions.

Bill of Rights. *Contract Rights Not Invaded by Ordinance Requiring a Removal of Street Tracks which is to be Enforced by Suit—Jurisdiction of Federal Courts.* U. S.

Mr. Justice Holmes's opinion in the case of *Des Moines* v. *Des Moines City Ry. Co.*, decided May 17 by the United States Supreme Court (L. ed. adv. sheets, Oct. term 1908, p. 553), was in part as follows:—

"This is a bill brought in the Circuit Court by an Iowa corporation against a city of Iowa. The ground of jurisdiction is that a resolution of the city council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and, if carried out, will take the property of the corporation without due process of law contrary to the Fourteenth Amendment. The Circuit Court granted an injunction against the enforcement of the resolution, and the defendant appealed to this Court. . . .

"We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

Circuit Court cannot be maintained. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

Defamation. *Official Immunity—Over-advertisement of Delinquent Taxes.* N. H.

The statutory duty of a tax collector was to post advertisements of overdue taxes in two or more public places within his town. The collector in *Hutchins* v. *Page*, 72 Atl. Rep. 689, advertised plaintiff's delinquency through two newspapers. The New Hampshire Supreme Court ruled that it was not the collector's duty to publish otherwise than as required by the statute unless he thought such publication was essential to the success of the tax sale. If he did not so believe, but used the occasion to maliciously proclaim that the plaintiff had not paid his taxes, there is neither legal nor ethical reason why an action should not lie.

Defamation. *Wrong Photograph—Identification of Subject of the Libel—Minority Reputation.* U. S.

Mr. Justice Holmes, in *Elisabeth Peck* v. *Tribune Company*, 29 Sup. Ct. Rep. 554, decided by the United States Supreme Court May 17 (L. ed. adv. sheets Oct. term 1908, p. 554) applied the rule of Lord Mansfield, "whenever a man publishes he publishes at his peril" to the facts of a case where a portrait purporting to be that of a nurse, Mrs. A. Schuman, but really that of the plaintiff had been inserted in a whisky advertisement with an indorsement of a certain brand of whisky which this nurse said she had used constantly for years. This the Court decided to be publication regarding the plaintiff, as a publication regarding an entirely different person from that referred to, arising from unintentional use of the wrong portrait, is not excused because it was by mistake. [*Note.*—The rule that the plaintiff must be capable of being identified as the person referred to by the published statement would seem to require more than the publication of a portrait, when that portrait purports to be the likeness of another.—*Ed.*] The Court consequently held that a verdict should not have been directed for the defendant, but that "it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view." The Court avoided ruling flat-footedly on the question whether a statement that one uses intoxicating liquors habitually is defamatory in law, without proof of special damage, but apparently inclined to the conservative view that it is not, the question of damage being one for the jury:—

"Obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride."

Election Laws. *Constitutionality of Illinois Act—Failure to Provide for Registration Fatal to the Act.* Ill.

The Supreme Court of Illinois, in a decision rendered June 16 in the case of *People* v. *Strassheim*, reported in 41 *Chicago Legal Laws* 379–381 (June 26), pronounced the Illinois Primary Election Law of 1908 unconstitutional, mainly on the ground that section 44 disfranchises voters who through no fault of their own have not registered.

Section 44 reads in part: "No person shall vote at a primary unless he shall be a legally qualified voter under the general election laws of this state, and unless he declares his party affiliation, as required by this act, and in all cases where registration is required as a condition precedent to voting at regular elections only registered voters shall be entitled to vote at such primary. *Provided, however*, that at such primary any legal voter of a precinct, who has not registered, shall be entitled to vote in case he shall file with the primary judges an affidavit, stating the time when he removed into such precinct, and the

length of his legal residence in such precinct, county and state, and that he has removed into that precinct since the last registration of electors at the last election and that he is a legal voter of such precinct, supported by an affidavit of a registered voter and householder of such precinct, that he knows such voter and that his statements as to the time of his residence, as aforesaid, are correct, and that such person is a legal voter in such precinct."

The Court said: "In cities where the City Elections Act applies many persons possessing the necessary qualifications of legal voters may be denied the right to vote at a primary election because the law has provided no means for their registration. If voters where registration is required as a condition precedent to the right to vote at a primary election were given an opportunity to register within thirty days previous to the primary, then if they failed or neglected to register, and thereby lost their right to vote, it would afford no just ground of complaint against the law; but where they are deprived of the right to vote because the law has not given them an opportunity to do that which it makes compulsory on them to do in order to be entitled to vote, and in other localities in the state not under the operation of such law voters similarly situated are allowed to vote, there is just ground of complaint of inequality."

With section 44, and also section 11 eliminated as void, the Act is held incomplete for the purposes for which it was intended and therefore unconstitutional in its entirety.

Election Laws. *Indictments under Common Law Valid—Criminal Conspiracy in Ballot Frauds.* N. J.

Common law indictments of Charles Bienstock, Thomas Brodell, Peter J. McDonald and John F. Kelly of Jersey City for conspiracy in connection with alleged Presidential election frauds were sustained by the Supreme Court of New Jersey in a decision rendered June 23. No statutes, federal or state, made the actions of the defendants criminal.

Justice Voorhees, who wrote the opinion, said that the purposes of political conventions for the recommendation of Presidential candidates are public purposes, and interference with such expression by the unlawful means of tampering with ballots "is interfering with a public act and one in the exercise of which all citizens are entitled to protection from combinations designed to prevent the honest use of these agencies. Rights unknown to the common law, if they be in truth rights, are protected by the principles of the common law, and their infringement by conspiracy is punishable by the criminal law."

Estoppel. *Person Setting Up Not Prejudiced Thereby.—Insurance.* Wash.

One insured in a beneficiary association indicated his purpose to absent himself from his family for a few days, but from that time nothing was heard of him. For two years following his absence the premiums were paid by his wife. Thereafter an opportunity presented itself to the wife to dispose of her real property, for which purpose she secured a divorce that she might convey a good title to the realty. Seven years after the husband's disappearance his wife instituted an action for the insurance. The association insisted that by bringing the action for divorce she had expressed her belief that her husband lived and that after she has ceased payments on his certificate, she was estopped to assert that he was dead. In *Butler* v. *Supreme Court I. O. F.*, 101 Pac. Rep. 481, the Washington Supreme Court decided that the wife was not estopped to assert her husband's death within the two years following his disappearance, as the association could not have been injured by reason of her conduct.

Evidence. *Hypothetical Questions to Expert Witnesses—How Framed with Reference to Questioner's Theories.* Neb.

The rule announced in *Hamblin* v. *State*, 115 N. W. 850, that "in prepounding hypothetical questions to expert witnesses, it is allowable for each party to the controversy to submit such questions upon the theory of the case contended for by the side proposing them," was construed by the Supreme Court of Nebraska, in *Landis & Schick* v. *Watts*, decided June 11, not to mean that a party propounding hypothetical questions may do so upon a theory at variance with testimony which ~~he himself~~ has given, either in person or through other witnesses whom he has previously introduced. In such a case the questions must be so framed as to fairly reject the party's theory as shown by the facts admitted or proved by him. And where the party's own evidence corroborates evidence which has been introduced by the other party to the action, such questions

should fairly reflect all of the facts so admitted or proved by both sides. But two of the judges dissented.

Insane Criminals. *Commitment After Verdict of Insanity—Notice and Hearing—Constitutionality.* N. Y.

The Appellate Division of the Supreme Court of New York, second department, sustained an order of the Special Term dismissing a writ of *habeas corpus* in favor of Harry K. Thaw, in *People* v. *Chandler*, decided in June, and upheld section 454 of the Code of Criminal Procedure, providing for the commitment of a defendant acquitted on the ground of insanity, as constitutional. For, as was said by Mr. Justice Jenks:—

"The Legislature contemplated that upon the trial for a crime the investigation into the insanity of the defendant at the time of the commission of a crime, pleaded by the defendant, might satisfy the Court that if the defendant were entitled to be freed absolutely upon an acquittal based upon such insanity, the verdict would not only exonerate the defendant, but in effect might let loose one then so insane as to be a menace to public peace and safety, and . . . therefore the Legislature expressly limited the effect of such an acquittal in the exercise of the police power, so that it might not be an absolute discharge in course, but that the Court might order the detention of the defendant as a dangerous insane person until his reason was restored.

"And I think that such a defendant, by this provision of the Code of Criminal Procedure, had notice and a hearing that contemplated the process whereby he might thus be committed, and that in any event the provisions of express law whereby he could forthwith institute proceedings to establish his sanity and his consequent right to instant discharge satisfy the safeguards invoked against this provision of the law." (Reported in N. Y. *Law Journal*, June 14, 1909).

Insurance. *Forfeiture for Non-Payment—Forfeiture Stipulation Must be Written into Contract to be Effective.* Neb.

Where the widow of a policyholder had been unsuccessful in securing payment of the sums due on two policies in which payment had been discontinued years before his death, the Supreme Court of Nebraska, in *Haas* v. *N. Y. Mutual Life Ins. Co.*, decided June 11, applied the two following rules:—

"Forfeitures are looked upon by the courts with ill-favor, and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." *Connecticut Fire Insurance Co.* v. *Jeary*, 60 Neb. 338.

"A clause stipulating for a forfeiture of a contract should not be aided or given effect by construction in a case where the plain meaning of the language used does not require it." *Jensen* v. *Palatine Insurance Co.*, 116 N. W. Rep. 286.

The Court, in deciding that the plaintiff could recover upon the policies by tendering all the overdue premiums, said:—

"A life insurance policy, when once it takes effect by payment of the first year's premium and delivery of the policy, does not terminate at the end of the year, but it is a contract for the life of the assured. If the policy contains no provision for a forfeiture thereof by reason of a failure of the assured to pay subsequent premiums annually, a failure to pay such premiums on the day named will not constitute a forfeiture of such policy."

Judicial Powers. *Power to Punish for Contempt Cannot be Abridged by Legislature.* Mo.

A Missouri statute prohibits courts from punishing contempts by fine exceeding $50 or imprisonment for more than ten days. In *Chicago B. & Q. Ry. Co.* v. *Gildersleeve*, 118 S. W. Rep. 86, it appeared that appellant had disregarded an injunction forbidding his traffic in partly used railroad tickets, and had been sentenced to fifteen day's imprisonment for contempt. Appellant relied on the statute. The Missouri Supreme Court held that the court was created by the Constitution and had inherent power to punish for contempt. Allowing the legislature to regulate this power would be permitting the legislative body to exercise functions properly belonging to the judicial. But three judges dissented.

Monopolies. *Illegal Combination to Raise Fire Insurance Rates.—Ultra Vires.* N. J.

Some New Jersey lawyers are saying that a recent decision of the New Jersey Court of Errors and Appeals, in declaring the Newark Fire Insurance Exchange a combination in restraint of trade, will have a far-reaching effect in the fight on other trusts of a similar character. The decision of the Court, written by Justice Garrison, and handed down June 15

restrains the exchange, under the contract with the companies by which it is operated, from fixing rates of insurance, declaring the contract to be *ultra vires*, and says:—

"A contract by which the directors of such corporations in conclusive form abdicate their duty of management in this respect (fixing of rates), and turn it over to an alien body, is in direct violation of the words and meaning of the statute, and is as typical an instance of an *ultra vires* act as can well be imagined. To do so in a given instance would be an illegal act, but the act of binding the corporation by contract to a settled policy of illegal acts is beyond the power of the corporation. That this is no academic criticism appears clearly from the fact that the central association erected by the contract by which, through a sub-committee of five, rates are fixed, consists of but one representative of each constituent company. Hence, in a body of 121, the New Jersey companies have but eight votes, and in the sub-committee they have but one vote to four cast by foreign corporations. It is inevitable, therefore, that the influences affecting such foreign corporations, the losses they may have sustained, the expenses they have incurred, the salaries they design to pay, the dividends they desire to declare, will all be reflected and asserted in the fixing of the rates to be charged for insurance to the citizens of this state."

The complaint had alleged that as a result of the agreement rates were raised about sixty per cent, making it practically impossible to place insurance with any company not in the association.

Monopolies. *Sherman Act—Jobbers' Association Not Unlawful Combination.* Mass.

In overruling the defendant's demurrer in the suit of the Wheeler-Stenzel Company of Boston against the American Window Glass Company to recover $100,000 damages for maliciously inducing the National Window Glass Jobbers' Association to break a contract which the plaintiff had with it, the full bench of the Massachusetts Supreme Judicial Court decided June 23 that the plaintiff had a right of action properly stated, and that there was nothing in the arrangement between the plaintiff and the association repugnant to the provisions of the Sherman act. The Court said:—

"There can be no doubt, we think, that those included in the association had a right to combine and appoint a common agent, which, according to the allegations of the declaration, was, in effect, what was done, to make purchases of window glass for them, and to distribute the window glass so purchased among them according to contracts severally entered into by them with such agent. It is not every combination that is unlawful or in restraint of trade under the Sherman act, but only such as tend directly to interfere with and to create a monopoly in or to restrain interstate commerce."

Municipal Corporations. *Ordinance Prohibiting Seining Invalid—Legislative Powers of Municipality.* Cal.

The town of Santa Monica, Cal., passed an ordinance prohibiting seining within 1,000 feet of its docks. In *Ex parte Bailey*, 101 Pac. Rep. 441, the California Supreme Court thought it manifest from the terms of the ordinance that it was in no sense designed for the preservation and protection of fish for the benefit of the state. It was rather intended solely to protect and add to the piscatorial advantages of the wharves, docks, and piers in the town, for the benefit of its citizens. Hence it was clearly beyond the power of the town to enact.

Municipal Corporations. *Notice of Accident Required by Statute—Time Not Extended for Disability.* Neb.

The charter of a municipality exempted it from liability for damages arising from a defective sidewalk, unless notice of the accident was filed within twenty days. Plaintiff slipped and fell on ice and snow which had been allowed to accumulate on a sidewalk, and sued for damages. By the fall he was instantly rendered unconscious and remained in that condition for more than twenty days, and was therefore unable to give the city notice of the accident within that time. In *McCollum* v. *City of South Omaha*, 121 N. W. Rep. 438, the Nebraska Supreme Court in an opinion from which Judge Fawcett dissented in terms of unmistakable strength and severity, held that the incapacity of plaintiff resulting from his injury did not extend the time, or afford an opportunity for the fixing upon the city of its statutory liability.

Negligence. *Riding on Car Platform—No Contributory Negligence—Carrier's Duty to Care for Crowds.* Kan.

A passenger mounted the platform of a crowded street car wherefrom he was pushed

and injured because of overcrowding. In *Lobner* v. *Metropolitan Street Railway Co.*, 101 Pac. Rep. 463, defendant contended that plaintiff had voluntarily exposed himself to danger by riding on the platform of a crowded car, a danger which he had the best opportunity to discover and appreciate. The Kansas Supreme Court held, however, that it was not contributory negligence *per se* to ride on the platforms of crowded cars. The practice of inviting and permitting passengers to ride on the platforms of street cars is so common that it cannot be held, as a matter of law, that a passenger in doing so is guilty of contributory negligence. One who rides on a crowded car assumes the inconvenience resulting from its crowded condition, but the company is not, for that reason, relieved from the responsibility of using due care for the safety of passengers invited upon the car.

Pilots. *Waters Which are Boundaries Between States—Federal and State Regulation—Scope of Louisiana Statute.* U. S.

That the state of Louisiana may make it a criminal offense for a pilot not duly qualified under its laws to pilot a foreign vessel from the Gulf of Mexico to New Orleans, Louisiana, although he holds a license issued under the authority of the state of Mississippi, was the ruling of the United States Supreme Court in the case of *Leech* v. *Louisiana*, decided May 17 (L. ed. adv. sheets Oct. term 1908, p. 552). For New Orleans, although upon the Mississippi river, is not "situate upon waters which are the boundary between two states," within the meaning of U. S. Rev. Stat. §4236, U. S. Comp. Stat. 1901, p. 2903, authorizing the master of any vessel coming into or going out of any port so situated to employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot a vessel to or from such port, the limit of the waters so referred to being the point at which they cease to be a boundary between the two states.

Police Power. *Compulsory Repaving of Unsanitary Passageway Confiscatory—Proper Manner of Abating Nuisance.* Mass.

Where a private passageway in the crowded business section of Boston was deemed unhealthy by the city board of health, because of the accumulation of stagnant water in pools, and the board had ordered the owners to repave it at their own expense, the Supreme Court of Massachusetts held that a statute (St. 1894, c. 119) which under its most liberal construction confers the arbitrary power to compel repavement of the road for a permanent object, instead of abatement of the nuisance "in any proper manner as the necessity of the occasion may demand" is unconstitutional. "Such a construction would sanction an unreasonable restriction upon the rights of the citizen in the ownership of and use of real property as they stood at common law." *Board of Health* v. *Minot*, decided June 25.

Proximate Cause. *Death Due to Suicidal Intent—Employer's Liability Not Sustained.* Ind.

A helper employed about an unguarded nail machine was severely cut in the performance of his duty. For nearly a year after the accident he seemed to have lost his reason. Then he was found one day in a corn field with his throat cut—beyond a doubt his own act. In *Brown* v. *American Steel & Wire Co.*, 88 N. E. Rep. 80, appellant sought to recover from the employer of decedent for his death, asserting that the injuries received from the unguarded machine were the proximate cause thereof. The Indiana Appellate Court held that the facts strongly indicated that decedent had a mind capable of conceiving a purpose of taking his life, as well as knowledge of the means to effect his purpose. The act of suicide, for which the employer was not responsible was the proximate cause of death, and not the injury inflicted by the unguarded nail machine.

Public Morals. *Swedenborgian Doctrines Not Immoral—Public Policy Not Opposed by Devise.* Penn.

In an opinion reversing the Orphans' Court of Lancaster County, the Pennsylvania Supreme Court decided June 22 that the teachings of Emanuel Swedenborg, founder of the Church of the New Jerusalem, were not in derogation of the laws of Pennsylvania or repugnant to public policy, thus overruling the decision noted in 21 *Green Bag*, p. 253 (May, '09). Frederick John Kramph of Lancaster, Penn., who died in 1858, left $35,000 to seven trustees for an academy in which the Swedenborgian doctrine should be taught. Mrs. Eva T. Appel of Lancaster, his granddaughter, started proceedings to get the money, asserting that the doctrines of Emanuel Swedenborg are in derogation of the laws of

Pennsylvania and are repugnant, not only to the law of the land, but to public policy." The Orphans' Court after an exhaustive discussion of Swedenborg's volume on "Conjugal Love" concurred in this view, which the Supreme Court has since repudiated.

Public Policy. *Contract for Medical Services During Life of Patient to be Paid for at Time of Death Void.* Ill.

In a decision rendered at Chicago June 28, the Appellate Court held that a contract which provided for the payment of a large sum to a physician on the death of his patient, for medical treatment during her life, was contrary to public policy and therefore void, as it virtually offered a premium to the physito accelerate the death of the patient. The Court said, however, that there was nothing to indicate that the physician did not do everything possible for the patient.

Public Service Corporations. *Discretionary Powers of Commission to Approve or Reject Franchise.* N. Y.

The Appellate Division of the Supreme Court of New York on July 13 overruled the Public Service Commission in its refusal to approve the franchise granted by the Board of Estimate of Greater New York to the South Shore Traction Company to operate cars over the Queensboro Bridge, and ordered the Commission to grant the application of the road and pay it $50 in costs. The opinion was written by Justice Ingraham; Justices McLaughlin, Laughlin, Clarke, and Houghton assenting. The Commission had refused to grant the franchise purely on its terms, admitting the necessity for the immediate operation of cars across the bridge, but declaring that under the franchise the road was given the right for fifty years to one of the most important thoroughfares between Jamaica and Long Island City, and that future extensions were not sufficiently provided for.

In its decision the Court held:—

"Necessity or convenience for the public service was the single question the Commission was authorized to determine, and upon the determination of that question depended the permission of approval.

"The Public Service Commission had no right to arbitrarily reject an application because of the action of the local authorities in granting or refusing their consent.

"If a railroad over the proposed route was required by the public; was necessary or convenient for the public service, then it was the duty of the Commission to grant the application, and as I understand from the return that they have determined that the proposed railroad was required, the denial of the application was error."

Right of Privacy. *Publication of Photograph Without Consent—Common Law Actions.* R. I.

Publishing a person's photograph for advertising purposes without his permission cannot be made the basis of a lawsuit, according to a decision of the Supreme Court of Rhode Island handed down June 22 by Chief Justice Dubois in the case of *James N. Henry* v. *Cherry & Webb.* The suit was brought because the defendants published a photograph of Mr. Henry and a party in an automobile as a means of advertising automobile coats. The case was certified to the Supreme Court from the Superior Court on two grounds, namely: "Has a person at common law a right designated as a right of privacy for the invasion of which an action for damages lies?

"Is the unwarranted publication of a person's photograph for advertising purposes actionable at common law where the only injury alleged is that of mental suffering?"

The Supreme Court decided both of the questions in the negative.

Trusts. *The Sound Discretion Required of Trustees—"Willful Defaults."* Mass.

The Supreme Judicial Court of Massachusetts, in *Warren* v. *Pazolt*, decided June 24, expressed the opinion that a trustee under a Massachusetts trust would be justified in tearing down an old building owned by the trust and erecting a new one in its place when a prudent business man would do so to secure a fair return by way of income, having regard to the relation which such an investment, when made, would have to the amount of the principal of the trust fund as a whole. But the erection by an ordinary trustee of a new building at a cost of $450,000 on trust land of $400,000, thereby making a single investment of $850,000 out of a trust estate of a little over $920,000, cannot be justified as the exercise of a sound discretion required of trustees. This rule, however, did not apply to the Carney Building in Boston, for the reason that Mr. Carney, by his will, provided that each trustee should be liable only for his "willful defaults."

From the *Constitutional Telegraph*, Boston, Dec. 25, 1799.]

The Lawyer's Fee

By P. FRENEAU

A MODERN TALE

A Lawyer once in a certain town reſided,
Whoſe eye-teeth had been cut; he well knew men;
Of paltry ſuits he ever had abundance,
And ſtill his fee was *two pound ten.*

When neighbours quarrel'd, ſome about pig
Breaking thro' fence, & rooting up potatoes,
Law was the word, and each as angry ſeem'd
As if the hungry pig had gnaw'd their great toes.

The Lawyer ſaw, and ſaw with keen delight,
That *wrangle* was the order of the day;
And took his meaſures to inſure advantage,
From every quarrel, tavern broil, and fray.

As buſineſs hove in faſt, he paſted up
A *caveat* in his ſhop to warn all men
That if they came to him to aſk advice,
In whate'er caſe, his fee was *two pound ten.*

Sometimes a farmer's limits were diſputed,
Which law alone could hope to reconcile;
And many weighty arguments were urg'd,
Of fixing breadths two inches by a mile.

Then came a widow in a mighty fret;
It ſeems her hen had pick'd ſome grains of rye
From neighbour Bumpkin's hundred acre crop,
And juſtice he would have, or he knew why.

Ah! (ſaid the lawyer) theſe are happy times,
Things now are getting right; I tho't that men
Would ſometimes have millennium—yes its come,
I ſee it plain, it lies in *two pound ten.*

Thus things went on for many a pleaſant year;
The lawyer plead for all, and made them pay
His uſual fee; at laſt grown very rich,
And hairs, as fate would have it, rather gray.

Diſeaſe attack'd, he made his will and died;
And when approaching near old Satan's den,
What's the admiſſion ticket? ſaid the guide,
Why, quoth the devil, it is *two pound ten.*

The Editor's Bag

THE WOLF IN THE FOLD

AMBULANCE chasing is an evil the extent of which has been generally recognized at meetings of bar associations, and the sentiment which is strongly opposed to it has been fortified by Mr. Justice Ingraham's summary disposal of the case of a New York attorney, who has been suspended from practice for one year for unprofessional conduct.

The lawyer who seeks to foment unnecessary litigation, by championing for his personal profit causes in the legal and moral honesty of which he does not truly believe, is a dangerous public foe, and the problem of the legal profession is to exclude him from practice and to make it impossible for him to carry on his obnoxious occupation. In ancient Greece the informer was treated as one of the most detestable of creatures, and the profession which is charged with the maintenance of the criminal law has not yet wholly wiped out the stain left by his ignominy. The attitude of those who regard all lawyers as beasts of prey, feeding on the vitals of the innocent and conniving with the guilty to shield them from punishment, is far too common, but is in part justified by the lack of that vigilance which should promptly discover the presence of the wolf in the fold and take steps for his discomfiture. Let that vigilance once be relaxed, and the wolves multiply. The profession gets into the habit of taking them as a matter of course. Professional honor is slowly poisoned, and when it is proposed to make an example of one of the wolves, the cry goes up that the fences are defective, and that therefore it is unfair to slay the wolf when he is only one of many innocent trespassers. Rather let the wolf be caged for a time, so that his companions shall take heed for the safety of their lives! Rather let courts, in passing judgment in cases of this kind, follow the reasoning of the Appellate Division of the New York Supreme Court:—

"It [ambulance chasing] is a practice that has been commented upon and criticised at meetings of lawyers and in judicial decisions as well as by the general public, and now, when it is for the first time in this department brought directly before the Court, it is our duty to speak in no uncertain terms in condemning it as a violation of the criminal law in this state and also a practice which is unprofessional and destructive of the honor of the profession and of the confidence of the community in the integrity and honor of its members.

"It has been urged in extenuation of this offense that it is a practice which is common among members of the profession who are engaged in the prosecution of negligence cases, and that it is unfair to visit upon the offender, who has first been brought before the Court upon a charge of this character, the extreme punishment of disbarment, and a majority of the Court are of the opinion that this fact should be considered, and that instead of disbarment the respondent be suspended from practice for one year.

"We wish it to be distinctly understood,

however, that after this expression of the views of the Court upon the nature of the offense, the considerations that have influenced a majority of the court in deciding upon this punishment, rather than disbarment, will not be considered upon further conviction of practice of this kind."

"SEND THAT DEED RITE A WAY!"

ONE of our readers, a Kansas lawyer, was employed by one Mr. Hodson, a prospective purchaser of a piece of land, to examine the title, and has furnished the *Green Bag* with a curious communication which he received from the owner of the land.

The abstract, as furnished by a bank, showed a break in the title and did not disclose any ownership in the real owner of the land at all. Mr. B———, our lawyer friend, wrote a letter to the bank in which he outlined what was necessary for the completion of a good title, stating that a deed had probably been left unrecorded and a deed of trust unreleased. These are the circumstances to which the owner had reference, in the following irate message sent to the lawyer:—

Send that Deed to Zodiac to Mrs Sofina groves
June 16

Zodiac vernon co mo

Mr B—I thought it Had binn some time sence you rote to me that I thought I rite and you can tell Mr Hodson that I Had owned that land for 26 years and no wone has never Has cause any trouble yet I am all most gaveing it to Him and when He think I go to the trouble and spend money and then maby He not take it then He is off I do not no anything a bout them men and dont no whare they are and if Mr Hodson wants that land all rite and if not send the Deed to me for thare is not enough in it for me to go to all that trouble so I look for the Deed rite a way I am the wone sent that Deed you said that that land was not mine at all I see wheather it is or not you made me mad and I dont care wheather He takes it or not thare s Just as smart men in this world as you are I live 26 years without selling that land and can live 26 more and not sell it Send that Deed rite a way

WHEN?

(From *Life*.)

CIGARETTES are unlawful in some Western states, as it is. Oh pshaw! What good are half measures! We look to Maine for leading in these matters. When will Maine see its duty and put a no-tobacco clause in its constitution?

A LAWYER'S TRICK

WHEN Baron Bramwell was once sitting on the crown side of the south Wales circuit, counsel for the defense in a certain case asked leave to address the jury in Welsh. The case being a simple one, permission was given without demur. He said but very few words. The Baron also did not think much comment was necessary, but was somewhat startled by a prompt verdict of acquittal.

"What was it," he afterwards inquired, "that Mr. L. said to the jury?" "Oh, he just said, 'This case, gentlemen, lies in a nutshell. You see yourselves exactly how it stands. The judge is an Englishman, the complainant is an Englishman, but you are Welsh, and I am Welsh, and the prisoner is Welsh. Need I say more? I leave it all to you.'"

It is scarcely necessary to mention, says the writer of "Some Legal Reminiscences," that Baron Bramwell did not allow the experiment to be repeated of addressing the jury in a language which he did not understand.

STORIES OF JUDGE HUBBARD OF IOWA

THE late N. M. Hubbard, known all over Iowa for many years as lawyer, judge and politician, was keen in retort, shrewd as a political manager, and while not as well versed in the law as many other of his contemporaries, won many verdicts because he knew the people with whom he dealt. The following stories told about Judge Hubbard will give the reader an idea of a typical man of the people in the West during the latter half of the past century.

Judge Hubbard had been appointed by one of the Governors and served as Judge for a time. While he was acting in this capacity a verbose doctor wanted to be excused for the reason that he had to go home and look after his many patients, to which the Judge said,

"I think you had better stay here so as to give your patients a chance to get well."

At another time Judge Hubbard was presiding when he had before him the Governor, who was practising in his Court and who felt that the Judge ruled against him; he finally said, "Your Honor, you perhaps have forgotten that I appointed you to your present position." The Judge sarcastically remarked, "No, I have not, and that was the only wise thing you did during the time you were Governor," and he went on ruling against him as he had before.

During a long and bitter trial in a matter arising out of an old partnership affair growing out of business deals with his old friend John Ware, Judge Hubbard on cross-examination got the witness pretty well mixed up. The court adjourned for a few minutes, it being a hot day in June, and as Ware, trying to get a little breathing spell, wiped his face with a red bandana, Judge Hubbard piped out in a sneering voice, for which he was famous, loud enough to be heard by the bar and frequenters of the court, saying "John, it makes you sweat to tell the truth, don't it?"

The Judge was a good friend and also a bitter hater. He and his old partner, Stephens, fell out over business matters and ended up in a row, when Judge Hubbard shook his fist in his old partner's face and said, "don't step in front of my path, and I will give you warning now that I don't want you to attend my funeral and I won't go to yours," for all of which his partner thanked him in the most profuse manner, and as Judge Hubbard survived he kept his word.

Judge Hubbard sometimes overlooked the ability in an opponent and frequently took advantage of the embarassment of youth. During an assignment a young New York lawyer by the name of Tom Corbett had made his appearance in Linn county as a lawyer and had an only case on the docket. The presiding Judge very modestly asked Mr. Corbett his name; Mr. Corbett arose to tell it, but the Judge did not hear him, and Hubbard stood up and said, "put him down plain 'Tom'—that is good enough." Mr. Corbett sat down blushing like a young girl, swearing vengeance at the Judge's remark, saying that he would get even some time. Corbett became a great lawyer and Judge Hubbard became the subject of his heartless raillery, his pungent wit and sharp retorts in the trial of cases whenever he was on the other side.

Judge Hubbard was for many years the Iowa attorney for the Northwestern Railway and had the appointing of assistant attorneys in various counties along the line. He was asked at one time how a certain attorney who had been appointed behaved, and the Judge replied, "he is a real bull in a china shop—what he does not break, he dirties."

He said of another local attorney, "you see here's my assistant J.; he is so technical that he will fall all over a crowbar to hunt for a pin and not even see the crowbar, mind you."

At another time he bemoaned to a friend that X had quit drinking; the friend said, "I never heard of any one being sorry for a man who stops a bad habit." Hubbard replied, "Well, you see we could have said of poor X that he was a mighty smart man if it wasn't for his drinking; now we all have to acknowledge that he wasn't anything but a fool, anyway."

During one of the political campaigns in Iowa Hubbard was accused of giving away five hundred passes to the delegates for railway influence. When asked by a friend about the truth of this—as he thought—unfounded charge the Judge replied, "That accusation is a lie; I gave away eleven hundred tickets this year, that was all."

During the fight over the governorship some years before his death Hubbard saw beforehand the turn of affairs and suggested that his candidate withdraw, but the candidate said "No, I have the support of enough delegates to elect me if they will all stick, and, furthermore, I have Providence on my side." Hubbard simply replied, "Well, you can take to Providence and I will take to Shaw," the name of the rival candidate who was in the lead.

While arguing a case before the Supreme Court of the state the opposing attorney had pounded the table at great length, and when he had concluded a lengthy argument Judge Hubbard arose to reply in the following speech: "I am the son of a blacksmith; I have been a blacksmith myself; I am pretty strong and can pound this oak table to pieces and I will pound this oak table into splinters if it will help me win this case," and he went on in this strain until the members of the court laughed and forgot all the points the opposing counsel had made.

During a contest where several lawyers

were pitted against one another, warring against admission of evidence and who should introduce the evidence first, the presiding Judge asked the attorneys what he was sitting there for, as they had paid no attention to him or his rulings. Judge Hubbard looked up with a smile upon his face and said, "Judge, you've got us now, I don't know."

At one time during his later years Judge Hubbard was called into a case involving considerable property rights, where the opposing counsel called Judge Hubbard an old fogy who was behind the times, who might have been a great lawyer but who had forgotten all he had ever known. When the lawyer sat down all eyes were turned upon the old Judge, who was pale as a ghost. When he arose to reply to the bitter attack he said, "True, I am old, gray and worn and I suppose I am fast becoming an old moss back." Then he went on telling of the old lawyers he had known at the bar in Iowa in his time; he talked about the methods of the old advocates, of their bitter fights and of their hard fought contests, legal and political, and turning to the counsel who had made the accusation, he said in words that rung with sarcasm and bitter invective: "However hard-fought our contests, the lawyers of the olden times never tried to bolster up a witness, defraud an enemy or blackmail an opponent, as they do now. If the real up-to-date lawyer must do such a dastardly thing to become great, then thank God I am an old fogy of a lawyer and belong to a former generation."

B. L. WICK.

REVENGE.

A certain judge is down on me;
He told me to my face
As long as he presided, he
Would see I lost my case.

I think some time he'll change his mind
And climb into my boat;
I know he will, for he will find
I've got him by the throat.

For, half in love, and half in spite,
To put him in hot water,
We two eloped the other night—
I, and his pretty daughter.

HARRY R. BLYTHE.

USELESS BUT ENTERTAINING

"They tell me you're working 'ard night an' day, Sarah?" her bosom friend Ann said.

"Yes," returned Sarah. "I'm under bonds to keep the peace for pullin' the whiskers out of that old scoundrel of a husban' of mine, and the magistrate said that if I come afore 'im ag'in, or laid me 'ands on the old man, he'd fine me forty shillin's!"

"And so you're working 'ard to keep out of mischief?"

"Not much; I'm workin' 'ard to save up the fine!"—*Law Student's Helper.*

The lawyer said sadly to his wife on his return home one night: "People seem very suspicious of me. You know old Jones? Well, I did some work for him last month, and when he asked me for the bill this morning, I told him out of friendship that I wouldn' charge him anything. He thanked me cordially, but said he'd like a receipt."

—*Central Law Journal.*

A certain prominent lawyer of Toronto is in the habit of lecturing his office staff from the junior partner down, and Tommy, the office boy, comes in for his full share of the admonition. That his words were appreciated was made evident to the lawyer by a conversation between Tommy and another office boy on the same floor, which he recently overheard.

"Wotcher wages?" asked the other boy.

"Ten thousand a year," replied Tommy.

"Aw, g'wan!"

"Sure," insisted Tommy, unabashed. "Four dollars a week in cash an' de rest in legal advice."—*Central Law Journal.*

A graduate of an Eastern law school wrote to a prominent lawyer in Arkansas to find out what chance there would be for him in that part of the country.

"I am a Republican in politics," he wrote, "and an honest young lawyer."

"If you are an honest lawyer," came the reply, "you will have no competition, and if you are a Republican the game laws will protect you."—*Everybody's Magazine.*

"Sir," requested the young man, entering with a suit on his arm. "I've brought these clothes for you to press. The man next door says you are a bird at pressing suits."

"Well, the man next door is right," replied the suit presser; "only this isn't a tailor shop —it's a lawyer's office."

—*Central Law 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.

The Legal World

Important Litigation

United States Attorney Henry A. Wise of New York sailed for Europe on June 30 to be present at the examination of witnesses in Paris in the Panama Canal purchase libel case by John D. Lindsay, of counsel for the Press Publishing Company, publishers of The *World*, which has been indicted for articles regarding the canal negotiations printed in October.

Mrs. Eleanor Griffiths, wife of Henry W. Griffiths of New York City, was deserted by him some years ago. She tried to sue him for non-support in New York City when she learned that he had married again. When the case came up in court Griffiths pleaded a Dakota divorce. Mrs. Griffiths asserted she had never heard of this or been served, and successfully made application to the court for alimony. Justice Greenbaum of the Supreme Court granted her a decree of absolute divorce in June, applying for the first time in New York county the principle laid down by the United States Supreme Court, that a Dakota divorce is not valid if the respondent is not living in the jurisdiction of the Dakota courts.

Sanford Robinson, of F. A. Heinze's personal counsel, was convicted June 24 of the charge of obstructing justice and fined $250, after a trial before Judge Ray in the United Circuit Court at New York City. The case against Robinson developed out of the disappearance of a witness needed by United States Attorney Wise in his investigation of the doings of F. A. Heinze in the Mercantile National Bank. The indictment charged Robinson with advising this witness, Tracy Buckingham, to secrete himself from a United States deputy marshal who was outside with a subpœna on the afternoon of May 21, when Robinson, Buckingham and others were in the offices of the United Copper Company. Arthur P. Heinze, who was indicted on similar charges of obstructing justice, was also found guilty, largely in consequence of testimony wrung from Buckingham by rigorous examination, sentence being suspended until October 11, by which time the Court thought he might be induced to bring about the restoration of the missing books.

Concluding the greatest issue in the history of San Francisco graft scandal, the case of Patrick Calhoun, millionaire president of the United Railroads, charged with bribery, a case which dates back to January 12, 1909, ended June 20 with ten men determined on acquittal and two resolved on conviction. One hundred and ten days were devoted to court sessions. In this respect the case outstrips the record established in the case of Abraham Ruef, who was convicted after seventy-six days actual court procedure. "I am ready to try this case again, and I will go ahead tomorrow, if necessary," said Prosecutor Heney after the adjournment. Mr. Calhoun said: "Of course I am disappointed at the failure of the jury to acquit me of the unjust charges against me. I should have liked my vindication by the jury to be absolute. The judge was hostile, the assistant district attorney bribed and the administration of the criminal law of this State disgraced. I purpose at the proper time and in a proper manner to submit formal charges against Assistant District Attorney Francis J. Heney for receiving bribes as a public officer, and against Rudolph Spreckles and James D. Phelan, who financed the prosecution, for having paid them."

The government has appealed from the decision of Justice Stafford of the District of Columbia Supreme Court, holding that the Juvenile Court has no jurisdiction in a case of nonsupport where there are no children. Justice Stafford's decision was rendered June 18 in the case of Leo S. West. He said: "Nowhere in the act is any jurisdiction conferred upon the Juvenile Court to adjudge as to rights and duties between husband and wife. It is given jurisdiction of certain offenses of children and certain offenses against children, and is given power to enforce certain duties which parents and guardians owe to their children or their wards." The appeal will be heard in the autumn by the Court of Appeals of the district.

The Supreme Court of the United States will have to pass upon the validity of life passes, which have been pending ever since the Hepburn Law was passed and interpreted by the Interstate Commerce Commission as prohibiting any form of free transportation. The *Motley* case, originating in Kentucky, will come before the court. In 1871 the Louisville & Nashville made a contract under which, in lieu of damages for injuries in an accident, E. L. Motley and Annie E. Motley, his wife, were given a life pass over the entire system. Mr. and Mrs. Motley went to law to compel compliance with the contract. They won their case in the Federal Circuit Court and Federal Court of Appeals. In New York State, moreover, a similar action has been brought, and this second case will come before the session of the Supreme Court convening at Ithaca in September. Mrs. Martha J. Robertson sues the Lehigh Valley Railroad Company for the specific performance of covenants whereby the company agreed in

1881 to furnish annual passes for life to Mott J. Robertson and Martha J. Robertson as part consideration for a right of way through the Robertson farm in the town of Dryden.

The constitutionality of the federal pure food law is to be tested in a suit brought by the Hipolite Egg Company of St. Louis against James Wilson, Secretary of Agriculture. The action was begun late in June in the Supreme Court of the District of Columbia, and is reported to be backed by the beef-packers and other powerful interests. The cause of action resulted from a seizure of canned eggs that had been preserved by the use of boric acid, and an injunction preventing further interference with the plaintiff's business is sought.

The federal grand jury which had been investigating the $1,250,000 loan which the American Sugar Refining Company made on December 30, 1903, to Adolph Segal as a part of a plan whereby control of Segal's Pennsylvania Sugar Refining Company was obtained, returned an indictment July 1 against the corporation and eight individuals connected with the loan or the events that followed. The indictment, containing fourteen counts, charged a conspiracy to restrain interstate and foreign commerce in violation of the Sherman anti-trust act. The eight individual defendants entered provisional pleas of not guilty in the United States Circuit Court at New York on July 6. After receiving the pleas, Judge Hand rejected the request of Assistant United States Attorney Crim that the defendants be held in $10,000 bail each, announcing without any request from the attorneys for the indicted men that he would parole them individually in the custody of their counsel.

Supreme Court Justice Gaynor of the Appellate Division heard arguments at his summer home at St. James, Long Island, N. Y., July 3, on the application for a change of venue from Westchester County to New York County, to decide the question whether Harry K. Thaw, the slayer of Stanford White, should be released from the Matteawan Insane Asylum. District Attorney Jerome of New York County having done just what he said he would, namely, to retire from the case unless the hearing was to be held in New York County, the Attorney-General took up the fight to prevent the discharge of Thaw from the Asylum. Justice Mills of the Supreme Court of Westchester County, who had refused to send back the case to Manhattan, remanded Thaw to the White Plains jail July 6, pending Justice Gaynor's decision. Justice Gaynor rendered a decision July 9 denying the application to transfer the trial to New York County. The motion for a change of venue, he declared, might equally well have been heard by Justice Mills. It was announced that the trial would immediately begin before Justice Mills and would continue till the question of Thaw's recovery from insanity should be decided.

Personal—The Bench

Judge J. S. Keyes of Concord, Mass., a graduate from Harvard in the class of '41, is the oldest judge in Massachusetts and holds his district court daily.

The University of Cambridge conferred the honorary degree of D. C. L. upon Hon. Oliver Wendell Holmes, Associate Justice of the United States Supreme Court, on June 23.

The United States Senate on June 16 confirmed the appointments of George W. Woodruff to be District Judge for the Territory of Hawaii and of Peter D. Overfield to be Judge of the district of Alaska, division No. 4.

Ex-Circuit Judge Abner Smith, formerly of the Cook county court of Illinois, convicted of conspiracy to cheat and defraud in connection with his wrecking of the Bank of America, is now an assistant librarian in the state penitentiary in Joliet, Ill.

Judge R. S. Bean, recently appointed to the federal bench, was tendered a banquet by the law alumni of the University of Oregon June 15 at Portland, Ore. Addresses were made by W. B. Gilbert, Judge of the United States Circuit Court, President Campbell of the University, and others.

"The boycott is cowardly, un-American, utterly indefensible and the American people will never submit to it. I will never submit to it. I would die in my tracks first." In these words did Judge George Gray arraign the boycott at Scranton, Pa., June 8, at the hearing on the matter in dispute between the Scranton Street Railway Company and the members of the union.

Judge John W. Price, who retired from the judgeship of the Corporation Court of Bristol, Va., on June 30, was educated in an Atlanta law school and practised law until 1904, when he was elected Judge of the Corporation Court for a term of eight years. His resignation is with a view to re-entering the practice of law. Hon. Joseph L. Kelly, a most successful lawyer of Bristol, was named to succeed him.

Delaware's new judiciary was inducted into office June 16 in the Kent county court house, and the retirement of the old bench and the entering in of the new one was of an impressive nature. Before an audience of representative Delawareans Charles M. Curtis, Chancellor; James Pennewill, Chief Justice, and Associate Judges Daniel O. Hastings, William H. Boyce, Henry C. Conrad and Victor B. Woolley took the oath of office for terms of twelve years each, and their first official duty was to convene the regular June term of the Supreme Court of Delaware.

Personal—The Bar

Hon. Richard Ballinger, Secretary of the Interior, received the degree of Doctor of Laws from Williams College at its Commencement exercises held June 23.

John M. Garman has defeated Judge Gains L. Halsey and secured the nomination for judge of Luzerne County, Pa., being the candidate of both the Republican and Democratic parties.

R. H. Jackson has been elected general counsel of the Chicago, Rock Island and Pacific Railway, to succeed Robert Mather, who will continue his connection with the Rock Island system in an advisory capacity.

The honorary degree of Master of Laws was conferred on George P. Merrick, trustee of Northwestern University and chairman of the law committee, at the Commencement exercises held on June 9. Mr. Merrick was a member of the class of 1884. As an attorney he has taken a prominent part in Chicago's lake front litigation.

Elihu Root, Jr., son of the United States Senator, tried his first case in the New York City Court June 15 and won it. He defended the Interborough Rapid Transit Company in a suit brought against it by Miss Tessie L. Silverstein, who alleged that she had been injured in consequence of being forcibly ejected from one of the defendant's cars.

Joseph H. Choate received $2500 from the receiver of the Third Avenue Railroad Company in New York for appearing before the judiciary committee of the state senate and arguing in opposition to the bills to increase the powers of the New York Public Service Commissions and to amend the state railroad law.

Arnon A. Alling of New Haven, Conn., was appointed State's Attorney for New Haven County, at the annual meeting of the Connecticut Supreme Court and Superior Court judges June 7. Mr. Alling was appointed during the April term to succeed former State's Attorney Williams.

Judge James A. Eakin, one of the ablest and most successful lawyers of Astoria, Ore., has been appointed Circuit Judge for the fifth judicial district of Oregon. He read law with his brother, Justice Robert Eakin of the Oregon Supreme Court, and graduated from the Boston University School of Law in 1891.

President Harahan of the Illinois Central Railroad recently announced the appointment of Blewett Lee of Chicago as counsel, to succeed Secretary of War Jacob M. Dickinson. Mr. Lee is a son of Gen. Stephen D. Lee of the Confederate Army, and formerly was Professor of Law at Northwestern University and later at the University of Chicago.

The degree of Doctor of Laws was conferred upon President A. Lawrence Lowell of Harvard University at the meeting of the Yale Corporation June 28. Under the rules this degree signifies a recognition of distinguished public service, though it might well have been given for President Lowell's learning.

Peter D. Overfield, a former noted football star of the University of Pennsylvania, for three years a practising attorney at Nome, Alaska, on June 11 was nominated by President Taft as judge of the third judicial district of Alaska, succeeding Judge Silas B. Reid. Mr. Overfield is about thirty-five years old and was formerly a citizen of Pennsylvania.

George P. Costigan, Jr., Dean of the College of Law of the University of Nebraska, now becomes Professor of Law in Northwestern University Law School, and Edwin R. Keedy, Professor of Criminal Law in the University of Indiana, who is secretary of the new American Institute of Criminal Law and Criminology, has also been appointed Professor of Law in Northwestern University.

The Providence Bar Club, of which Walter B. Vincent is president, held its twenty-seventh annual clambake at the Warwick Club on Narragansett Bay June 12. The principal guests included Chief Justice Dubois and Associate Justices Blodgett, Parkhurst, Johnson and Sweetland of the Supreme Court, Justice Stearns and former Justice Mumford of the Superior Court, Attorney-General W. B. Greenough, Assistant Attorney-General Harry P. Cross, and many others.

Bar Associations

The Washington County Bar Association was formed June 19 at Greenville, Miss., Judge J. H. Wynn being elected president.

The Belmont County (O.) Bar Association gave a banquet on June 17 in honor of Hon. C. L. Weems, former Congressman from the sixteenth district of Ohio, who has lately removed to Steubenville, O., where he has been made district solicitor for the Pennsylvania Railroad.

Steps are being taken under the direction of former Judge Curtis H. Lindley, president of the San Francisco Bar Association, toward the formation of a state bar association in California. It is pointed out by the organizers that such organizations are in existence in all the eastern states, and Judge Lindley has put himself in touch with most of these associations, with the view of adopting the best and most modern organization for California. The Los Angeles Bar Association has promised its co-operation.

The Virginia State Bar Association will meet at Hot Springs August 10–12. Hon. James M. Beck of New York, former Attorney-General of the United States, will deliver the annual address. Papers will be read and speeches made by several prominent men. Many matters of importance will be discussed and acted upon by the association, notably the reports of the special committees on amendment of practice and on revision of criminal law and procedure.

The Erie County Bar Association at the meeting at Buffalo June 18 rejected the remedies proposed by the committee which had been investigating the subject of ambulance chasing and releases by corporation claim agents, and decided not to approve the suggestion that the courts be empowered to review any contract so made, and that injured persons have the right to break such a contract within thirty days after the accident. These recommendations were opposed on the grounds that the Association had the names of ambulance chasers and could act if it so desired.

The annual meeting of the New Jersey Bar Association was held at Atlantic City June 11. An exciting fight waged around the appointment of a committee to conduct a political campaign for the adoption of the judicial amendment to the state constitution at the special election on September 14. The discussion was started by the proposal to empower the president to appoint a committee to aid in the passage of the amendment. William N. Johnston, chairman of the committee on the judicial amendment, proposed the resolution. John J. Crandall led the opposition. The wording of the resolution was changed so that it should call for the appointment of a committee to "enlighten the public on the nature of the judicial amendment." The amendment to the resolution allowing the committee to add to the membership at its own discretion and make return of the expense incurred was accepted. In the evening two hundred members attended the annual dinner at the Marlborough-Blenheim. Governor Fort and Associate Justice of the United States Supreme Court David J. Brewer were the guests of honor. After welcoming the association's guests Clarence L. Cole, retiring president of the Association, introduced the Governor. Justice Brewer spoke on the relations of the United States Supreme Court to our foreign affairs and the functions of that body. Other speakers were Whitehead Kluttz, Francis J. Swayze and James B. Dill. The officers elected included: president, Samuel Kalish, Newark; vice presidents, former Judge Howard Carrow, Camden, William M. Johnston, Hackensack, Judge William I. Lewis, Paterson; treasurer, Judge Lewis Starr, Woodbury; secretary, William J. Kraft.

Former Justice Henry B. Brown of the United States Supreme Court expressed dissent from views of Cardinal Gibbons regarding divorce at the annual meeting of the Maryland State Bar Association, at Old Point Comfort, Va., July 8. "The head of the Roman Church in America," he said, "a man for whom I have profound respect, has painted divorce as 'a monster, licensed by the laws of Christian States to break hearts, wreck homes, and ruin souls.' This is certainly a gruesome picture. That separation of Church and State which is a cardinal principle of American jurisprudence is nowhere more applicable than in that which concerns the marriage relation. By the Greek and Roman Churches marriage is regarded as a sacrament, an impressive word of somewhat indefinite meaning, standing generally for something exempt from the control of the civil authority. It is not perceived why the partnership created by marriage should so far differ from a commercial partnership that one may be dissolved at pleasure while the other is absolutely indissoluable. A proper regard for the interests of the State as well as the preservation of domestic happiness would seem to require that when the whole object of the matrimonial compact had been defeated by the habitual, persistent, and uncontrollable conduct of either party, and that relation, which should represent the acme of human happiness, is made to stand for all that is most repugnant to our desires and anticipations, a severance of the ties should be permitted. I cannot recall a divorce fairly obtained, without fraud, and upon due and personal notice to the other side, that did not apparently redound to the welfare of the parties and prove a real blessing."

At the annual meeting of the Kentucky State Bar Association at Paducah, Ky., Attorney-General George W. Wickersham of President Taft's cabinet made an address July 7, in which he suggested that Congress should enact a law providing for nationally created corporations to carry on interstate commerce. Mr. Wickersham sketched the ways by which states may regulate business of foreign corporations within their boundaries and advocated that the license of any foreign corporation be vacated if fifty per cent of its stock be owned by any company, domestic or foreign, or if that amount become later so owned. He said such a law would logically follow the excise on corporations. Dealing with the citizenship and standing of corporations, he quoted decisions to show that they were not citizens in the meaning of the federal constitutional requirement that citizens of each state should be entitled to all the privileges and immunities of citizens of the United States. "The unlimited extent of the power of the States recognized by the Supreme Court," said Mr. Wickersham, "is strikingly illustrated by the decision in the case of *Security Mutual Life Insurance Co.* v. *Prewitt*, where the constitutionality of a statute of Kentucky was upheld. [*Cf.* article by F. R. Lacy referred to in Review of Periodicals, pp. 403-4 in this issue of the *Green Bag*.—*Ed.*] The result of this decision is to enable a state to compel a for-

eign corporation to refrain from resorting to the federal Court in controversies brought by or against it or else to cease to do business within that state." The Attorney-General also said that the imposition of higher license fees on foreign than on domestic corporations had been declared void. He pointed out that in view of the cases of the state of Arkansas against the Hammond Packing Co. and others, it might be safely asserted that the only limitations on the powers of the states to exclude foreign corporations entirely from doing business within their territory, or to prescribe such conditions as they might deem proper to the carrying on by them of such business, were "that the regulations so prescribed should not deprive the foreign corporations of property without due process of law or deny to them the equal protection of the laws; and second, that such regulation shall not amount to an interference with interstate commerce or with other business of a federal nature."

Necrology—The Bench

William T. McNealy, first Superior Court judge of San Diego county, Cal., died at San Diego June 9, at the age of sixty-one years. He had served thirteen years on the bench.

A portrait of the late Judge Thomas A. Moran, who died in 1904, was unveiled in the court room and formally presented to the county board by several Chicago lawyers June 12, Levy Mayer making the presentation speech.

Samuel Ashton, a retired lawyer, at one time a Justice of the Supreme Court of Illinois, died in New York June 2. He was eighty-five years old. He was born in Loudoun County, Va., but later removed to Illinois.

Judge Nathaniel W. Voorhees died June 14 at Clinton, N. J., at the age of eighty years. He held several legal and political offices during his lifetime, and was the father of former Governor Foster M. Voorhees of New Jersey.

Judge Emmett Field of the First Division Circuit Court, in Louisville, Ky., was stricken June 21 and died in a few minutes. He was sixty-eight years old. He served in the Confederate Army with a company of boys that was organized at Fulton College, Missouri.

Judge Stewart S. Denning, one of the most noted criminal lawyers of Idaho, died June 4. Judge Denning went to Idaho seventeen years ago from Canyon City, Ore. He is said to have appealed more criminal cases than any lawyer in this state. He was a native of Scotland and leaves a widow and three children here, a brother in Australia, and one in Arizona.

Judge Myles P. O'Connor, one of the oldest and most respected residents of San José, Cal., died there June 9. He was formerly a member of the legislature. In 1844 he was admitted to the bar, but becoming interested in gold mining he went to Idaho, where he made a large fortune in a gold quartz mine. In 1872 he went to San José, where he built a magnificent residence, and donated large sums to numerous charitable and humane projects. His greatest work was the building and equipment of a large non-sectarian hospital and sanitarium, to which he has left a large endowment.

Necrology—The Bar

William R. Lee, former District Attorney of Dutchess County, died suddenly in Pawling, N. Y., June 7. He was sixty-three years of age.

Ford D. Smith, Town Attorney of Dover, N. J., died suddenly on June 18. He had served in the New Jersey Assembly in 1891.

Charles H. Minshall, a prominent attorney of Viroqua, Wis., well known as an advocate of prohibition, died June 9, at the age of forty-one years. Death was due to accidental shooting.

Major S. Clifford Belcher, one of the oldest and best known lawyers in Maine, died recently in Farmington, aged seventy years. His military title was won in the Civil War.

Arthur Hurst, a well-known lawyer of Brooklyn, N. Y., died there June 12. He was a classmate of ex-President Theodore Roosevelt at Harvard, and was admitted to the bar in 1883.

Gilbert M. McMaster, a prominent attorney of Pittsburgh, Pa., died June 7. In 1876 he retired from the practice of law to take up the cause of temperance, and was closely associated with Francis Murphy in this work.

President Augusto Mordira Penna of Brazil, who died June 14, took up the study of law in early life, graduating in 1870. While serving as governor of the state of Minas, Brazil, he founded the first law school in that state.

Isaac Moss, a New York lawyer, committed suicide by jumping overboard from an ocean liner on May 30. He had been suffering from mental strain due to overwork and was on his way abroad for a rest.

Benjamin L. M. Tower, a prominent member of the Suffolk county bar, and a member of the law firm of Tower, Talbot & Hiller, died suddenly at his home in Boston June 14. He was born in Cohasset in 1848.

Isaac R. Hitt, Illinois state agent before the Court of Claims, died at Washington, D. C., June 13. He was eighty-one years old, and was one of the ablest as well as oldest attorneys practising in Washington.

Charles A. White, a member of the law firm of White Brothers and one of the oldest practising lawyers in New Haven, Conn., died at his home in that city June 17, aged seventy-six. He was graduated from Yale in 1854. He was a grandson of Roger Sherman, one of the signers of the Declaration of Independence.

Frank M. Estes, attorney-at-law, former Judge, and a leader in politics, died at his home in St. Louis, Mo., June 19, at the age of fifty-four. He served several terms as chairman of the Democratic City Committee and was appointed a special Judge of the Circuit Court. He always took an interest in the Missouri State Bar Association and served several terms as its secretary.

Frank L. Hungerford, one of the leading members of the Hartford, Conn., bar, and corporation counsel for the city of New Britain, died there suddenly June 22. He was graduated from Harvard Law School with honors, and soon built up a considerable law practice. Of late years his private practice had become lucrative and his abilities were widely recognized.

Judge John H. Stotsenburg, a leading member of the bar of Floyd County, Indiana, died June 7 at New Albany, Ind. He was a graduate of Trinity College, Hartford, Conn. Judge Stotsenburg served three terms as city attorney of New Albany. He had also been a member of the Indiana House of Representatives during the Civil War, and was a member of the commission appointed to revise the statutes of Indiana about twenty-five years ago.

A session of the Supreme Court in memory of the late Colonel Albert W. Bradbury of Portland, Me., was held June 21 at Portland. Justice Bird of the Supreme Court presided and there was a large attendance of members of the bar. There were eulogies by Judge J. W. Symonds, Gen. Charles P. Mattocks and Judge Bird, and resolutions on the death of Col. Bradbury were placed on record by the Court.

Aaron B. Gardenier, one of the most prominent lawyers of northern New York, died suddenly June 22, at Chatham. He was three times elected district attorney of Columbia county and conducted many famous trials as public prosecutor. As Member of Assembly from Columbia he at once attained prominence, was chairman of the judiciary committee and was frequently mentioned for the office as Speaker.

Edwin B. Franks of Trinidad, Colo., who at one time was a member of the territorial legislature of New Mexico, died June 8 after a long illness. He was fifty-two years old, and was known as the leading criminal lawyer of the Southwest for a number of years. He had also gained considerable distinction as a writer of short stories.

J. Dickinson Sergeant died at Abington, Pa., June 10 at the age of eighty-seven. He was with one exception the oldest member of the legal profession in the country. Mr. Sergeant was associated with many large business interests, such as the development of railroads and mining investments in Virginia. He became expert in outdoor photography at the time when the processes were much more complicated than at present.

Joseph Nimmo, Jr., LL.D., one of the oldest residents of the District of Columbia, died June 15. He was seventy-nine years old. A native of New York, and educated there, he was a civil engineer and followed that profession for thirteen years, until he studied law and made a specialty of political economy and constitutional law. For years he was connected with the government as a statistician and economic specialist. He was a writer of ability, and as a statistician and economist was an accepted authority.

Miscellaneous

A class of sixty received diplomas from the Detroit College of Law at the exercises held June 18.

Gov. Hadley of Missouri signed a bill June 16 providing an additional circuit judge for St. Louis county.

Sixty-two young men and one woman received their diplomas from the Chicago-Kent College of Law at Chicago June 10. James G. Jenkins, former Chief Justice of the United States Circuit Court of Appeals, delivered the Commencement address.

A ball game between the "Decedents" and "Alibis" was a feature of the outing of the Allegheny County Bar Association on the Monongahela River June 19. The rival Pittsburgh teams did their best to show that "Alibis" were not there and the "Decedents" were dead on the field.

The annual Commencement exercises of the Valparaiso University law department took place June 10 at Valparaiso, Ind. The address was made by James E. Russell, dean of the Teachers' College of Columbia University. Forty-seven graduates received their degrees.

The New York Law School conferred the degree of Bachelor of Laws on about one hundred and fifty students, and gave sixteen others the degree of Master of Laws, at the graduation exercises held June 17. Justice John Proctor Clarke of the Appellate Division

of the Supreme Court delivered the annual address.

The annual meeting of the Illinois State's Attorneys' Association was held at Chicago June 9–11. Among the prominent speakers were Wade H. Ellis, Assistant Attorney-General of the United States, State's Attorney Wayman, Vice President John S. Miller of the Illinois Bar Association, and Dean A. C. Harker of the University of Illinois Law School.

Several members of the bar of Allegheny County, Pa., have consented at considerable sacrifice of time and money to serve in a "Lawyers' Court of Compulsory Arbitration" to expedite matters in clearing up the dockets of the Common Pleas Court. The new court will cover all points of law and evidence thoroughly with the view of making appeals infrequent.

Judge James B. Dill gave an address on "Viewpoint and Standpoint," and cautioned the graduates not to borrow legal knowledge, at the first Commencement exercises of the New Jersey Law School at Newark June 17. The school has proved at the end of its first year that it is needed. The degree of Bachelor of Law was conferred on seven students.

The Georgetown University Law School graduated the largest class it had ever had June 7, when one hundred and forty-seven young men received their diplomas. Many prizes were awarded by Chief Justice Seth Shepard of the Court of Appeals of the District of Columbia. Wade H. Ellis, Assistant Attorney-General, delivered the address to the graduates.

The Governor of New York has signed a bill prohibiting corporations from acting as attorneys. It is believed that this will stop the abuses which have given rise to so much complaint in New York City, and that legal advice will no longer be furnished by legal bureaus and collection attorneys employing clerks who are not registered attorneys to attend to their clients' affairs.

Anent the proposal to change the method of electing judges in Georgia, which is now by popular vote, former Governor Allen D. Candler has proposed that Georgia go back to the plan set out in the first state constitution, that of 1877. Under this method the house of representatives balloted for superior court judges and presented to the governor the three names receiving the highest vote. The governor then selected one of these names and presented it to the senate.

President Taft has decided to call a national conference for the securing of uniform legislation to be held in Washington January 5, 6, and 7, 1910. Each state will be invited to send five delegates. President Taft, who will preside over the conference, has said that "either some plan for attaining uniform legislation must be put into effect in the different states or we shall have to have more centralization of power here in Washington."

H. H. B. Meyer, chief bibliographer of the Library of Congress, has compiled a list of works relating to the Supreme Court of the United States. The list, which is in four sections, does not attempt the completeness of a bibliography. The first section contains general works, the two next United States reports or digests, and the last bibliographical material on the chief justices and associate justices.

The Superior Court at Karlsruhe, Germany, rejected the appeal for a new trial for Karl Hau, who was sentenced to life imprisonment there in 1907 for the murder of his mother-in-law. Hau had been a gifted student in Baden-Baden and later studied at George Washington University in Washington, D.C., where his brilliant work won him the degrees of A.M. and LL.D., and an appointment to the chair of Roman law in the university in 1904.

The first volume of an important work, "Les Associations au Point de Vue Juridique," by Edouard Clunet, founder and editor of the *Journal du Droit International Privé*, has been published by Marchal & Billard of Paris. The purpose of this work is that of studying associations in every form, as part of the plan of actual positive law, to assist in understanding the present by a review of historical facts. The work seems to be written more from the point of view of French law than from that of comparative legislation.

Pope Pius X has issued a decree suppressing the order known as "The Attorneys of St. Peter," which has a number of representatives in this country. The order was founded in 1878, shortly after the accession of Leo XIII to the pontifical throne, and was composed, in its inception, of eminent Catholic lawyers in different parts of the world. It was intended that admission should be restricted to those members of the legal profession who had given adequate proofs of unselfish devotion to the interests of the church. But unfortunately the French branch did not exercise necessary care in the election of its members and as a result members of questionable antecedents were able to make use of their relation to the order for the purposes of fraud, mainly in connection with bogus sales of titles of knighthood and nobility. These involved the order in some notoriety of an unsavory character.

Frederic de Martens, Professor of International Law in the University of St. Petersburg from 1871 to 1907, died at St. Petersburg, Russia, June 20. He was born in 1845. Edinburgh, Cambridge, and Yale Universities made him an LL.D., and Oxford conferred upon him the degree of D.C.L. He had been

a Privy Councilor and permanent member of the Council of the Ministry of Foreign Affairs since 1882. He was the second Russian plenipotentiary at the Peace Conference at The Hague in 1899 and President of the Second Commission. He was President of the Court of Arbitration in Paris in 1899 between Great Britain and Venezuela; arbitrator between France and England, England and Holland, and the United States and Mexico. He was a member of the Permanent International Court of Arbitration at The Hague; Russian delegate at the peace negotiations between Russia and Japan in Portsmouth in 1905, and plenipotentiary of Russia at the Geneva Conference of 1906 for the revision of the Geneva Convention of 1867. He was also Second Russian Delegate at the Second Peace Conference at The Hague in 1907.

At the Yale Law School alumni banquet, held at New Haven on Class Day, June 28, Dean Rogers presided, and Chief Justice Simeon E. Baldwin unveiled a portrait of Dean William Callahan Robinson of the law department of the Catholic University of America, a former Professor of Law in Yale. Other speakers included ex-Gov. George P. McLean, Judge Selden D. Spencer of St. Louis, Burton Mansfield of New Haven, Dean Kirchway of the law department of Columbia University, and ex-Senator John C. Spooner, all alumni. The alumni re-elected C. Larue Munson of Williamsport, Penn., president; E. D. Whitney of New York and E. G. Buckland of Providence, vice presidents, and J. W. Edgerton, secretary and treasurer. The Law School exercises were held at Hendrie Hall immediately afterwards. The degree of Bachelor of Laws, *summa cum laude*, was conferred on F. H. Wiggin of New Haven, who leads his class.

At the annual meeting of the Harvard Law School Association held in June in the rooms of the Boston Bar Association, the following officers were elected: President, Melville W. Fuller, '55, Chief Justice of the United States Supreme Court, District of Columbia, who was re-elected; vice presidents, David Cross, '43, New Hampshire; Addison Brown, '55, New York; Richard Olney, '58, Massachusetts; William T. Spear, '59, Ohio; Everett P. Wheeler, '59, New York; Joseph B. Cummings, '59, Georgia; Simeon E. Baldwin, '63, Connecticut; George Gray, '63, Delaware; John C. Gray, '66, New York; J. W. Hammond, '66, Massachusetts; Oliver Wendell Holmes, '66, Massachusetts; David T. Watson, '66, Pennsylvania; John S. Duncan, '67, Indiana; Ezekiel McLeod, '67, New Brunswick; Augustus E. Willson, '70, Kentucky; Austen G. Fox, '71, New York; Jacob Klein, '71, Missouri; Joseph B. Warner, '73, Massachusetts; Charles J. Bonaparte, '74, Maryland; William Thomas, '76, California; Louis D. Brandeis, '77, Massachusetts; Francis C. Lowell, '79, Massachusetts; Francis J. Swayze, '81, New Jersey; Shinichire Kurino, '81, Japan; Edward Kent, '86, Arizona; Julian W. Mack, '87, Illinois; Edward T. Sanford, '89, Tennessee; George E. Wright, '92, Washington; secretary, Robert G. Dodge, '97, 60 State street, Boston; council, Winthrop H. Wade, '81, Boston; William G. Thompson, '91, Newton; Frank L. Hinckley, '94, Providence. Three of the vice presidents elected represent sections of the country which heretofore have not been included in the association, namely, the northwesterly and the southeasterly parts. The council recommended that it was expedient to have one member elected to the council annually who should not be a Harvard graduate.

The United States Supreme Court

By Harry R. Blythe

They stand like sentries at a country's gates,
Guarding the mighty realm lest in should come
The alien things to poison and benumb
The sovereign heart. Where this tribunal waits
There dwells the ancient power of the fates
Which sways our destinies. Not rolling drum
Or cannonade their means,—all such is dumb
Before these peaceful arbiters of States.
They wield one battle-blade,—the country's law;
And each man is an intellectual king
Whose work shall last till time's clear eyes are dim
It is but meet we look on them with awe
Who can by weight of words such forces swing,
While men have no appeal except to Him.

FRANCIS ALMON GASKILL

LATE JUSTICE OF THE SUPERIOR COURT OF MASSACHUSETTS

[See page 455]

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Death Sentences in Germany

By H. Becker, *Dr. juris*

NOT so long ago that the details of the case should not readily be recalled to mind, Prof. Carl Hau, formerly of Washington, D. C., then under sentence of death for the murder of his mother-in-law, Mrs. Molitor, was awaiting in the court jail of Karlsruhe, the capital of Baden, Germany, the final disposition of his case, after all efforts to have his judgment reversed by the highest tribunal, the *Reichsgericht* at Leipzig, had proved futile. Just at this juncture, so critical for the convicted man, the old Grand Duke of Baden died. His well-known reputation as a confirmed opponent of death punishment had made it a virtual certainty that the bloody act would not have to be expiated on the executioner's block, while the opinions held in this regard by his son and successor were entirely unknown, and did not permit any assured inferences on a decision which meant life or death for the lonesome prisoner, separated by the expanse of oceans and continents from all that was dear to him. Under such circumstances there was caused, according to repeated utterances of the Washington press, considerable concern among those interested in Hau's fate, and it was certainly with a sigh of profound relief that the press dispatch from Karlsruhe was welcomed of the death sentence being commuted to life imprisonment, which, by the way, Hau is serving now in the penitentiary at Bruchsal.

However, in point of fact, his life has never, for a moment, been in actual danger of coming to such an untimely and ignominious termination, it being accepted in Germany as a governing principle, prevailing in all the single states forming the Empire, that no sentence of death is ever put into execution if the records do not include an unequivocal, unreserved confession by the convicted. As may readily be surmised, such surprising consensus of opinion in so many exalted personages, leading to the acceptance of the same practice, must have been occasioned by events of more than passing significance. It happened at Berlin in the year 1856, that a certain Thomas, by profession a forester in private employ, but for years out of work, was accused of highway robbery and brutal murder. Though professing with great violence his complete innocence, he was convicted on seemingly overwhelming circumstantial evidence, with a very dark past asserting itself strongly in his disfavor. Sentence of death was pronounced, and was, after

an appeal against the judgment had been unavailing, in due time performed. Two or three years later, the real murderer was discovered; his death-bed confession and his revealing of facts which could not possibly be known to a third party, in connection with a careful investigation started by the Prussian government, removed all and every doubt that Thomas had anything whatever to do with the crime.

The stir made by the affair was a tremendous one; the whole country was ringing with it for years. Even up to the present time, young lawyers pleading in capital cases before a jury, when they have exhausted all arguments they can think of in favor of their clients, occasionally conjure up the shadow of the "ruthlessly murdered forester,"—not, however, without being seriously rebuked by the court.

Of course mankind may not unjustly glean a good deal of comfort from the reflection that the victim of this miscarriage of justice was a thoroughly bad and dangerous character, a man with a police record showing several terms served in the penitentiary for the worst crimes of the calendar, who, in all human probability, in his long criminal career, had already committed, and perhaps more than once, a deed making him liable to death penalty, and who, after a life spent in something like a nodding acquaintance with death, could almost be depended upon to die, sooner or later, in expiation of one of his desperate crimes. But in spite of these extenuating circumstances, the impression left by the incident was so deep and uneffaceable that the kings of Prussia, as such, and since 1871 in their capacity as emperors of Germany, laid it down as a firmly established though unwritten rule for future guidance, to make the non-interference with the course of justice, and accordingly the execution of death sentences, contingent upon a confession. And the sovereign powers in the federal states followed invariably this example where in cases not belonging to the jurisdiction of the empire the right of pardon rested with them.

During the whole period of more than fifty years, there is only one single exception to this rule recorded, and that occurred when, in 1881, the old Emperor William, as King of Prussia, refused to avail himself of his constitutional right in favor of a driver of the name of Conrad who, though on exclusively circumstantial evidence, had been convicted and sentenced to death for having murdered his wife and his five little children, in order to thus remove the only obstacle standing in his way of marrying a young servant girl, thirty-five years his junior, with whom he entertained illicit relations. Few criminal cases in German courts have attracted such widespread attention, or caused such intense feeling of disgust and abhorrence when the revolting details became known. Moreover, there was a feature in the circumstantial evidence which appealed in quite an unusual degree to the interest not only of the legal fraternity, furnishing, as it did, a striking illustration of the fact that when the element of coincidence enters into an affair, those are not always right who pronounce that they have learned to distrust coincidence on principle.

Conrad, who was of an intellect far above the average, and in morals hypocritical, astute, and thoroughly bad, had prepared most carefully for the crime contemplated by building up beforehand, to be used in a contingency, what he conceived to be an unshakable *alibi*, and by arranging everything so as to make it appear that his wife, in despair over being deserted by her husband, and

finding herself in bitter want for the commonest necessities of life, had killed her five children and then committed suicide. He conducted himself in the judicial investigation with perfect ease and self-possession, and being denied a lawyer's advice, by the German law, in this phase of the proceedings, defended himself with remarkable cleverness and unusual presence of mind. But he was no match for the famous Rath Hollmann, the specialist for complicated murder cases at the criminal court in Berlin. After the offered *alibi* had been all but completely broken up, and the "bitter want" theory had fallen utterly discredited to the ground, there remained only one perplexing feature, the most unexplainable fact that the door which formed the only available means of exit from Mrs. Conrad's room, the place of the murder, had been found locked by a bolt, only to be operated from the inside by being pushed into a corresponding socket in the door frame by means of a small upright handle at the opposite end of the bolt. The bodies of the five children were found in a large wardrobe, dangling from pegs, while that of the mother was suspended from a strong hook in the upper horizontal beam of the door frame. For some days the judge had been racking his brain to find a satisfactory answer to the question how the murderer could have made his get-away, leaving behind him the door bolted as it was found later, when he decided to make a thorough search of the room inhabited by Conrad who, as mentioned before, lived apart from his wife. Hoping to find some correspondence that had passed between the man and his sweetheart and might furnish damaging evidence of one sort or the other, the judge was attracted by a pretty large collection of so-called sensational literature, and started at once to examine every one of the volumes, well acquainted with the habit in that class of people to preserve letters and other papers between the pages of their books. Coming in turn to a rather bulky novel, he could not fail to notice that the book opened, almost automatically, always between the same pages, the pages themselves showing every sign of being read and re-read, and being brooded over time and again. Grown curious, the judge fell to reading the text himself, and was soon fully absorbed in his task, which gave him the surprise of his life. The book was "Nena Sahib," by John Ratcliffe, and on the pages in question was described the murder of an Indian noble in his London mansion by a professional burglar in the pay of a third party. When the crime is discovered the door of the room is locked by a device exactly as that in Conrad's case. The police officer in charge solves the mystery by finding a little hole bored above the bolt near the edge of the door, so that with the help of any suitable material, such as a piece of wire doubled up to form a loop, the handle of the bolt could be caught, the bolt pushed home, and the wire then removed; the hole itself was found filled up with putty of the same indistinct color as the surface of the door—all this easily to be accomplished from the outside after leaving the room and closing the door.

Rath Hollmann had nothing more to learn in Conrad's room, but hurried to the place of the murder, where he at once ordered the door removed. There was no longer any doubt possible. He found the telltale hole, *à la* Ratcliffe, filled up, for the matter of a variation, with sealing wax, and to make assurance doubly sure there were sticking in the wax two short pieces of strong

horsehair indicating the material used to work the handle.

These facts, which could not possibly be considered mere coincidences, completed the chain of circumstantial evidence so as to show no missing link. The jury felt itself justified in giving a verdict of guilty; and Emperor William, shocked to the utmost by the cowardly crime, must have regarded the proof as so absolutely convincing that, by way of exception, a confession could be dispensed with.

In concluding it may be pertinent to point out the fact that the German law does not require at all a confirmation of the death sentence. After all possible legal proceedings have been exhausted, the sentence is liable to execution under the formalities prescribed by the law. But since a human life is at stake, it devolves upon the Secretary of Justice as a duty to ascertain whether or not the Sovereign should be disposed to make use of his constitutional right of pardon, and for this end the records, together with a concise report, are turned over to the Privy Cabinet. If the Crown decides not to interfere with the course of justice, this fact is stated in a separate "cabinet order," signed by the sovereign by his own hand. Technically this act can hardly be considered a confirmation of the sentence, while the signing of the death sentence by way of confirmation on the part of the sovereign is simply a fable.

Legal Idealism

By Charles F. Chamberlayne

THE legal profession recognizes, with some alarm, the extent to which it is suffering from low idealism. Wherever lawyers privileged by position to speak for their profession have occasion to let their views be known a profound consciousness is shown that the standard of professional conduct is abnormally low. From time to time our bar associations have met and deliberated deeply on the situation; and they have given us, as a panacea for the evil —codes of professional ethics. To the fervent cry for the bread of moral life a stone of formalism and negation, admirable in itself, has apparently been given. The American lawyer has a fondness for codes; and to formulate that which is fixed they are valuable. But that which dominates conduct and determines its social value, whether in the line of a profession or elsewhere, is not a fixed rule but an unattainable purpose, held steadily in view. Paradoxical as it may seem, the world knows that in matters of conduct nothing is more practical than the ideal, nothing more visible than the unseen. Analogies are everywhere. Back of the creaking of masts, flutter and spread of sails, the rattle of anchor-chains, lies the subtle, mysterious loyalty of the compass needle to its mystic affinity of the north. So the success or shipwreck of a professional voyage will be found to be determined by moral forces over which a code of ethics, however salutary, can have but slight control. When the compass of

life is "out" something more is needed than an accurate chart of the rocks.

The practical question is not whether professional conduct shall be dominated by ideals, but rather what these ideals shall be. Ideals of some kind, lawyers, like other men, necessarily must have. The low standards of the profession are the ideals of a trade, a business, a money-getting, power-procuring, success-securing occupation. To men who have once adopted these standards a code of ethics may, indeed, be of a certain value; it is the "Thou shalt not" of the Hebrew lawgiver; it fixes a minimum below which no practitioner may safely fall. He may, therefore, see in its prohibitions the threat of disbarment. He may find himself surrounded by a professional opinion which may steady his steps. But with it all, it may well be doubted whether it will ever be in the power of such a practitioner to exhibit the highest usefulness to his profession and through it to society.

For the successful attainment of this supreme end, something deeper, more radical, is needed and that can only, as a rule to which there are but few exceptions, be supplied to the man in his youth. In that plastic period nature furnishes the ideal which is usually to go through life. It is part of the soul-world from which the spirit has come; the heaven which "lies about us in our infancy." It is the lure and call of the Beyond, part of the dreamy, uncrystallized longings of youth, parcel of its "splendid vision." And then the plaster sets, the gristle becomes bone, the twig is bent, the blessed vision of youth fades, and the intellective attitude of manhood has taken its place. A false ideal, therefore, is exceedingly hard to change. It would, in general, be folly to attempt the task. The wise course would seem to be for those who seek the moral elevation of the profession to endeavor, having done what may be accomplished for those already in it by means of a code, unswervingly and unstintedly to give to those who are to become its future members early and adequate instruction in the ideals of the legal profession.

What these are, one well may hesitate to declare in any formal and determinative way. An ideal which may justly be regarded as fixed is no longer really an ideal. Nor is the subject one for dogmatism. Each soul follows its own, not easily shared or communicated. It is sacred ground: the voice is one which comes, alone, in the silence, when the heart is uplifted in prayer, when the higher mandate is given. Expression here is limitation; the truest ideal must always remain undefined, perhaps undefinable.

Still, that which is to be taught must first be formulated,—so briefly stated as can be easily remembered, so simple as to be readily understood. Possibly with such an object, the negative provisions of the admirable Canons of Ethics of the American Bar Association as adopted by it at Seattle, August, 1908, might be affirmatively stated to an applicant for membership in the bar, in one primary and six dependent propositions:—

1. Social service, not personal profit, is the aim of your profession.

Therefore:—

2. Exalt and loyally magnify the prestige and power of the court; that thus the administration of law may be made efficient for the attainment of justice.

3. Regard every practitioner as a fellow-soldier in the common cause of justice; and his honor as sacred to you as your own.

4. Value your services justly; yourself as above all price. Service is the right of the client. Self is sold to none.

5. In choosing between morally permissible paths, follow the highest of which you are capable; as between two courses not so sanctioned, select neither.

6. Cultivate character, not smartness, as your aid to success; instinct for truth is a sure guide. Self-interest cannot but mislead.

7. Every professional act has the meaning you have led others to give it.

Viewed as illustrations of these or similar principles of legal morality, the limiting disadvantage of a formal code disappears; while its usefulness is preserved and even enhanced. The nice balancing of conflicting duties which lies entirely beyond the prohibitions of a moral code, but in which rests the crowning glory of socially valuable professional conduct, still remains possible.

That the giving of adequate instruction on legal ethics can be done principally, if not solely, by morally stimulating lectures, instruction and suggestion at the law school seems fairly obvious. Time was, indeed, when the personal interest of the venerated head of a law office might have been safely relied upon to furnish the novitiate with some adequate conception of the ethical nature of his chosen calling. At the present, it would be quite as rational to expect that his successor in position would suddenly appear in knee breeches or essay to go on circuit in a stage coach. Modern legal business requires a finished product, something that will fit at once, like a well-oiled cog, into the complicated machinery of the great law office. The law school has necessarily supplanted other agencies for producing this completed practitioner, and it is therefore, of necessity, to the law school alone that the profession is forced to look for the desired instruction in legal idealism. Yet there are very few law schools which undertake, even in the most casual way, to furnish it. General Thomas H. Hubbard, of New York City, whose generous interest in this matter, as a member both of the Committee on Legal Ethics of the American Bar Association and of the New York State Bar Association is a subject for national congratulation, founded, a few years ago, at the Albany Law School, of which he is a graduate, a professorship of legal ethics. The income of the fund, as is well known, is employed in procuring the delivery to the students of that institution of annual addresses by various distinguished lawyers, and giving a limited circulation to copies of these addresses. Recommendations to state and national bar associations that law schools furnish instruction in legal ethics meet as a rule, whenever presented, with instant public and professional recognition of their importance. But all such action is unproductive of practical result; the instruction is not given. It needs but slight inquiry of the official heads of our law schools to learn why this is so and could not well be otherwise.

The great law schools of the country have no lack of interest in the matter of giving their students needed assistance in this branch of a lawyer's complete education. No man fit to be the dean of a leading law school could hesitate to feel that the soul of the legal profession is at least quite as important. objectively or subjectively, individually or socially, as its brains. These gentlemen are fully conscious that the law schools alone are expected to supply this instruction; they do not deny the justice of the expectation. Obviously, however, they feel that there are difficulties in the way which at present they do not see how to overcome. These will be found to be of two kinds: (1) how to find the right man, (2) how to pay him.

In itself considered, the difficulty of selecting a proper person for giving helpful suggestion on legal morality, while

not insuperable, is, at least from the standpoint of the individual school, by no means without foundation. Confessedly the instructor should be a practising lawyer of high repute, deserved eminence and general esteem. The very presence of such a man, the knowledge that his highly successful career has resulted from following the moral principles which he announces, is in itself no small argument, in quarters where the information is valuable, against the false ideal that in "smartness" lies the royal road to professional success. Yet it by no means follows that any eminent lawyer is well fitted to teach. He may lack the art of imparting what he knows. He may be wanting in voice, in presence. More than this, while in theory every upright lawyer is qualified to treat of the moral aspect of his chosen profession, this is scarcely borne out in practice. Such a man may discuss intelligently the code of ethics of his bar association, as he might teach a penal code. But to go beyond the intellectual into the spiritual, to furnish young men with generous enthusiasms which shall continue to dominate conduct and determine careers, demands not only special aptitude but is gained in its highest efficiency only by a constant concentration of thought and personal familiarity with the entire field. Effectively to preach a crusade, one needs must be a Peter the Hermit. Were an individual law school fortunate enough to find such a rare combination of qualities available to its hand, the separate needs of the institution would still be limited to a few hours a year, and the element of constant association with the work would necessarily be absent. The matter of selecting a suitable instructor is however, in reality, a mere detail. Were other difficulties removed this would be easily overcome. There are eminent lawyers like, for example, if indulgence be accorded to the statement, Mr. Justice David J. Brewer of the Supreme Court of the United States, amply equipped by natural aptitude and both popular and professional standing for such a work, who might fairly be expected to show a willingness to consecrate themselves to so high a purpose, were the call of the profession sufficiently clear, its support suitably generous.

The impediment in the way of general law school instruction, which is at present found insuperable, is lack of money. In any educational institution one of the rarest possessions is a fund the disposal of which is entirely optional. The curriculum of our legal institutions is well established. Under it, suitable professors and instructors in absolutely essential courses exhaust by salaries, usually moderate in amount, the entire available income of the school. This is an arrangement which cannot well be disturbed for the benefit of instruction on ethics just beyond the special work of the law school professor. Money for such purpose must, therefore, be specially contributed. If given, the schools would be glad to use it.

A concrete illustration of the situation comes from the dean of one of the great law schools of the United States. "I felt," he says, "so keenly the advantage to our students of some competent instruction in legal ethics as to entertain the purpose of inviting a jurist of national reputation to address them on the subject. I decided, however, that the suggestion of an *honorarium* should properly accompany such an invitation; and that in view of the eminence and probable engagements of the lawyer in question, one hundred dollars would be little enough to present him. No law school funds being available for the purpose, I applied to the president of the

university and laid the matter fully before that gentleman. His reply was entirely unambiguous. 'The university, sir, has no money for *honoraria*.' Accordingly, the invitation was not extended." Yet this was among the well-known institutions of learning in this country and one of the most wealthy.

In a way the situation is highly creditable to the law schools. It means that every available dollar is being used to do its measure of usefulness, according to the wishes of its donor, or the recognized and established curriculum of the institution. What is true of the great law schools is true, in a still more marked degree, of the smaller ones and those in less wealthy sections.

Broadly viewed, this situation of affairs is not even to be regretted. It presents an unmistakable call to public and professional duty which would not otherwise have been made. The determination of a splendid body of professional men that its membership be purified from moral taint ought not, in the fitness of things, to find expression in the action of any law school faculty, grudgingly forcing from other needed purposes a few dollars to pay a local celebrity for a little instruction. Nor is it in the highest degree expedient that, as at the Albany Law School, the generosity of one public-spirited graduate should provide the funds. To any body of students whom a speaker may chance under such conditions to meet, he represents the moral backing and support merely of a few law professors, or the public spirit of a single man. Not thus will the great legal profession feel it is proper to call into practical effect its own purpose of self-preparation for a higher social service. It is easily within its power, at any moment, to create a national endowment of such extent and range of application as will be in some sense a fitting expression of its determination that no considerable body of law students in any section of the country, who are desirous of following the high ideals of their profession, shall be prevented from learning them simply by lack of financial means. While not perhaps venturing to assume the moral responsibility of limiting the immediate usefulness of the fund by declining contributions from any who deem its purposed end desirable, such an endowment might with propriety and moral effectiveness present the distinct characteristic feature of a creation by the legal profession, open to contribution from all its members, regardless of amount, never completed but with ever-increasing usefulness, for the delivery and circulation of addresses and the use of any means deemed by suitable trustees expedient for elevating and maintaining the highest level of ethical achievement in the practice of law at present attainable. The income of such a fund might, it would appear, be utilized in supporting, in connection with some leading American law school, a professorship, the distinguished holder of which could devote to the work his entire time. In all sections of the country or its dependencies, any excess of income might effectively be used in securing and remunerating suitable men for similar work. The highest public spirit, the most generous contributions, and the widest repute and professional standing should unite to make such a fund speak unmistakably for the highest aspirations of the legal profession of the country.

This conception, *quoad* myself, is a borrowed one. The head of the law faculty of a great metropolitan school, who has made the subject a matter of long and careful consideration, has kindly authorized repetition of his statement:

"That which is needed, it seems to me, is what I may call an ambulatory professorship, connected primarily with the law school of some suitable American university. Speaking for our own institution, I feel justified in saying that we should be very glad to have such a professorship established in connection with this school. The endowment supporting such a chair should be under the management of a board of trustees who should determine the duties of the professorship and the further usefulness of the fund. No person less prominent than the Chief Justice of the Supreme Court of the United States should, *ex officio*, be at the head of such a board. With him I should like to see associated specially equipped judges of state and federal courts, the presidents of national and state bar associations, the deans of representative law schools, and, in general, the great men of the profession. As soon as the modesty of the man who shall feel moved to take the initiative in inaugurating such an endowment has been overcome, the rest appears to me to be a matter 'easily arranged.' "

The moral force of such a presentation of legal idealism to the students in the law schools of the country, and other aspirants for admission to the bar, as such an endowment would render possible must easily transcend that of any instruction furnished by the overtaxed resources of the law school. He who should be privileged to speak from the chair so endowed would be, beyond any possible dispute, the visible representative of the entire profession of America. His words could scarcely fail to grave deep and irradicable lines upon the plastic material before him, to the incalculable benefit of future years.

Upon the profession itself, the effect could scarcely fail to be most happy. In morals, as in physics, action and reaction are equal. These men do not offer to the profession and through it to the country that which shall have cost them nothing. Such a fact will avail more to fix in the busy mind of the practitoner the moral stand his profession has taken than any comfortable acceptance by his bar association of the report of the most conscientious and painstaking committee recommending the adoption of an unexceptionable code of legal ethics.

It may even be permitted to indulge the hope that the far-reaching influence of such an effort at higher professional usefulness would go still deeper into the body-politic. He is, indeed, blind to his environment who shall have failed to notice that a very widespread lack of confidence in the work of the American courts exists among the American people. They have ground for dissatisfaction. Yet the only adequate remedy, consistent with present institutions, is to increase the administrative power of the court and subordinate the function and curb the irresponsibility of the jury. The people, in other words, must be asked to give up the power of the popular branch of the tribunal for the benefit of the legal. In England this could readily be done, for England had and still has a well-merited confidence in her judges and her bar. Have the American people the same respect for and confidence in their own? The question is crucial and its answer practically determinative for any satisfactory immediate reform in judicial procedure. This confidence in the social loyalty of the bar is a thing of slow growth, and its vitality has been greatly sapped. For many years it has withered in the noxious fumes of a vitiated moral atmosphere. The legal practitioner is now startled into full consciousness of the fact that any lawyer who seeks to defeat the ex-

pressed will of the people or to prevent litigation from succeeding on its merits is a social enemy, engaged in loosening the cement which holds society together, an anarchist compared with whom the Russian type is a supporter of the established order. What more convincing guaranty can the aroused profession give of its determined purpose to render efficient service to the people than willingness to give generously and unselfishly of its means or of its time and effort in order that it may perfect its powers, concentrate its will, and in all ways prepare its membership for the highest forms of service to which it may be called? With this confidence alone will come the opportunity for a true law reform in the United States which may readily transcend the English in juridical effectiveness. With the personal interests in litigation properly subordinated to the social, trials elevated from the level of an unscrupulous private duel to that of a serious search for truth, the common experience of the jury and the special training of the judge placed equally at the service of justice, power coupled with definite responsibility and always devoted to the public interest, we may in time, through the higher ideals of the profession, look forward with Mr. Justice Brewer to the time when, purer than the vestal virgin who watched the flames on the altars of imperial Rome, the lawyers standing in the grandest temple built by human hands—the temple of Justice—shall keep alive on its sacred altar the flames of equal, universal and exact justice. When that is accomplished, society will indeed be the New Jerusalem, coming out from Heaven adorned as the bride for her husband.

A Case of Trial by Jury

By Henry H. Ingersoll

Dean of the Department of Law, University of Tennessee.

"OLD HICKORY," first "State Solicitor," then member of the Constitutional Convention, then Congressman, then United States Senator, all of which offices, save the second, and all other offices, state and federal, which he ever held, except the Presidency, he voluntary resigned, was in 1798 appointed judge of the Superior Court of Tenessee, a court of *dernier ressort*, and with two other judges held the court for six years, wherefore he was dubbed by Judge Seymour D. Thompson, in a model address before the Tennessee Bar Association, "Mr. Justice Jackson." The reported decisions of that court during his period of service are to be found in Vol. 1 and 2 of Overton's Reports, *alias* "First and Second Tennessee Reports"; and it is noted and noteworthy that therein is not a single opinion attributed to Andrew Jackson, although he is supposed to have delivered his share of those pronounced *per curiam*, and is known to have been peculiarly effective *ore tenus*.

All the cases in these volumes are reported in the oral or colloquial style of English reports, in many of them counsel intervening and every judge

expressing his separate views on the questions for decision, which was both common and proper a century ago. No trouble arose from this *en banc*. But all the judges rode circuit, and sometimes all rode together, the same circuit at the same term; and all seemed to have joined in presiding at the same time not only *en banc* but on jury trials also, and then there was a "merry mess fitting for a king."

Individuality characterized the American pioneers, lay and professional, and was not absent from the bench in these Jeffersonian times, when courts were not uncommon composed of one lawyer and two or more prominent laymen of the vicinage, called in Ohio the "Court of 1000 Judges—one judge and three cyphers." Diverse views were often held and expressed as to admissibility of evidence and were reconciled by the rule of majority. What two of the three judges decided admissible was heard by the jury, and all went well. So likewise other points raised for judicial decision were decided and settled. But in this Superior Court no such experiments as these were tried after the evidence had all been offered, the speeches made and the vital point was reached in the trial. The jury was now to be instructed, and each member of the court felt bound to do all in his power for the administration of justice and the attainment of right according to law.

Twelve good men and true from the body of the county were not left to grope their way through the dark shadow cast by a cloud of witnesses, aided by the dim flicker of a single judicial torch. Not at all. They had, rather, all the light which could be diffused from the three *flambeaux* of the entire court.

The procedure and effect are thus reported in *Sevier* v. *Hill*, 2 Overton 38–9, a case involving the most complicated questions of Tennessee land law, the intricacies of which are still a secret known only to a chosen few:

"Campbell J., to the jury observed that there appeared to be a difference of opinion with the Court as to the law. Agreeably to the principles of our government, it is the province of the jury to decide the law as well as the fact, and the jury will act accordingly in this case. The grant is not legal, there being no law to authorize the consolidation of warrants except one which applied to swamp lands in the lower part of North Carolina. It was decided in the case of *Lytle's Lessee* v. *Barfield* that a warrant could not be divided. The grant is not valid and the jury are the proper judges whether it is so or not. If in obtaining a grant an individual does not pursue the requisites of the law, it would be useless.

"Overton, J., stated to the jury that it was the province of the Court to declare what the law was; and, in civil cases particularly, the jury should receive it as delivered, in their application of it to facts, of which they were the exclusive judges. In this case, it appears, there were not any marked lines or corners at the time of the survey. Taking this view of the subject alone, the claim of the plaintiff would be invalid. But it will not be so if the potential existence of those lines and corners can be reduced to a certainty by something that is certain. At the time this survey was made, it was lawful in running out lands to make some allowance for the roughness of the ground; the jury may now make the same reasonable allowance as was then customary, and then fix the boundary of the land accordingly. The jury ought, however, to be clearly satisfied that the defendant

would fall within the plaintiff's claims; if not, they ought to find for the defendant and he should hold his possession.

"Humphreys, J.: It is the province of the Court to declare the law, and of the jury to find the facts. The Court is to give its opinion of the law, and it was prudent of the jury to pay attention to that opinion; but they might find contrary to the directions of the Court; and the only control the Court has is to grant a new trial."

Being thus assured by Campbell, J., that their province was to decide the law as well as the fact, the jury, at least Campbell's followers, entered upon the strenuous undertaking of deciding whether the grant was valid or not; while the disciples of Overton, J., tried to receive the law as it was delivered and apply it to the facts, and solve the problem in that way. On the contrary, the Humphreys contingent of jurors prudently resolved to pay attention to the Court's opinion of the law and then exercise their prerogative of finding contrary to those directions. Imagine the jargon and discord in that jury room in the chase after a verdict, whether receiving or rejecting the instructions of the Court! It happened in this as it did in that other case, where the chancellor gave all the contradictory instructions requested on both sides, seventeen for plaintiff and twenty-one for defendant.

"When doctors disagree, disciples then are free." And so these jurors, each following his own choice among these three wise men on the bench, went their several ways, and the result is laconically reported—"Mistrial." And yet there are people who would abolish trial by jury and try causes by judges only, because of the dullness or ignorance of perversity of jurors! And that, too, notwithstanding old Justice Miller's report that three-fourths of the cases of disagreement in the federal Supreme Court were upon facts and not law!

Communis Error Facit Jus

By Mr. Justice Darling

NO code to Britons gave a right.
They reasoned wrong; then saw
Their common error's regal might,
And hailed it common law.

—From "On the Oxford Circuit," recently published by Smith, Elder & Co., London.

Right of Labor Union to Compel Members to Aid in Strike by Imposing or Threatening to Impose Penalties*

By W. A. Martin, New Orleans, La.

WHETHER or not a labor union may, in aid of a strike which it has declared, employ, in respect of members unwilling to quit their employment, such coercion as is incidental to the imposition of, or threats to impose, penalties, such as fines, suspension or expulsion, in order to compel them to join the strike, or to continue on strike after going out, is a question of paramount importance to the union and likewise of considerable importance to the employer against whom the strike is declared. This question comes up for consideration in connection with three distinct and well-defined states of facts. *1st*, Where the strike is unlawful. *2d*, Where the strike is lawful, but the members against whom the coercive measures are directed are under contract to work for a definite time. *3d*, Where the strike is lawful and the members against whom such measures are directed are not under contract to work for a definite time, but may quit their employment at will.

1st. The question is one of easy solution, where the strike itself is unlawful—*i. e.*, where the strike is in breach of contract by those engaged in the strike, to serve for a definite time, or where the end sought to be gained thereby is one which the law does not regard as legitimate or proper. In such case any act in furtherance of the strike will be deemed unlawful, however innocent it might be if done to attain a legitimate end.[1] In consequence, threats to impose, or the imposition of penalties such as fines, suspension, or expulsion for the purpose of keeping in line members unwilling to join or continue in an unlawful strike is unlawful.[2] This principle has found direct application in the case of strikes in aid of boycotts.[3] Where the threat of fine and expulsion is employed for the purpose of coercing the employees of a large number of different employers to refrain from working for them, in order to coerce all these employers into boycotting a third person with the ultimate object of coercing the latter in respect of a matter with which the employees coerced into striking have no concern whatever, the scheme becomes an attack upon his right to a free labor market.[4] It has, accordingly, been held that officers and members of a union may be enjoined from attempting to coerce into striking

[1] *A. R. Barnes & Co.* v. *Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 640; *Reynolds* v. *Davis*, 198 Mass. 294, 84 N. E. 457; *Hellenbrand* v. *Building Trades Council*, 14 Ohio, Dec. 628.

[2] *Purvis* v. *United Brotherhood of Carpenters and Joiners*, 214 Pa. St. 344, 60 Atl. 585, 12 L.R.A. (N.S.) 242, 112 Am. St. Rep. 272; *Quinn* v. *Leathem* (1901), A. C. 495, 70 L.J.P.C., 76, 85, L T. 289, 50 W. R. 139, 65 J. P. 708; *Schneider* v. *Local Union* No. 60, 116 La. 270, 40 Ga. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. Rep. 549; *Coons* v. *Chrystie*, 53 N. Y. Suppl. 668. And see opinion of Sheldon, J., in *L. D. Willcutt & Sons Co.* v. *Bricklayers' Benevolent & Protective Union*, Mass., 85 N. E. 897; *Wabash R. Co.* v. *Hannahan*, 121 Fed. 563; *In re Charge to Grand Jury*, 62 Fed. 828.

[3] *Alfred W. Booth* v. *Burgess*, N. J., 65 Atl. 226; *Purvis* v. *United Brotherhood of Carpenters and Joiners*, 214 Pa.St. 344, 63 Atl. 585, 12 L.R.A. (N.S.) 242, 112 Am. St. 272.

[4] *Alfred W. Booth* v. *Burgess*, N. J., 65 Atl. 226.

members in the employ of persons with whom they have no trade dispute, by threats of fine and expulsion, for the purpose of coercing such employers into refraining from purchasing materials manufactured by a person with whom the union has a trade dispute.[5] It has likewise been declared unlawful for a combination of officers of a union to order strikes under threats of enforcing their orders by the infliction of effective penalties, where the object of these acts is not to further the interests of the members of the union, but to gratify the personal ambition or malice of the officers; and where the members thus coerced are employees of a carrier engaged in the transportation of the mail, such officers are guilty of conspiracy to obstruct and retard the mails, an offense punishable under Rev. Stat. U. S. §§ 3995, 5440.[6] And the carrier would unquestionably be entitled to an injunction against such acts.

2d. Even in case of a lawful strike, the imposition of, or threats to impose penalties, such as fines, suspension, or expulsion, to cause members to join in or continue on strike, would be unlawful, if the members on whom this pressure was brought to bear were under contracts to work for a definite time for the employer against whom the strike had been declared.[7] It is well settled that even simple persuasion cannot be employed to induce persons to join a strike, in violation of their contracts of employment, unless those employing the persuasion are acting in the exercise of some equal or superior right,[8] and *a fortiori* would methods of a coercive nature be unlawful.

3d. The remaining question for consideration is this: Can a labor union, in aid of a strike which it has declared, use against members unwilling to quit their employment such coercion as is incidental to the imposition of, or threats to impose fines, suspension, or expulsion, to force them to join the strike, or continue on strike after going out, where the strike itself is lawful, and the members against whom the coercive measures are directed are under no contract of employment for a definite time with the employer against whom the strike is declared but may quit the service at will? While this question is not free from difficulty and the decisions not in harmony, it is believed that both on principle and on the weight of authority, it must be answered in the affirmative. It will be considered (*a*) on the weight of authority; (*b*) on principle.

(*a*) In *L. D. Willcutt & Sons Co.* v. *Bricklayers' Benevolent & Protective Union*,[9] in which the question was considered at great length, it was held by a divided court that the imposition of, or threats of imposition of fines of a coercive nature by a union in furtherance of a strike, to force members to join the strike who were unwilling to do so, is an unlawful injury to the employer against whom the strike is in operation, although the strike itself is a lawful one, and the members of the union in his employ against whom the coercive measures are directed violate no contractual right of the employer by leaving, and that the employer is

[5] *Purvis* v. *United Brotherhood of Carpenters and Joiners*, 214 Pa. St. 344, 63 Atl. 585, 12 L. R. A. (N. S.) 252, 112 Am. St. Rep. 272.

[6] *In re Charge to Grand Jury*, 62 Fed. 828.

[7] *A. R. Barnes & Co.* v. *Berry*, 156 Fed. 72; *Wabash & C. R. Co.* v. *Hannahan*, 121 Fed. 563. And see *Branch* v. *Roth*, 10 Ont. Law (Can.) 284; and opinion of Sheldon, J., in *L. D. Willcutt & Sons Co.* v. *Bricklayers' Benevolent and Protective Union*, Mass., 85 N. E. 897.

[8] *Parker* v. *Bricklayers' Union No. 1*, 10 Ohio Dec. (Reprint) 458; *Jersey City Printing Co.* v. *Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, L. R. (1905) A. C. 239; *Knudsen* v. *Benn*, 123 Fed. 636; *Southern R. Co.* v. *Machinists Local Union*, 111 Fed. 490. And see *W. A. Fletcher Co.* v. *International Association of Machinists*, N. J., 55 Atl. 1077.

[9] Mass., 85 N. E. 897.

entitled to an injunction against such acts. This decision assumes to follow and is perhaps sustained by *Martel* v. *White*,[10] another Massachusetts case, which held that although a combination of manufacturers formed for the purpose of competing more successfully with outsiders in the same business is not unlawful, yet the enforcement of a by-law prohibiting members from dealing with those not members, by the imposition of fines so large as to be coercive in their nature, will give a right of action to a manufacturer not a member of the association, whose business is injured thereby; *Martel* v. *White* is practically identical in its facts and in the conclusions reached with *Boutwell* v. *Marr*,[11] a decision of the Supreme Court of Vermont, and gives unqualified approval to the reasoning of that Court. On the other hand there are a number of decisions involving labor disputes which are squarely in conflict with the Willcutt case, and others which at least inferentially support them. Thus in *Jetton-Dehkle Lumber Co.* v. *Mather*,[12] a decision of the Florida Supreme Court, it was held that an employer of labor is not entitled to an injunction to prevent officers and members of a union, acting in furtherance of a lawful strike, from fining or expelling, or threatening to fine or expel members, in order to prevent them from working for such employer; that courts will not interfere with labor unions in the peaceable enforcement of their rules. In *Longshore Printing & Publishing Co.* v. *Howell*,[13] it was held that the ordering by officers of a union of its members to cease working for one against whom a justifiable strike had been declared, under penalty of being dealt with in accordance with the rules and by-laws of the union which provided for suspension or expulsion, was not in violation of a statute making it a misdemeanor for a person by threats, force or intimidation, to prevent an employee from continuing or performing his work, and that the employer was not entitled to an injunction against such acts. In *Mayer* v. *Journeymen Stone Cutters' Association*,[14] it was held that an injunction will not be granted an association of employers, to prevent a union from enforcing one of its rules whereby members who work for an employer with whom the union has a trade dispute are denounced as "scabs" and expelled. In *Gray* v. *Building Trades Council*,[15] it was held not unlawful for officers of a union to "order" their members to cease working on premises where complainant, with whom the union had a trade dispute, was engaged in doing work as a contractor, and that an injunction awarded him should be modified in so far as it prohibited such acts. This decision is scarcely distinguishable from the Florida case, and those similar to it herein cited. It is true that it does not appear from the opinion that the "order" was accompanied by threats of the imposition of a penalty, but the rules and by-laws of labor organizations invariably provide a penalty for disobedience of the orders of its duly accredited officers, and the order itself necessarily imports that non-compliance therewith will subject the offender to a penalty. In *Thomas* v. *Cincinnati R. Co.*,[16] a proceeding by a receiver to punish a labor union official for con-

[10] 185 Mass. 255, 69 N. E. 185, 64 L. R. A. 260, 102 Am. St. Rep. 341.

[11] 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803.

[12] 43 So. 590.

[13] 26 Ore. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

[14] 47 N. J. Eq. 519, 20 Atl. 492.

[15] 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753.

[16] 62 Fed. 803, 817.

tempt in wrongfully inciting employees of the railroad managed by the receiver to quit the service, and to enjoin the continuance of such acts, it was said by Judge Taft that officers of a union duly vested with authority to call strikes may order members, "on pain of expulsion from their union, peaceably to leave the service of their employer, because any of the terms of their employment are unsatisfactory." Inasmuch as this proceeding is not a controversy between a union and its members, but between an employer of labor and a union represented by its officers, it is a legitimate inference that the language used by Judge Taft was intended to apply to the latter species of controversy and was not intended to be limited to controversies between a union and its members where no rights of third parties were involved. In *Wabash R. Co.* v. *Hannahan*,[17] the court refused to grant an injunction on a bill filed by a railroad company to prohibit officers of a union from calling a strike and "compelling" its members in complainant's employ to quit the service, it appearing that the strike was for the purpose of obtaining better terms of employment. In this case it was urged that the acts of the officers were "subversive alike of the fundamental rights of the employer to manage his own business and of the employees to bestow their labor as they will." In answering this contention, the Court declared itself entirely in accord with the views of Judge Taft, (quoted in a preceding passage of this article), and in addition used the following language in disposing thereof: "This kind of argument enters deeply into the domain of political science, and might well be addressed to a body of constructive statesmen or men originally contemplating a labor organization. *It is an argument that would be pertinent against the organization of society into government.* [The italics are ours.] The will of the individual must consent to yield to the will of the majority, or no organization either of society into government, capital into combination, or labor into coalition can ever be effected. The individual must yield in order that the many may receive a greater benefit. The right of labor to organize for lawful purposes and by organic agreement to subject the individual members to rules, regulations, and conduct prescribed by the majority is no longer an open question in the jurisprudence of this country." In *Bohn Mfg. Co.* v. *Hollis*,[18] it was held that an agreement between members of a retail lumber dealers' association not to deal with any wholesale dealer who sells directly to customers not dealers, at a point where a member of the association is doing business, and containing provisions for notification to all members when the wholesale dealer makes such sale and for the expulsion of members who deal with him, is not unlawful, and such wholesale dealer cannot enjoin the sending out of such notices. The infliction of the penalty of expulsion, it was said, is not coercion. "It was wholly a matter of their own free choice whether they preferred to trade with plaintiff or the association." In *Mogul Steamship Co.* v. *McGregor*,[19] it was held that a combination of ship-owners, entered into for the purpose of securing all the freight shipped at certain ports, might, among other means to make the combination effective, prohibit their agents,

[17] 121 Fed. 563, 568, 571.

[18] 54 Minn. 2[illegible] 55 N. W. 1119, 21 L. R. A 337, 40 Am. St. Rep. [illegible]9.

[19] 23 Q. B. D. [illegible]8 (affirmed in 1902, A. C. 25, 66 L. T. 1, 40 W. [illegible] 337).

on pain of dismissal, from acting as agents for competing lines of ships. In *In re Charge to Grand Jury*,[20] Judge Grosscup charged in substance that officers of a union acting in combination, who call strikes under threats of enforcing their orders by the infliction of effective penalties, are not guilty of the offense of conspiring to retard and obstruct the mails, if they acted in good faith and for the purpose of advancing the interests of the union. It is thus apparent from a review of the decisions that the decided weight of authority is against the *Willcutt* case. Its authority is still further weakened by the exceptionally able dissenting opinion of Judge Sheldon, in which the Chief Justice concurred, and by the further fact that Judge Loring agreed with the reasoning of the dissenting opinion, but considered that the case was ruled by *Martell* v. *White* and that the doctrine of *stare decisis* must apply. "It would," he said, "be hard to measure the disastrous consequences to the administration of justice, if it were thought that a change in the personnel of the Court is to be the occasion of re-arguing what has been decided."[21]

(*b*) Having shown what the general trend of authority is, an attempt will be made to show how the question should be decided on principle, and in reaching an intelligent conclusion it is necessary at the outset to ascertain with precision what the primary rights of the parties in contests of the character under consideration are, and also the relation of these rights to each other. The right of the employer may be described as the right to a free labor market, to have labor flow freely to him,[22] in other words, the right to employ or to retain in his employ those who are willing to work for him, upon such terms as may be mutually agreed upon.[23] The right of employees, members of a union, so far as the matter under consideration is concerned, is the right of persons not under contract to serve for a definite time, to strike—that is to quit their employment by concerted action—for the purpose of obtaining better terms of employment, as, for instance, shorter hours of labor or an increase of wages, and to use all means not in themselves unlawful nor inconsistent with the rights of others, in order to render the strike effective,[24] the latter right being necessarily involved in the right to strike. The right to strike for the purposes and under the conditions mentioned is so comprehensive and compelling in its nature, that, leaving out of consideration a limited number of earlier decisions the rulings in which are probably attributable to the influence of the harsh and tyrannical English statutes relative to laborers and which have long since been repudiated, no reported decision

[20] 62 Fed. 828.

[21] See opinion of Loring, J., 85 N. E. at page 910.

[22] *Jersey City Printing Co.* v. *Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Atkins* v. *W. A. Fletcher Co.*, 65 N. J. Eq. 658, 55 Atl. 1074; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *L. D. Willcutt & Sons Co.* v. *Bricklayers' Benevolent and Protective Union*, Mass., 85 N. E. 897; *Iron Moulders' Union* v. *Allis Chalmers Co.*, 166 Fed. 45; *Quinn* v. *Leatham* (1901), A. C. 495, 70 L. J., P. C. 76, 85 L. T. 289.

[23] *Maryland Lodge* v. *Adt*, 100 Md. 238, 56 Atl. 721, 68 L. R. A. 252; *Vegelahn* v. *Guntner*, 157 Mass. 62, 44 N. E. 1077, 57 Am. St. Rep. 443; *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 44, 42 L. R. A. 407; *Brennan* v. *United Hatters of North America*, 73 N. J. Eq. 729, 65 Atl. 165, 9 L.R.A. (N.S.) 254; *Frank* v. *Herold*, N. J. Eq. 443, 52 Atl. 153; *Master Stevedores' Association* v. *Walsh*, 2 Daly (N. Y.) 1; *Purvis* v. *United Brotherhood of Carpenters and Joiners*, 214 Pa. St. 344, 63 Atl. 585, 12 L. R. A. (N. S.) 242, 112 Am. St. Rep. 272.

[24] *Karges Furniture Co.* v. *Amalgamated Woodworkers' Union*, 165 Ind. 421, 11 N. E. 877, 2 L. R A. (N. S.) 788; *Goldfield Consolidated Mines Co.* v. *Goldfield Miners' Union*, 159 Fed. 500, 519. And see *Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477; *Morris Coal Min. Co.* v. *Guy*, 14 Pa. Dist. Rep. 600.

can be found which in the slightest degree limits it. This right has been announced by the courts with such frequency that any citation of authority therefor is mere waste of time, except, perhaps, in a few special instances where it might be and with some degree of plausibility has been argued that it is subject to limitations. The special instances to which allusion is made are those in which it was urged that the right is limited or non-existent, where the employer is a receiver, or where it was urged that the strike was prohibited by some general legislation, such as the Sherman Anti-Trust Act, the Interstate Commerce Act, or the statute making it an offense to retard the mails. It has been uniformly held, however, in the face of these contentions, that the right is in no way affected by the fact that the employer is a receiver, managing property under the control of the court,[25] nor by the Sherman Anti-Trust Act, although the cost of transporting interstate freight would be enhanced thereby,[26] nor by the Interstate Commerce Act, though the strike might incidentally result in interference with the interchange of interstate traffic with connecting lines,[27] nor by section 3995 of the Revised Statutes of the United States (making it an offense to willfully retard the mails) even though the mails may be incidentally retarded by the strike.[28] It is beyond controversy, therefore, that under any and all circumstances, the right of employees not bound by contract to serve for a definite term, to engage in a strike for better terms of employment, is superior to the right of the employer to a free labor market.

Having ascertained what these primary rights are, and their relation to each other, the way is cleared for a consideration of the principal question involved, *i. e.*, whether, in aid of this superior and unqualified right to strike, the union and its members may, without infringing on the employer's qualified and inferior right to a free labor market, use the enginery of its rules and by-laws and the accompanying penalties to force into joining the strike, or continuing on strike, such members as are unwilling to quit their employment, and cast in their lot with the common cause or, to borrow a phrase from the parlance of the betting ring, would rather "welch" than perform their obligations to their fellow members.

Now, the general rule is well settled that a labor union or other voluntary association has the right to make rules and by-laws for the government of its members and the regulation of their conduct in respect of matters affecting the common welfare,[29] and to punish its members, by fine, suspension or expulsion, according to the gravity of the offense, for disobedience of such rules and by-laws, or orders made in accordance therewith by officers vested with the requisite authority,[30] or for con-

[25] *Arthur* v. *Oakes*, 63 Fed. 310, 321, 11 C. C. A. 209, 25 L. R. A. 414; *Thomas* v. *Cincinnati R. Co.*, 62 Fed. 803; *United States* v. *Kane*, 23 Fed. 748; *In re Doolittle*, 23 Fed. 544. And see *United States* v. *Weber*, 114 Fed. 950.

[26] *Hopkins* v. *United States*, 171 U. S. 578, 593.

[27] See *Toledo, etc., R. Co.* v. *Pennsylvania Co.*, 54 Fed. 730; *Wabash R. Co.* v. *Hannahan*, 121 Fed. 563; *Arthur* v. *Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

[28] *United States* v. *Debs*, 65 Fed. 210. See also *In re Charge to Grand Jury*, 62 Fed. 828.

[29] *Jetton-Dehkle Lumber Co.* v. *Mather*, Fla. 43 So. 490; *Longshore Printing and Publishing Co.* v. *Howell*, 26 Ore. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464; *Burns* v. *Bricklayers' Benevolent and Protective Association*, 14 N. Y. Suppl. 361, 27 Abb. N. C. 20 (affirming 10 N. Y Suppl. 916, 24 Abb. N. C. 150); *Erdman* v. *Mitchell*, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783; *Brown Mfg. Co.* v. *Local Union No.* 76, 12 Ohio, Dec. N. P. 753; *Patterson* v. *Building Trades Council*, 11 Pa. Dist. Rep. 500; *Wabash, etc. R. Co.* v. *Hannahan*, 121 Fed. 563. And see 4 CYC *Associations*, 305; *Brennan* v. *United Hatters of North America*, 73 N. J. L. 229, 65 Atl. 165, 9 L. R A. (N. S.) 254.

[30] *Jetton-Dehkle Lumber Co.* v. *Mather*, Fla., 43, So. 590, *Burns* v. *Bricklayers' Benevolent and Protective Union*, 14 N. Y. Suppl. 361, 27 N. C. 20 (affirming

duct in violation of the fundamental objects of the union,[31] the right being subject to the limitation that it cannot make and enforce rules and by-laws which are in contravention of the laws or of public policy.[32] And the constitution, rules and by-laws of a union constitute a contract between the union and its members.[33] This right to make and enforce rules and by-laws for the government of its members is essential to the existence of any union or association, for if each member may determine his own line of conduct for himself without responsibility of any character to the organization to which he belongs and owes his allegiance, then it is in a large measure shorn of the power to accomplish the objects for which it was formed. To repeat the language of Judge Adams, quoted in a preceding paragraph of this article: "The will of the individual must consent to yield to the will of the majority, or no organization either of society into government, capital into combination, or labor into coalition can ever be effective. The individual must yield in order that the many may receive a greater benefit."[34] Also pertinent in this connection is the following quotation from a recent decision: "The risk of fines and expulsion is one voluntarily assumed by the members entering the union, and if no longer willing to pay the price, if the advantages to be derived are not equal to the burdens assumed, each member has a perfect right to withdraw from the union."[35] Indeed, this general right of a union to make, and enforce by penalties, rules and by-laws for the government of its members, has never been denied, where the rights of the union and its members only are involved. Can it be held unlawful, then, as between a union and its members for the union to impose penalties, in accordance with its rules and by-laws, on members who refuse to quit work in aid of a justifiable strike, or to continue on strike, after going out? The answer is that the lawfulness of such action by the union as between itself and its members is amply sustained by many well considered decisions,[36] and denied by none, nor could any valid reason be assigned for such denial. It is hardly possible to conceive of a case where the right of a union to exercise disciplinary measures would be stronger. Nor can any sound reason be advanced why this right should be restricted or denied, merely because the employer may suffer incidental damage thereby. This is demonstrated by the foregoing review of the decisions, which establishes beyond

10 N. Y. Suppl. 916, 24 Abb. N. C. 150); *Master Stevedores' Association* v. *Walsh*, 2 Daly (N. Y.) 1; *Thomas* v. *Cincinnati, etc., R. Co.*, 62 Fed. 803; *Wabash R. Co.* v. *Hannahan*, 121 Fed. 563; *Longshore Printing and Publishing Co.* v. *Howell*, 26 Ore. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464; *Moores & Co.* v. *Bricklayers' Union*, 23 Ohio W'kly Law Bul. 48, 10 Ohio Dec. 665; *Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663; *Perrault* v. *Gautier*, 28 Can. Sup. Ct. 241 (affirming 6 Q. B. 65).

[31] *Otto* v. *Tailors' Protective Union*, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; *Beaseley* v. *Chicago Journeymen Plumbers' Association*, 44 Ill. App. 278; *Brennan* v. *United Hatters of America*, 73 N. J. L. 729, 9 L. R. A. (N. S.) 254.

[32] See *Schneider* v. *Local Union No. 60*, 116 La. 270, 40 So. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. Rep. 549; *Purvis* v. *United Brotherhood of Carpenters and Joiners*, 214 Pa. St. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642; *Toledo, etc., R. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. (N. S.) 387; *Waterhouse* v. *Comer*, 55 Fed. 149, 19 L. R. A. 403; *Parker* v. *Toronto Musical Protective Union*, 32 Ont. (Can.) 305.

[33] *Brown* v. *Stoerkel*, 74 Mich. 269, 41 N. W. 925, 3 L. R. A. 430; *Connell* v. *Stalker*, 48 N. Y. Suppl. 77, 21 Misc. 609; *Harrington* v. *Sendall* (1903), 1 Ch. 921. And see 4 CYC *Associations*, 305; *Levy* v. *Magnolia Lodge No. 29, I. O. O. F.*, 110 Calif. 297, 42 Pac. 887; *Hammerstein* v. *Parsons*, 38 Mo. App. 332; *Weatherly* v. *Montgomery County Medical Society*, 76 Ala. 576.

[34] *Wabash R. Co.* v. *Hannahan*, 121 Fed. at p. 571.

[35] *Jetton Lumber Co.* v. *Mather* (Fla.), 43 So. 590.

[36] *Thomas* v. *Cincinnati R. Co.*, 62 Fed. 803, 807; *In re Charge to Grand Jury*, 62 Fed. 828; *Master Stevedores' Association* v. *Walsh*, 2 Daly (N. Y.) 1; *Longshore Printing & Publishing Co.* v. *Howell* 26 Ore. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464; *Jetton-Dehkle Lumber Co.* v. *Mather*, Fla., 43 So. 590.

controversy the following rules: *1st*, The right to maintain a lawful strike is superior to the employer's right to a free labor market. *2d*, A labor union has the general right to make, and enforce by suitable penalties, rules and by-laws for the government of its members and the regulation of their conduct affecting the common welfare. *3d*, In the exercise of this general right, it is lawful as between the union and its members for the union to enforce penalties on insubordinate members, in accordance with its rules and by-laws so providing, for not joining in a justifiable strike, or for not continuing on strike after going out. *4th*, The rules and by-laws of the union constitute a contract between the union and its members. *5th*, A contract between a union and its members, through its rules and by-laws, binding them to aid in a lawful strike by joining therein when so ordered, is not unlawful or against public policy.

It follows, then, that in order for the courts to hold it unlawful for the union, in furtherance of a lawful strike, to impose or threaten to impose on its members, in accordance with its rules and by-laws so providing, penalties, such as fines, suspension or expulsion, for the purpose of compelling them to join in, or continue on strike, it is necessary to accept as sound law the following proposition: Notwithstanding the facts that the right of the union and its members to maintain a lawful strike—to obtain better terms of employment—is superior to the right of the employer to a free labor market, and that the refusal of insubordinate members to join in or continue on such strike when declared is in violation of a valid contract between them and the union binding them to do so, and lessens its power to render effective the exercise of this superior right, yet it is a violation of the employer's qualified and inferior right to a free labor market for the union to use means lawful as between it and its members—and the only means it possesses having a particle of efficacy—in order to prevent such breach of contract, in derogation of its superior right. The mere statement of this proposition carries with it its own refutation, and there is no possible point of view from which it can be upheld.

The Trial of Madar Lal Dhinagri

THE notable trial of Dhinagri, the East Indian student who murdered Sir W. Curzon Wyllie in London under such atrocious and revolting circumstances, was witnessed by Mr. Thomas Leaming of the Philadelphia bar, who furnished the *Public Ledger* of that city with an account from which we publish an extract.

The trial took place at the Central Criminal Court, generally known as the Old Bailey, a modern building occupying the site of the old Fleet Prison.

The opening of court is a singular ceremony. From the rear of the bench enter two or more sheriffs, each dressed in a dark blue robe with fur trimmings, and each carrying a bouquet of bright flowers. Then comes the undersheriff, dressed in black velvet, knee-breeches, ruffled shirt-front, cocked hat under his arm and a small sword at his side.

Those persons back into the room with their faces toward his Lordship, whom they thus usher to his place. He also carries a bouquet, and on his desk, as well as on the

desks of the sheriffs, are little heaps of dried aromatic herbs, thickly strewn over the carpet of the raised dais on which the Court sits. The ancient object of the bouquets and herbs was to guard against the Court contracting what was known as "prison fever," and the custom has survived the thorough disinfection of prisons and prisoners by modern chemicals.

The Lord Chief Justice is dressed in a scarlet gown with a dark blue sash over one shoulder, and, of course, wears the inevitable wig, as also do the barristers, although their gowns are black. His chair is an enormous structure, requiring a little railroad track to enable it to be rolled forward close enough to his desk. With the oak paneled walls and the soft rays falling from the skylight the highly colored group on the bench makes an effective picture.

In a few moments Dhinagri's case was called, and, like a "jack-in-the-box," he suddenly appeared in the dock from below with his guardians. He is a little yellow youth with an Oriental cast of features and silky black hair and moustache. His gold-rimmed spectacles leave the eyes hardly discernible, but so far as can be seen they are of a glittering black. His meagre physique was clothed in ordinary gray, and one hand was thrust into the breast of his coat, suggesting the idea that he might have there a concealed weapon or perhaps poison, although, of course, he had been carefully searched and guarded.

The clerk of the arraigns asked him whether he pleaded guilty or not guilty. He had already stated that he was not represented by counsel or a solicitor. His answer was almost impossible to understand, as he speaks rather broken English, and the newspapers gave various versions of it. Apparently, however, what he said was to the effect that he was not guilty from his point of view because the murder was an act of patriotism.

The Lord Chief Justice volunteered leave for the prisoner to sit down, and he afterward sat perfectly motionless during the ninety minutes which elapsed until he was sentenced to death. His head was slightly bent to one side, conveying the impression that, owing to his imperfect knowledge of English, his distance from the witnesses and the poor acoustics of the room, he had difficulty in grasping all that was said, although the rapid winking of his black-lashed eyelids indicated whenever his intelligence comprehended the different phases of the trial.

He was asked if he had any objection to the jury, who were already seated in the box, and answered in the negative. Each juror was then separately sworn to try the case of "Our Sovereign Lord the King" against Madar Lal Dhinagri, and thereupon the Attorney-General opened the case in a detailed speech occupying half an hour.

He described minutely how the prisoner had purchased two revolvers and a dagger, which were exhibited, had practised in a pistol gallery at a target about the size of a man's head, which was produced with the bullet holes in it, had gone to the evening reception where Sir Curzon Wyllie, who had befriended the prisoner and his family, was a guest, and how, immediately after his victim had stepped into an anteroom, while Lady Wyllie passed down the staircase, the prisoner had fired four bullets through Sir Curzon's head, had, immediately after, killed Dr. Lalaca, an Indian physician who endeavored to interfere, and had then tried to kill himself, but without success.

The witnesses were then called in rapid succession, and their examination was exceedingly brief and very leading, as in all English courts, although somewhat slow, owing to the inveterate habit of English judges to write down every word a witness utters, indicating by the word "Yes," when this laborious record is complete and the court ready for a fresh question.

The judge rigorously confined the examinations to the absolutely essential, and promptly stopped the slightest digression or any unnecessary detail. In fact, it seemed as though this was rather carried to an extreme, for the untrained witness may often bring out an important point embedded in much verbosity.

At the conclusion of each direct examination Dhinagri was asked if he wished to cross-examine. At first he replied by a gutteral "No," but later by a mere shake of the head, and his manner was sulky and to the last degree insolent and defiant.

At the conclusion of the evidence the Lord Chief Justice asked the prisoner if he desired to call witnesses or if he had anything to say. He had no witnesses, and it was almost impossible to understand his response to the other question; but it amounted to this, that he had something to say which he could not remember, but had reduced to writing, and which was in the possession of the police.

The Lord Chief Justice asked him whether he preferred to make the statement from the

stand, which might have made much difference, for a mere unsworn statement is not evidence, whereas, if the prisoner is sworn as a witness, what he says becomes part of the record.

What his Lordship meant by the question was to distinguish between a mere statement, in the nature of a plea for mercy, or evidence going to the merits of guilt or innocence; but this was not explained to the prisoner, who was simply asked from which location he desired to speak, which would not convey to a man without counsel any intimation of the difference between an unsworn statement and testimony under oath. It was quite apparent that the prisoner and the presiding judge did not fully understand each other at this point of the trial.

However, in this particular case it made no difference, as it was inevitable the man should be sentenced as he richly deserved,—and it was all over before luncheon.

A long statement which the prisoner had prepared was then read by the clerk of the court, who stumbled over the manuscript, and the effect of the revolutionary diatribe was quite lost, although enough of it was audible to be exceedingly offensive to a British court and audience who heard their country charged with the exploiting of India and the murder of innumerable Indian subjects.

The Lord Chief Justice then charged the jury in a most sensible manner, avoiding all reference to the sensational and political aspects of the assassination, saying that, in the eye of the English law, there is no such thing as justification for murder, and that the prisoner had atrociously killed his friend and benefactor wholly without cause. The jury put their heads together for about one minute, when the foreman rose and delivered the verdict of "Guilty."

There are no degrees of murder in England, but in cases where a weak intellect or extreme extenuating circumstances render hanging too severe a penalty the Home Secretary exercises a power of commutation.

Dhinagri was then ordered to stand up and was asked whether he had anything to say why sentence should not be passed upon him. With a venomous snarl he replied (as well as could be understood): "You can do what you like with me. You white people are all-powerful now, but, remember, we shall have our time in the future."

Then followed absolute silence for two minutes—a silence in which the breathing of persons near was audible.

The purpose of a piece of black cloth lying on the desk of the Lord Chief Justice then became apparent, for it was the "Black Cap." One naturally thinks, from its name, that this is a kind of headgear having some relation to the shape of a man's head. On the contrary, it is a plain piece of limp black cloth, about one foot square, which the judge merely places on the top of his wig, where it rests quite casually, perhaps at a rakish angle, the four corners hanging down and the whole producing a somewhat ludicrous effect.

Neither judge, jury nor audience rose for the sentence of death—as is the practice in America—but all remained seated, while the Lord Chief Justice pronounced the sentence that Dhinagri should be hanged by the neck until he is dead and be buried at the place of execution. At this stage the chaplain appeared at the elbow of the Lord Chief Justice and invoked mercy upon the soul of the prisoner.

Thereupon Dhinagri brought the back of his hand to his forehead with the Indian gesture of "salaam," saying, with decided impertinence of manner, "Thank you, my Lord; I am proud to have the honor of giving so humble a life to my country."

Then Dhinagri and his three guards disappeared downward from the dock, much as rabbits scurry into a burrow, and in two minutes the Lord Chief Justice and his escort, as well as the small audience, had withdrawn, leaving the courtroom empty except for one or two newspaper reporters who were completing their notes.

The Late Judge Gaskill of Massachusetts

THE death of Judge Francis Almon Gaskill of the Superior Court of Massachusetts, at the age of sixty-three, is mourned not only in Worcester county, which takes pride in having given him birth, but throughout the old Commonwealth. In Boston the most prominent members of the bench and bar, as well as the executive heads at the State House, noted Judge Gaskill's death with much sorrow, praising his marked attainments as a jurist and his rare ability in charging a jury. He died of heart trouble at York Cliffs, Maine, where he had gone to pass the summer recess, on July 16, only a few hours after writing a long letter to his son in which he had declared himself to be in the best of health.

He was born January 3, 1846, in that part of Mendon, Mass., now known as Blackstone, the son of Albert Gaskill and Anna Smith Comstock. Attending school in Mendon, and completing a course at Woonsocket (R. I.) High School, he entered Brown University, from which institution he was graduated in 1866, at the age of twenty. For a year he served as private tutor in the family of Clement B. Barclay, in Newport, and then entered Harvard Law School, remaining there a year and a half, when he went to Worcester and continued the study of law in the office of Hon. George F. Verry.

After his admission to the bar, March 3, 1869, an association was formed for the practice of law, under the style of Verry & Gaskill, which continued under favorable auspices until the death of Mr. Verry in 1883. He then became associated with a stepson, Col. Horace B. Verry, and for ten years this firm continued. He specialized in corporation law, and during this time was District Attorney for the middle district of Massachusetts, holding that office from 1887 to 1895, when he was appointed by Gov. Greenhalge Associate Justice of the Superior Court.

Judge Gaskill served the city of Worcester as a member of the common council in 1875–1876, and as a director of the free public library for six years and as president of the board in 1888.

His fondness for books, of which he possessed a rare assortment, brought him into a circle of various literary and social clubs. He was vice-president and a director of the People's Savings Bank, and director of the State Mutual Life Assurance Co. In 1899 Brown University gave him the degree of LL.D., and later paid him the honor of placing him upon its board of fellows. He was a member of its board of trustees from 1888 to 1904. He became a director of the Worcester Natural History Society in 1882.

In 1893 he was a candidate for the Republican nomination for Attorney-General, but it became apparent that the nomination for State Treasurer was likely to come to western Massachusetts and he withdrew from the canvass.

Judge Gaskill was first married in Providence, October 20, 1869, to Katherine M. Whittaker. She died January 25, 1889, leaving two children, Mary M., and George A. Gaskill. Judge Gaskill afterward married Josephine L. Abbott of Providence, July 12, 1892. No children were born of this marriage.

At a meeting of the Worcester County Bar Association called to take appropriate action after his death, Hon. Herbert Parker, former Attorney-General of Massachusetts, seconded the motion that the Association attend the funeral in a body, in the following words:—

"Not here or yet may we speak words of adequate tribute of the great judge and lawyer, of a generous and noble-hearted friend. I dare not trust heart or tongue to speak further now.

"So great and generous was his heart, that none of us may say we were first chosen in his heart. None of us owed so much to him as I. I am here to give evidence of the sentiments of love, and second the motion of Col. Johnson."

President W. H. P. Faunce of Brown University, in his eulogy delivered at the funeral services in Worcester, said:—

"The first impression our departed colleague made upon us was that of buoyant overflowing vitality. The farmer's boy had in earliest years laid in a stock of sturdy strength, of restless energy. And that overflowing strength was at the service of all who needed it. He delighted to put his strong shoulders under other men's burdens.

"Judge Gaskill was never so happy as when helping young men. He trusted men into

trustworthiness and loved them into lovable dispositions and noble careers. 'Virtue went out of Him' was written of our Lord, and truly we may say it of this His faithful servant.

"But one may say: Are these the virtues of a learned judge? Have we not rather thought of justice as blind, impersonal, coldly wise and inhumanly exact? If we have, then this noble life may correct our error and teach us to think more nobly of the sphere and function of human law. When Judge Gaskill mounted the bench he had the reputation of being a stern and inflexible judge. He blamed the evil-doer, and he righteously executed righteous laws. But he did this not as a mere recorder of sentences, but as a human being dealing with his fellow men. Perhaps no man of our time on the bench more finely combined the judicial and the human than did Judge Gaskill."

"On the bench," says the *Boston Transcript*, "his decisions reflected high courage. In the matter of injunctions he was prompt and accurate in his grasp of the principles of a case. Few of his decisions under this head or any other were ever set aside, their soundness being attested whenever referred to a higher tribunal." With this opinion the *Boston Advertiser* agrees, observing: "His decisions were rarely set aside, and thus throughout his career has been bred and made firm a public faith in him and his works in the law."

Judge Putnam's Views on the Reelfoot Lake Case

"THE principal cause of disaster to trains is the habit of getting behind time, and the principal cause of disaster in the courts is the same."

These words are taken from a communication sent to the Portland (Me.) *Press* by Judge William L. Putnam of the United States Circuit Court of Appeals, in which he expresses some views regarding legal procedure suggested by the recent miscarriage of justice in Lake County, Tenn., where the trial judge whose proceedings were afterward reversed pushed matters to an extreme in order to secure the conviction of eight persons accused of the murders at Reelfoot Lake.

This case, he writes, illustrates the ills of small counties. It is there impossible to obtain prosecuting attorneys of proper skill and experience. But the main difficulty here arose from the fact that the accused were entitled under the statute to 192 challenges, over one quarter the total number of persons qualified to serve as jurors in the county. The situation was also complicated by the fact that the whole county was inflamed against a corporation, on account of its summary disposal of fishery rights which had been enjoyed by individuals for more than one hundred years, and the question of the sympathy of jurors with the murderers came up. It was not at all strange, therefore, that the trial judge pushed his proceedings to an extreme:—

"Under the circumstances it is not at all strange that the Supreme Court of Tennessee said of the trial judge that 'he assumed control from the start' of the matter of selecting the grand jury. Of course under the circumstances I have described it would be almost impossible to obtain an indictment from any grand jury. Consequently he secured thirteen jurors by selecting them from the bystanders. It may well be presumed that he made this selection arbitrarily in view of in some way securing an indictment. To any one that follows thoroughly, it is also plain he went to the extreme of the law, and had to, in order to secure a verdict from a hostile county. . . . The wonder is not that the verdict was reversed but that the trial court was able to get any verdict at all."

Hence it is not the courts of Lake county that are to be condemned, says Judge Putnam, but rather the constitution of these small counties by the legislature. Moreover,—

"The great cause of what are called failures of justice is in the legislature. A striking illustration of that fact is found in the Congressional *habeas corpus* act in 1872, which was so loosely drawn that there was no possible way of preventing any person postponing execution of criminal judgment by appealing

through various courts, and finally to the Supreme Court of the United States. The most serious of unjustifiable delays which have occurred have occurred in this way. The act provided no possible method by which these appeals could be prevented, although it was apparent to every judge that they were of the most frivolous character. Congress, within the last two years, has remedied this in part, but, through its careless legislation, only in part; so that, by going through another channel, the criminal has the same opportunity as before.

"A more striking illustration of this fact is in section 335 of the Congressional codification of penal laws of the United States, approved last March, which section provides that all offenses which may be punished for a term exceeding one year shall be deemed felonies. This is a radical change in the law, as the great mass of crimes under the federal statutes were misdemeanors, and the difficulties in the way of proceeding with the trial of felonies are very much greater than with trying misdemeanors."

With regard to the general character of our judicial procedure, there are some localities, as the state of Massachusetts, for example, "where judicial justice is advanced as much as in any part of the world." Even Parliament has had to grant universal appeals, of late, in criminal trials. He concludes:—

"It is not to be forgotten that it is not always wise to make litigation too easy. Somebody who was steamboating as a passenger down the Mississippi river spoke to the captain of the steamer of the crooks and eddies. The captain replied: 'Stranger, you must thank the Lord for these; otherwise the whole country would have been out in the Gulf of Mexico centuries ago.' Nevertheless, while it is not wise to make litigation too facile, it is certain that there are existing evils as there always are in all human matters which can be remedied; and it is also more certain that there will be new evils springing up in lieu of these now existing unless vigilance is constantly exercised in all directions."

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Aërial Navigation. "The Law of Aërial Navigation." By Lyttleton Fox. *North American Review*, v. 190, p. 101 (July).

"Should the state, by the exercise of the right of domain, take the air above a certain fixed height and devote it to the purposes of a public highway, this would seem to be a partial solution of the problem of trespass. It would not be a complete solution, because as matters stand at present the aëroplanist, in order to make a landing, must arise and descend on a slanting course, and should this continue to be necessary trespasses would be committed while passing between the earth level and the upper air. The project of condemning the air, while in a sense novel, would be perfectly feasible from a legal standpoint."

Animals. "The Dog and the Potman: or 'Go it, Bob.'" By Sir Frederick Pollock. 25 *Law Quarterly Review* 317 (July).

A reply to a recent article in 22 *Harv. L. Rev.* 465 (see 21 *Green Bag* 284, June).

"The somewhat discursive judgments delivered by the five learned judges who took part in deciding *Baker* v. *Snell* (1908) 2 K. B. 352, 825, 77 L. J. K. B. 1090, in the Divisional Court and the Court of Appeal, have aroused Mr. Thomas Beven to a drastic utterance in the May number of the *Harvard Law Review*. Now Mr. Beven, as our readers know, is a specially learned and expert critic on everything connected with the law of negligence, including the cases of 'extra-hazardous risk,' as Mr. Justice Holmes names them, in which negligence need not be proved. When such a critic attacks the Court of Appeal at large, and publishes his argument in a jurisdiction where English decisions, though constantly quoted with respect, are not binding authorities, it is a matter not to be neglected."

Capital Punishment. "Capital Punishment." By Cosmo G. Romilly. *Westminster Review*, v. 172, no. 6, p. 96 (July).

"Is it right to put men to death on circumstantial evidence, as the evidence in murder trials is nearly always of necessity? People say that innocent people are never put to death, but most people put too much trust in circumstantial evidence. In the Grant-Duff memoirs there is a story told of Lord Denman, of which the following is the gist: He wished to send some wine one day to a friend older than himself, and gave instructions accordingly. The wine, however, was put into bottles which had had poison in

them. Now Lord Denman points out that if his friend had drunk the wine and died, it would have been a clear case of murder, as not one of his own bottles was poisoned and his friend's will was in his favor. Circumstantial evidence may be most misleading."

Carriers. See Public Service Corporations.

Contempt. "The Summary Process to Punish Contempt." By John Charles Fox. 25 *Law Quarterly Review* 238 (July).

The writer draws these conclusions:—

(1) "That in the fourteenth century and onwards—perhaps down to the early part of the eighteenth century—the jurisdiction of the King's justices to punish contempts of a criminal nature summarily was limited to offenses, not heinous, committed in court in their actual view, and to breaches of duty by officers of justice.

(2) "That in the eighteenth century the summary jurisdiction was held to extend to all contempts whether committed in or out of court."

Corporations (Scotland). "Joint Stock Enterprise in Scotland Before the Companies Acts." By J. Roberton Christie. 21 *Juridical Review* 128 (July).

"The genius of the Scots law of 'Society'—based as it was upon civil law conceptions, and amenable to Continental and especially to French influence—was much more congenial to the development of the idea of a company as an entity independent of its constituent members and trading upon the credit of its own resources than was the common law of England. . . . A line of development was entered upon which—had circumstances been more favorable to its continuance than they proved to be—might have led to the growth in Scotland of a full-blown system of non-statutory company law, in which a place might have been found for nearly all the latest developments of modern company law."

"Is the Creation of a Floating Charge Competent to a Limited Company Registered in Scotland?—II." By A. J. P. Menzies. 21 *Juridical Review* 159 (July).

"Against the competency of a floating charge in the case of a Scotch company there is nothing to be said on the question of policy. It is a form of raising money greatly valued by English companies—'too convenient a form of security to be lightly abolished.' . . . It is hardly conceivable that Scotch influence in Parliament could have purposely excluded Scotch companies from the use of this favored commercial expedient of English companies."

See Interstate Commerce, Public Service Corporations, Railways.

Criminology. "Race Improvement by Control of Defectives (Negative Eugenics)." By Alexander Johnson. *Annals of the American Academy*, v. 34, no. 1, p. 22 (July).

"I think neither restrictive marriage laws, elimination by a painless death, nor wholesale sterilization can be applied, at any rate within the next generation or two, so as to have any serious effect in the reduction of the number of the degenerate classes. But I think a process can be applied, and is now being applied, partially, in many states, with remarkable success, that is entirely within our power to apply thoroughly. I think that the whole class of the feeble-minded and the epileptic, say two-fifths of one per cent of the whole population, may be at once segregated and taken into permanent, maternal care by the good mother state."

"Political Assassination in London." By J. D. Rees. *Fortnightly Review*, v. 86, p. 272 (Aug.).

"We have often heard the expression, 'A man without an enemy.' As a matter of fact, there are few such amongst public men; but it is probable that the late Sir Curzon Wyllie was such a man. For my part, I have no doubt whatever that the assassin, inflamed with anarchical literature and political fanaticism, went out to an assembly of Anglo-Indians to shoot the most prominent person with whom he came in contact."

See Immigration, Insanity.

Damages. See Tort.

Declaration of London. "The Laws of Naval Warfare." By D. Oswald Dykes. 21 *Juridical Review* 113 (July).

"Never before, perhaps, did the British Government throw the weight of its influence so strongly on the side of neutrals. And the relief given to neutrals by the rules which we have considered is in some respects considerable. The keynote of the Instructions to the British Delegates was in the sentence already quoted, that 'what the commerce of the world above all desires is certainty,' and it is mainly in the settlement of open and disputed questions that the trade of the world will benefit.

"To the jurist, this Declaration has something of the interest of a codification of a part of the Law of Nations which before was nebulous and uncertain."

Likewise in an appreciative strain is this able review of the work of the Conference:—

"International Prize Law and the Declaration of London." *Edinburgh Review*, v. 210, p. 162 (July).

"The more nations are united as to the form in which prize law should be applied, the less is the need for the intervention of the international court, whose decisions will not be obtained without untold loss of time; and therefore those who hold that it is desirable that there should be a consensus of international opinion in maritime prize law will do well to endeavor to secure from time to time amendments in the Declaration of London, which can only be regarded as the beginning of an international code."

Divorce. See Marriage and Divorce.

European Politics. "The Year in France." By Stoddard Dewey. *Atlantic*, v. 104, p. 245 (Aug.).

"The year in France—from May, 1908, to May, 1909,—has seen two events such as mark the turning of the tides of history.

"One is the Agreement between Germany and France concerning Morocco. While it leaves Germany unhampered in her domination of Central Europe as far as Constantinople, it comes as a final recognition of the immense colonial dominion which France has won for herself during the past quarter of a century.

"The other is the strike of 'state functionaries,' and their relations with the revolutionary General Confederation of Labor. It is one sign among many of the disorganizing of the Parliamentary Republic in France, and, perhaps, of a spontaneous reorganizing of society in depths which factitious political government has reached only to trouble."

Examination of Prisoners. "The 'Third Degree'—Its Origin and History." 18 *Bench and Bar* 9 (July).

"While we are not ready to go to the length of advocating the prohibition of all preliminary examination by officers of the peace, the license now permitted ought, in our judgment, to be curtailed. The practice should be placed under such definite statutory restrictions that the natural and constitutional rights of the weakest and most ignorant prisoner may be adequately protected."

Government. "The Cult of the Unfit." By E. B. Iwan-Muller. *Fortnightly Review*, v. 86, p. 207 (Aug.).

Of leading importance as a study of the proper functions of the government in relation to the private citizen, and one of the most notable of the magazine articles of the month, is this article giving a drastic exposition of the extent to which the age sets a premium on mediocrity and inefficiency. Its tonic plea for the substitution of more enlightened opinions for the false metaphysical idealism ruling so much of our politics and jurisprudence should not pass unheeded.

"When the future of his own race is in question," says this writer, "man ignores the teaching of nature and leaves the fitness of future generations to Providence or to chance. As with the physical body, so with the body-politic. . . . The development of the doctor and of the politician is subject to the same conditions. But there is a marked difference in the rate of progress. Both pass, or should pass, through the different stages of empiricism, metaphysics, and science. . . . We are emerging from the purely empirical stage and are just entering the metaphysical, the land of the mirage, the home of the ideologue. The political empiric applied his remedies after the fashion of the primitive herbalist. He administered to his patient what experience had taught him 'would do him good.' . . . In his track came the ideologue, with his unproved, untried, and often imaginary scheme of causes and effects, related in his mind by a nexus which no amount of experience would ever break. Talleyrand tells us that during the Consulate he was astonished to see some of the most violent of the Jacobins leaving the study of Napoleon. Napoleon said, 'Ah, you do not know the Jacobin. There are two classes of them—*les sucrés et les salés*. The one you just saw come out was a *salé;* with these I do what I wish: no one better fit to defend all the daring acts of a new Power. Sometimes it is necessary to stop them, but with a little management it is soon done; but the *sucrés* Jacobins—they are ungovernable. With their metaphysics they would ruin any Government.' Today is the day of the *sucré* Jacobin. He is particularly interested in the problem of poverty and the inequality of wealth. His fellow, the *salé* Jacobin, would solve the problem of inequality by rushing at his neighbor with a bludgeon in his hand and shouting, '*Sois mon frère, ou je te tue*'; and he would settle the unequal distribution of wealth on the same simple and effective principle. The other, however, being cursed with a political conscience, seeks to justify the same ends by metaphysical reasons. The mental process is not very recondite. The problem which presents itself may be stated thus: Poverty and its attendant miseries are due to the struggle for life. If there were no struggle there would be no resultant evil. Inequality in like manner is due to competition, a phase incident to the struggle; if there were no competition there would be no inferiority. . . .

"The new trades-unionism consciously or unconsciously aims at the establishment and endowment of mediocrity by the elimination of competition. . . . Upon a thousand platforms orators declaim as if the whole policy of a great Empire ought to be determined solely by the duty of administering to the wants of its less fit and, therefore, of its less efficient members." This writer condemns what he calls "the cult of the unfit, as taught by our Radical Socialists, and as translated into practice by the present Chancellor of the Exchequer."

Closely correlated with the foregoing topic is the question of an elective or appointed judiciary. Needless to say, the elective judiciary is less certain to succeed in maintaining the *régime* of competition and more likely to set up an idealistic construction of statutes, where class interests are supposed to be involved, than a judiciary less directly reflective of public opinion. The qualities of an elective judiciary are discussed in—

"The Elective Judiciary and Democracy." By Hal W. Greer. 43 *American Law Review* 516 July–Aug.).

"Popular judges render popular decisions; popular decisions reflect transitory popular sentiment—the antithesis to law and justice.

"That we have inadequate laws when some of our citizens are permitted fraudulently

and unjustly to amass stupendous fortunes at the expense of the many, is true; but the fault, it is earnestly contended, does not lie at the door of the cautious and carefully selected appointive judiciary. On the contrary, the corrective remedy lies in the very influence 'the people' are supposed to directly exert—the executive and legislative branches of the government."

The clearing away of obscurities in the "twilight zone" wherein the boundary between public and private rights lies hidden—the determination, in a word, of the rights of the individual by society—must of course devolve, in the United States, chiefly upon the Supreme Court, as the guardian and expositor of the Constitution. That its labors are constantly being increased by the concurrent action of Congress and of forces of social evolution is evident from the following:—

"The United States Courts." By Orin Judson Field. *North American Review*, v. 190, p. 74 (July).

"A rapidly increasing amount of litigation of national importance is becoming the subject-matter of suits in the federal courts," and the expense of administering the affairs of these courts during the year was $8,400,000. Hence our federal judiciary "is charged with a grave and important work in passing judgment upon the thousands of cases coming before it each year."

Interesting to all those interested in constitutional questions is the problem of our neighbor the Dominion of Canada how best to nullify laws which in the United States would easily be disposed of as unconstitutional. Professor Dicey's advice is here given:—

"Unjust and Impolitic Provincial Legislation and its Disallowance by the Governor-General." By Professor A. V. Dicey. 45 *Canada Law Journal* 457 (July).

"There is nothing in the [British North America] Act, as far as I can see, which provides that a law passed by a provincial legislature shall not be palpably unjust; nor is there anything in the Act, as there is in the Constitution of the United States, prohibiting the passing of a 'law impairing the obligation of contracts.' The guarantee provided by the B. N. A. Act, 1867, against possible injustice resulting from the legislation of a provincial legislature is to be found, if anywhere, in the Governor-General's power under the B. N. A. Act, 1867, ss. 56, 90, to disallow any law passed by a provincial legislature."

Turning now from the broader to the more special phases of the science of government, we find interesting contributions, in the following articles, to the study of the royal prerogative in England, to that of our most ancient still surviving popular legislative assemblies, as illustrated in the case of the Isle of Man, and to that of contemporary political conditions in Hungary:—

Great Britain. "The Immunity of the Crown from Mandamus." By W. W. Lucas. 25 *Law Quarterly Review* 290 (July).

The presence of many restrictions "reduces the authority of the judiciary over the executive to something very small." And several decisions "tend to raise the suspicion that the courts have considered that some limit should be placed upon the automatic extension of the royal prerogative to an indefinite and ever-growing number of public officials."

Hungary. "The Problem of Hungary." *Edinburgh Review*, v. 210, p. 134 (July).

"The problem of Hungary remains what it always was—that of a proud and high-spirited race maintaining on the one hand its right to its inherited liberties; on the other hand its right to dominate over peoples upon whom it looks down as inferior."

Isle of Man. "The Constitution of the Isle of Man." By R. D. Farrant. 25 *Law Quarterly Review* 255 (July).

"The Icelandic *Alpingi* came to an end; the Norwegian and Swedish moots lost their continuity of existence; and in no other country, civilized or uncivilized, has there existed for over one thousand years a free and independent legislature truly representative of the country, whose assent to all new laws, or alterations of old ones, was required to be given in solemn form. We may therefore say with truth that the Manx Legislature is the oldest in the world."

See also, South African Union.

Immigration. "Immigrants and Crime." By William S. Bennet, M.C. *Annals of the American Academy*, v. 34, no. 1, p. 117 (July).

"The relation of the immigrant and the criminal may be summed up as follows: There is a great deal of exaggeration on both sides. Do not believe that the majority of immigrants coming here from the southern European countries are either criminals or have criminal instincts. It is not so. Think of them not as a mass, but with the knowledge that they are men and women, each with a separate individuality. On the other hand, do not believe that they are all angels by a good deal, because they are not."

Injunctions. See Procedure.

Interest. "Interest on Debts Where Intercourse Between Debtor and Creditor is Forbidden by a State of War." By Charles Noble Gregory. 25 *Law Quarterly Review* 297 (July).

"The question whether or not interest should run upon a debt where debtor and creditor are separated by the line of war, so that all communication between them is prohibited and illegal, is an interesting one and has been dealt with by the courts of the United States with great frequency."

Interstate Commerce. "The Commodities

Clause." By L. C. Marshall. *Journal of Political Economy*, v. 17, p. 448 (July).

"No one questions that the clause was adopted in the hope of stopping real evils. Whether that clause, as popularly interpreted, employed a wise method is another matter. He who believes that a rigid matrix should not be prepared for a developing industrial situation does not regret that the Supreme Court adopted a new interpretation. He does not regret that other, and less rigid, methods of reaching the evils here involved may now claim consideration."

See Government, Public Service Corporations.

Insanity. "The Lunatic, A Ward of the Court." By Frederick A. Fenning. 43 *American Law Review* 527 (July–Aug.).

"It is a reasonable hope that the Congress of the United States, sitting as a legislature or common council for the District of Columbia, will give to the seat of government a lunacy law which shall be founded upon an advanced medical view, as well as upon a more complete appreciation of the paternal jurisdiction of the Courts."

See Criminology.

Legal History. "Pleading Rules at Common Law." By T. F. Martin. 25 *Law Quarterly Review* 284 (July).

"Pleading, as a science, dates from the reign of Edward I. In subsequent reigns it became deteriorated, not to say disgraced, by the subtle distinctions invented by the profession. In 1852 pleading was again put on a rational basis, but in 1873 a new system, that of pleading facts instead of law, was inaugurated. Whether the old system (cleared of its excrescences and with ample powers of amendment) or the new is the better is a question on which opinions differ, though the balance of opinion appears to be decidedly in favor of the new system. There is not less difference of opinion, as there are still widely different systems of pleading and procedure, in the United States."

See Contempt, Corporations.

Logislative Procedure. "The Privileges of the House of Commons in Regard to Finance Bills." By H. C. Malkin. *Quarterly Review*, no. 420, p. 256 (July).

"The conclusion from these and many other precedents appears to be that, while in theory the House of Commons adheres to its most extreme claim to absolute independence in matters however remotely affecting finance, yet in practice, whenever an amendment made by the Lords appears to the Commons desirable in itself, they will find some excuse for waiving their privileges and agreeing thereto. Whenever there is a disagreement, the true cause of it lies in the amendment itself and not in the breach of privilege."

See Government.

Marriage and Divorce. "The Instability of the Family." By J. P. Lichtenberger, Ph.D. *Annals of the American Academy*, v. 34, no. 1, p. 97 (July).

One of the most suggestive estimates of the meaning of divorce we have met with for some time is here stated:—

"The true causes of the modern divorce movement are inherent in our modern social situation. It is a problem of adjustment of society to our new economic, social, and ethical environment due to progress. The stress of modern economic life, rising standards of living, the passing of the economic function of the family, the economic emancipation of women, the struggle for social liberation, the popularization of law, the increase of popular learning, the improved social status of women, the revised ethical concepts, the equal standard of morals for both sexes, the higher ideals of domestic happiness, the new basis of sexual morality—these are the forces that are producing their inevitable results. The old religious-proprietary family of patriarchal authority is doomed, and until the new spiritual restraints are formed to take the place of those that are passing away a condition which, in the sight of some, will border on chaos is bound to result. The present phenomena we are fully persuaded are the phenomena of transition and are alarming only to those who view the family as an institution which has its origin in and depends for its perpetuation upon external authority."

That which is popularly believed to be the traditionally uncompromising attitude of the Roman Catholic Church toward divorce is ventilated in a few keen criticisms by the Protestant Episcopal Bishop of Albany:—

"Divorce." By Bishop Doane. *Century Magazine*, v. 78, p. 608 (Aug.).

A comment on the views expressed by Cardinal Gibbons and Professor Ross in the May number of this magazine.

"When we remember the very doubtful and even contradictory attitude of the Roman clergy as to the validity of baptisms not administered by themselves, and realize that Rome regards as dissoluble the marriages of all unbaptized persons; and when one adds to these facts the number and variety of the diriment impediments, often not known until discovered and used as reason and excuse for getting rid of an unhappy marriage,—really more in number than the causes for divorce in the worst of our states,—it seems to me that it is a play on words to hold up the Roman Catholic Church, in its teachings or in its practice, as the one protector of the sacredness of the marriage tie."

Pleading. See Legal History.

Procedure. "Injunctions in Criminal Prosecutions." 2 *Lawyer and Banker* 78 (Aug.).

"Truly, a criminal can hope for but little from the courts of equity; and an innocent party who is indicted can look for no more than the guilty.

"It is submitted that criminal courts should be empowered to go beyond the determination of the question of the guilt or innocence of an

accused, so that, in case of an acquittal, the court may inquire and award damages in accordance with the equities of the case, or that equity be empowered to inquire and enjoin prosecutions where there is, *prima facie*, merit in the defense which the accused may be enabled to make upon trial."

See Contempt, Legal History.

Public Health and Morals. "The Importance of the Enforcement of Law." By Champe S. Andrews. *Annals of the American Academy*, v. 34, no. 1, p. 85 (July).

"Instead of saying that laws are absolutely necessary to prevent all public health evils, I would say that in most instances the passage of laws to correct these abuses is a necessity, but that we must not stop with the mere enactment of the law. We must also provide a means for its enforcement. That part of the law which provides the means by which it shall be enforced is of as much importance as the law itself. Many recalcitrant and criminal legislators pass laws at the request of the reformers of our community, and the reformers go away satisfied with what has been done, yet we may read the statistics after the passage of that law and find no convictions under it and no good accomplished."

Public Libraries. "The Legal Status of the Public Library in the United States." By Bernard C. Steiner. 43 *American Law Review* 536 (July–Aug.).

Treats of decisions of the courts under the following headings: The Library as an Institution of Learning; The Public Library as a Public Charity; Extent of Exemptions from Taxation; Conditions or Directions Connected with Gifts to Libraries; Control of Libraries by Municipalities; Rights of Members of a Library Staff Under a Civil Service Law.

Public Service Corporations. "Law Governing Telephone and Telegraph Service." By Charles A. Enslow. 2 *Lawyer and Banker* 101 (Aug.).

"In view of the decisions which have been rendered, it may be stated as law that where the agent of a telegraph company receives a message over the telephone for transmission over the wires of the telegraph company, where it is the custom to so receive messages for transmission in that manner, and acts within the apparent scope of his authority in so doing, in the absence of knowledge on the part of the sender that the agent is not so acting by authority, the agent taking the message over the telephone acts as agent of the telegraph company and not as the agent of the sender, and that the company will be bound by his act and liable in damage for loss sustained through errors made by such agent."

See Interstate Commerce, Railways.

Race Discrimination. "Race Distinctions in American Law, VII." By Gilbert Thomas Stephenson. 43 *American Law Review* 547 (July–Aug.).

This installment sets forth the effect of the Civil Rights Bill of 1866, of the Civil Rights Bill of 1875, and of the civil rights legislation of the states since the Civil War.

A popular as opposed to a juristic treatment of the problem of the negro vote is given by a Southerner in the following:—

"The Negro in Politics." By Judge Harris Dickson. *Hampton's*, v. 23, p. 225 (Aug.).

The author discusses the effect certain to follow giving the negro the right to vote.

"As the matter now stands the negro is disfranchised chiefly on the ground of illiteracy. But the educational qualification for suffrage is a barrier of straw that a generation may utterly destroy. For instance, in the state of Mississippi there are 50,000 more black males of voting age than white males of voting age. This, upon the basis of manhood suffrage, would put every state office in the hands of negroes and the renegade whites who fatten on their folly."

Railways. "The Railway Situation in Italy." By Filippo Tajani. *Quarterly Journal of Economics*, v. 23, p. 618 (Aug.).

"Under state operation we have liberally reformed our passenger service, we have greatly lowered rates, and we have increased the number of trains and the comforts of travel. Some of these provisions encourage traffic, and may have the effect of increasing earnings; but, in general, such liberality is not consistent with a good financial showing."

So favorable a financial showing is evidently not made in New Zealand:—

"Railways in New Zealand." By James Edward Le Rossignol and William Downie Stewart. *Quarterly Journal of Economics*, v. 23, p. 652 (Aug.).

"Notwithstanding the large financial losses of the railways, practically nobody in New Zealand proposes private ownership as a remedy. . . . While the sale of the railways to a private company would probably yield good financial returns and further rather than retard the development of the country, the creation of a great monopolistic corporation might introduce a source of corruption new to New Zealand political life."

Statute of Frauds. "What is 'Goods, Wares and Merchandise?'" By E. Connor Hall. 43 *American Law Review* 532 (July–Aug.).

"The rules for distinguishing 'goods, wares and merchandise' from 'work and labor,' under the seventeenth section of the Statute of Frauds, have been widely varying in different jurisdictions, and often in the same jurisdiction at different times. . . . Within recent years there has been propounded a new test for distinguishing between merchandise and labor. This test is: Is the article, when manufactured, fit for the general market, or

is it of such peculiar construction as to be of value only to the particular person ordering it?"

Status. See Race Discrimination.

South African Union. *Edinburgh Review*, v. 210, p. 1 (July).

The disposition in England seems to be in the main, to take an encouraging view of the new political entity in process of formation in South Africa. In an able historical treatment of the whole movement, we read:—

"Unification had much to recommend it. . . . The comparative failure of President Roosevelt's campaign of reform in America was attributed largely to the ineffectiveness of the federal authority against the power of the states, which at times seemed to render all improvement and even all vigorous administration impossible. . . . In the United States, Alexander Hamilton's efforts to secure closer union were thwarted by state jealousies, for which the country had to pay by the bloodiest war of modern times, and is still paying even today by an unnecessary weakness of administration. . . .

"The war [in South Africa], as we believe, cleared away forever some serious obstacles to the union of the two races, and many of the rest were removed by the grant of responsible government so promptly, so boldly, and so unreservedly by Sir Henry Campbell-Bannerman's Ministry. This gift has also confirmed the loyalty of South Africa."

Similar cordiality toward the new Union of South Africa is expressed in the following:—

"The South African Union." Anon. *Blackwood's*, v. 186, p. 284 (Aug.).

"When one party in the state claims all the credit for an event which all welcome," we are here informed that it is "only fair to point out the greater claims of others." The Liberal policy has not produced "the bad results which many anticipated, but the Liberals "gambled on an offchance, and gambling is no true statesmanship." Rather should we recognize the fact that the new Union of South Africa, due to the co-operation of the two races with the help of a commissioner appointed by the Conservatives, was built upon "foundations laid by Mr. Balfour's Government and their great Viceroy.' "

Taylor's Science of Jurisprudence. "A New Apology for Plagiarism." By Prof. James Mackintosh, K.C. 21 *Juridical Review* 178 (July).

The controversy with reference to Dr. Taylor's work, in which that gentleman has decidedly got the worst of it, continues somewhat wearisomely, but it is interesting to read an editorial estimate of the value of the vaunted "discovery":—

"The great 'discovery' is announced in these words:—'Roman public law has perished, leaving behind it the inner part, the private law, which lives on as an immortality and universality—as the fittest it survives. For the same reason English public law is living on and expanding as the one accepted model of popular government.' There is nothing particularly new in the description of Rome as the law-giver of the world, or of England as the mother of Parliaments; and it is a gross exaggeration of these commonplaces to lay down as a general proposition, applying without qualification to Continental Europe and Latin America—that 'the outer shell of the state, the system of Parliamentary government, is purely English through deliberate and recent imitation, while the interior core of private law is essentially Roman.' But even if the thesis were as new and true as its author believes, what relevancy has it to the charge that he has helped himself without proper acknowledgment to the ideas and phrases of others? The man who is capable of original work has least excuse for copying."

Torrens System. "The Torrens System in Ontario." By A. McLeod. 29 *Canadian Law Times* 695 (July).

"It is too late in the day to advance any argument in favor of the Torrens system, it is now classified with the proven things. The advantages of it in Ontario would be enormous."

Tort. "English Law in Scots Practice; III, Tort and Reparation Generally." By Hector Burn Murdoch. 21 *Juridical Review* 148 (July).

"Scots Law recognizes that there are wrongs without a money standard, and, as a comprehensive rule, that a person suffering an injury of this description is no less entitled to ordinary redress. On the other hand, English Law does not admit this general principle, and knows no claim of *solatium* as such. Indeed, it is commonly supposed and asserted that *solatium* is never awarded there."

However, "in substance damages may in many cases be obtained by English Law in respect of non-pecuniary loss, *i. e.*, *solatium* as understood in Scotland. Indeed, English Law goes to the very other extreme, and allows for 'nominal' damages in circumstances where no actual damage of any kind has been sustained."

Both the leading and the incidental differences between Tort in English Law and Reparation in Scots Law are pointed out, with some attention to Defamation together with other subjects.

War. See Declaration of London, Interest.

Waters. "The Water Law of the Public Domain." By Samuel C. Weil. 43 *American Law Review* 481 (July–Aug.).

This article is of interest to those who have been inclined to prefer Secretary Ballinger's views to those of his critics, in the controversy that arose at Spokane, Wash., at the recent conservation Congress held there.

"The theory of the law of water, under what has come to be called the 'California Doctrine,' has been continuously the same from pioneer times to the present day; namely,

an appropriation is an interest in fee *in the public lands* equal to any subsequent patent of riparian land, on the 'free exploitation' theory that an appropriator on public land never was a trespasser, but it is and always was treated as actually a guarantee in fee of the federal government. . . .

"Both Congress and the Supreme Court of the United States joined in this theory, and it is the foundation of the 'California Doctrine' of Water Law of the Public Domain; the term 'appropriation of water' means, in California and the states following the historical basis, such a title (and only such) as, because acquired on public land under the federal policy of free rights in the public domain, is valid against a riparian owner where (and only where) the riparian patent issued subsequent to the appropriation.

"As the law developed since 1866, actual documentary patents were issued by the United States to lands and to mines. This has never been done regarding waters, but the theory is as though it were. As to the yet undisposed of water on public lands, there would hence appear, under this historical theory, a field for federal legislation, provided it repeals or modifies the guaranty of free appropriation (under local rules) contained in the Act of 1866. Congress has actually exercised its power recently in providing that 'riparian rights' shall not exist in the Black Hills.

"This theory, however, is in force only in states following the 'California Doctrine.' In the other states the 'Colorado' or 'Wyoming Doctrine' is (with the sanction of the Supreme Court of the United States in *Kansas* v. *Colorado*, 206 U. S. 46), adopted, and the historical theory is not in force. The federal jurisdiction and title are denied, and there is instead an elaborate state organization which has assumed absolute control over all waters within their borders. Under the decision in *Kansas* v. *Colorado* it is difficult to see how the policy of conservation can be carried out by federal action in these states."

Attention may here be called to a demogogic article which, though of no value, is of some interest in connection with the foregoing:—

"The Trust that Will Control All Other Trusts." By John L. Mathews. *Hampton's*, v. 23, p. 201 (Aug.).

This gives a clear picture of the impending tyranny of the water power trust. One of its methods of self-aggrandizement is this:—

"Open the pages of 'Moody's Manual' or any other list of these corporations and you will find the word 'foreclosed,' or the statement 'obtained by foreclosure,' after the name of many of the water or steam power concerns owned by the grabbers. The word represents their favorite method of gaining possession. In Carolina they have worked this as a fine art. They have developed the excellent and usually legal game of taking the local capitalists into partnership with them. They adopt them into financial brotherhood, and use local money for the construction work. Then they freeze out the unnecessary stock- and bondholders, and seize the plant."

Miscellaneous Articles of Interest to the Legal Profession

Biography.

Cleveland. "Grover Cleveland: A Record of Friendship." By Richard Watson Gilder. *Century Magazine*, v. 78, p. 483 (Aug.).

"Mr. Cleveland always insisted upon this—that if right political policies were simply and clearly put before the American people, they would generally make a wise and honest decision. He was sometimes discouraged; but I do not think he was ever fundamentally shaken in his belief. He realized that there might be long periods of indecision or mistake, but he looked forward to a final satisfactory outcome.

"He was encouraged in his view by various occurrences in his own public career, for he often did a right but risky thing; and instead of losing by it his popularity and influence were strengthened. It was so with incidents in his relations, for instance, with Tammany Hall. His letter, when Governor, to the Tammany leader in New York, protesting against the support by Tammany of a certain silver-tongued, but, ethically speaking, annoying member of the legislature, increased a personal enmity, but was only another proof to the public of the Governor's fearless rectitude."

Gaynor. "The Austerity of Judge Gaynor." *Current Literature*, v. 47, p. 151 (Aug.).

"Judge William J. Gaynor, who has just caused such a commotion in the police department of New York City, is not a man given to jesting. He is even described as mirthless and smileless. Look upon his counterfeit presentment and you will see austerity writ large on every feature. He cracks no jokes in his court, he laughs not at those the lawyers may crack. He takes life seriously and lives it earnestly. He is no sour cynic, not at all. His faith in the power of an idea and his confidence in the righteous intentions of the people are a splendid tonic; but if he were the husband of the heroine in 'What Every Woman Knows,' we have an idea she would have to work even harder than in Barrie's clever play to get the saving guffaw that finally comes from her hard-headed Scotch spouse."

Knox. "Knox—'Able Citizen.'" By Edward G. Lowry. *Putnam's*, v. 6, p. 527 (Aug.).

"Mr. Roosevelt told him that he wanted him to accept the vacancy caused by Justice Brown's retirement. Mr. Knox declined, leaving the way open for Attorney-General Moody to scale the dizzy height. When Justice Shiras retired, the tender of his seat in the Supreme Court was made to Mr. Knox by

President Roosevelt. Mr. Taft had previously declined both of these seats before they were offered to the present Secretary of State. The idea is firmly lodged in Mr. Knox's mind that some day his mail will be addressed to the White House; and it is not the contemporary practice of the Republican party to select its Presidential candidate from the Justices of the Supreme Court."

Nisbet. "Sir John Nisbet of Dirleton." By George B. Young. 21 *Juridical Review* 170 (July).

"A modern author has thus epitomized Dirleton's legal career: 'When bad judges were common, he was one of the worst, and it does not appear that in the course of his public career he did one act which brightens the darkness of his servile and mercenary life.'"

Democracy. "The Old Order Changeth: The Schools, the Mainspring of Democracy." By William Allen White. *American Magazine*, v. 68, p. 376 (Aug.).

"The Report of the United States Commissioner of Education, 1907, indicates (p. 525) that there are only twice as many school teachers as there are bartenders in the country. So while the aggregate amount spent for schools is large, the comparative amount is small."

Fiction. "The Iron Empire." By George Randolph Chester. *Cosmopolitan*, v. 47, p. 281 (Aug.).

"To the victor belong the spoils, and the spoils of this war were the proxies. Breed got the proxies, and through personal representatives from his New Jersey offices he walked into one meeting after another with a majority of stock. He had succeeded, through Kelvin, in that apparently impossible dream of every railroad man since Stephenson invented the steam-engine—the concentration of every railroad in the United States under one management."

History. "Was 'Secession' Taught at West Point?" By Col. Edgar S. Dudley. *Century Magazine*, v. 78, p. 629 (Aug.).

"The result of this examination of the records of the United States Military Academy and of the review of statements on both sides of the subject, shows conclusively, to my mind, that Rawle's work, 'A View of the Constitution of the United States' was introduced as a text-book by the professor of geography, history and ethics for one year only (1826), and was then discontinued, never again being used; that it was never officially adopted as a text-book by action of the academic board; that of all the graduates named, only one, General Albert Sidney Johnston, of the class of 1826, received instruction in that work; that the records show positively the use of Kent's Commentaries from 1841 until after the beginning of the Civil War, so that no one who was graduated during that period could ever have had Rawle as an authorized text-book.

"There is no necessity to seek to assign 'instruction at the military academy' as an excuse for the action of those who joined the Confederacy or for those who remained loyal to the Union."

Miscellany. "Stories of a Famous London Drawing-Room." By William H. Rideing. *McClure's*, v. 33, p. 388 (Aug.).

"Most of the judges and many barristers were, of course, frequent among the guests of that house. I have been at the Royal Courts of Justice in the afternoon, and watched them, gowned and bewigged, at their solemn work—the judges precise, austere, portentous, Rhadamanthine; the barristers deferential, ingratiating, and all attention. Then they have assembled at dinner in the evening, like Olympians descending from their pedestals, as worldly-wise, as merry, and as familiar as common mortals. Who could have been more human and amusing than the late Lord Chief Justice Russell of Killowen (once Sir Charles Russell), a stately, handsome man of commanding presence; or his successor, the present Lord Chief Justice Alverstone, who, when he can be persuaded to sing after dinner, is likely to select W. S. Gilbert's nonsensical song from "Trial by Jury," and rattle it off with the greatest spirit—that song which just describes his early days when he had—

" 'A couple of shirts and a collar or two,
And a ring that looked like a ruby.'

"The late Justice Day was another guest, he upon whose name was obvious and easy play. In criminal trials he was so severe that he became 'Judgment Day'; when he married, 'Wedding Day'; at Bristol, 'Day of Reckoning'; and one day when he was seen to nod on the bench, 'Day of Rest.' Once when he was trying a case, a prolix barrister tried his patience, and at the end of a long and tedious speech spoke of some bags which were in question. 'They might, me Lud, have been full or half-full bags, or again they might have been empty bags,' 'Quite so, quite so, the judge interjected, adding dryly and significantly: 'Or they might have been wind-bags.'

"On one occasion the conversation turned to the thoroughness of the administration of the law in Great Britain. 'We sweat the law in England to get all the justice out of it we can,' declared a vivacious gentleman who sat next to me, and I infer that no one doubted his sincerity or the truth of what he said."

Reviews of Books

JUDICIAL VERSE

On the Oxford Circuit, and Other Verses. By Sir Charles John Darling. With illustrations by Austin O. Spare. Smith, Elder & Co., London. Pp. 80. (*5s. net.*)

MR. JUSTICE DARLING is chiefly known in this country from occasional references in the English journals to his lively sense of humor and to his versatility and learning as one of his Majesty's judges. This little book shows him in the light of a poet of no ordinary accomplishments. For he evidently is a writer of verse of better quality than that most commonly encountered in the literary mart of today.

There seem to have been some lawyers who have dabbled in verse, among them Blackstone, Bacon, and Eldon, but the number of poets who have forsaken the law and turned to literature is so large that the law could doubtless successfully maintain, solely on proof of this desertion, an action against literature for the dissolution of any *vinculum matrimonii* between them. Poetry and the law seem to suffer from incompatibility of temper.

Poetry is made up of the less nutrient and useful materials, the fat part of life, while the law, on the contrary, is a builder of the tissues of private rights and social justice, and may be called the lean of life. The lawyer is so concerned with the lean part of life that, like Jack Spratt, he can eat no fat. The poet, like Jack Spratt's wife, can eat no lean. And so, between them both, one would suppose an ideal relation of domestic harmony to exist. The reason, however, for the incompatibility is found not in the difference between tastes, but in defects of digestion. The lawyer finds difficulty in digesting poetry, and the poet in digesting law. Something is assuredly wrong, for all seemingly conflicting interests of life are reconcilable, and the duty of well-balanced humanity is that of reducing to a logical unity the baffling and irritating complexities of the world. Man is supposed to live not by meat alone, nor by vegetables alone, but is omnivorous, and he ought likewise in his mental habits to be able to comprehend and assimilate whatever comes along, and to derive equal benefit from every wholesome variety of intellectual pabulum. If we are not much mistaken, the tendency of the time is not so much toward the narrow kind of specialization as it is toward that general specialization which is synonymous with a real liberal education; and growing keenness of appreciation and sympathy will inevitably, sooner or later, break down the barrier between the law and *belles lettres*, which are apt to have many impulses and thoughts in common.

We are glad to see a judge writing good verse, which as regards technique does not tempt quibbling criticism, and which otherwise considered derives added interest from a breadth of worldly experience not generally found among men of letters. We are glad that Mr. Justice Darling, through such a poem as "On the Oxford Circuit," is able to furnish his brethren of the bench and bar with so admirable an illustration of the truism that there is no reason why a lawyer should not aim at high literary distinction, and successfully attain it, without endangering his prestige as a legal luminary.

What, for example, could more saliently emphasize the indifference of our leading poets to the lawyer's and publicist's themes than this graceful wording of pregnant thoughts, by way of comment on the maxim, *necessitas non habet leges?* —

> Rare the complaint in that laborious age
> When little satisfied the frugal thief;
> Content to win a barely living wage,
> Nor to his parish turn for out-relief.
>
> Law now rules all; and these of right demand
> For every want reward, as legal due;
> Need holds by Law—because as statutes stand
> *Le nécessaire veut dire le superflu.*

With the criticism advanced by one reviewer (in London *Law Times*, July 24, 1909), that when Mr. Justice Darling "has shaken the dust of law entirely from his feet we find him coming nearest to that inner light, that constellation of language which is poetry," we find that we cannot agree. The dramatic and sensitive "On the Oxford Circuit" is *facile princeps* in this collection, and its eloquent beauty overshadows that of the admirable lines suggested by sport and fine art. Let us hope that the author of "Scintillæ Juris," "Meditations in the Tea Room," and

"Seria Ludo," may find time to produce more work belying the false tradition that the poet cannot derive inspiration from strong and solid themes.

CASPERSZ ON ESTOPPEL

Modern Estoppel and Res Judicata. By Arthur Caspersz. Part I, The Doctrine of Changed Situations; Part II, The Conclusiveness of Judgments, Decrees, and Orders. 3d ed. S. K. Lahiri & Co., Calcutta. Pp. xliv, 356+index 30; xxxi, 347+index 39. (Rs. 18.)

THIS work was originally issued in 1893, as the author's Tagore Law Lectures. A scholarly equipment gave much value to the production, and it at once took rank as the most authoritative treatment of estoppel to be found in India. In the present third edition the work is thoroughly revised and much enlarged, and while dealing primarily with the Indian phases of the doctrine it may well be regarded as a standard treatise of more than local importance. The qualities which render this work interesting to the American lawyer are its historical erudition, its accurate exposition of the common law, its logical grasp of the whole subject, and its delightful clearness of style.

American authors, Thayer and Bigelow particularly, and the Canadian authority Ewart, have evidently influenced the production of this work, which possibly gives information in a more lucid and accessible form than the other treatises. The subject of estoppel is one which lawyers are disposed to regard as somewhat complicated, and furthermore one which, as Mr. Caspersz says in his preface, "still suffers from the unpopularity of its name." But this writer has made the whole topic simple. He has succeeded where other writers on estoppel have failed. For the purpose of gaining a scientific view of the subject, there is no one but can get much profit from the present volume by disregarding the local application of principles under conditions of Indian codification. The English as well as the Indian cases are set out with much accuracy and fullness, and the rich materials of the common law and its latest increment are ably and carefully arranged and expounded. A systematic and scientific volume like this, evidencing scholarship of so high a grade, is to be commended in the most favorable terms. The American reader, moreover, will take a somewhat justifiable pride in the fact that the example of Thayer and Bigelow has inspired Mr. Caspersz with an ideal of scientific treatment which has been so admirably followed up.

UNSYSTEMATIC ETHICS

The Moral Economy. By Ralph Barton Perry, Assistant Professor of Philosophy in Harvard University. Charles Scribner's Sons, New York. Pp. xvi, 256, notes and index. ($1.25 *net*.)

THE author calls this book "a preliminary sketch of a system of ethics," and declares that his aim has been to study morality directly, by an appeal to experience. He therefore avoids a cumbersome mode of procedure by eliminating discussion of controverted doctrines and by a pleasant everyday attitude toward a subject which is, "without doubt, the most human and urgent of all topics of study." There is much to be said in favor of thus proceeding in a science which is, as it were, in process of construction, and if the simpler method is not so well suited to a science in a high state of development, where the criticism and consolidation of doctrines must steadily keep pace with each new discovery, it may be preferable, as Leslie Stephen preferred it, in the science of ethics in its present stage, where to reduce chaos to system would call for labors almost superhuman.

But is Assistant Professor Perry's, even in the "preliminary" sense, a scientific discussion? The very title suggests a non-scientific treatment. The author has endeavored, primarily, it seems to us, to set before educated laymen an informal dissertation on the part which moral values play in human life. He follows that tradition of multifarious discourse from which modern philosophy has not yet wholly divorced itself even with the dawn of the scientific age. His essay aims distinctly at a literary treatment of a technical subject, and the beauty of its workmanship and persuasiveness of its logic may add to the fame of a group of Harvard philosophical luminaries distinguished for their literary excellence quite as much as for their scientific achievements.

The non-scientific mode of procedure necessarily threads its way precariously among countless pitfalls of error which are not always safely avoided. Dr. Perry sometimes mistakes the figments of idealism for the facts of sociology. He ignores the conflict be-

tween the hostile social groups which mold public opinion, and belittles the strife within the social organism, when he declares with misguided optimism that in morals men are all practically unanimous, and when he implies that our common morality is not a battlefield of perpetual strife. He also entertains a kind of pathetic fallacy regarding nature when he speaks of "the mechanical cosmos" as "man's hereditary enemy." Nor can one accept his explanation that a disagreement between two individuals with regard to a question of moral conduct, to be settled in accordance with justice and sound morals, requires simply the exclusion of personal or party considerations and respectful attention "to the deliberate judgment of any rational minded individual." Suppose that the first "rational minded individual" encountered is an astute villain?

In spite of these defects, however, Dr. Perry has given us a readable and charming essay; charming not only because of its striking literary beauty, but also because of the delightful clearness with which he elucidates new truths, and restates with astonishing originality old ones. An admirable quality of penetrating discernment is everywhere beautifully in evidence. The dryness of the ethical treatise is lacking because of the extraordinary fertility of the author's ideas, and because of an irresistible energy which is not only stimulating, but inspiring. The book is in many respects well executed, and one desirable to add to even the most carefully selected library of ethical literature.

NEW BOOKS RECEIVED

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

The Transfer Tax Law of the State of New York. By George W. McElroy, of the Orange County Bar. Matthew Bender & Co., Albany, N. Y. 2d ed. Pp. xlii, 595, + appendix and index 167. ($6.)

Proceedings of the Thirty-second Annual Meeting of the New York State Bar Association, held at Buffalo January 19, 28–29, 1909. The Argus Company, Albany. V. 32. Pp. vi. 706.

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.)

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.)

Legislative and Judicial History of the Fifteenth Amendment. By John Mabry Mathews, Fellow in Political Science. Being series xxvii, nos. 6–7, of University Studies in Historical and Political Science. Johns Hopkins Press, Baltimore. Pp. x, 116. ($1.)

The 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.

Modern Constitutions: A Collection of the Fundamental Laws of Twenty-two of the Most Important Countries of the World, with Historical and Bibliogaphical 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.)

A Digest of the Bankruptcy Decisions under the National Bankruptcy Act of 1898, reported in the American Bankruptcy Reports, Volumes 15 to 20 inclusive (1906–1909). By Melvin T. Bender and Harold J. Hinman, of the Albany, N. Y., Bar. V. 2. Matthew Bender & Company, Albany, N. Y. Pp. xiii, 393 + table of cases 61. ($4.)

*Latest Important Cases**

Advertising Nuisance. *Advertisements Attached to Vehicles—Restrictive Ordinance Valid.* N. Y.

New York City passed an ordinance regulating the use of streets for the exhibition of advertising, providing that no advertising wagons be allowed therein except ordinary business notices on wagons not used merely for advertising. The power to pass this ordinance was questioned in *Fifth Avenue Coach Company* v. *City of New York*, 86 N. E. Rep. 824. It appeared that the compensation which the Coach Company derived from advertising was regulated by the number of coaches which it employed. This number constantly increased. From the advertising display alone was realized a gross income of more than six per cent on the entire capital stock. Slow moving trucks were barred from the streets owing to the congestion attending the passing of these vehicles. The New York Court of Appeals decided the ordinance within the city's power, remarking that every procession, parade or show upon vehicles passing through the public streets tends to congestion therein, and to some extent interferes with those engaged in business. If the company had the right to so decorate its conveyances, the owner of any wagon would have the same right, which would enable the owners of vehicles to decorate them until they became a congestive menace on the thoroughfares.

See Public Ways.

Bill of Rights. *Statute Punishing Escapes from Prison—Denial of Equal Protection of Laws to Convicts.* Idaho.

Prisoners in Idaho attempting to escape were punishable by confinement for the term of their original sentence. If a convict was serving a one-year sentence, his punishment for escape would be one year, while a convict serving a twenty-year sentence would be punished by being imprisoned just twenty times as long. This statute was alleged to deny equal protection to all persons charged with its violation and to be class legislation. The court held that the statute, in making the escape from the state prison the offense, and not the escape from the punishment of the judgment fixed by the court, was not natural but arbitrary. The very theory of punishment to be imposed for crime is that it should be in proportion to the gravity of the offense. The statute was therefore held unconstitutional by the Idaho Supreme Court in *Ex parte Mallon*, 102 Pac. Rep. 374.

See Due Process of Law.

Boundaries. *Shifting Channel of River Between Two States.* U. S.

When Oregon became a state the boundary between it and Washington was the main channel of the Columbia river. The diminishing depth of that channel, the jetties constructed by Congress, processes of accretion and the diminution of the volume and depth of water have made another channel more important and properly the main channel. In *Washington* v. *Oregon*, 29 Sup. Ct. Rep. 631, the federal Supreme Court held that whatever changes had occurred in the former channel, its varying centre was still the true boundary, and suggested that the course of wisdom would be for the interested states to gain the consent of Congress to secure the aid of commissioners who could adjust as far as possible the jurisdiction and this elusive boundary.

Capital Punishment. *"Conscientious" Scruples of Juror.* Wis.

The question of the propriety of sustaining a challenge to a juror on the ground of his conscientious scruples against convicting a person of a capital offense on circumstantial evidence alone, arose in *Spick* v. *State*, 121 N. W. Rep. 664. The Wisconsin Supreme Court, holding a person imbued with such scruples incompetent for jury duty, remarked: "A person might as well say, generally, he has conscientious scruples against obeying the law of his country as to say he has such scruples against acting as a juror upon circumstantial evidence in a capital case. Such a person has too much conscience for the best of citizenship. He has that species of conscience with that grade of weakness that

*Copies of the pamphlet Reporters containing full reports of any of these decisions which are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

often makes the coward mistake his timidity for that conscience which is worthy of distinction."

Contempt. *State Legislature Cannot Limit Discretion of Judiciary—Punishment for Contempt Not Subject to Regulation.* Mo.

In a recent Missouri case the Supreme Court, by a vote of four judges against three dissenting, held an act of the legislature forbidding a constitutional court (namely a court established by the constitution rather than by statute) to impose a fine in any case of contempt in excess of $50, or to inflict imprisonment for more than ten days, to violate the constitution of that state. The dissenting judges expressed the opinion that constitutional courts could not be shorn of their inherent right to punish for contempt by the legislative branch of the government, but insisted that the legislature might make reasonable rules regulating the punishment in contempt cases, so long as such regulation does not render the contempt jurisdiction ineffectual. (See editorial in *New York Sun*, July 20, 1909.)

Corporations. *Right of Cumulative Voting Under New York Statute—Preferred Stockholders May be Deprived of Power to Vote—Public Policy.* N. Y.

The relators in *Stewart Browne* v. *Samuel S. Koenig* (reported in *New York Law Journal* July 19, 1909), which was decided last July by the New York Supreme Court, Appellate Division, first department, had been denied a certificate of incorporation by the Secretary of State. The Supreme Court of New York County issued a peremptory writ of mandamus, from which the defendant as Secretary of State appealed. The Court denied the appeal, for reasons about to be stated.

The Secretary of State had refused the certificate because of the provision that the stock should be divided into one-half preferred and one-half common, the preferred to have the right to vote only upon certain matters relating to corporate management, and being given no right to vote for directors of the corporation.

The Court, per Mr. Justice Houghton, said:—

"Unless expressly forbidden by statute the articles of incorporation may divide the stock into common and preferred, and may provide that the preferred stockholders shall be deprived of voting power in consideration of the preferences over the common stock which are given them. Such a provision is but an arrangement between two classes of stockholders which does not concern the public and does not violate any rule of the common law or any rule of public policy. . . .

"In view of the fact that it is perfectly lawful for different classes of stockholders to agree amongst themselves, through the certificate of incorporation, that one class shall have no vote upon all or certain questions relating to the management of the corporation, and that such an agreement does not contravene public policy or affect the public, we are of the opinion that the Legislature did not intend to compel every class of stockholders to hold the right to vote, or to prohibit the formation of a corporation which deprived the preferred stockholders of voting power."

Damages. *Disfigurement as Basis of Mental Suffering.* U. S.

From a charge allowing the jury to consider on the subject of damages the humiliation resulting from the loss of an eye, an appeal is taken in *United States Express Co.* v. *Wahl*, 168 Fed. Rep. 848. The United States Circuit Court of Appeals, remarking that there was a contrariety of decisions involving this point, adopted the decision of the Supreme Court in *McDermott* v. *Severe*, 26 Sup. Ct. Rep. 709, and allowed a recovery. Where mental suffering producing embarrassment, shame or mortification as the result of the absence of a facial constituent is a direct and necessary consequence of the physical injury its submission to the jury is proper.

Defamation. See Privacy.

Due Process of Law. *Delegation of Judicial Power to Administrative Officials—Rights of Aliens.* U. S.

The United States Supreme Court, in *Oceanic Steam Navigation Co., Ltd.*, v. *Nevada N. Stranahan*, decided June 1 (L. ed. adv. sheets Oct. term 1908, p. 671), followed its decisions in *U. S.* v. *Ju Toy* (198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644), and in *U. S. ex rel. Turner* v. *Williams* (194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719), and sustained the validity of the act (32 Stat. at L. 1213, c. 1012) providing for the exclusion of aliens affected with a loathsome or dangerous contagious disease, on penalty of a heavy fine imposed on persons bringing in such aliens, the enforcement of the law being confided to administrative officials:—

"In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals. They mistakenly assume that mere form, and not substance, may be made by the courts the conclusive test as to the constitutional power of Congress to enact a statute. These conclusions are apparent, we think, since the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance, as a means of enforcing the penalty which there was lawful authority to impose."

See Bill of Rights.

Employer's Liability. *Federal Act Unconstitutional with Reference to Intra-State Commerce—Federal Law Not for State Courts to Administer.* Conn.

The Connecticut Supreme Court of Errors declared the Employer's Liability Act passed by the National Congress in 1908 to be unconstitutional, with slight qualification, in a decision rendered in New Haven July 20, Chief Justice Simeon E. Baldwin writing the opinion. It was furthermore stated that if the act was not unconstitutional, action under it should be instituted in the federal and not in the state courts. The opinion was in the cases of William H. Hoxie and Oscar Mondow, brakeman, against the New Haven road for injuries received in an accident resulting from the negligence of a fellow employee, the decision upholding the ruling of the Superior Court, which was favorable to the defendant corporation. The Court summed up as follows:—

1. "Congress did not intend by the act of April 22, 1908, to authorize the institution of an action in the courts of the states.

2. "It had no power to make it incumbent upon the state courts to assume jurisdiction of such an action.

3. "The issue before the Superior Court involved the consideration of these points, which justified, of themselves, the dismissal of the plaintiff's actions; but further—

4. "The act, so far as it concerns this case, is wholly void, by reason of certain of its provisions which cannot be separated from the rest."

On the question of constitutionality the court said:—

"Except so far as the act is a regulation of commerce between the states, its enactment was beyond the power of Congress. That it remotely affects such commerce is not sufficient if that result is only secured by invading the settled limits of the sovereignty of the states with respect to their own internal police.

"The act cannot be interpreted as referring only to negligence of employees while engaged in interstate commerce. It substantially reenacts in this particular the words of the previous Employer's Liability Act of 1906, and must be presumed to have been drafted with the knowledge of the construction which those words had received."

Evidence. See Procedure.

Federal and State Jurisdiction. *State Statute Governing Delivery of Telegram Inoperative in Navy Yard.* U. S.

Virginia makes it the duty of telegraph companies, upon the arrival of a dispatch or message at the point to which it is to be transmitted, to cause it to be forwarded by a messenger to the addressee, and imposes a penalty for the violation of this law. The addressee was a marine on the U. S. S. *Abarenda*, stationed at the navy yard at Portsmouth. The message was received at Portsmouth, intrusted to a messenger for delivery on board ship, where it was taken from him at the gangway, receipted for, but was never received by the plaintiff. In *Western Union Telegraph Co.* v. *Chiles*, 29 Sup. Ct. Rep. 613, plaintiff sought to recover the statutory penalty. The federal Supreme Court held that this was not a contract within the laws of Virginia and was not within the jurisdiction of its courts. The exclusive legislative power which Congress has over the Norfolk Navy Yard excludes the operation, within it, of the state statute allowing a penalty for its violation.

Denial of Recourse to Federal Courts Beyond Power of State Legislature. U. S.

Alabama enacted a law in 1907 providing that if any foreign corporation procured the removal of a cause from a state to a federal court its franchise would be canceled and any contract in intra-state business thereafter made by it would be void. At the time of the entrance into the state by the telegraph com-

pany it had a constitutional assurance that "all corporations shall have the right to sue in all courts in like cases as natural persons." In *Western Union Telegraph Co.* v. *Julian*, 169 Fed. Rep. 166, an injunction was sought to prevent the operation of the statute. The Circuit Court granting the injunction characterized the statute as an attempt to forfeit property or business because its owner exercised a constitutional right in a lawful way, in a resort to the courts of his country for justice, and as transcending all the bounds of the legislative power, being a mere edict of despotism. No court which sits to administer the fundamental law can recognize it as a legitimate exercise of power.

Gifts. *Left Undelivered by Testatrix in Attorney's Hands—Principal and Agent.* Ill.

Testatrix, not caring to ameliorate the condition of her second husband after her death by leaving to him certain personal property given to her by her first husband, consulted her attorney in regard to it. She was advised that she could not make a valid bequest of it so as to deprive her husband of his interest therein, but to accomplish her purpose it would be necessary for her to deliver the property to the different persons she desired to have it. Subsequently, being confined to her bed, she called in her attorney, separated the articles, and the attorney marked the different parcels with the names and addresses of the persons for whom they were intended. The attorney delivered to her a receipt for the property, stating that the articles were to be given to the parties mentioned in memoranda contained in an envelope. This receipt was found pinned to the will when opened in the probate court. The attorney placed the articles in a private vault and the testatrix died before they were delivered. In *Trubey* v. *Pease*, 88 N. E. Rep. 1005, it was contended that the property was delivered to the attorney, not as agent of the testatrix, but as trustee for the donees, and operated to vest title in them immediately on its delivery to the trustee. After fully considering the testimony, the Court concludes that the attorney was merely the agent of the testatrix, and not a trustee for the donees, and that the agency was revoked by her death before delivery, and no title, therefore, passed to the donees.

Interstate Commerce. See Employer's Liability, Federal and State Jurisdiction.

Marriage and Divorce. *Annulment Refused where Bride was Under Eighteen—Construction of Statute.* N. Y.

Supreme Court Justice Greenbaum of New York, in refusing August 6 to grant the application made by Mrs. Anna J. Kruger to have her marriage to Henry Kruger annulled on the ground that she was under eighteen when the ceremony took place, said that the right to bring the action in this case was based upon section 1743 of the New York Civil Code, which declared that a person who has not attained the age of legal consent may bring an action for annulment, but that it must be taken in connection with section 1742, which states upon what other conditions it may be brought, and which applies only to a woman under sixteen years of age. If an annulment of marriage, however, contracted "under sixteen may not be decreed where the marriage took place with the consent of parents, it follows that the legislature must have intended that an annulment may not be granted in the case of an infant above sixteen years of age and under eighteen where the consent of the parents, or guardian, had been obtained."

Master and Servant. *Unconstitutionality of Statute Requiring Explanation of Reason for Dismissal.* Kans.

A Kansas statute required an employer of labor, upon request of a discharged employee, to furnish in writing the true reason or cause of such discharge. In *Atchison, T. & S. F. Ry. Co.* v. *Brown*, 102 Pac. Rep. 459, it appeared that one who had been discharged asked for the reason and was given a document reading thus, "discharged for cause." He alleged that this information tendered by his erstwhile employer was too vague to acquaint him or any future employer with his objectionable deficiency if any. The Court ruled that the mere matter of time requisite to comply with the statute (s. 2422, Gen. Stat. 1901) was perhaps a matter of trifling consideration, yet, if the state may compel the sacrifice of a few minutes of the time of one person for another, may it not compel the sacrifice of days? In that event where and upon what principle shall the time limit be placed? Again, if the employer can be compelled to state the true cause of discharge, it implies that he should state the facts as he understands them, and the facts may be in dispute and may be regarded by the employee as libelous. Litigation might

result which might be burdensome to the employer, although successfully defended. The state can impose no such burden.

Negligence. *"Turn-table Doctrine—Infant Who is not Chargeable With Contributory Negligence or Trespass.* U. S.

That doctrine usually alluded to as that of "turn-table cases" has of late been so often swerved from that the decision in *Snare & Triest Co.* v. *Friedman*, 169 Fed. Rep. 1, assumes interest because of its adherence to it. Defendant, an independent contractor, had left material consisting partly of heavy iron girders near a street. One of these beams became so nicely balanced on the other material that it could easily be displaced and caused to fall. Plaintiff, a little girl four and a half years old, with several companions had been skating on the pavement, when she sat at the base of the girders to rest. One of her companions, climbing upon the pile, so struck one end of the balancing girder that it fell, crushing plaintiff's foot. The Circuit Court of Appeals held that the child could not, by reason of her age, be charged with contributory negligence or with being a trespasser, and that defendant was liable.

See Procedure.

Privacy. *Publication of Picture—Defamation—Fraud.* Ky.

A patent medicine concern published in its magazine a forged recommendation of a patent medicine along with plaintiff's picture. The publication also contained a sketch of plaintiff, showing him to be a person of prominence in the community. Plaintiff in his suit for libel in *Foster-Milburn Co.* v. *Chinn*, 120 S. W. Rep. 364, charged that he did not write the letter and that it was published without his authority and brought him into ridicule and greatly mortified him. It was insisted strenuously for defendant that the publication was not actionable. Ordinarily words verbally spoken are not actionable *per se*, unless they impute a crime, but there is an important difference between oral slander and a written or printed publication. Such a publication is actionable when it subjects the person to disgrace, ridicule or contempt in the estimation of his friends and acquaintances or the public. After asserting this distinction, the Court maintains that a person is entitled to the right of privacy as to his picture, and that its publication without his consent as a part of an advertisement for the purpose of exploiting the publisher's business is a violation of such privacy and entitles him to recover without proof of special damage. It is further held to be a fraud on the public to publish the forged endorsements of public men of a patent medicine which they have never seen.

Procedure. *When Questions of Negligence are not for the Jury—Facts Must be Reasonably Uncontroversial to Justify Withdrawal.* U. S.

The case of *Kreigh* v. *Westinghouse, Church, Kerr & Co.* came before the United States Supreme Court upon a writ of certiorari to the United States Circuit Court of Appeals for the eighth circuit. The action was brought for injuries received while superintending the construction of a brick and steel building for which plaintiff's employer, the defendant, was the contractor. The Circuit Court of Appeals had taken the case from the jury on the evidence offered, which showed that the plaintiff had been knocked from a staging where he was superintending the work of bricklayers, by a heavy bucket used by fellow workmen in hoisting concrete material to the roof, the derrick employed for the purpose having but one guy rope, such derricks ordinarily being provided with two. The Supreme Court reversed the decision and ordered a new trial, holding that the evidence should have gone to the jury. Mr. Justice Day, in delivering the opinion of the Court, said:—

"Questions of negligence do not become questions of law, to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.' *Gardner* v. *Michigan C. R. Co.*, 150 U. S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140.

"It may be that the jury would have found that the injury to the plaintiff was the result solely of the negligence of his fellow servants, but there was testimony in the case tending to establish the unsafe character of the derrick when operated in the manner it was intended to be operated, so far as the record discloses."

Public Ways. *Height of Vehicles—Validity of Municipal Ordinance.* N. Y.

To protect the trees and other vegetation

within its parks and driveways, New York City passed an ordinance forbidding the operation within them of any vehicle more than ten feet high. In *People* v. *Shellenberg*, 117 New York Supplement 820, the company employing defendant, who had been convicted of driving a double-decked motor omnibus exceeding the prescribed height, contended that it had the right conferred by statute to operate its stages without restriction as to height. The New York Supreme Court, assuming that the company had the right to run its automobiles on Riverside Drive, thought it had no right so to operate them as to violate a city ordinance, which if otherwise valid could not be impeached merely because it interfered with the use of a particular kind of stage which the company operated. If it chose to select a route which included a public park, it thereby subjected itself to reasonable regulation. That vehicles of excessive height will probably injure the lower branches of trees that overshadow the drive and thus impair its usefulness is self-evident. It was held that no ground for the invalidity of the ordinance was shown.

Obstruction of Sidewalks by Street Peddlers and Bootblacks. Neb.

The city of Lincoln, Neb., passed an ordinance making it unlawful for any person to erect any booth, shed, stand, or other obstruction upon the sidewalk for the sale of merchandise, or to be used for shining boots. In *Chapman* v. *City of Lincoln*, 121 N. W. Rep. 596, plaintiffs complained that other merchants were allowed to use the sidewalks for the display of their goods, so why should not they? The Nebraska Supreme Court held that simply because the city, perhaps illegally, had seen fit to allow its merchants to display upon the walk in front of their shops samples of their wares, it did not follow that it was ever the intention that the public sidewalk space should be converted into a source of monthly revenue by obnoxious persons crying out for the purpose of engaging their services and selling their merchandise.

See Advertising Nuisance.

Waters. *Riparian Rights—Private Wharves May be Built to Reach Navigable Portion of Stream.* U. S.

In *Weems Steamboat Co.* v. *People's Steamboat Co.*, reported in L. ed. advance sheets Oct. term 1908, p. 661, decided by the Supreme Court of the United States June 1, the Court, per Mr. Justice Peckham, said:—

"The rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right, among others, to build private wharves out so as to reach the navigable waters of the stream. *Dutton* v. *Strong*, 1 Black, 23, 17, L. ed. 29; *Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Parkersburg & O. River Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 445, 36 L. ed. 1018, 1039, 13 Sup. Ct. Rep. 110; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.*, 158 U. S. 349, 368, 42 L. ed. 497, 504, 18 Sup. Ct. Rep. 157. The courts of the state of Virginia affirm the same rights of the riparian proprietor. *Norfolk City* v. *Cooke*, 27 Gratt. 430, 435; *Alexandria & F. R. Co.* v. *Faunce*, 31 Gratt. 761, 765. If the wharf obstructs navigation or the private rights of others, or if it encroaches upon any public landing, the wharf may be abated. Va. Code, 1887, §998. A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property of the exclusive use of which the owner can only be deprived in accordance with established law; and if necessary that it or any part of it be taken for the public use, due compensation must be made."

Wills and Administration. *Executor's Personal Liability for Claims Which He Has Not Disallowed.* R. I.

Where the testatrix was indebted to the plaintiff for labor and materials, and the defendant, the executor, was sued for the claim as personally liable for it, in view of his failure to disallow it within the statutory time, the Superior Court of Rhode Island, per Tanner, P. J., expressed the opinion that the plaintiff had already had, by the allowance of his claim, all that he could obtain by an action at law. Such allowance by the executor amounts to a judgment against him, said the Court. "We know of no way to compel an executor to pay a claim against an estate except by suit on his bond." (Not yet reported.)

See Gifts.

The Editor's Bag

DARWINISM AND THE LAW

CHARLES DARWIN, the centenary of whose birth is observed this year, was in no sense a political writer, and he did not furnish us with an application of his principle of "the survival of the fittest" to social phenomena. It is not difficult, however, to imagine that, were he alive today, he would see in the attrition of social forces evidence of a different form of "the survival of the fittest" from that to which he devoted a lifetime of study, and that his great contribution would enrich other departments of science than that to which he gave chief attention.

Darwinism and the doctrine of evolution are by no means synonomous. The science of evolution, or to be more accurate that of genetics, is not yet complete, and the invaluable contributions of Weismann, Mendel, de Vries, with many others, have considerably enriched and expanded it since Darwin and Wallace. The complexities of human society will provide material for an expanding science of evolution. Darwin left practically untouched the problem of human progress. Future writers will have to explain the meaning of "the survival of the fittest" as applied to the progress of humanity.

The unpopularity of Darwin's theories when they were first made public was due chiefly to theological odium, but partly also to sentimental causes and to prejudices not easily shaken off. There was a cold brutality about the idea of the destruction of the unfit which offended tender-hearted orthodox optimism. There was also, in the prerogative of those favored by nature, something repellent to the then prevalent notion of justice. Why should the individual be rewarded for what is not of his own doing, and why should he be destroyed because he is born with weaknesses for which he is not responsible? That was the attitude of the morality of an earlier generation. But a truer moral perspective has since helped us to perceive more clearly that while the free-willed individual does not deserve to suffer for the faults of that which is determinate and no longer free neither does society deserve to suffer because of a false sentiment of charity which defies the principle of social self-preservation, and invites the corrosion sure to follow upon tolerance of decay within threatening its very vitals. In other words, the old conception of justice to the individual, instead of being supplanted, has been strengthened and corrected by that notion of justice to society which though never wholly overlooked was never so clearly envisaged as now, when man has learned that the will unaided cannot rise to all things, but the heights of virtue are to be sealed only with the fortunate assistance of forces of environment and heredity which are beyond the control of those who triumph.

Man is a part of nature, so that natural selection, if the term is used accurately, must mean not only the selection which nature exercises upon man, but also that which man exercises upon himself. It must mean the selection applied by the social as well as by the physical environment of man, and "the survival of the fittest" in consequence of social selection—which includes sexual selection—may mean one of two things: the survival either of those best adapted to their physical environment, or of those best fitted to their social surroundings.

If in the lower forms of life, among ants and bees for example, we see the operation of that social selection which favors the socially fit and eliminates the socially unfit, of how tremendously greater importance must be the part which social selection must play in the life of mankind! Adaptation to the social environment, if not the substance of moral goodness, is its shadow, and as we enter the field of social science we see that the doctrine

of "the survival of the fittest" has important bearings upon the fundamental problems of the race, and is thus, in the words of Weismann, transforming our old conceptions (*Contemporary Review*, July, 1909, p. 21):—

"It is teaching us to understand the struggle, silent or clamant, among human races, their rivalry for the possession of the earth, and to understand, too, the composition of human society, the unconscious division of labor among the members, and the formation of associations. The development of 'classes' and their union in a state appears in a new light when looked at from this point of view. In this department a good deal has been already accomplished."

Much has been accomplished, and much will be accomplished, by the several specialized sciences dealing with the broad field of human society in the light of the great discovery of Darwin and Wallace. What applied ethics learns from the doctrine of selection is that as social fitness is moral fitness, the world should do what it can to promote the survival of the morally fittest, and the destruction of the morally unfit. Applied politics and jurisprudence learn from it the lesson that political organization and legal development are to assist in the survival of the fittest by means of political franchises and juridical capacities so apportioned among men as to further the general welfare, being withheld in those quarters where anti-social or injurious forces are to be discovered at work. In a word, the survival of the fittest means wholesome competition. But in the strife of competition, in which the weakest must go to the wall, we must not commit the error of supposing that the strong may no longer serve the weak, for justice and mercy are always compatible. As the distinguished biologist whom we have just quoted says:—

"The principle of selection has often been applied in an inverted sense, as if the brutal and animal must ultimately gain the ascendency in man. The contrary seems to me to be true, for it is the mind, not the body, that is decisive in the selection of the human race."

People are now writing in many quarters on the subject of eugenics, or the improvement of the race, but if we could only adhere consistently to the scientific ideal of justice the problem of the improvement of the race would no longer exist. We should then be improving the race automatically, by allowing natural forces to have full sway. We should then have left behind us the legacy of outworn toleration, mainly of theological origin, fostering the evils of pauperism and vice. Justice, not sentiment, would be the dominant motive of public and private charity. Social legislation would not be granted in recognition of any popular demand hostile to the well-being of humanity. Our laws and institutions would themselves constitute agencies actively at work for the improvement of the race. This, it seems to us, is the correct view of eugenics. No application of eugenics can be either practicable or efficacious, if it is to be made through artificial as opposed to natural selection. The human race cannot act upon itself after the fashion of an external force. It must rather act as the passive agent of natural forces operating through society, and no higher good can be attained than that which is inherent in the race. A man who conforms to the laws of health should not have to study the science of medicine to be well, neither should a race.

We are not contending for a Darwinian ideal of justice. There is of course no such thing. What is urged is the importance of never forgetting the naturalness of an unremitting struggle which has as its goal the survival of the highest social merit. It is a natural struggle and a just one. The rewards and punishments distributed by society among the fit and the unfit, by means of laws, are not artificial contrivances but a natural expression of the social conscience. Wealth and opportunity are not an artificial and unnatural discrimination, but likewise a normal expression of the social will. Property is an agency in promoting civilization. Socialism contemplates a kind of artificial selection in violation of the regular order of nature. In this connection it is interesting to quote one of the few political documents we have from the pen of Charles Darwin, perhaps the only one. He wrote of the inhabitants of Tierra del Fuego, visited by the *Beagle* in 1834, in an acute manner, very much as any shrewd observer might write, but his remarks at that early period are interesting because of any possible connection they may have with the theories that were probably then germinating in his mind. He wrote in his log book:—

"The perfect equality among the individuals composing the Fuegian tribes must for a long time retard their civilization. As we see those animals whose instinct compels them to live in society and obey a chief are most capable of improvement, so it is with the races of mankind. Whether we look at it as a cause or a consequence, the more civi-

lized always have the most artificial government. For instance, the inhabitants of Otaheite, who, when first discovered, were governed by hereditary kings, had arrived at a far higher grade than another branch of the same people, the New Zealanders, who, although benefited by being compelled to turn their attention to agriculture, were republicans in the most absolute sense. In Tierra del Fuego, until some chief shall arise with power sufficient to secure any acquired advantage, such as the domesticated animals, it seems scarcely possible that the political state of the country can be improved. At present, even a piece of cloth given to one is torn into shreds and distributed, and no one becomes richer than another. On the other hand, it is difficult to understand how a chief can arise till there is property of some sort by which he might manifest his superiority and increase his power."

If this extract, which we have requoted from a significant article in the August *Fortnightly Review* by Mr. E. B. Iwan-Muller, is read in the light of the principle of "the survival of the fittest," it is one of the strongest pronouncements against socialism and communism ever written.

The uses of the Darwinian position in solving some problems for the lawyer are not to be overlooked, at a time when Darwinism has become merely part of a stream of growing knowledge which it no longer helps much to swell. Formerly the lawyer's refuge from visionary, metaphysical doctrines was to be found in a wholesome Anglo-Saxon tradition of empiricism. The empirical grounds upon which judges have repeatedly refused to sanction eight-hour labor laws, in compliance with a metaphysical socialistic program, are sustained by more weighty and convincing reasoning. The liberty of the individual, safeguarded by the Constitution, is not a barren metaphysical dogma, but is something which is dependent upon natural capacity and must be subject to qualification in the interest of the general welfare. Judicial interpretation can no more override stubborn scientific facts than can the public opinion which gives to laws their ultimate sanction. In defining the new articles of the Bill of Rights of modern democracy, constitutional jurists must pay due heed to the *régime* of competition, which even monopoly in the field of economics cannot utterly destroy, and the extent and character of fundamental guarantees must be set forth with reference to a sound ideal of social justice. If the correlated principles of the supremacy of merit in consequence of the survival of the fittest, and the progress of mankind as a result of the same process, are to exert a formative influence on the jurisprudence of the future, the inevitable scientific movement in legislation will have owed not a small part of its impetus to Charles Darwin.

AN EXTRAORDINARY WILL

AN exceptional case was lately before the Superior Court of St. Petersburg. One of the wealthiest land owners near Smolensk died not long ago, and after the funeral the heirs looked vainly for the will, but without success.

A few days later, a young man, seeing a graphophone on a table in the dead man's library, put into it a record which he supposed was that of a popular Russian song. To his amazement and terror, instead of a song he heard the voice of the dead man recite the words of the missing will.

The heirs were notified of the discovery, lawyers were summoned, and they lost no time in examining the record containing the will. It was found to be flawless, and the question then arose whether a will left on a graphophone cylinder would be deemed valid by the courts. It is, therefore, on this unique point that the Superior Court must render its decision.

THE LAW AND LITERATURE

"BY the bye, Wells, I have read your poem," said Hazlitt to the young author of "Joseph and his Brethren," one of the finest poems ever written by a solicitor. "I consider that it shows real genius, and—I advise you to stick to your profession." Mr. Birrell, in the happy and humorous speech he made at the Hardwicke dinner, gave similar advice to young lawyers with a leaning towards letters. Describing his own practice at the bar as "a pleasant trickle of work between a great margin of leisure," he observed that the income he had enjoyed as a Chancery lawyer was ten times greater than that he had obtained as an essayist, and advised such of his auditors as had literary ambitions to stick to their less attractive calling. The worst of this advice, however wise from one point of view, is that the world has so much reason to be thankful that it has not always been acted upon. Bacon, Scott,

Gray, Cowper, Macaulay, R. D. Blackmore, Stevenson, Sir W. S. Gilbert, Calverley, Stanley Weyman, and Anthony Hope are among the members of the Bar who might have been lost to literature if the practical wisdom of Mr. Birrell's advice had always been recognized. —London *Law Journal.*

ATTRACTIVE JAILS

SOMETHING needs to be done to make our jails less attractive, when a prisoner serving a six months term in Ludlow street jail, New York, for contempt of court in refusing to pay alimony to his first wife, is moved to talk to the newspapers in this strain:—

"I came here on April 1. In four months I have accomplished what I have been trying to find time to do all my life. I have read practically every one of Balzac's novels. I have also brushed up on the Elizabethan dramatists and read many lighter books and magazines. In no other place except another jail could I find time for this reading. I should advise every young man who wishes to go through a course of home study, and finds it impossible under his circumstances, to get in contempt of court and be sent to this jail for six months or a year."

If the opportunity for self-improvement wholly outweighs the penalty of social disgrace, as this sculptor-prisoner seems to think, to maintain schools and jails is a foolish waste, when one can do the work of both.

LEGAL DEFINITION OF "ROOTERS"

A FRIEND in Winnipeg writes July 29, 1909, to the *Green Bag* as follows:—

Legal "rooters" and "fans" may be interested in a recent legal definition of a *rooter* formulated by His Lordship Mr. Justice Riddell of the High Court of Justice of Ontario, in the case of *Stewart* v. *Cobalt Curling and Skating Association*, 14 Ontario Weekly Reporter 171. The action was for damages caused to a spectator at a hockey match by the breaking of a rail upon which a large number of spectators were leaning to watch the progress of a fight. His Lordship said, "The plaintiff paid for a seat in one of the galleries, at the 'rooters' ' end—'rooters,' as I understand it, being those spectators who are most enthusiastic." . . . Incidentally, his Lordship remarked that a hockey match was a place where a "row might be expected to take place." The plaintiff got $850 damages and costs.

OF WITNESSES

SPEAKING of witnesses at the annual meeting of the Tennessee Bar Association, Col. W. A. Henderson, general counsel for the Southern Railway, said:—

"The usual witness wants to tell the truth. There is not so much perjury in the courts as the public believes. I don't know how i happened to get abroad, but the impression prevails with every witness that he is on the side of the lawyer who summoned him. Hence he is unconsciously partisan. Beware of the willing witness. Don't introduce your witnesses alphabetically. And don't ask, 'Who's the next witness?' or say, 'Call the next witness.' Know who they are and call them.

"The most ignorant person in all the world is a young lawyer examining a witness. The young lawyer is then 'It,' and he can't see anybody but himself. Beware of asking too many questions. Try to put the one question which will bring the answer you want. I had a case up in Fentress county. One of the witnesses was a woman who wouldn't answer any question satisfactorily. She was reluctant to tell the truth. When she was turned over to me, I said, 'Madam, you swore when you came on this stand to tell the truth, the whole truth and nothing but the truth, didn't you?' 'Yes, sir, I did,' she snapped. 'Well, Madam, may I ask whether you have done so?' 'Yes, sir, I have,' she retorted, 'and I had a legal right to do so.' "

JUDGE BREWER'S STATUS

MR. JUSTICE BREWER'S explanation of the situation in the Supreme Court, in his speech at Milwaukee, should cheer the suffragette. Said he:—

"There are four men on the supreme bench who could retire. I told my wife I should retire because the statute said I could do so.

"'I don't care what the statute says; you can't do it.' she said. That seemed to settle my status."

It seems also to settle the power woman exercises over the law in the United States, despite the restriction of the franchise under which some of the sex chafe a little.

—*Boston Record.*

LEGAL ENGLISH

AS an illustration of the peculiarities of the English sometimes used in legal documents, the following may be of interest:—

"In the county court of Wyoming county [West Va.], March 2nd, 1903.

"On motion of William Allen Rollins, after having proved to the satisfaction of the court that he is suffering from Tuberclar Arthritis of the right knee which is showh by the certificate of Dr. Allen It is therefore adjudged and ordered that said William Allen Rollens do go to the Hospital No. 1 in McDowell county West Va. and there make application to be treated for the disease from which he is now suffering. But the court does not by this order intend to charge the county of Wyoming with the expenses of said William Allen Rollins, should he be received and treated at said Hospital, and a copy of this order shall be made by the clerk of this court and delivered to the said William Allen Rollins. The Court would further add that said Rollins is a very poor man."

GETTING AN OPINION

A SHREWD old Vermont farmer came into a lawyer's office the other day, and proceeded to relative the circumstances in a matter about which he thought it would be profitable to "go to law."

"You think I hev got a good case?" he finally asked.

"Very good indeed!" the lawyer assured him. "You should certainly bring suit."

"What would your fee be fer the whole thing?" the old farmer asked.

"Fifty dollars," was the prompt response.

The client pulled out an old wallet, extracted a roll of bills, and counted out fifty dollars.

"Now," he said, "you hev got all you would get out of this case anyhow, so s'pose you tell me honestly just what you think of my chances of winnin' a suit are?"

THE LAWYER KNOWS BEST

THAT was a pretty good way of squelching a legal objection, as illustrated in the case of Gifford Pinchot, the United States Forester, at the recent Seventeenth National Irrigation Congress at Spokane.

Ex-Judge Campbell of the Department of Justice, sitting beside Mr. Pinchot at a press banquet, made a long harangue upon the illegality of the Forestry Service, and then a personal attack upon Pinchot. When he was through, Mr. Pinchot, smiling as usual, told a single story which effectually closed the episode. It reminded him, he said—the wanderings of the legal mind reminded him—of the story of the Irishman who fell from a high building on which he was working. As he lay on his back with his eyes shut, his palms open upward, the doctor came and looked at him.

"No good to do anything. He's dead," said the doctor.

Just then Pat rose up from his swoon and started up the ladder again. The foreman caught him by the arm.

"Here, here, Pat," said the foreman. "Lie down again, now, that's a good fellow. The doctor knows best, Pat."

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

"Wanted, solicitor, experienced in laundry or dye works, to drive wagon."

— *Vancouver World.*

The next witness was a hard-fisted, resolute yeoman with a bristling chin beard.

"Mr. Gigson," said the attorney for the defense, "are you acquainted with the reputation of this man for truth and veracity in the neighborhood in which he lives?"

"I reckon I am," replied the witness.

"I will ask you to state what it is."

"Well, sir, his rep'tation fur vrassity—well, that's diff'runt. Some says he does and some says he don't."

"Witness," interposed the judge, "do you know the meaning of 'veracity?'"

"I reckon I do."

"What do you understand by the word?"

The witness twirled his hat in his fingers a few moments without replying. Then he looked up defiantly.

"I refuse to answer that question, judge," he said, "on the ground that it might discriminate me!"—*Chicago Tribune.*

Most lawyers take a keen delight in trying to confuse medical experts in the witness box in murder trials, and often they get paid back in their own coin. A case is re-

called where the lawyer, after exercising all his tangling tactics without effect, looked quizzically at the doctor who was testifying and said:—

"You will admit that doctors sometimes make mistakes, won't you?"

"Oh, yes; the same as lawyers," was the cool reply.

"The doctors' mistakes are buried six feet under ground," was the lawyer's triumphant reply.

"Yes," he replied, "and lawyers' mistakes often swing in the air."—*New York Times.*

"The recent press reports touching the use of whisky by juries in Tennessee," says a New York lawyer, "remind me of an amusing incident in connection with a trial I once witnessed in Arkansas.

"The defendant had been accused of selling adulterated liquor, and some whisky was offered in evidence. This was given the jury as evidence to assist in its deliberations.

"When they finally filed into court, his Honor asked:—

" 'Has the jury agreed on a verdict?'

" 'No, your Honor,' responded the foreman, 'and before we do we should like to have more evidence.' " —*Lippincott's.*

"Gentlemen of the jury," said the prosecuting barrister, "this prisoner is an unmitigated scoundrel; he acknowledges it. And yet, thanks to the wisdom of the common law, he has been given a fair trial by a jury of his peers."

—*Law Student's Helper.*

Lawyer (to deaf witness)—Do you know the plaintiff's pigs?

Witness—Eh?

Lawyer (raising his voice,—Do—you—know plaintiff's pigs?

Witness—Yes.

Lawyer—How long have you known them?

Witness—Eh?

Lawyer (louder still)—How long have you known them?

Witness—Fed 'em all last spring.

Lawyer—Were they all about a size?

Witness—Eh?

Lawyer (rises on his feet petulantly and shakes his forefinger at the conclusion of each word at the witness)—Were—they—all—of—a—size?

Witness—Some ov 'em wor, and some ov 'em worn't. —*Exchange.*

It was seriously (but unsuccessfully) urged in a Nebraska case that an applicant for a liquor license was not entitled to it because he did not have a respectable character, and that he did not have a respectable character because he applied for a license to sell liquors.

—*Case and Comment.*

A corporation composed of negroes is held, in a recent Virginia case, not to be a "colored person." This corporation bought the land for an amusement park for the use of colored people, and the land was subject to a covenant against the sale thereof to colored persons. But while it has been well established that a corporation is a person, it is not a colored person because it is composed of persons of color. —*Lancaster (Pa.) Law Review.*

Correspondence

THE ECONOMIC SITUATION AND THE CONSTITUTION

To the Editor of the Green Bag:—

FOLLOWING closely upon President Taft's special message to Congress, the address of Attorney-General Wickersham before the Kentucky Bar Association is of the greatest interest and significance to students of economic questions. As he undoubtedly speaks with authority, we may take it as the purpose and determination of the present administration of our national government to face the economic problems which now present themselves as the outcropping of forces long at work beneath the surface of things. The evolution of industry is so far in advance of the constitutional limitations of political government in the United States as to cause serious embarrassment to the conduct of legitimate business on the one hand, and, owing to lack of adequate machinery for guiding and restraining the new forces, to permit on the other an unwarranted exploitation of the people by trusts and combinations. The invincible power of co-operative effort which the organization and success of these trusts and combinations witness has come to stay. It is the working out of economic progress, and may be regarded not only as inevitable but as eminently desirable.

The chief province of combination in productive enterprises is to eliminate waste, through a scientific organization of production. The untoward features which we complain of, stockwatering, holding companies, evasion of legal responsibility and the unrestrained and unqualified appropriation of the entire social profit consequent upon this organization by the pioneers in these new economic fields, are merely incidents.

As the rules and orderly government of civilization always follow close upon the heels of the pioneers who explore and settle newly discovered countries, so will the regulation of law and decency overtake the captains of industry who have discovered and explored for us hitherto unknown economic realms.

Consequently the suggestion of President Taft that Congress should propose a constitutional amendment to the states which shall authorize the imposition of an income tax by the federal government raises an issue of great importance. It comes at a period in our history that is peculiarly promising for a careful study of first principles, for the reason that so many of the cherished rules of procedure are being found inadequate to cope with the demands of a wholly new economic development. The broadening of the limits of the federal power is an economic necessity. There do not exist in our time the same reasons for fearing a centralization of power that impelled our forefathers to jealously guard against it.

They thought only of political power. Economic force was unknown to them. Whereas in our day political power is wholly secondary and the economic strength of organized industry has become irresistible. A tariff bill is made not as a piece of statecraft devised for the benefit of the entire nation, but in subservience to the wishes of the heads of great business enterprises. Already the claim is being put forth that the proposed tax on corporations is unconstitutional. Perhaps upon test it may be found to be so, and thus become an additional argument for broadening the Constitution. The Supreme Court is bound in honor and conscience strictly to uphold the literal interpretation of the Constitution, for it cannot properly change the clear intent of the instrument merely to meet new conditions. If an organization governed by rules of order and a constitution finds it difficult to transact business under those rules, the constitution and rules are promptly changed by an exercise of the right to change expressly reserved in the membership.

There are other matters besides the right to levy an income tax which sorely need an extension of the powers of Congress beyond the rigid limits set by the written Constitution of 1789.

We have a national bankruptcy law. We should have a uniform law of sales, uniform regulations governing marriage and divorce, and prescribing the inheritance and descent of property, and a power in Congress to regulate the great business of insurance. Congress now has power to regulate commerce, but the Supreme Court has repeatedly decided that insurance is not commerce. This business of such immense magnitude and importance is thus left to the varied and inconsistent regulation of the forty-five states of our country. As Mr Wickersham pointed out in his address, the Supreme Court recognizes the unlimited extent of the power of the states over corporations transacting business within their borders A few years ago the writer suggested that insurance companies reincorporate under a federal law to be passed for that purpose in order to escape the intolerable burden and expense consequent upon transacting a business national in its character under the independent supervision of our many states. But there is considerable doubt as to whether the Supreme Court would change its views upon this subject, and the necessity of a constitutional amendment which shall expressly declare insurance to be commerce thus becomes evident.

The final decision upon the question of amendments rests entirely with the citizens of the separate states to whom it is finally referred. It is forty years since the last constitutional amendment was adopted. It may be that many people are not even aware that amendments to the Constitution were contemplated by its framers and definite machinery provided for the purpose. It cannot fail to be wholesome to have a widespread discussion of the subject, one covering the entire field of government by Constitution, and a recognition of the fact that for economic purposes at least we are one entire nation, not a collection of independent sovereignties.

SAMUEL DAVIS.

Boston, Mass.

The Legal World

Important Litigation

Circuit Court Judge Burdett, at Charleston, West Va., restrained Attorney-General Conley and County Prosecutors July 24 from enforcing the two-cent rate law against the Virginian Railroad on the ground that the act limiting the rate was unconstitutional. The state decided on an appeal.

The Supreme Court of Nebraska has declared the so-called nonpartisan judiciary law unconstitutional. This law prohibited any political party, committee, or convention from "in any way whatsoever endorsing, recommending, censuring or referring to any candidate" for judicial office. This provision was deemed in violation of the constitutional guarantees of free speech, free assemblage, and free elections.

All discrimination is not forbidden by the Act to Regulate Commerce, but only such discrimination as is undue, was substantially the decision rendered July 13 by the Interstate Commerce Commission in the case of *Herbeck-Demer Company* v. *Baltimore & Ohio R. R. Co. & Pennsylvania R. R. Co.* The complainant has traveling salesmen who carry about 1,250 pounds of baggage, on all over 150 pounds of which they have had to pay excess fare. The commission held that the discrimination cited was not unlawful, and that the railroad had a right to stipulate the amount of baggage to be carried by a passenger on his ticket as personal property.

In the opinion of the Treasury Department, litigation will be necessary to settle the status of goods imported on the last day the Dingley tariff rates were effective. The usual hour of closing the customs offices is 4.40 p. m. In some instances the offices were closed at the usual hour; in others they were kept open as late as midnight, on the theory that as the new law would not go into effect until the morning of August 6, the importer should be given possible facility to get their consignments through the custom house. Protests have been received by the Treasury Department in great numbers against the early closing, but the new duties have been enforced.

In a sweeping and important decision made public July 15, the Interstate Commerce Commission condemned the manner in which the leading express companies of the country had been conducting their business. The commission commanded the companies to file with it a new basis of rates for the carriage of small parcels. The companies directly affected are the Adams, United States, American, Pacific, and Wells-Fargo. The Boisé Commercial Club brought the complaint, maintaining that Boisé and other towns in Idaho were grossly discriminated against because of the lack of competition in such towns. It was shown that a package weighing in excess of seven pounds and less than forty-eight pounds, shipped from New York to Boisé, was exorbitantly taxed. An additional trespass on the Interstate Commerce Law was the rule the companies had formed of charging much more for packages on which the rates were to be collected at their destination. The commission said that when a company had a monopoly at the packages' destination the exorbitant rate was applied, but not if there was competition. The commission's ruling found that the conditions under which rates were at present made were "chaotic," and the carriers were ordered to submit a new tariff on or before October 1.

After a three weeks trial before Mr. Justice Mills of the Supreme Court of Westchester County, N. Y., Harry K. Thaw, the slayer of Stanford White, was decided on Aug. 12 to be still insane, and was sent back to the asylum at Matteawan. The Court expressed itself as convinced that the facts clearly showed a substantial though not strong hereditary taint of insanity, a delusion regarding White's practices based on an unalterable belief in the wildest and most impossible stories, and insanity of the kind known as paranoia, and not at all of the so-called "brainstorm" variety. The judge presiding at the trial, from his own personal observations and interrogation of Thaw, concluded that he had continued to be of unsound mind, being still subject to the same delusions as when he shot White. In anticipation of a decision unfavorable to his release, Thaw on July 19, three weeks previously, through his counsel, filed in each of the five counties of the ninth judicial district copies of an appeal in the New York Court of Appeals from the recent order of the Brooklyn Appellate Division. In this the court, with the exception of Justice Gaynor, had upheld the action of Justice Mills in dismissing a former writ of *habeas corpus*, and had ruled that section 454 of the Code of Criminal Procedure, under which Thaw had been originally committed to the asylum, was constitutional (see 21 *Green Bag* 416).

Personal

Jay Mertz of Detroit has been appointed to the newly created position of deputy clerk of the Supreme Court of Michigan. He was secretary and stenographer to Chief Justice Carpenter up to the time when the latter resigned a year ago to resume the practice of law in Detroit.

Daniel J. Richardson of New York, whom Secretary Nagel of the Department of Commerce and Labor made his confidential clerk, was educated at the Syracuse University and at the law school of George Washington University. On his graduation from the latter institution he was awarded a prize of $250 for the best legal thesis.

Forrest C. Donnell, an attorney connected with the office of former Judge Selden P. Spencer of St. Louis, has been appointed attorney for the collection of the collateral inheritance tax, from which the Missouri State University derives a large part of its revenue. Mr. Donnell is a graduate of both the collegiate and legal departments of the University of Missouri. He has been active in two campaigns, making speeches on the stump throughout Missouri.

Martin W. Littleton of New York City, in telling a *New York Herald* correspondent his observations on a few months' vacation in London, expressed surprise at the lack of sentiment which enters into British legal proceedings. "They seem to discount the value of emotions," he said. "Lawyers addressing juries confine themselves to dry statements of fact and depend for success upon adroit methods by which they procure admission of evidence. In America it depends a good deal on appealing to a man's feelings, and personally I believe it is a fairer method, because when the decision comes from the heart it is more apt in many ways to be right than when it is purely a product of the head."

Bar Associations

The Iowa State Bar Association has accepted without change or amendment the canons of legal ethics reported to the American Bar Association a year ago.

The twenty-fifth annual meeting of the West Virginia State Bar Association was held at Webster Springs on July 7 and 8. W. E. Haymond of Sutton was elected president, and Charles McCamie of Wheeling secretary.

Hiram T. Gilbert made an eloquent appeal for legal reform before the Illinois Bar Association at its recent meeting. Edgar A. Bancroft of Chicago was elected president and W. R. Curran of Peoria, Ill., vice president.

The Washington State Bar Association held its annual meeting at Aberdeen and Westport, Cohassett Beach, July 29–31. J. B. Bridges delivered the president's annual address. A new constitution was adopted. One afternoon was spent on the beach, where after athletic games and sports the lawyers ate clams and went bathing in the surf.

The eleventh annual meeting of the North Carolina State Bar Association was held in Asheville on June 30 and July 1 and 2. The annual address was delivered by James W. Osborne of New York City, whose subject was "Reminiscences of the New York Bar." Among the papers read were "The Progress of the Law," by E. F. Oydlett, of Elizabeth City, and "The Life and Character of Lord Coke." Col. John W. Hinsdale of Raleigh, was elected president for the next term, and Thomas W. Davis of Wilmington was re-elected secretary and treasurer.

The thirty-second annual meeting of the Alabama State Bar Association was held in Birmingham on July 8 and 9. The annual address was delivered by William L. Curtis of New York, on the subject, "The Truth About the Panama Canal." The papers included, "The Ideal Trial Judge," by W. O. Mulkey; "The Majesty of the Law," by S. L. Field; "Buying a Piece of Land," by E. W. Faith; "Common Law Marriage," by R. C. Brickell; "Quadrennial Sessions of the Legislature," by Emmett O'Neal. Emmett O'Neal of Florence was elected president.

The Texas Bar Association held its twenty-ninth annual meeting at Austin, July 6–8. The annual address was delivered by William C. Fitts, ex-Attorney-General of Alabama. The address of welcome was given by J. Bouldin Rector, City Attorney of Austin. Other addresses were: Judge N. W. Finley, "The Profession of Law as Distinguished from the Business of the Law"; Judge R. L. Batts, "Inefficiency in the Administration of the Law"; Judge R. B. Levy, "Criminal Laws of the Early Period"; Judge S. P. Jones, "Unreasonable Delays in the Final Disposition of Civil Suits."

The thirteenth annual meeting of the Indiana State Bar Association was held in Indianapolis on July 7 and 8. President Daniel W. Simms opened with an address on "The Law and the Lawyer." The annual address was delivered by Hon. Alexander Humphrey of Louisville, Ky., who took for his theme, "The Last Year with the United States Supreme Court." Other papers read during the meeting were "Indiana Courts," by Hon. James S. Dodge, "Modern Views of Compensation for Personal Injuries," by Hon. Addison C. Harris, "The Trouble with the Law," by Hon. William Dudley Foulke, "The State Bar Association of Indiana," by Hon. Emory B. Sellers; "Lawyers and Courts," by Hon. Cassius C. Hadley. John T. Dye of Indianapolis was elected president, and George H. Batchelor of Indianapolis secretary.

The Tennessee Bar Association, at its recent annual meeting at Chattanooga, elected Henry B. Anderson of Memphis as its new president. A report was presented by the

Committee on Jurisprudence and Law Reform, advocating the commission form of municipal government for all cities of a given population, the change being brought about by a constitutional amendment if necessary. John Bell Keeble read a splendid eulogy on "Judge William Frierson Cooper," of the Supreme Court of Tennessee, who died last May. The Association approved a form of oath of admission to the Tennessee bar, in connection with the American Bar Association's code of legal ethics.

The attendance was large at the annual meeting of the Virginia State Bar Association at Virginia Hot Springs, on August 10–12. The president's address was delivered by Captain Micajah Woods, his subject being "The Value of General Culture in the Training of a Lawyer." Professor William M. Thornton of the University of Virginia gave an address on "Thomas Jefferson—as Man, Statesman, Lawyer and Politician." Papers were also read by Judge Robert R. Prentis of the State Corporation Commission, William W. Ould of Norfolk, who discussed "Taxation in Virginia and our Relation to the Subject," and George E. Caskie of Lynchburg. Among those who responded to toasts at the banquet were Hon. Hannis Taylor, ex-Minister to Spain, and Hon. Rosewell Page of Hanover, who spoke on "The Uniformity of Legislation." A report on expert testimony in murder cases was received with some interest. The following officers were elected: president, R. Walton Moore, of Fairfax; vice-presidents, Robert B. Tunsell, E. Chambers Goode, J. A. C. Keith, Abraham P. Staples, and John W. Chalkley; secretary and treasurer, John B. Miner of Richmond; executive committee, Aubrey E. Strode, Cardner L. Boothe, George A. Frick.

Attorney-General Denman of Ohio opposed the poll tax as violative of the American principle of equality before the law, and astonished members by disapproving of the constitutional amendment proposed by tax experts, in a paper presented at the annual meeting of the Ohio Bar Association held at Put-in-Bay, O., July 6–8. The annual president's address was delivered by Hon. A. D. Follett of Marietta, O., and the program also included papers by Thomas Beer on "Coke Literature," by Hon. James R. Garfield on "Employer's Liability and Compensation Laws," and by Hon. Walter George Smith of Philadelphia on "Uniform Marriage and Divorce Laws." Congressman Samuel W. McCall of Massachusetts was to have delivered the annual address, his topic being, "The Importance of a Trained Bar in the Maintenance of Free Institutions," but was unable to be present. Mr. Garfield advocated the overthrow of employer's liability laws and the shifting of the burden of industrial accidents from the families of working men to the industries concerned. A committee was appointed to investigate this subject and suggest legislation needed in Ohio. The canons of professional ethics settled upon by the American Bar Association were adopted and it was resolved that they be made a part of the subject-matter of bar examinations. Reports were adopted recommending that the term of office of the state supreme judges be lengthened to twelve years, and that the right to appeal from the judgments and final orders of the common pleas court to the circuit court be abolished and such judgments be reviewable only upon proceedings in error. The following officers were elected: Judge J. B. Burrows of Painesville, president; E. B. Carter of Columbus, secretary, and C. F. Gilmore of Dayton, treasurer.

At the fourteenth annual meeting of the Maryland State Bar Association, held at Old Point Comfort, Va., July 7–9, President William C. Devecmon's opening address dealt largely with the elective franchise in Maryland and the representation of Baltimore in the legislature. He judged it to be the current belief that if the Fifteenth Amendment were now for the first time to be submitted to the states, few, if any of them, would vote for it. Arthur W. Machen, Jr., of Baltimore, read a paper discussing incorporation laws, referring to the Taft tax as discriminatory. He also insisted that a sound and distinct theory for incorporation laws should be found, and suggested the adoption of an interstate law, or statutory rule, to apply to corporations which do not live up to their declared purpose. By vote of the meeting, Mr. Machen was directed to draw up a draft of a model incorporation law. The Committee on Legal Education deplored a "marked deficiency in English education" among candidates for admission to the bar. Herbert W. Noble, of New York, spoke on the "Sherman Anti-Trust Act and Industrial Combinations," and Omer F. Hershey of Baltimore, on "Covenants Without the Sword." The committee on the Torrens system recommended deferring action until the Supreme Court shall have rendered its decision. On the second day, reform in the presentation of expert testimony by the appointment of experts by the state courts was debated. The question was referred to a conference committee composed of the committees of the Baltimore City Bar Association and of the State Bar Association which had both drafted bills on the subject. A resolution bearing on the jury system was referred to the Committee on Laws for consideration. The resolution, which was offered by William B. Smith of Baltimore, provides for verdicts rendered by three-quarters of the jury only, except in trials for felonies, and prescribes that in the trial of criminal cases the jury shall be the judges of facts and not of the law. On the same day the association heard four addresses, Mr. Justice Henry B. Brown, formerly of the United States Supreme Court, speaking in the morning on "The Law and Procedure in Divorce," an address which has since received some publicity in the press; Albert A. Doub discussing "The Election of United States Senators," Chief Justice Simeon E. Baldwin of the Supreme Court of

Errors of Connecticut discoursing on "The New Reading of Due Process of Law," and W. Irvine Cross considering "Some Late Workings of the Doctrine of Public Policy." Prof. Roscoe Pound gave an address on "Law in Books and Law in Action." The following officers were elected: president, David G. McIntosh; vice-presidents, Joshua W. Miles, Joseph B. Seth, George L. Van Bibber, J. Augustin Mason, James M. Monroe, Glenn H. Worthington, Fillmore Beall, Alexander H. Robertson, and Thomas Foley Hisky; secretary, James W. Chapman, Jr., of Baltimore city; treasurer, R. Bennett Darnall, of Baltimore city; executive council, Albert C. Ritchie, Z. Howard Isaac, Alfred S. Niles and Walter J. Mitchell.

The Pennsylvania Bar Association held its fifteenth annual convention at Bedford Springs Pa., June 29 and 30 and July 1, the president, Attorney-General M. Hampton Todd, calling the meeting to order. In his address, President Todd discussed matters of Pennsylvania legislation, and explained the necessity for the Governor's vetoing several bills, including that which sought to give to the courts the legislative function of determining the reasonableness of licenses charged by the municipality to water, gas and other companies. "No power in the land," he said, "could make the courts perform such duties if they should decline to do so." Amasa M. Eaton of Providence, R. I., delivered the annual address on the evening of the first day, taking for his subject "Thomas W. Dorr and the Dorr War in Rhode Island." The Committee on Law Reform submitted an amended act "to authorize the Supreme Court from time to time to adopt and promulgate general rules of practice for all the courts of record of one kind in this commonwealth," and also an act relating to elections to take under or against wills of decedents where parties have failed or refused to elect, a divergence of views on the latter act becoming so apparent that the subject was referred back to the committee. It was voted that the Committee on Grievances be requested to make a further investigation of the use of money in judicial campaigns. The report had charged that candidates for the bench, in their scramble for office, had degraded judges into common politicians, led them into expending large campaign funds and had forced them into making merchandise of justice. It was estimated that it now cost from $15,000 to $25,000 to conduct a successful campaign for election to the bench in several counties. In consequence, to a special committee was referred a resolution looking to the removal of judges from the entanglements of political relations. A report was offered by Charles Wetherill on comparative jurisprudence. The code of ethics provoked more discussion than any paper presented. The committee stated that the code, after submission to various authorities, had been almost invariably preferred to that adopted by the American Bar Association as more terse and forcible and as placing the rectitude of conduct of judges and lawyers upon a higher plane. The majority of those present favored the code adopted by the American Bar Association, but there was sufficient adverse sentiment to influence votes, and with the idea that the report of the committee would never again appear it was referred back. The Committee on Uniform State Laws reported that this movement is making satisfactory progress. "Comparative Law as a Practical Science," was the title of a paper read at the evening session by William M. Smithers of Philadelphia. John W. Appel of Lancaster read a paper entitled "Gibson and a Progressive Jurisprudence," citing Chief Justice John Gibson as a type of the progressive jurist not enslaved to precedent. On the next day of the meeting Judge Harold M. McClure read the report of the Committee on the Constitution of Courts of Pennsylvania. After much discussion on the question whether the Superior Court should be abolished and the number of Justices of the Supreme Court should be doubled to fourteen by a constitutional amendment, it was finally voted, as there would be no meeting of the legislature for nearly two years, that it would be better to educate the people so that a public sentiment would be created. A special committee of five was recommended to investigate the jury system and report on the question whether unanimous verdicts are to be desired or not. Stock-watering practices were arraigned in a paper entitled "Full-Paid and Non-Assessable," by Owen J. Roberts, of Philadelphia. It was alleged that "our whole system of corporate finance has come to be one of mere capitalization of prospective profits." An interesting paper was read by A. J. W. Hutton, of Chambersburg, Professor of Law in the Dickinson School of Law, Carlisle, Pa., entitled "A Judicial Solecism." It was a learned criticism of the rule established by the Pennsylvania Supreme Court as to wagering life insurance policies, the contention being that the rule, as laid down in *Ulrich* v. *Reinoehl*, 143 Pa. 238, in nowise precludes wagering policies, but, on the contrary, expressly permits the taking out, by creditors, of policies upon the lives of debtors, and collecting upon them amounts out of all proportion to the claims intended to be secured, thus making them a gamble upon human life. The election of the chief officers resulted as follows: president, Gustav A. Endlich, President-Judge of the Courts of Common Pleas in Berks county and author of "The Interpretation of Statutes"; vice-presidents, W. L. Dalzell, Allegheny, D. Watson Rowe, Franklin, Russell C. Stewart, Northampton, Charles M. Clement, Northumberland, John I. Rogers, Philadelphia; secretary, Judge William H. Staake, Philadelphia; treasurer, William Penn Lloyd, Cumberland.

Necrology—The Bench

Judge Francis Martin, sixty-five years old, died at Falls City, Neb., July 20. He had served as state senator and probate judge.

Judge J. Randolph Bryan of the Roanoke, Va., Police Court died at Northampton, Mass., Aug. 1. He was formerly mayor of Roanoke.

Judge David Boone Blalock, County Judge of Caldwell county, Ky., died at Princeton, Ky., July 19. He was elected judge in 1905.

County Judge David D. Sousley of Fleming county, Kentucky, died suddenly at Flemingsburg, Aug. 6. Judge Sousley was the Democratic nominee for re-election, and popular with all parties.

Judge R. S. Turner, the senior and leading member of the Ashland City, Tenn., bar, died Aug. 6, in his sixty-third year. He was one of the progressive and influential men of Cheatham county, Tenn., and had been successful at the bar.

Judge Henry Ross of Esmeralda county Nev., died suddenly Aug. 1 at the age of fifty-five. He was born in Allentown, Pa., and went to Colorado as a young man, where he built up a large law practice. He was at one time urged to become candidate for Governor of Colorado, but declined. He afterward removed to Rawhide, Nev., becoming judge of the county courts.

Judge Daniel B. Lucas of the Supreme Court of West Virginia, formerly United States Senator, and a soldier and poet, died at Baltimore in July. A dramatic incident of his early career was his daring in "running the blockade" to Canada to defend Capt. John Yates Bell, his college friend, who was tried as a spy at Governor's Island, N. Y., and was condemned and executed in February, 1865.

Judge S. W. Lamoreux of Beaver Dam, Wis., where he was president of the German National Bank, and an extensive iron manufacturer, died Aug. 5. A veteran of the Civil War, he was a member of the Wisconsin Legislature in 1872 and was elected Judge of Dodge county in 1877, which office he held until his appointment to the office of United States land commissioner during Grover Cleveland's second administration.

Judge William I. Clopton, an active member of the Virginia State Bar Association, died July 25 at Crockett Springs, Va. He was elected City Attorney of Manchester in 1866, and held the office constantly until 1874. In 1871 he was elected a member of the lower house of the state legislature, and in 1873 Judge of Chesterfield county and Judge of the Corporation Court of the city of Manchester. He held this office at the time of his death, at the age of seventy.

Judge Edward W. Pratt of the town court of East Hartford, Conn., twice elected to the Connecticut legislature, died July 25 in consequence of an accident. He was formerly a dentist in Glastonbury, Conn., but soon became keenly interested in Republican politics and was sent to the legislature. After he had become a prominent citizen of East Hartford, he was made judge of the town court, and had been commended by the State's Attorney for the complete record which he had ready on cases which went up to the Superior Court on appeal. He was forty-seven years of age.

Judge Joshua Hilary Hudson, a prominent South Carolinian lawyer, whose home was at Bennettsville, S. C., died July 22 at Greenville, S. C., at the age of seventy-seven. He was a veteran of the Confederate army, and had also been a teacher, state legislator, and leader of the bar. The legal profession of South Carolina mourns his death as that of one of the state's most distinguished citizens. He had been at one time president of the State Bar Association. In 1878 he was elected Judge of the fourth judicial circuit of his state, holding the office for sixteen years.

Solomon Hicks Bethea, United States judge for the northern district of Illinois, died at Sterling, Ill., Aug. 3, in his fifty-sixth year. He was United States District Attorney in Chicago during the investigation of the alleged beef trust. Born in Lee County, Ill., he received his education in Dixon Seminary, Dixon, Ill., and at the University of Michigan, from which he was graduated in 1872. He practised in Dixon from 1877 until 1898. He was mayor of Dixon for two terms and was a member of the Illinois Legislature in 1882–83. President McKinley made him District Attorney, and he was appointed to the United States District Court by President Roosevelt in 1905.

Necrology—The Bar

John R. Olmsted of Leroy, N. Y., probably the oldest practising lawyer in Genesee county, N. Y., died at Buffalo, July 30, aged ninety.

D. P. Rose, one of the most prominent and oldest attorneys of Camdem county, Ga., died July 7. He was judge of the city court.

Jonas Hartzell McGowan of Washington, D.C., died July 5. From 1868 to 1872 he served as prosecuting attorney for Branch county, Michigan.

Harry Wilbur Cragin, one of the best known of the elder guild of attorneys in Washington, D. C., died suddenly at his home in the Blue Ridge Mountains, July 19.

Rush Fullerton, an attorney of Kittaning, Pa., died there suddenly at the age of forty-six years. He had been District Attorney for Armstrong county since 1899.

Thomas W. Bakewell, of Plainfield, N. J., a widely known patent attorney with offices in Pittsburgh and New York, died suddenly in Pittsburgh on July 7 at the age of fifty-five.

Judge John J. Orr, the Nestor of the bar of Carroll County, Ky., died July 27. He received his legal education at the University of Louisville, and was three times County Attorney and at one time County Judge.

Lansing Hotaling, one of the best known of the older generation of Albany lawyers, who died July 22, had been district attorney and assemblyman, as well as a learned advocate and an energetic and patriotic citizen.

Abner Harrison Davis, clerk of the United States Circuit and District Courts in Portland, Maine, from 1876 to 1903, when he resigned on account of ill health, died July 25. He was born in Farmington, Me., in 1834 and graduated from Bowdoin College in 1860.

Goodwin Stoddard, who was one of the most prominent lawyers in Connecticut, died July 26 at his home in Bridgeport, Conn. He was graduated from the Albany Law School in 1867, and had practised in Bridgeport for more than forty years.

The Rochester Bar Association met in July and adopted resolutions on the death of Frederick W. Smythe, a well-known lawyer who was killed near Rochester, N. Y., Aug. 1, by the overturning of an automobile. Members of the Monroe County Bar Association also took action.

John Goode, eminent as lawyer, statesman, and soldier, died at his home in Norfolk, Va., on July 14, at the advanced age of eighty years. Mr. Goode became a member of the Virginia legislature at the age of twenty-one. He was three times elected to Congress. Mr. Goode was one of the ablest lawyers that Virginia has produced.

Milton A. Candler, one of the most prominent men in Georgia, soldier and lawmaker, died at Decatur, Ga., Aug. 8, at the age of seventy-two. Mr. Candler was elected to Congress in 1879 at the close of the reconstruction period and at the expiration of his term was re-elected. He also served several terms in the legislature.

George B. Orr, attorney for the Santa Fé Railroad at Atchison, Kan., was drowned at San Diego, Cal., July 21, in sight of his bride of a month. Watching the breakers on Lajolla Beach, he remarked that he would lie there until the waves carried him out. A few minutes later a breaker took him out to sea. He was caught by the undertow, despite the fact that he was a strong swimmer.

William C. Farnsworth of Harrisburg, Penn. and New York, a well-known corporation lawyer and former State Corporation Clerk, died suddenly at his home in Harrisburg of heart disease Aug. 9. Two years ago he was nominated by the Democratic and Prohibitionist Parties of Dauphin County for state senator, but retired before election on account of sickness.

Abram X. Parker of Potsdam, N. Y., aged seventy-eight, one of the most distinguished public men of northern New York, is dead. He served in the Assembly in 1863, and in 1890 received the appointment of Assistant Attorney-General of the United States, being the first incumbent of that office. He was identified with leading industrial and educational institutions, and at the time of his death was president of the Clarkson Memorial School of Technology.

Prosecutor Ernest H. Koester, recognized as one of the best criminal lawyers in New Jersey, died at his home in Hackensack, N. J., Aug. 2. He was born at Norristown, Pa., in 1855, and studied three years at the University of Heidelberg, Germany. He was District Attorney of McKean County, Pa., for three years, afterward moving to Hackensack, where he found a lucrative criminal law practice. In 1900 he was appointed Prosecutor and reappointed in 1905. He had never been himself since Gus Eberhardt threatened his life after he had been given a thirty-year term in state's prison for the self-confessed murder of his aunt.

William Brown, one of the leading attorneys of Illinois, and late counsel for the Chicago & Alton Railroad, died at Jacksonville, Fla., July 25, aged seventy. He was a graduate of Illinois College and of Missouri University, and admitted to the bar in Jacksonville in 1861. He was one of the solicitors for the Wabash Railroad and later became a member of the law firm of Beckwith & Brown, Chicago, in 1887, Beckwith being head counselor for the Alton. Upon his death Brown succeeded him, holding the position until his resignation in 1905. In his earlier years he was city attorney and state's attorney for the first judicial circuit in 1872, and state senator from 1872 to 1874. He was a leader in Democratic ranks.

James O. Troup, a prominent lawyer of marked ability, died at his home in Bowling Green, O., July 20. Two years ago he was president of the Ohio State Bar Association, and for many years was one of the state bar examiners. He was born in Aberdeen, Scotland, May 11, 1845. When ten years of age he worked in the coal mines around Evansville, Ind. Later he secured some schooling and put himself through Oberlin College. Later he was a trustee of the college for eight years. He became superintendent of the Perrysburg schools, studied law with Judge Asher Cook and in 1873 was admitted to the bar. He served two terms as prosecuting attorney of Wood county, and he handled a large amount of litigation for the Standard Oil Company in Ohio.

Col. James Chamberlin, who had been lawyer of Nashville, Tenn., ever since the Civil War, in which he served with distinction on the Union side, died there July 26, at the age of seventy-three. A native of Union County, Pa., he was graduated from the Harvard Law School in 1859, and before the War he practised at Lewisburg, Pa. He was a man of highest honor and recognized ability, and had more than once declined to be a candidate for judicial and other honors.

Edwin A. Ballard, one of the pioneer members of the Larimer County Bar Association for forty years a practising lawyer in Colorado and Ohio, a former pupil of President Garfield, died at Fort Collins, Colo., July 19, aged seventy-two. He served through the Civil War as private and first lieutenant, and was afterward prosecuting attorney of Allen county, Ohio. He went west in 1878, settling first in Utah. From 1880 to 1892 he practised law in Fort Collins, Colo., and then went to Denver, remaining there about twelve years. Just before 1892 he served one term in the state senate from Larimer county. In his forty years of practice he made and lost a fortune. He had a remarkable memory, and was known among the attorneys there as a walking encyclopedia of the law. His briefs are used as models of diction and form in the Colorado State University Law School.

Miscellaneous

Seventy young men passed the June bar examinations in Colorado.

Eighteen young men successfully passed the state bar examinations held at Portland, Me., recently.

The University of Maine has received from Dr. Thomas U. Coe of Bangor a gift of land as a site for a new building for its law school. It is proposed to erect a building similar to the University of North Dakota Law School, which is built of Indiana sandstone and cost about $50,000.

The Connecticut Supreme Court made public some new rules on July 20, providing for greater simplicity, directness, and economy in judicial actions by diminishing the practice of entertaining requests for reservations of questions of law arising in the course of actions not ready for final judgment.

It is the belief of many lawyers that other states might strengthen their jury system by adopting some such provisions as that of the New York statute which requires that a juror must be between twenty-one and seventy years of age, and the owner or husband of the owner of property worth $250, and be able to read and write English.

The Georgia senate passed a bill July 14 making it a penal offense to utter any false or defamatory remark about a woman. It was not adopted without long debate, many senators believing it would impair the right of free speech.

Little legislation of importance seems to have been passed in the five months session of the Wisconsin Legislature, and the important subjects of industrial insurance, banking and water power were left to special recess committees. These committees, it has now been discovered, are without power, having died with the adjournment of the Legislature.

Judge Lawlor, who presided at the trial of Patrick Calhoun in San Francisco, says that the courts are powerless to prevent the evil of extraordinarily protracted criminal trials. Referring to a bill to remedy procedure in the federal courts pending in Congress, the *Tacoma Ledger* expresses the opinion that a greater duty rests upon the states than upon the federal government.

Governor Hughes of New York may not think so much of an appointment to the United States Supreme Court bench as he once did, says the *Washington Star*. "If Governor Hughes continues in politics it will be seven years before he will figure in Presidential calculations. Mr. Taft, if he lives, will be renominated, and then in the contest for the new Republican leadership Governor Hughes should be a factor."

A movement for the organization of a Women's State Bar Association was recently started in Cincinnati, O., when Misses Ella Purcell and H. A. Quinby of Columbus met with Miss Nellie Robinson of Cincinnati, and decided to call a meeting of all the women lawyers in Ohio, at Columbus, this fall. There are twenty-five women lawyers practising in this state. It would be the first organization of the kind in the United States.

"It is to the credit of the commissioners of Luzerne county," remarks the Scranton (Pa.) *Republican*, "that they incline to the consideration of the jurors and their comfort in the palatial new courthouse. The idea is to provide sleeping quarters with shower baths, good beds and attractive surroundings. It is announced that they will send the old cots and bedding to the county jail, an indication of previous conditions not peculiar, however, to Luzerne county."

A committee of the American Bar Association is taking steps toward the preparation of the program for the Conference on Uniform Legislation which is to be held in Washington, Jan. 5–7, 1910, and is to be opened with an address by President Taft. The subcommittee named to prepare a tentative program is composed of Alton B. Parker, Amasa M. Eaton, Walter L. Fisher, Frederick N. Judson, George W. Kirchwey, Henry Wade Rogers and Walter George Smith.

Dr. Charles E. Woodruff, surgeon and

major in the United States Army, finds after a tour of inspection that all the prisons and asylums are filled with blondes, who vastly outnumber the brunettes. The sunshine of the American climate, he thinks, tends to break down the nervous system and lower the *morale* of the light-complexioned person. In Clinton Prison, where the worst class of criminals are confined, instead of "black-beards" he found an astonishing large number of blondes, and in Elmira Reformatory there were only 1406 out of 5000 men with black hair.

Mrs. Carrie Brunham Kilgore, the first of her sex to be admitted to the practice of law in Pennsylvania, died June 30 at Swarthmore, Pa. She was a familiar figure in all the courts in Philadelphia and enjoyed a large practice. Mrs. Kilgore was admitted to the law school of the University of Pennsylvania in 1881. After being graduated she was admitted to the local, state and federal courts and in due time was admitted to practice in the Supreme Court of the United States. A few years ago Mrs. Kilgore became interested in ballooning and made an ascension, remaining in the air several hours.

The National Probation Officers Association at its annual meeting in Buffalo in June elected Homer Folks, president of the New York State Probation Commission, president, Judge William De Lacey of the Washington Juvenile Court, vice-president, and Chief Probation Officer Roger N. Baldwin of the St. Louis Juvenile Court, secretary and treasurer. The association meets next year in St. Louis. Its membership includes judges and probation workers from all parts of the country. The dominant note of the meetings was that in order to secure the best results, probation officers must use friendly means to win the confidence of those under their care.

The question of the law's delays is to be investigated in Massachusetts by a commission of three appointed by the Governor in pursuance of a resolve (c. 115) of this year's Legislature. This commission, which is to serve without pay and to report before Jan. 10, 1910, "shall investigate the causes of delay in the administration of justice in civil actions in the courts of the commonwealth, the advisability of constituting new courts and of enlarging or otherwise altering the jurisdiction and powers of existing courts, the expediency of permitting the examination of parties and witnesses at an early stage of judicial proceedings, and any other matters relevant to securing a more speedy administration of justice in civil actions."

A bill for the improvement of the administration of justice in police courts, aimed particularly at New York City, has been drawn by Mr. Justice Charles F. MacLean and introduced in the New York Legislature. It provides for the immediate hearing of the cases of all prisoners arrested, the abolition of all police court records of persons discharged, the enforcement of city ordinances, and a general economy and simplification in the administration of police court functions. It is predicted that it will work wonders in checking the "system" of the professional bondsmen and police court sharks. The Committee of One Hundred has announced that it would make the conditions of the city magistrates' courts an issue in the mayoralty campaign this fall in New York City.

The Prevention of Crimes Act, regarded in England as marking a new era in the treatment of habitual criminals, went into effect August 1. If an offender already convicted three times in his life is convicted a fourth time, the court may, in addition to ordinary punishment, pass upon him an indeterminate sentence limited to between five and ten years. Every case of indeterminate sentence is to be brought before the Home Secretary at least once every twelve months. Power is also given to the Home Secretary to release a man on license while serving an indeterminate sentence.

Mrs. Harriette Johnston-Wood, who is associated with her husband in law practice in New York, and is the first woman member of the New York State Bar Association, declared at a meeting at Toronto recently that "married women are under cruel bondage by reason of man-made marriage laws." In the laws of New York state she finds systematic discrimination against women. "Perhaps one of the biggest and most apparent acts of injustice," she says, "lies in the fact that woman has absolutely no legal right to compensation for any services connected with the home. Anything she may earn in the discharge of her domestic duties belongs entirely to her husband."

A propos of the intermittent discussion of abuses of the rogues' gallery system, the following resolution reported at the convention of the International Association of Chiefs of Police held at Buffalo June 18, is of interest: "That it is indispensable and should have the support of all good citizens that any person who has been arrested by an officer of the law for a criminal offense, or any person under indictment by a grand jury, or any person who is under strong suspicion of crime sufficient to place him in the class of 'suspicious persons,' may be photographed, measured and finger-printed by officers of the law, due regard being taken to consider the seriousness of the suspected crime, and also to the humane, careful and proper treatment of the person. If acquitted said photographs and measurements should be returned or destroyed."

Of 560 candidates 369 were admitted to the New York state bar, as the result of the examinations held last June, and seven of the successful ones were women, the largest number of women ever admitted in the state

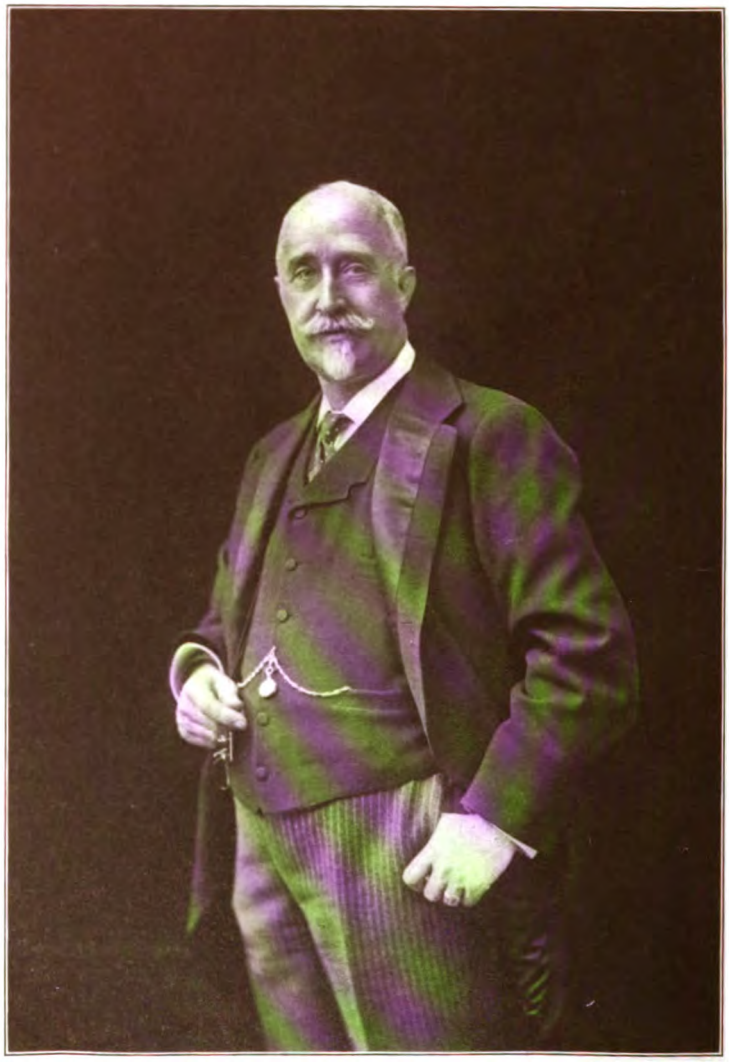
at one time. Secretary Danaher of the State Board of Law Examiners says that the lawyers are being admitted at the rate of a thousand a year. More than two-thirds of them come from New York City. There are at present about 18,000 lawyers in New York state.

By a vote of 317 to 14, the national House of Representatives on July 12 adopted the resolution to submit to the legislatures of the several states an amendment to the Constitution, empowering the federal government to levy an income tax. As the resolution had already been adopted by the Senate, by a unanimous vote, the proposed amendment now goes to the legislatures for ratification. The amendment provides that Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states and without regard to any census or enumeration. The Alabama legislature has since voted in favor of the amendment. The Connecticut legislature has referred the matter to the next General Assembly. The Georgia senate has thrice refused to ratify the amendment.

A post-office inspector put in the hands of Postmaster-General Hitchcock August 6 evidence that the eighteen men arrested in Ohio in June were connected with the great Black Hand Society in Italy, and were working under a chief appointed by that society in Sicily, and put in charge of a large territory reaching as far west as Chicago, extending east ordinarily as far as Pittsburg, but on extraordinary occasions stretching its activities up to New York itself, though that city is believed to lie in another district. There is also evidence that two of the prisoners were in Palermo at the time of the murder of Lieutenant Petrosino of the New York detective bureau, and that money orders for $3,100, obtained by the band in Cincinnati, furnished the money used to shield the murderers.

Pennsylvania's new law providing for the probation, indeterminate sentence and parole for convicted criminals, which went into effect in July, owes its passage to the Pennsylvania Society for the Promotion of Improved Prison Legislation, the Pennsylvania Prison Society and the American Society for Visiting Catholic Prisoners. It provides that when the person convicted of crime is a first offender —except in the case of murder, administering poison, kidnapping, rape, arson or burglary of an inhabited dwelling house—the judge may suspend the imposition of sentence usually provided by law and place the convict on probation under such conditions as suit the case. In the indeterminate sentence the judge simply sentences the prisoner to prison for an indefinite term, naming the maximum and minimum limits prescribed for the offense, the minimum being one-fourth of the maximum, unless otherwise provided. When, however, the person to be sentenced has already, for previous offenses, been in a penitentiary twice, for a year or more each time, the court must fix the maximum at thirty years. Prisoners whose minimum terms of indeterminate sentence will expire in three months may apply for release on parole. During the period of parole the offender may be recommended to the Governor for absolute pardon.

The Commercial Law League of America listened to several helpful addresses at its annual meeting at Narragansett Pier, R. I., July 19–22, among them being a discussion of "Methods of Developing Commercial Practice" participated in by Albert N. Eastman of Chicago, A. H. Gleason of New York, C. Moultrie Mordecai of Charleston, S. C., and E. J. Thilborger of New Orleans. Ormsby McHarg, assistant secretary of the Department of Commerce and Labor, urged that methods be more earnestly sought of distributing labor in sections where it is most needed; Japanese Consul-General Midzuno declared that peace was the greatest asset of his people, and that the Japanese desire peaceful and happy commercial relations with us; and Speaker Burchard of the Rhode Island House of Representatives said that the relations between business and the law were never in so delicate and dangerous situation as now. Resolutions were passed recommending the following amendments to the national bankruptcy law: increasing jurisdiction over corporations, conferring upon trustees the rights of judgment creditors, the amendment preventing dismissal of proceedings except upon notice to all creditors. The committee also recommended an amendment declaring that voluntary bankrupts must have debts of at least $750. A resolution was passed urging an act increasing the salaries of judges of the United States District and Circuit Courts and authorizing a committee to urge the increase upon Congress.



CHARLES F. LIBBY, OF PORTLAND, ME.

THE NEWLY CHOSEN PRESIDENT OF THE AMERICAN BAR ASSOCIATION

[See page 513]

The Green Bag

Volume XXI October, 1909 Number 10

Covenants Without the Sword*

By Omer F. Hershey, of the Baltimore Bar

I

UNIVERSAL empire did not bring universal peace; and the civilized world today is too wide for universal empire, if, indeed, it will tolerate empire at all. A universal church did not bring universal peace, although it was a church dedicated to peace and to good will; and today human reason is too varied and too militant to yield to a universal church. The cry of humanity for social justice and human brotherhood has grown more and more universal; but the dream of the prophet, that nation shall not lift up sword against nation and shall learn war no more, is answered still by the tramp, tramp, tramp of countless soldiers and the frantic building of priceless *Dreadnoughts*. But what the Hebrew prophet and Greek philosopher and Roman emperor of antiquity failed to do, and what the priest and poet and statesman of our day have only been able to realize in their dreams, we are now told the lawyer is about to accomplish.

A universal legal tribunal, a "High Court of Justice of the World," a "Supreme Court of the Nations," an "International Court of Arbitral Justice" is now to succeed where other movements failed. Humanity is about to make its judicial appearance in the world. In the grandiloquent phrases of the Bar Association of New York in their petition to President Cleveland shortly after his Venezuelan scare, praying that he "serve the cause of humanity" by favoring such a Court, we are now about "to compass the realization of the dream of good men in every period of the world's history, when nations shall learn war no more and enlightened reason shall fight the only battles fought among the children of men."

Enlightened reason, which is often benighted unreason, human passion, human prejudice, the envies, the jealousies, the rivalries, the ambitions, the perversities of diverse people, which would not give in to the Universal Emperor nor bow to the Universal Church, are expected to yield gracefully and contentedly to the decrees of a Universal Court. Let but a legal rule exist and a legal tribunal be established to expound and apply it, and humanity, which has been deaf to the preacher and blind to the philosopher, will hear the law and read the decree and humbly obey. Like the Roman *prætor*, this great Court will interpose its *vim fieri veto*, and a law-abiding, justice-loving world, lawless only through ignorance

* Read at the meeting of the Maryland State Bar Association, at Old Point Comfort, Va., July 9, 1909.

of the law and unjust only because no living voice of universal law proclaims the rule of justice, will beat its swords into plowshares and its spears into pruning hooks and learn war no more.

Such a notion, gravely entertained by statesmen and promulgated by conventions and conferences of laymen, who are not prone to think any too well of law in its domestic manifestations, is indeed flattering to the law. And it is from the view-point of our profession, as practising lawyers and as men more or less versed in the law in its practical applications, that I think it worth our while to study the first of the *vœux* of the last Hague Conference, proposing the establishment of what is officially called a Permanent Court of Arbitral Justice. While I wish to discuss the scheme for such an international tribunal only in general terms, and if I may with becoming modesty say so only in its more philosophic aspects, it may be well to outline briefly the specific Hague proposal for such a Court, especially as it is the culmination of a great variety of movements so far in that direction.

The first Hague Conference in 1899 created a so-called Permanent Court of Arbitration, which is still in existence. It is, however, not a "permanent" tribunal, nor even a "tribunal" at all. It is simply a panel of about sixty possible arbitrators named by the signatory powers, from which list judges may be selected by the disputant nations for a given case.

It has none of the functions nor powers of a court, has no permanence nor continuity, and is at best a cumbersome, time-consuming and expensive contrivance. The arbitrators selected from the panel merely assemble and deliver judgment on any clearly defined issue presented to them by two or more litigant nations which have previously agreed to select them and abide by their decision. The rules of procedure may be varied to suit the parties, and the fulfillment of the award is left to the honor of the disputants and to the moral compulsion of international public opinion. Since its creation ten years ago this Court has been used in five cases only; and it owes its existence almost entirely, I think, to a desire on the part of the first Hague Conference not to adjourn without doing something that might be construed as a step in the direction of a real International Court.

At the second Hague Conference in 1907 the question of such a real International Court threatened to pass from the academic to the practical stage. No one could follow the proceedings of the Conference without realizing that its members took their work with much seriousness and solemnity, and had hopes of accomplishing great results; but, at the same time, one could not help suspecting that the chancelleries of the great Powers were smiling up their sleeves at the solemn consideration their representatives at the Conference were giving to questions of great abstract worth but of little possibility of concrete fulfillment. Just as your political boss permits his puppets to debate profound questions with profound sincerity before he pulls the strings that actually move the machinery, so England, Germany, Russia, Japan, and even the United States permitted and even instructed their delegates to submit proposals and agree to *vœux*, which, as practical possibilities, they well knew had not the remotest hope of success. I have a suspicion that this Supreme Court project belongs to this category.

However, the proposal for such a Court bulked large in the proceedings of the Conference; and it should be all the more interesting to us as lawyers,

because its most ardent advocate was Secretary Root, *facile princeps* the leader of our American bar. In his instructions to the American delegates, Secretary Root said:—

"If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different states, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be more ready to submit their controversies to its decision than they are now to take the chances of arbitration. It should be your efforts to bring about in the second Conference a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be selected from the different countries so that the different systems of law and procedure and the principal languages shall be fairly represented. The Court should be made of such dignity, consideration and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments."

It would consume too much time to go into the details of the plan for this Court as eventually formulated and accepted. Suffice it to say that the plan proposed, for political reasons, apparently did not contemplate the abolition of the existing so-called Permanent Arbitration Tribunal, but it covered with considerable skill the defects inherent in that abortive institution. The new Court is referred to in the plan as the Permanent Court of Arbitral Justice; and the theory and detail of its organization carry out the suggestions of Secretary Root. The Conference, however, merely approved the organization of such a Court and commended to the signatory powers the adoption of the plan agreed upon, leaving to be determined the method by which judges should be selected. Upon this question an irreconcilable difference of opinion developed at the Conference, and the whole project was defeated.

Perhaps I should also allude to the existing "Hague Tribunal," with certain executive functions of possible usefulness, as well as to the "International Prize Court" composed of fifteen judges which the Hague Conference actually did agree upon. This Court, in case of actual war, should prove of real service, though it loses much of its value as a real tribunal by the provisions of Article 7 of the Convention creating it, which provides:—

"If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself or the subject or citizen of which is a party to the proceedings, the Court is governed by the provisions of the said treaty. In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity."

The obvious limitations of this tribunal may be somewhat overcome by the work of a Naval Conference of the leading nations recently convened by England, at which a convention of seventy-six articles was agreed upon as to what the delegates believe to be the law on such subjects as blockade, contraband, unneutral prizes, determination of enemy character of ships, convoy, resistance to search, compensation for illegal seizure, etc. This declaration of "what ought to be law" must, of course, be ratified by the signatory powers, after which presumably it becomes "law"—but hardly international law in any juristic sense. It is also worth noting that towards the end of this London Conference the American delegation sub-

mitted an official proposition to establish a Court of Arbitral Justice as proposed at the second Hague Conference, and to allow the judges of the Prize Court to sit also as judges of this Court. This proposition was rejected.

The work of this London Conference, in providing a body of conventional or treaty "law" and in harmonizing the varying rules and practices now prevailing in prize litigation, is, of course, a great step forward if ratified; but it is after all an institution made necessary by actual war, and I mention it here only because the advocates of a general Court of Nations see in it a step towards their goal. There seems to be a unanimity of opinion among writers on this subject that, now that a start has been made, the next Hague Conference will agree upon such a Court; and there is undoubtedly a tremendous movement for it on the part of publicists and the various societies and individuals working for the general cause of Peace, the Federation of the World, the Parliament of Man, and the like. Let us see whether these expectations are justified.

I shall not stop to analyze the plan proposed nor the more obvious objections to it. Many interesting practical questions connected with the creation of such a Court do, of course, at once suggest themselves to you as practising lawyers. Under our Constitution how could we agree to it? What form of procedure should or could be adopted? What general system of jurisprudence should prevail? What language should be used? How could jurisdiction be obtained over refractory parties, or decrees enforced? I shall pass these questions by. Most of them have been answered, at least to the satisfaction of the proponents. So, too, I shall resist the temptation that comes to every lawyer who has to do with international law, "the vanishing point of jurisprudence," to say some unkind things about that unsatisfactory branch of our science. To most of us it is too often a mere bundle of contradictory precedents and emasculated fictions, adorned by the moral precepts of many generations of college professors and learned text-writers. We have, as lawyers, allowed this branch of jurisprudence to fall into other hands and perhaps we have no business in their territory; certainly we are looked upon as interlopers. "What business have you," pertinently demanded Orgetorix of Cæsar, "in this Gaul of mine which I have conquered?"

The idea of such a Court should, however, interest all of us as students of the general philosophy of law. This proposition to substitute the lawyer for the soldier, and the pen for the sword, is quite the most ambitious world movement of our era. Aside from all questions of feasibility, it should interest us as American lawyers especially, because (1) it is a phase of an idea that is today at work everywhere in American law-giving, and because (2) it is an attempt of the Anglo-American to enforce his ideas of the science of law upon peoples that hitherto have entertained radically different theories.

Before discussing the proposition generally it is of capital importance to note that the idea of a purely juristic solution of the problem of putting an end to war is of Anglo-American origin. Perhaps if this fact were more fully realized, the difficulties, if not the futility, of the whole plan would be better appreciated. At least, I think it well to establish briefly this proposition.

The Grand Design of Henri IV, the elaboration thereof by the Abbé de St. Pierre, Kant's scheme of perpetual peace, and the schemes of modern Continental writers, are attempts not at a juristic,

but at a political solution. Perhaps William Penn's plan for a "European Diet, Parliament or Estates" (1893) is the first suggestion of a Universal Court. But Penn's scheme, too, is on the whole an attempt at a political and not a juristic solution. True, he insists chiefly upon the judicial functions of the Universal Parliament he proposes. Evidently, however, he expected it to decide questions as a political assembly rather than as a court.[1]

Jeremy Bentham, to whom we owe the term "international law," was the first (1789) to propose the purely juristic solution—to propose an International Court which was to administer an international law. His plan was for "a common court of judicature," whose power "would consist" (1) in reporting its opinions, (2) in causing those opinions to be circulated in the dominion of each state, (3) after a certain time, in putting the *refractory state under the "ban of Europe."*[2]

With the first suggestion of a court arises at once the question of "sanction." Bentham believed the "ban of Europe" would be effective. In the last analysis, no other, or at least no better, sanction is suggested by the present day advocates of this Court. And yet we have ample historical evidence of its impotence. This "ban" at once suggests to you, for example, "*sacratio*," in the beginning of Roman law. If one violated the rules of *fas* he was devoted by the *Pontifices* to the infernal gods. It was this outlawry, or devotion by *sacratio* to the infernal gods, which constituted the penalty in most of those constitutional pacts between the different bodies forming the Roman state, which pass for the early *leges* of the republic. Indeed, the early statutes soon added, "if any one acts counter to this statute, '*sacer esto*.'" Festus says: "But he is a man devoted to the infernal gods (*homo sacer*) whom the people have adjudged by reason of wrong-doing, nor is it allowable for him to be sacrificed, but he who kills him shall not be condemned of murder."[3]

So, likewise, this proposed ban of Europe or ban of the civilized world is not unlike the excommunication and interdict wielded by the mediæval church. And, indeed, it is not a far-fetched idea to say that during the middle ages such sanction as international law actually had was given to it almost entirely by the great power of the Papacy; or, perhaps, I ought to put it that for centuries the peculiar power of the Pope actually did give international law a real "sanction." Bentham refers to this as a "religious sanction."

But all such sanctions speedily became *brutum fulmen*. *Sacratio*, at first over-severe, came to be obsolete. The interdict and Papal excommunication lost their terrors when the latter came to be put to the test in the case of Luther. Yet such is the sanction which is now to be revived.[4]

Next after Bentham came the American peace societies, which have been persistent advocates of such a plan. The first of these societies arose in America in 1814–15. England followed in 1816. Since then they have spread over Europe. At the Hague Conference in 1907, the pacificists were more in evidence and more active than the regular delegates.[5]

At first the idea of the American Peace Society was political. Its mem-

[1] See Darby, International Tribunals, 20.

[2] Bentham's Works, Bowring's ed., vol. II, 546 *et seq.*

[3] Festus *sub voc.* "*Sacer*": Bruns, *Fontes Juris Romani Antiqui*, 6th ed., vol. II, 41.

[4] Root, "The Sanction of International Law," 2 *Am. Jour. Int. Law*, 451, 453; Scott, "The Legal Nature of International Law," 1 *Am. Jour. Int. Law*, 831, 832, 840, 841.

[5] See Pradier-Fodéré, *Droit International Public*, VI, 116, note, and Klüber (French ed.) *Droit des Gens*, par. 329, note.

bers saw the solution of war in a "Congress of Nations." At their first meeting in 1828 they arranged a prize competition for essays on this subject. In 1840 they put out a plan for a Congress of Nations and a Court of Nations —the Court to be "permanent like the Supreme Court of the United States." This Court was to act as "conservators of the peace of Christendom," and watch over the welfare of mankind both of the nations of the confederacy and the world at large. Where it could not decide authoritatively it was to offer to mediate. And mediation, or some form of international organization providing the machinery or the excuse for mediation, I may say in passing, seems to me probably to be the only method of outside interference in a given dispute which is capable of much practical development or usefulness.[6]

In 1880 Sheldon Amos, an English lawyer, sometime Professor in the University of London, wrote a book entitled "Legal and Political Remedies for War," in which, briefly, he argues for an International Court, permanently constituted, as an aid to diplomacy in that it furnishes a means of "obtaining a ready and immediate decision of questions of law and fact which from time to time come into controversy."

But Professor Amos, as a practical lawyer, recognizes that much more than such a Court is needed,—that it is at most a mere incident. "The main and only hope," he says, "for maintaining throughout large populations a balance of mind and moral self-restraint in the presence of irritating instruments and diplomatic controversies is to be found in such a popular training as shall bring the brutal passions of an associated crowd under exactly the same chronic discipline as the civilized individual man, not to say the Christian, has long learned to exercise in the control of his own spirit."[7]

In 1887 Leone Levi, a barrister of Lincoln's Inn, published a draft project of a "Council and High Court of International Arbitration." His fourteenth proposition, as revised by Lord Hobhouse, reads:—

> "It is not contemplated to provide for the exercise of physical force in order to secure reference to the council, or to compel compliance with the award of the court when made. The authority of the council is *moral*, not physical. Nevertheless, when the award of its regularly approved court is set at naught by the contending parties, it shall be the duty of the council to communicate the facts of the case and the award of the court thereon to all the states represented in the same."[8]

In other words, if its decision was disregarded, the court *could protest*.

"My Lord," said Mr. Hunt, in a well-known legal anecdote, "I desire only to protest." "Oh! is that all?" said Lord Ellenborough. "By all means protest and go about your business." "So Mr. Hunt protested and went about his business, and my lord went unruffled to his dinner, and both parties were content."[9]

During the last few years we have had the ambitious efforts of the Interparliamentary Union, the plan of Sir Edmund Hornby,[10] the proposition submitted to the Universal Peace Conference at Chicago, in 1893, by William Allen Butler, Dorman B. Eaton and

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[6]Darby, International Tribunals, 231. Essay of A. P. Sprague (1876), Darby 225.

[7]See also Scheme proposed in Lorimer's "Institutes of the Law of Nations," II, 279–287 (1884) which, although it has provision for a judiciary, is chiefly political. See also Molinari's Scheme for a "League of Neutral Powers" (1887), which is also a political solution. See Maine, International Law, Lect. 12.

[8]Darby, International Tribunals, 60. See also the same proposition differently worded in Levi, International Law, 273.

[9]Campbell's Lives of the Chief Justices, 3d ed., vol. 4, page 303.

[10]Darby, 188.

Cephas Brainerd,[11] the petition of the New York State Bar Association in 1896,[12] followed by the eloquent appeal of Russell of Kiloween the same year before the American Bar Association, the resolutions of the National Arbitration and Peace Congress at New York in April, 1907,[13] the resolutions of the Lake Mohonk Conference at its sessions of 1907 and 1909; and since the last Hague Conference there has been no end of pastoral, conventional, and editorial propaganda..

But the striking part of all this effort for such a Court is its Anglo-American origin. The only project prior to the Hague Conference in 1907 that has not emanated from England or America is the resolution adopted by the Interparliamentary Conference at Brussels, in 1895,[14] and this really had an English origin, just as the Hague proposition had an American origin.

Having given this cursory history of the movement, let us now consider (1) the proposal itself. What are its inherent virtues and defects? How far may we expect it to accomplish the great purposes for which it is designed? For if it cannot accomplish measurably these purposes—if it will not bear the strain of a real conflict, say, for example, between England and Germany, will it not set back the cause of peace and undermine international law instead of strengthening it? Would not its failure destroy all respect for a system whose strongest partisans admit that it rests upon no support more substantial than the moral sentiment of nations and on international public opinion, whatever that may be. And (2) let us consider the reasons that impel English and Americans to advocate such a Court so persistently—in other words, its relations to Anglo-American juristic thought.

II

"Covenants, without the sword, are but words, and of no strength to secure a man at all."[15]

"Unfortunately for the welfare of the world, men are not so constituted that to know the right is to do it. Each man tends ever to do what is right in his own eyes, instead of that which is right in the eyes of mankind at large, preferring the relatively to the absolutely good. If, therefore, we would maintain the right, it is necessary to add compulsion to instruction. It is not enough to point out the way; it is needful to compel men to walk therein."[16]

"A legal proposition without legal compulsion behind it is a contradiction in itself; a fire that burns not, a light that shines not."[17]

A

In a sense, this would be a court not only without a sword behind it, but without even any law to administer. It would have largely to create its own law. And in saying this I do not mean to adopt the Austinian conception of law, nor to be drawn into any discussion of the several schools of international law, who still argue over their doctrinal differences as earnestly, if not as bitterly, as the early Schoolmen.

[11] *Ibid.*, 124.

[12] *Ibid.*, 138.

[13] *Am. Jour. Int. Law*, vols. I, II and III. See also Sir Thomas Barclay's book (1907); papers by Clarke, Ralston, Scott, *et al.* (*Am. Jour. Int. Law*, vols. I, II and III).

[14] Darby, 132.

[15] Hobbes (Molesworth ed.), vol. 3, p. 154.

[16] Salmond, First Principles of Jurisprudence, 17–18.

[17] Ihering, *Zweck im Recht*, I, 322 (3d ed.).

There is an old and well-worn controversy whether without some sanction behind it international law is law at all. It is not necessary to go into that question, though I may say that it seems to me that the orthodox notions about "sanction" are somewhat archaic. The notion of an irresistible executive is one extreme, and high-sounding generalities about "natural justice," "laws of nature," etc., the other. International law is simply in the stage in which the ordinary law was before the evolution of the modern state had given it sanction as we now know it.

"International law is merely the formal expression of the public opinion of the civilized world respecting the rules of conduct which ought to govern the relations of independent nations, and is, consequently, derived from the source from which all public opinion flows—the moral and intellectual convictions of mankind."[18]

"When, in the second place, we ask what are the sanctions of international law, it is plain from what has already been said that *they can only be such as opinion has at its disposal.*"[19]

In the last analysis, abstractions aside, the sanction of international law, as of all law, is conformity to the general sense of justice. Though now, having formulated that statement, I am not sure whether I agree with myself. I ought, at least, to define what I mean by "justice." I don't mean "natural justice," known on the docket sometimes as "the law of God," and at other times and in other moods as the "law of nature," "custom," "usage," "utility," etc. I mean by "justice," in this connection, rather that sense of fair dealing and of give and take, that form of orderly procedure and accepted usage in our human relations, that system of morality, which we accept; in short, that sense of right conduct which appeals to our emotions and in due time gets itself written into our civilization and our law. The idea of justice comes slowly with a race or a people or even an individual. Wager of battle, so dear to the Norman conquerors, did not actually disappear until the nineteenth century, and, indeed, in a measure still survives. "Four stages," says Professor Pound,—

"may be observed in the development of the juristic idea of justice. . . . We say that the end of law is the administration of justice. What do we mean here by the term 'justice'? What is it that courts and jurists have sought to accomplish in the adjustment of human relations in public tribunals? The primitive idea was simply to keep the peace. Justice, juristically, was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice."[20]

Here is a prime difficulty confronting such a Court. Not only has it no law, but it has no accepted notion of justice upon which to draw. Justice among the nations is still halting. The argument from history and analogy is very tempting; but one can at least safely say in passing that, juristically speaking, justice among nations does not connote or denote what it does among individuals, and that in international law today justice, as yet, has hardly even attained to the primitive idea of a device to keep the peace.

The plan now is to find some sanction "sounding in justice" for international law, by putting behind it (1) an agreement of the nations as to what the law is; or (2) to agree on a Supreme Court which shall say what the law is or shall be and to expound it; or (3) both.

But as soon as one considers the question of such an agreement, the academic character of current discussion as to "sanctions," and of most other juristic

[18]Cairnes, Political Essays, 112.
[19]*Ibid*, 114.
[20]"Liberty of Contract," *Yale Law Rev.* (May, 1909).

questions in international law, becomes evident at once. The real question is not the abstract one of the Schools, but the practical one of the Rialto. Given this agreement, what sanction is to be put behind it? Or, given the Court, what sanction is to be put behind its decrees? Unless there is such effective sanction the difficulty is only removed one degree—it remains as formidable as ever. It is like the Hindu resting the world upon a tortoise, and the tortoise upon an elephant, and so on.

I have already discussed some of the sanctions proposed, Bentham's "ban of Europe," Leone, Levi's "protest," etc. In the scheme of Messrs. Butler, Eaton and Brainerd, it is proposed that—

> "the chief executive of every other nation party hereto shall issue a proclamation declaring such hostilities, or failure, to be an infraction of this treaty, and at the end of thirty days thereafter the ports of the nations from which the proclamation proceeds shall be closed against the offending or defaulting nation, except upon condition that all vessels and goods coming from or belonging to any of its citizens shall, as a condition, be subjected to double the duties to which they would otherwise be subjected."

Even if such an agreement could be obtained among the nations, and even if such a sanction fulfilled the international notion of justice, its performance would to a large degree, and certainly in many instances, be impossible or impracticable. Nations like Switzerland, Venezuela, Turkey, could not well close ports they do not have. Nations closing their ports, say, to England, Germany or France, would be cutting off their noses to spite their faces and be hurting themselves more than they hurt the guilty. England, for example, could not possibly close her ports to the grain of the world. And as to double duties, they presuppose a tariff and assume that "the foreigner pays the tax." Consumers might object to punishing themselves for the others' wrongs by paying a larger price for imported necessities or luxuries.

The difficulty of an effective sanction confesses itself in the very title of the Hague proposal: "A Permanent Court of Arbitral Justice." Given but permanency, with permanent salaried judges, who are "citizens of the world," with the Carnegie temple in which to meet, and a startled world to look on and applaud, and men are confident it will be a "Court." But what, pray, is this "arbitral justice" which they propose to administer? International law writers, as I have shown, are not at all agreed as to their conceptions of "justice" itself, and nations certainly and necessarily differ each and all. As to arbitration, the putative parent of this new form of justice, it, too, cuts rather a sorry figure in this disputatious world.

I cannot, of course, here discuss the history of arbitration. Dabney reports 540 international arbitrations since 1794, and yet it has made very little of a place for itself. It has certainly won no such position in the juridical thought or the political scheme of our day as to entitle it to much respect as one of the institutions of civilization. Some famous international arbitrations there have been, to be sure. But most of them are so marred by blunders, prejudices, acrimonious disputes, and even corruption, as to make them anything but an orderly administration of justice. Arbitration rests on expediency rather than principle. It still partakes more of the nature of ordeal or wager of battle than of a judicial proceeding. It means prudent compromise rather than just judgment. Few arbitration awards rest on judicial grounds—they are generally compromises between conflicting interests. And this is true in spite of the fact that most disputes submitted to

arbitration are judicial, and rarely, if ever, political. Indeed, questions of practical politics (*Realpolitik*) can never be arbitrated. Arbitration, in Kant's expressive formula, is a principle whose tendency lies in the moral rather than the pathological direction. It has never won a place of any consequence for itself in our municipal law, and it meets with little favor among our profession as a means of attaining justice. Yet here, as an effective sanction, we have the judicial machinery of the state to enforce its awards. The International Arbitral Court of Justice will have no such machinery, it will have no precedents, no accepted form of procedure, no body of customary law or usage, no consensus of practice or opinion to draw from in exercising its "arbitral" functions. At this moment we have a dramatic illustration of the difficulties in the four-cornered controversy between Bolivia, Peru, Argentina and Brazil. The President of the Argentine Republic consents to act as arbitrator between Bolivia and Peru. He decides in favor of Peru, and Bolivia in resentment commits violent acts of aggression against Argentina. In the words of Editor Brisbane: "In that Utopian time of universal arbitration that has been promised us by the enthusiastic apostles of peace at any price, who is going to arbitrate the issues of contempt of court?" The truth is that experience having shown the administrative defects of international arbitration, and the Hague plan having with really great skill rectified most of those defects—judges, permanency, impartiality, etc.,—it is assumed *a fortiori* that a court without such defects must necessarily be a success.[21]

[21] See R. Floyd Clarke, A Permanent Tribunal of International Arbitration: Its Necessity and Value, 1 *Am. Jour. Int. Law*, 342. J. H. Ralston, Some Suggestions as to the Permanent Court of Arbitration, 3 *Am. Jour. Int. Law*, 321.

B

Can we not oppose to the *a priori* arguments of those who believe in courts without a sheriff and posse, and in the efficacy of covenants without the sword, some examples from legal history and current experience?

(1) The Amphictyonic Council came very near being a Congress and Court of the civilized states of the world. It broke down utterly under pressure.

(2) A better, in fact a perfect example of the difficulties confronting such a Court is furnished by the history of our country under the Articles of Confederation. The Confederation had a congress and had a court. "The High Court of Appeals in Maritime Cases, or as it was finally styled "The Court of Appeals in Cases of Capture," which the Confederation after five years of trials and tribulations eventually brought forth, though it never rose to the dignity of a federal judiciary, was in fact the first federal progenitor of our Supreme Court. But the real supreme court of the Confederation was the tribunal for territorial and land disputes.

The Constitution of the Confederation provided that Congress should be the last resort on appeal in territorial and land grant disputes. An elaborate machinery modeled after Mr. Grenville's act of 1770, for the trial of disputed elections in the House of Commons, was adopted for the organization of this court. If the parties could not agree on arbitrators, Congress was to name three persons out of each of the United States, and from the list of such persons each party was alternately to strike out one until the number was reduced to thirteen; and from that number not less than seven, nor more than nine, in the presence of Congress, were to be drawn by lot; and the person so drawn, or any five, were to be the judges to hear the

controversy. Obviously, this tribunal might have been called upon to decide momentous questions. In point of fact it was apparently called into existence for but three cases, and of these only one came to judgment; and obviously, also, it failed for want of any sanction of sword or sentiment to its possible decrees; "it could declare everything, but do nothing"; and yet this court, or if not the court, then the Confederation and court, met all the requirements of the learned proponents of an International Supreme Court; and furthermore, this court was provided to judge among states speaking one language, inhabited by one race, having the same laws, ideals and traditions, and which had covenanted to form a perpetual union as one political community.[22]

(3) The constitutions of the Latin nations (France, South America, etc.), show how futile are mere covenants. Not only does the legislative department pay no attention to them, but the executive overrides as and when it pleases or dares. When the executive overrides law the constitution is vindicated not by *quo warranto*, but by revolution. *Quo warranto* has sanction—the constitutional texts have none.

(4) So, too, a valuable moral can surely be drawn from the French "Supreme Court" and Napoleon III. This Court had the power to *protest*—to pronounce a decree that the executive was acting unlawfully. Yet it had no more effect on Napoleon's *coup d'état* than the attempt of the Deputies to read the constitution to the soldiers:—

"Throwing across their shoulders scarfs which marked them as Representatives of the People, the Deputies ranged themselves in front of the barricade and one of them, Charles Baudin, held ready in his hand the book of the Constitution. When the column was within a few yards of the barricade it was halted. For some moments there was silence. *Law and force had met.* On the one side was the *Code Democratique*, which France had declared to be perpetual; on the other a battalion of the line. Charles Baudin, pointing to his book, began to show what he held to be the clear duty of the battalion; but the whole basis of his argument was an assumption that the law ought to be obeyed; and it seems that the officer in command refused to concede . . . the major premise, for instead of accepting its necessary consequences he gave an impatient sign. Suddenly the muskets of the front rank men came down, came up, came level, and in another instant their fire pelted straight into the group of the scarfed Deputies."[23]

(5) But aside from any such historical instances as may be cited, it is a fact only too obvious to all of us, that even within the state the actually existing sanctions of law are not sufficient to prevent organized private violence in times of stress. If the fear of the bayonet cannot suppress organized disorder in our great strikes; if existing courts with an effective constabulary and the power to punish behind them, cannot prevent lynchings; if Ku Klux and White Caps and Night Riders are not deterred by the powerful sanctions of the organized state when excitement or a strong sense of social or individual injury seizes the people, isn't it too much to expect that sheer respect for a covenant will keep diverse peoples peaceable in times of excitement? For it must always be remembered that it is only in times of excitement, akin to those which produce internal disorders, that modern states think of going to war.

It is an error to suppose that the peoples of the world will take a vital interest in the enforcement of international law as such. The people of each state do not take such an interest in the enforcement of their own muni-

[22] Story Const., pars. 236–252 and pars. 257–58.

[23] Kinglake, Crimea, vol. I, chapter 14.

cipal law as such; they look only at the concrete case, not the abstract rule. And it is precisely when public passions blaze so fiercely over a concrete case that abstractions will not be thought of that we have war today.

Socrates thought that virtue consisted in knowledge; that if men knew what was right, they would do right; that the source of wrongdoing was ignorance.[24] But if philosophers had not long ago abandoned this idea, American experience in legislative law-making—in pointing out the will of all as to the conduct of each so clearly that none can doubt, and yet seeing each go on in his accustomed course of action—would require us to reject it as a doctrine of politics.

C

It is idle too to expect a "Court such as the Supreme Court of the United States" to be set up as a Court of the world. The success of our own great tribunal has made the idea attractive, especially to Americans, but there is in reality no analogy between the two.

A *sine qua non* of such a Court is a bar with unity of legal ideas, traditions of legal thought, an established jurisprudence, or at least an agreement on juristic premises. There is no such international bar. It can scarcely be said, even, that there are practitioners of international law. That elusive science is still in a state of turmoil and uncertainty from which it is not likely to emerge until it gets out of the hands of theorists and professorial jurisconsults. South Americans say there is an American international law.[25] Lord Russell objects to the methods of the French international law writers.[26] Sir Henry Maine says American and English jurists differ. English courts insist that the doctrines of authoritative text-writers cannot be admitted, and call for treaties, conventions or decisions.[27]

This, however, is not the Continental doctrine. But there, too, is discord. French jurists object to the premises of Italian writers on international law,[28] and German jurists go on in their own purely doctrinal method. In the United States we are still debating all sorts of questions. Dr. Scott asserts that international law constitutes an integral part of the municipal law of Great Britain and the United States and that it operates *ex proprio vigore* to extend the jurisdiction of the municipal courts; and he cites decisions of the courts of both nations which say so. Prof. Willoughby in reply disputes this proposition utterly, and he seems to have the best of the argument.[29]

Such a condition is, of course, widely different from that under which courts have been constituted to try private litigations; and if it be said, as it has been said, that such a Court will be valuable and successful because it establishes the law and gives us unity, it can be said with quite as much likelihood of proving true that it will be reactionary and a failure because it will give us discord. To reproduce the feeble beginnings of archaic law in the modern world is to make a mock of law. Prof. Clark insisted we must say "international law," lest we weaken the hold of the system on men's imagination.[30] How much more would the system be weakened by the spectacle of hopeless dis-

[24]See Zeller, Socrates and the Socratic Schools, chapter III *b*.

[25]Alvarez, Latin America and International Law, 3 *Am. Jour. Int. Law*, 269.

[26]*Am. Bar. Asso.*, 1896, page 268.

[27]See Lord Alverstone in *West Rand Central Gold Mining Company* v. *The King* (1905) 2 K. B., 391. "For writers on international law, however valuable their labors may be in elucidating and ascertaining the principles and rules, *cannot make the law*." (Cockburn, C. J., in *Queen* v. *Key*, 1876 L. R., 2 Ex. Div. 63.)

[28]Antoine's Preface to Fiore, *Nouveau Droit International Public*, vol. 1, page ii.

[29]*Am. Jour. Int. Law*, II, 357.

[30]Practical Jurisprudence, 187.

agreement, in the Highest Court of Justice of the World, as to the basis of the system—each jurist following the traditional views of the school of juristic thought in which he had been trained? Isn't no court better than a weak court? Isn't voluntary arbitration, with all its defects, the real evolutionary product of international law development, so far? Must not an effective Federation of Nations, or at least an actual Inter-Parliamentary Union, antedate any Court?

D

The primary object of and only real justification for such a Court is, of course, that it shall make war impossible or at least less likely; and yet the most vital objection to the plan for such a tribunal is that *it does not reach the causes of war in the modern world at all.* It merely provides another means for dealing with disputes which, today, do not lead to war.

It takes more than an ordinary dispute over fact or law to produce war today—at least outside of Latin America.

"Wars for the most part are no longer the contests of princes in which the people have little concern, but are national struggles *to which the people themselves are parties* rather than the governments which represent them. It is the opposing *people* that is to be coerced into the recognition of the claims of the belligerent."[31]

Not only the causes but the incidences and effects of war are different today and changing constantly. The sword bulks larger now than ever before in history, but it is more difficult to unsheath. The emotional element which plays so large a part in history and the affairs of men has shifted its centre as to international politics. It centres now not in such abstractions as national glory, or the defense of a mythical chip on the shoulder, but in the protection of concrete international investments, economic interests and enterprises, food supplies, markets, etc. War not only seems an absurdity and an anachronism to the man in the street, but the powers that rule and shape our national destinies are no longer the captains and the kings but the capitalists and the people. To them entirely different issues appeal. The policy of the "open door" is commercial, not political. Just the other day our government insisted that America must have its share in the building of the Hankow railroad in China. Imagine how such a position, now placidly accepted as fair, would have dumbfounded the old diplomats with their alliances and dynastic quarrels. Then, too, of course, other ideas of right prevail. Napoleon could not say today, "With the armies of France at my back, I shall always be in the right." Nor could Charles Augustus of Sweden declare today, as he did when he broke the truce of Roskild, "There is always just cause of war as soon as there is found a realm incapable of resisting." But all these mighty forces which are making for peace would not be helped by such a Court. In other words, where they do not operate to prevent war, no such Court can.

I am not going into a discussion of war; but as bearing on the possible functions and possibilities of such a Court it is worth noting the obstacles which at present prevent the peaceable adjustment of international differences. They may be grouped roughly as (1) distrust of foreign peoples, due to ignorance of their life and institutions and lack of individual acquaintance. The Mongols say: "The thigh bone of an elk cannot be fitted into a sauce-pan, and stranger does not jibe with stranger."[32] In

[31] Bordwell, Law of War, 3.

[32] Rochet, *Sentences, Maximes et Proverbes Marchoux et Mongols*, page iii.

spite of the great spread of learning and the great tides of travels, nations are still extraordinarily ignorant of each other. If you doubt this read American news in English or Continental papers, and, indeed, *vice versa*. The average Oxford graduate still believes that we are only a little less barbarous than the Tierra-del-Fuegans. Perhaps he is right. But what nations need is not so much to know a *rule*, or a court to which they can carry it, as to know and understand the other party to the dispute.

Other obstacles to peaceable adjustment are (2) the prevalence of an individualist philosophy, leading each people to regard its rights first and its duties afterwards; and (3) the difficulty involved in all abstract reasoning which makes it hard for men to think of duties and obligations as resting upon a people which they would concede at once to rest upon a man.

The state is, after all, an abstraction. If all reasoning is difficult, abstract reasoning or reasoning about an abstraction is doubly difficult. Men who are perfectly clear as to their duties to an individual and who would never think of cheating a flesh-and-blood fellow-man, are not so clear about a corporation, a municipality, or a state. Scrupulously just men ask few questions as to how a corporation has earned the dividends it pays them. The modern state itself is only just beginning to recognize duties of justice to its own citizens when they happen to be its creditors. Most of our American states still leave the public creditor to the mercy of the legislature. The conception of rights in the development of the race comes much earlier than that of duties, and popular recognition of duties to other peoples has not yet become much of a force for peace.

Still another (4) obstacle to the peaceable adjustment of disputes leading to war is the popular lack of restraint, the susceptibility to the mob spirit, the love of change and newness and excitement. Governments today are popular governments, and, above all things, a popular government must be interesting. A dull government is lost. Passion is always more interesting than reason, and the politician who appeals to passion has many advantages over one who appeals to reason; and as questions of international law are also questions of politics, the tendency of all to be governed by passion rather than reason is given a freer rein in matters of international relation, and may even be stimulated by the exigencies of politics.

Another (5) obstacle to peace undoubtedly did exist in the absence of any easily available means of deciding disputes of fact. This cause of war, however, now that governments have everywhere become popular governments, no longer exists. Wars no longer really grow out of disputes as to facts. Yet it is only this last obstacle to peace which the proposed Court could possibly hope to overcome and as to this it is unnecessary. It could not hope to overcome the other obstacles named.

Such a court might pass on facts and lay down rules, but in the absence of a world federation, with an effective sanction behind it, it could not, in my judgment, succeed except to a very limited degree. Take our American judicial system. It is constantly strained to the utmost by the political pressure growing out of our doctrine of judicial power over unconstitutional legislation, and the fact that our polity confides so much that is really administrative, and hence political, to the courts. On two occasions the political platforms of a great party have dealt with the administration of justice by the courts.

There is undoubtedly a growing change

of popular attitude, if not dissatisfaction, towards courts. The leaders of what is not unlikely to be the dominant political force in the near future preach and believe that they are the victims of wrongful acts of our courts. The agitation against government by injunction in the last campaign, however mistaken as to facts, had a very real sentiment and not a little justification behind it. The "aristocracy of the robe" is coming in for bitter criticism in quarters that have formerly been quiescent, and the effects of this are becoming daily more evident in legislation.[33]

If our time-tried judicial system bends under this relatively small load of political jurisdiction and interference, what may we expect of a tribunal whose whole jurisdiction is political; which has no tradition, no bar, no precedents, no sanction; which has to make *ex hypothesi* in large part the law it is to administer; which, however, will deal with political questions affording the utmost scope to passion and suspicion of prejudice? Add to this that popular impatience of restraint is an inherent difficulty in all legal administration of justice, and here the whole work of the Court must be to restrain peoples at a time when their passions are likely to be aroused.

Over and above the obstacles just considered, the capital hindrance to the peaceable adjustment of international disputes is the fact that the situations that lead to war today are not capable of peaceable adjustment. In the most recent of armed conflicts it is obvious that recourse to any such Court would have been out of the question. In the China-Japanese conflict the real aggressor could not even have been summoned to the bar; in the Spanish-American controversy Spain certainly would never have yielded to any judgment involving her pride, sovereignty or territorial integrity; in the South African contest no court could ever have convinced the Boers that the progress of industrial civilization and the logic of events made a decree of annexation inevitable; in the Russo-Japanese dispute what award could any court have made which would have led Russia to abandon a policy on which she had spent half a century of effort and millions of treasure?

And today what causes the alarums of war? Why for three years have England and Germany had their navies concentrated within easy striking distance of each other? What casts the shadow of war upon the Pacific? Why must the United States make a spectacular display of naval power? Why the frantic increase of arms and armament at the very hour of our loudest peace talk? Why should the French Cabinet plan to expend $600,000,000 in naval expansion or minor powers like Austria and Italy build half a score of Dreadnoughts? Why? Because of the perennial and inevitable question of hegemony.

We must not flatter nor delude ourselves that the law has settled, or perhaps ever can settle, by peaceable means, this question of leadership even among individuals. Business wars are wars to the knife in which often quarter is neither asked nor given; and legislation and prosecution, although they have engrossed public attention for years, have made little appreciable progress in subjecting them to law. But individual strife, struggle for business hegemony among men, is surely a much simpler problem than the same struggle among nations.

Besides, there are causes which make for war which partake of that element

[33] See Smith, The Spirit of American Government

of inevitability and destiny which in a different era would have been credited to Providence or the nature of things. Simmel, the great German sociologist, lays the causes of strife to "inherent irreconcilableness."[34] Cousin says:—

"War has its root in the nature of the ideas of different peoples, which being necessarily limited, partial, exclusive, are necessarily hostile, aggressive, tyrannical. Wherefore war is necessary. We should not bewail this fact. For it is through war that progress is accomplished. If war is nothing less than the violent encounter, the collision of the exclusive ideas of different peoples, it follows that in a collision the more feeble idea will be destroyed by the stronger, that is to say, absorbed and assimilated by it. Now the stronger idea in an epoch is necessarily the one which is most in accord with the very spirit of that epoch. Each people represents an idea. The people that represents the idea most in accord with the general spirit of the epoch, is the people called to domination in that epoch. When the idea of a people has had its day, that people disappears, and it is well that it disappears. But it does not yield its place without resistance. Whence arises war."[35]

"Would they [the pacificists] as Christian philanthropists and law-abiding citizens, have been satisfied to stand aside and contemplate the final trumph of the first Napoleon, of the French Commune, of Russian Nihilism, or of the Koran?"[36]

It is this struggle for hegemony between peoples and ultimately, perhaps, between ideas, that is behind the great wars of the world in all time. And that such struggles are yet to come, Court or no Court, we have ample evidence. The imperialist and the jingoist may lose caste, and the cultural forces of civilization may temper the brute forces of the world, and, in the phrase of Kant, teach man to think more highly of man, but the saying of Nietsche nevertheless remains true, that "war has always been the chief occupation of mankind" and that man *semper ubique omnibus* is a fighting animal. The very size of our armament and the ruinous burden it imposes may ultimately insure peace or even disarmament, but it is not likely, and it could not last. Perhaps Marshal Moltke is right in his belief that "war enters into the views and designs of Providence; it is a means for the people to fulfill their object on earth, a divine mission to retemper the edge of their manhood, and to keep them from falling into decay."

Indeed, as one reads the history of the race and sees one civilization after another succumb to barbarian invader, it is not altogether absurd to suggest that there are still barbarian races in the world who might some day topple us over, if we disarmed. The "yellow peril" may be more real than we imagine. Only the placid Mediterranean separates Europe from a Continent peopled with millions upon millions of sleeping blacks of superior physical attainments. Who shall say that they may not in some distant and yet undreamed of hour awake and swoop down on Europe as the equally despised barbarians of the North swarmed down upon imperial Rome.[37]

III

Let me for a moment also call your attention to the connection between our Anglo-American advocacy of this project and Anglo-American legal and political thought.

A

The idea of such a Court is pre-

[34] *Soziologie*, 335–6 (1908).

[35] *Cours de l'Histoire de la Philosophie*, lect. ix. See also much the same argument by Lueder in Holtzendorff, *Encyclopadie des Völkerrechts*, IV, 54.

[36] Lorimer, Institutions of the Law of Nations, I. 133.

[37] See Sir Ian Hamilton, Staff Officer's Scrap Book, vol. I, pp. 166–8, 5–8, 14.

eminently, as we have seen, American. This is in no way to be wondered at, for in its intellectual pedigree it is Puritan. As Mr. Pound has so well pointed out, the dominant note in our legal and legislative ideals and systems is still Puritan. To the Puritan "covenants without the sword" was a favorite juristic and political idea. Men were free moral agents. The basis of everything must be free will. "The church is a willing covenant." Hence the Puritan made *contract* the basis of ecclesiastical polity, of political association and of law. An eminent Puritan apologist says:—

"Geneva was at once the strength and the weakness of the Puritans: their strength, because it gave them their idea realized; their weakness, because it made them think the only method of realization was in and through the state."[38]

This is the key to much of our American political theory—the sacred rights of the majority, the express and implied assent of the minority and the general consent of all; it is the key to much of our juristic theory—freedom of contract, non-interference, sanctity of a rule agreed upon by a majority on the bench or at the polls, etc. "We will venture to define municipal law in American jurisprudence as *a rule agreed upon by the people* regulating the rights and duties of persons."[39]

The Puritan had great faith in this covenant or agreement, for which he found a warrant in the covenant that made Abraham and the children of Israel the people of God. Perhaps it was part of the exaggerated faith in the mere machinery of things which Matthew Arnold harps on so often as a characteristic of the Anglo-American Philistine. Browne, himself, says that the Puritan imagined that reformation was, as a matter of polity, only to be brought about by structural and organic changes in the church; and a polity in which the few could covenant for the many. "The Kingdom of God," he says, "was not to be begun by whole parishes, but rather by the worthiest, be they ever so few."[40]

The bearing of this Puritan attitude of mind on religious institutional history in this country and England is obvious, but its bearing on our political and juristic history, if not quite so obvious, is quite as real. The dominant ideas of the adolescence of any system, and particularly a legal system, are sure to take hold of it and persist. At any rate, faith in the efficacy of a bare legislative or judicial declaration that a thing is or shall be law is seen to survive all discouragement of practical experience in America. It has been the theme of remarks of the Presidents of the American Bar Association at their last three meetings. It plays a large part in Mr. Carter's late book. Dead-letter laws and fool legislation, as a result of this Puritan idiosyncrasy which persists in us, have been the subject of jest among lawyers and laymen for fifty years, but the output increases steadily. The Puritan empire is slowly passing westward, and is there bringing forth legislative and juristic harvests worthy of the sowers who went before.

Along with this exaggerated faith in abstract rules and declarations and covenants, so characteristic of our people, goes a more or less unconscious contempt for those same rules in their concrete application, which is also characteristically American.[41] This, too, is Puritan—the free moral agent freely exercising his free will in each emergency and

[38] A. M. Fairbairn in Encyc. Britannica, art. "Independents."

[39] Andrews, American Law, 35.

[40] Browne's "True and Short Declaration," page 6.

[41] Fagan's "Confessions of a Railway Signalman" is full of illustrations of this.

judging for himself how far the covenant expressed in the law ought to bind him.

And yet it is this spirit and this people that would set up an International High Court of Justice.

B

It is a settled conviction of American lawyers that the common law is part of the eternal jural order. We may philosophize otherwise and know better, but it is difficult for us to conceive of law where there is neither legislative, declarative, nor judicial precedent. Therefore, when the rest of the world, which has a somewhat different conception of law generally, thinks it can get along with international law as laid down by doctrinal writers, the English and Americans conceive that it means to get along without any *real* international law at all.[42]

On the Continent, where the intrinsic jural reason of the rule is taken to be a sufficient basis for it, men have no such trouble. To Americans such a basis is no basis. We must have the convenant —the agreement to be bound—witnessed by a treaty or convention or judicial decision by the appointed magistrate. Hence we are taken with the idea of an International Court. It would be an interesting question to consider how far Continental jurists, with their ideas of the relatively low value of decisions and precedents and the high value of doctrinal writings, would agree with us as to the legal and binding value of the decisions of such a Court.

But the point I wish to make is that we are urging such a Court to meet the exigencies of our own peculiar legal theories: the point is interesting, perhaps, merely as a matter of philosophical rumination, but it is important as presaging the weakness and impossibility of any real Court of Nations.

It is an old experience that ideas reach their complete logical development in detail after they have ceased to be vital. The idea of covenants without the sword has broken down in political theory and is moribund in our polity. Puritan individualism is on the wane in our social economy and shows signs of decline in its last stronghold—our common law. But apparently we still have faith that it can govern the world. "How beautiful upon the mountains are the feet of him that bringeth good tidings, that publisheth peace." It is significant that those who urge such a Court most in peace congresses and conferences, and in pulpit and print, are the same well-meaning enthusiasts who have filled our statute books with unenforceable pronouncements of the sovereign will. "The more they do law," said the Anglo-Saxon Chronicle, "the more they do unlaw." Certainly there is nothing more lawless than unenforceable law; nothing more useless than a judge who cannot enforce his decrees; nothing more futile than a "fire that burns not, a light that shines not."

[42] "So will be constituted a true permanent court of international arbitration, a true international judiciary, *from which will spring a true system of* international law." (Clarke, 1 *Am. Jour. Int. Law*, 342, 408.) "The mere opinion of jurists, however eminent or learned, . . . are not of themselves sufficient." (Lord Alverstone in *West Rand Central Gold Mining Co.* v. *The King*, 2 K. B. 391.) There should be the same reason for respecting precedent in this as in other branches of the law." (Scott's Preface to Cases in International Law.)

The Thirty-Second Annual Meeting of the American Bar Association

THE thirty-second annual meeting of the American Bar Association, held at Detroit, Mich., August 24–27, owes its chief interest, for the profession in general, to President Lehmann's notable remarks about the unchecked monopoly of the holding company, "the modern trust," and the dangers of issues of shares without a par value, to the bitter denunciation of faulty methods of legal education which came from several speakers, to the able and striking report submitted by the special committee which is investigating the question of reformed procedure, and to the adoption of the bill favored by this committee for the reform of judicial procedure in the federal courts.

The convention was called to order by President F. W. Lehmann, of St. Louis. Samuel Douglas, president of the Detroit Bar Association, made an address of welcome. There were about three hundred and fifty delegates and visitors in attendance, including Secretary of War Dickinson, Sir Frederick Pollock of London, and George R. Peck of Chicago.

THE PRESIDENT'S ADDRESS

President Lehmann's address dealt with the subject, "Changes in State and Federal Laws during the Year." Mr. Lehmann declared that the trust is obsolete. "Out of the ashes of the 'trust' has sprung the holding company, the 'trust' in an improved, perfected form. Is it under the ban of the law? Certainly not in all of the states." The speaker mentioned Montana. "Having slain the senile and debilitated 'trust', they made invulnerable through legitimacy its youthful and sturdy successor, the holding company." As a result any industry or business of the state may be legally monopolized, provided it is well and thoroughly done. This condition of the law exists in other states, he asserted. "States which prohibit 'trusts' and assume to prohibit monopolies, set no bounds to the capitalization of their corporations, or fix the limit so high that under it many industries may be completely engrossed.

HOW STATES ENCOURAGE THE NEW TRUST

"The great industrial corporations are in practical effect as much agencies of interstate commerce as are the great carrier companies. If the production of a commodity is under one control, commerce in that commodity is under the same control, but unfortunately production is held not to be within the commerce clause of the federal Constitution, and so combinations to engross production may be effected, because the general government cannot prevent them, and the states in which they are located will not.

"But something can be done under the taxing power. What may be aided by the government may also be regulated, for there is no more stretch of federal authority in the exercise of control over our industries than in extending to them a constant fostering care.

ISSUE OF SHARES WITHOUT A PAR VALUE

"The New York State Bar Association recently recommended a law permitting corporations to issue shares without a par value and as representing only aliquot parts of the ownership. The proposition, it was said, had attracted a great deal of sympathetic support from business men who were looking for a way of reconciling the necessary methods of business with the interests of ethics and who feel that they have been disturbed by the apparent conflict and more than an apparent conflict between the universal practice that we know in the organization of corporations with capital stocks not perhaps entirely within the bounds of the figures that have been annexed, and the money value of the property. Never was more serious charge conveyed in softer phrase, and never was father confessor more gentle in rebuke. Stripped of its euphemism, the charge is that falsehood universally prevails in the capitalization of corporations, and the utmost extent of the remedy proposed is silence. A watered share having an announced par value is a positive misrepresentation, a share issued as an aliquot part is an equivocation, it gives no information and it cries caution only to the initiated.

"Why not have it speak and speak the truth?"

The report of the secretary showed that since 1903 the membership has grown from

1,800 to more than 3,650. The association now includes representatives from all the states, Alaska, Arizona, Hawaii, New Mexico and the Philippine Islands.

PREPARATION FOR THE BAR

The mornings and evenings being given up to the regular sessions of the Association, the afternoon of Tuesday, the first day, was allotted to the meeting of the Section on Legal Education. Whether law can be successfully taught in correspondence schools and whether four years' preparation is necessary for admission to the bar provoked a heated discussion. Dean Harry S. Richards of the University of Wisconsin College of Law and James Perker Hall of the University of Chicago Law School were strong in their denunciation of the correspondence school. Mr. Hall classed it with mining scheme advertising. Both speakers also urged a three years' law school training and one year clerkship before a student be admitted to the bar.

Judge Francis M. Danaher of Albany, N. Y., speaking from the standpoint of the experienced lawyer, replied with scathing criticism of modern law school methods and said that the incompetency of many candidates for the bar after completing the course is appalling. If law correspondence schools are bad, he asked, why do Wisconsin and Chicago Universities conduct them in other departments? Maintaining that at least one year's clerkship is essential to an applicant for the bar, he urged that the law school course be left at three years. A four years' course, he said, is too long for the student enthusiastic about beginning his life's work.

The report of the committee on standard rules for admission to the bar, as read by Lucien Hugh Alexander of Pennsylvania, was adopted. This calls for three years in an approved law school and one year in an office or four years in either the office or school.

FRENCH FAMILY LAW CHANGING

The guests having enjoyed an automobile ride to Belle Isle Park Tuesday afternoon, in the evening Georges Barbey, *Avocat à la Cour d'Appel* of Paris, made an address on "French Family Law." He said in substance:—

"In France the authority of the husband, the authority of the father, are necessary consequences of the whole economic *régime*. But modern industrialism is developing in France a new people to whom the laws of the *Code Civile*, upon which the French family law is based, are not suited. The *Code Civile* was framed for a population of farmers and small landowners, while now an enormous fluctuating factory population is developing in France. Day by day the French *Code Civile* is being completed by new laws. Slowly French legislation is trying to adapt itself to the complexities of modern life." A paper was also read at the evening session by Julian W. Mack, Judge of the Circuit Court of Cook county, Ill., on "Juvenile Courts.",

THE ANNUAL ADDRESS

On Wednesday morning Governor Augustus E. Willson of Kentucky delivered the annual address, on the subject, "The People and their Law." His text was the *dictum* of the United States Supreme Court in *Crowley* v. *Christiansen*, that "liberty is not unrestricted license to act according to one's own will," and he spoke of the causes which led up to the recent "night rider" troubles in Kentucky and Tennessee.

NIGHT RIDERS TO BE PUNISHED

"My promise to the people that they would need no lawyers if they hurt any one in defense of their homes was kept," said the Governor, "and there will be no pardons for the crimes of pillage, plant scraping, burning, and organized murder. But now the people are coming into their own and I look for trials and convictions, a rare thing up to this time. The politician who parleys with crime in a 'straight American state' like Kentucky will be rebuked instantly and woe will come to him.

"I believe that there can be no renewal of the trouble. The night riders are still unpunished, but no statute of limitations protects them. The murderers of Hiram Hedges are still at large, but the people's law will punish the criminals in time."

APPEALS IN DISTRICT OF COLUMBIA

The Committee on Judicial Administration and Remedial Procedure offered a report urging a bill regulating the right of appeal to the Supreme Court of the United States from the courts of the District of Columbia. The contention of the Committee is that greater rights are accorded District of Columbia litigants than are allowed elsewhere in the United States, in that any case of sufficient pecuniary

interest from the District of Columbia may be reviewed in the Supreme Court as a matter of course. The Committee asks that the same requirements be imposed on District of Columbia courts as on courts of other judicial circuits.

NEW YORK'S LOW STANDARD OF ADMISSION TO THE BAR

The report of the Committee on Legal Education and Admissions to the Bar was presented by Dean Henry Wade Rogers of Yale Law School. Dean Rogers said:—

"The anomalous conditions which still continue in the state of New York excite surprise and provoke criticism. Four out of nine schools have courses of two years for the LL.D. degree, and a fifth school, while having a three years' course, allows students under exceptional circumstances to graduate in two years. That this should be the case in the Empire State occasions comment at home and abroad. More than two-thirds of all the law schools of the United States are now on the three years basis.

"The State Bar Association at its meeting in 1901, as is well known, took action looking toward the improvement of conditions in New York. It declared its opinion that candidates for admission to the bar should be required either to have had a course of three years in a law school or of four years in a law office. It appointed a committee to lay the matter before the Court of Appeals. The Court has thus far failed to take the action recommended."

BANKRUPTCY AND ADMIRALTY

The Committee on Commercial Law made a report covering the subjects of bankruptcy legislation, uniform state legislation, and Congressional legislation concerning admiralty courts, and recommended opposition to any effort to repeal the present bankruptcy statute, and the passage of three important bills affecting the courts of admiralty. These are: An act to authorize the maintenance of actions for negligence causing death in maritime cases; an act relating to liens on vessels for repairs, supplies or other necessities, and an act to permit owners of certain vessels and the owners or underwriters of cargoes laden thereon, to sue the United States.

RIGHTS OF PATENTEES

The Committee on Patent, Trademark, and Copyright Law offered a report recommending the passage of a law allowing owners of patents to recover by suit in the Court of Claims reasonable compensation for the use of their patents by the government without permission. Russia and the United States are the only civilized countries denying the patentee this right to receive damages from the government. The Committee also reported strongly in favor of the establishment of a United States Court of Patent Appeals.

A MODEL INSURANCE CODE

The Committee on Insurance Law recommended that Congress be asked to pass a bill (H. R. 28407) for the creation of a commission to prepare a code of insurance laws for the District of Columbia. The object is the perfecting of a model code, which will then be urged upon the legislatures of the various states. Such a code "would eliminate the scandalous retaliatory laws which many of the states have adopted."

A MODEL INHERITANCE TAX LAW

The Committee on Taxation urged the importance of the American Bar Association trying, with the International Tax Association and the Commissioners on Uniform State Laws, to evolve a sane inheritance tax law, designed to afford revenue, not to level fortunes, and to get this before the attention of the various states before the field is preempted by conflicting and unsatisfactory legislation. In the discussion on this report, an inheritance tax met with decided opposition from many delegates.

JUSTICE CARPENTER ON THE BENCH AND THE BAR

Wednesday afternoon was given over to pleasure, the delegates enjoying an excursion on Lake St. Clair. In the evening they heard an address on "Courts of Last Appeal," by former Justice William L. Carpenter, of the Michigan Supreme Court. Judge Carpenter said in part:—

"Faith that our courts of last resort will determine controversies according to law is the rock upon which our governments are built. That is the most elementary of legal principles. Lawyers do not always appreciate it. If they did, they would not, as they often do, urge considerations calculated to incite feelings of sympathy and prejudice.

"I think it may be said as a general proposition that failure of courts of last resort to understand a case is chargeable to the imper-

fect argument of counsel. In their anxiety to achieve a victory, counsel yield to the temptation of stating the facts from the point of view most favorable to their client's interest.

"Judges sometimes take themselves too seriously. They fear they will change the law if they incorrectly declare it. But if a collision occurs between their declaration and the law, the law does not suffer; they suffer."

AN IMPORTANT COMMITTEE REPORT

On Thursday morning the special committee appointed two years ago to consider the matter of unnecessary costs and delays in litigation submitted a report in which it advocated a gradual but sweeping reform in judicial procedure. The committee reported satisfactory progress in bringing to the attention of Congress proposed laws to authorize the appointment of official stenographers for United States courts and to fix their compensation, to limit the setting aside of verdicts on error unless the error complained of shall appear to have resulted in a miscarriage of justice, and to permit the use of authorized printed copies of records in appealing cases, instead of written or typewritten manuscripts.

REORGANIZATION OF STATE COURTS

Further, the committee outlined the general principles on which it considered a reorganization of state courts should eventually be effected, saying in substance:—

> The whole judicial power of each state, at least for civil causes, should be vested in one great court of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records and the like, thus obviating expense to litigants and cost to the public.

ONLY ONE COURT FOR CIVIL CAUSES TO EACH STATE

> This court should have three divisions:—
>
> 1—County courts, including municipal, having exclusive jurisdiction of petty cases.
>
> 2—Superior court of first instance, with exclusive original and general jurisdiction in equity and at law, in probate and administration and in divorce.
>
> 3—A single ultimate court of appeal.
>
> All judges should be judges of the whole court, eligible and liable to sit in any locality. Supervision of administration should be committed to one high official of the court responsible for failure to utilize the judicial power of the state effectively.
>
> In like manner the business administration of the court should be organized, with the clerical and stenographic forces under the control of a responsible officer. . . .
>
> We have carried decentralization of courts to such an extreme that in many jurisdictions the clerks are practically independent functionaries over whom courts have little real control. . . . There is much unnecessary duplication of papers; judicial records are needlessly prolix and unduly expensive. . . .

ADVANTAGES OF CENTRALIZATION

> Petty causes demand good judges no less than causes involving larger sums. The judges to whom such actions are committed ought to be of such caliber, that but one review should be necessary, and that confined to questions of law. The advantages of such an organization are nine:—
>
> 1—A real judicial department would be created.
>
> 2—The waste of judicial power involved in our present system of separate courts with hard and fast personnel would cease.
>
> 3—The bad practice of throwing out cases to be begun over again because started in the wrong place would be done away with.
>
> 4—The great and unnecessary expense involved in transfer of cases would be done away with, obviating necessity of transcripts, bills of exceptions, certificates of evidence, and the like.
>
> 5—All technicalities, intricacies and pitfalls of appellate procedure would be done away with.
>
> 6—It would do away with the unfortunate inno vation upon the common law by which venue is a place where an action must be begun, rather than a place where it is to be tried, so that a mistake may defeat an action entirely.
>
> 7—It would obviate conflicts between judges of co-ordinate jurisdiction.
>
> 8—It would allow judges to become specialists in the disposition of particular classes of litigation.
>
> 9—It would bring about better control of the administrative officers connected with judicial administration.

ABOLISH THE FEE SYSTEM

The committee would abolish the fee system, proposing:—

> All clerks and other employees of courts and all persons having permanently to do in any way with the administration of justice should be compensated by fixed salaries, and all fees collected should be paid into the public treasury.

This, in the opinion of the committee, would drive money-making out of the clerkships, curb the ambitions of the politicians to hold such jobs, and remove from the office the suspicion that those administering justice are governed by a desire to earn fees.

The committee is also paying attention to official stenographers, their earnings and their ways. The draft of the bill which has been prepared provides that the compensation for services and the price for transcripts and copies shall be fixed in each district by the Circuit Court, and that the sum to be paid

in the federal courts shall not exceed that paid in the state courts of the same locality.

The report is signed by Everett P. Wheeler, chairman, Roscoe Pound, Charles F. Amidon, Joseph Henry Beale, Frank Irvine, Samuel C. Eastman, William E. Mikell, Henry D. Estabrook, Edward T. Sanford, Charles E. Littlefield, Charles S. Hamlin, Charles B. Elliott, George Turner, John D. Lawson and William B. January.

REFORM OF FEDERAL PROCEDURE

The report of this committee was adopted with but one dissenting vote. The adoption of the report carried the pledge of the Association's support to the amended bill to regulate the judicial procedure of United States courts. The second section of this bill provoked a storm of debate. It provides that the trial judge may in any case submit to the jury issues of fact arising upon the pleading, reserving questions of law for subsequent argument and decision. The Bar Association, however, showed its approval of the bill, and authorized the committee to urge it upon the consideration of Congress at the next session.

COMPARATIVE LAW

The Comparative Law Bureau, of which Chief Justice Baldwin of the Connecticut Supreme Court is director, reported a marked advance in the interest in the science of comparative law in this country during the past year.

Other committee reports submitted were on the subjects of "Title to Real Estate," and "The Proposed Copyright Bill."

On Thursday afternoon the members were entertained at the Country Club, where a reception took place.

THE NEW OFFICERS

On Friday morning the officers were elected for the ensuing year. These are the new officers: President, Charles F. Libby of Portland, Me.; secretary, George Whitelock, Baltimore; treasurer, Frederick E. Wadhams, Albany; executive committee, Charles H. Butler, Yonkers, N. Y.; W. O. Hart, New Orleans; John Hinkley, Baltimore; R. W. Breckenridge, Omaha; Lynn Helm, Los Angeles; secretary of the general council, Arthur Stuart, Baltimore.

CHARLES F. LIBBY CHOSEN PRESIDENT

Charles F. Libby, who was elected president of the Association for the ensuing year, is a native of Maine, the son of James B. Libby, a well-known wool merchant of Portland. His family traces its descent back to the original immigrant, John Libby, who came over in 1630. Charles F. Libby had a liberal education, graduating from Bowdoin with honors. He studied in a law office, and finished his professional education in the Columbia Law School. After his admission to the bar in 1866 he went abroad, and for two years continued his studies in Paris and Heidelberg.

As a lawyer Mr. Libby early took a prominent position in the Cumberland county bar. His natural ability and acquired knowledge were soon manifested in the broad field of practice, and many cases of importance were intrusted to his care. He began his public career as city solicitor of Portland in 1871, and in 1871 was elected county attorney. In 1882 he was elected Mayor of Portland, and in 1888 was elected to the state senate, being given a re-election in 1891. During his term he served as president of the body.

Mr. Libby was active in forming the Maine State Bar Association, and from 1891 to 1895 was its president. From 1869 until 1882 he served on the Portland school committee, and for many years has been one of the Bowdoin College overseers. He has been and is now attorney for many large corporations, being senior member of the firm of Libby, Robinson & Turner.

BANQUET AND ADJOURNMENT

The annual dinner of the American Bar Association was given at the Hotel Pontchartrain on Friday evening. The speakers expected to appear included Dallas Boudeman of Kalamazoo; Henry A. Lockwood, president of the Michigan State Bar Association; James T. Keena of Detroit; W. U. Hensel, Lancaster, Pa.; Georges Barbey, Paris, France; J. Hamilton Lewis, Chicago, and W. C. Languedoc, K.C., representing the Montreal bar.

The association adjourned for one year. Its next meeting place will not be chosen until January, 1910.

DEANS OF LAW SCHOOLS CONFER

In connection with the meeting of the American Bar Association, the ninth annual meeting of the Association of American Law Schools, composed of the deans of thirty or forty of these institutions, was held on the afternoons of August 25 and 27. The president's annual address was delivered by Charles Noble Gregory, Dean of the Iowa State Univer-

sity College of Law, who referred particularly to the growth of law schools throughout the country and to the advance in educational standards. A paper was read by Professor Harold D. Hazeltine of Emmanuel College, University of Cambridge, England, on "Legal Education in England." Mr. Hazeltine declared that several features in the present system of legal education in England are to be changed soon. Further elaboration of a system of electives, and more work in special and advanced subjects is expected to result. The discussion which followed was led by Dean James Barr Ames and Sir Frederick Pollock. Dean Ames declared that if England had a better system of education it would have even better lawyers. Within the next twenty-five years, he said, the best treatises on English law would be written by Americans.

At the second session, Dean John H. Wigmore of the Northwestern University Law School, and Harry Pratt Judson, President of the University of Chicago, read papers dealing with the general question of education preparatory to the study of the law. These papers were discussed at length by Henry Wade Rogers, dean of the Yale University Law School, and by Professor Henry M. Bates, of the University of Michigan.

Dean Wigmore declared that out of one hundred law students who had had only high school preparation, only two attained high legal position, whereas of one hundred taking a four years' A. B. course ten became lawyers of note. He backed up his main proposition by the opinion of Charles W. Eliot of Harvard University.

Dean Rogers of Yale was of the opinion that no more than two years of preparatory training in college should be required. "If we put the standard too low young men are admitted to the bar at an immature age. On the other hand, if we exact a higher standard than the situation warrants, we do them and the commonwealth an injustice. Today there are still law schools that admit any person who applies for admission. They are discriminated against by the profession."

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Administrative Law. "The Law of the Constitution." A review of the seventh edition of Prof. Dicey's work bearing that title. By Edmund M. Parker. *American Political Science Review*, v. 3, p. 362 (Aug.).

"This tendency on the part of an administrative body to be transformed into a judicial tribunal we may see clearly in the United States. How often do we not see administrative boards or officials to whom are entrusted the decision of questions affecting rights of property required by the pressure of public opinion or even by law to adopt the procedure of a judicial body, and to take on all the paraphernalia of a regular court! . . .

"Administrative law is chiefly case law; it has been made by those who administeri t; it is therefore more flexible than code law and may be more readily adapted to new conditions. . . By whatever name one may call it, England undoubtedly possesses administrative law, in the sense of a special set of legal rules governing the relations between the administration and its officials and the private citizen; and the contrast between the rule of law as between private individuals and the rule of law as between the government and the individual is one which may be drawn instructively in England, as indeed in any country. This is particularly true of the United States, for it must not be forgotten that the 'prerogative of the administration' may exist and has actually existed in republics as in monarchies, as France during her great revolution found to her cost, and as we have often had occasion to learn in this country."

Aliens. "International Law and the Aliens Act." By N. W. Sibley, LL.M. 34 *Law Magazine and Review* 432 (Aug.).

"From the point of view of modern authoritative international usage, it would be breaking a butterfly on a wheel to demonstrate the proposition that, with the possible exceptions of Great Britain and Russia, the modern state claims a right of expelling an alien who becomes dangerous to its public tranquillity. . . .

"Everything tends towards the conclusion that the alien should be deprived, if necessary, by express enactment, of the benefit of

the doubt on the point whether he is a political offender or not."

Anarchism. See Property and Contract.

Basis of Law. "The Belief in Innate Rights." By H. Frances Peterson. 34 *Law Magazine and Review* 385 (Aug.).

"Sir Henry Maine has pointed out that the origin of 'legal rights' was the judgments of those in authority as to what was right. 'Legal rights' being derived from moral conceptions of right, it follows that whenever, as frequently happened, those moral conceptions were erroneous the term 'legal rights' when applied to the so-called 'rights' derived from those moral conceptions was metaphorical. Whenever the term 'legal right' has been or is used to cover some 'wrong' sanctioned by law it has been or is a metaphor and nothing else. Therefore, contrary to the teaching of jurists, it is precisely 'legal rights' that are more frequently 'metaphorical' than any other. . . .

"It is foreign to our purpose to discuss here the meaning of the terms 'natural' and 'moral rights,' beyond observing that such classifications are, like the term 'legal rights,' distinctions drawn between the sanctions which enforce 'rights,' and are not distinctions between 'rights' themselves. . . .

"The terms 'innate and abstract rights' are used in antithesis to such terms as 'moral or legal rights,' to signify all the innumerable rights which are not sanctioned by law, public opinion, religion, or anything else."

See Property and Contract.

Bill of Rights. See Basis of Law, Property and Contract.

Contracts. See Property and Contract.

Corporations. "Uniform Foreign Corporation Laws." By Franklin A. Wagner. *New York Law Journal*, v. 41, July 27, 1909.

This paper was read at the fifteenth annual convention of the Commercial Law League of America, held at Narragansett Pier, R. I., on July 20.

"Unquestionably much hardship has been inflicted on foreign corporations when, through ignorance of the local laws or through failure to understand their drastic scope, they have entered into contracts which, because of these statutes, they were unable to enforce. In some states the statutes are too lenient, in others too severe. In few states have they been comprehensively worked out to adequately meet present day needs. A uniform law would confer a lasting benefit both upon the states and the corporations. Such a law should embody the following features:—

"1. Define what is 'doing business.'

"2. Provide a simple procedure for qualification.

"3. Name the Secretary of State the agent upon whom process may be served.

"4. Abolish the license fee, excise or bonus tax.

"5. Tax the foreign corporation on the amount invested in the state on the same basis and at the same rate as domestic corporations.

"6. Require an annual report of condition, including a statement of assets and liabilities, naming the officers and directors of the company and its officers and agents located in the state.

"7. Affirmatively grant the privilege to use the federal courts in proper causes.

"8. Remove drastic penalties and substitute reasonable fines.

"9. Abolish attachment on the mere ground that it is a foreign corporation.

"10. In all other respects place foreign corporations on a par with domestic corporations."

See Property and Contract.

Criminal Intent. "Constructive Murder and Felonious Intent." By W. F. Wyndham Brown. 34 *Law Magazine and Review* 453 (Aug.).

"There is no doubt, eliminating any question as to the insufficiency of the original authority, that the trend of modern judicial opinion and *dicta* has been toward a limitation of the rule to those felonious acts which are intrinsically likely to cause death. . . .

"No doubt, when the question arises in the Court of Criminal Appeal, some definite principle will be laid down which may not indicate so greatly the divergence of judicial opinion, the inconsistency of our case law, and the great weight given to legal writers whose names appear in the text-books as the old authorities."

Criminology. "Criminal Statistics, 1907." 34 *Law Magazine and Review* 416 (Aug.).

"Last year we expressed the view that the great majority of the serious crimes committed may be traced to the unsatisfactory conditions in which the poorest classes live, and we maintained that the astonishing diminution in crime during the last half-century could only be explained by the general rise of the standard of life among the less fortunate strata of society. The diminution is so remarkable that it is worth while again to recall the figures."

See Penology, Police Administration.

Election Laws. "The New York Direct Primaries Bill of 1909." By Arthur Ludington. *American Political Science Review*, v. 3, p. 371 (Aug.).

"Under the Hinman-Green bill there is opportunity for the fullest consultation and deliberation before the candidates are designated. At present the only real deliberation is not in the convention, but among the party leaders in private conference; and it is just this sort of deliberation that is preserved by the terms of the bill. Where the plan differs from the present system is in the fact that all suggestions made by party committees are subject to the approval of the party as a whole. They will be made, therefore, under

a sense of immediate responsibility, and this responsibility will be strengthened by the fact that the members of party committees, if candidates for re-election, must submit themselves to the voters at the same time as the candidates for nomination whom they have proposed."

Government. "The Increased Control of State Activities by the Federal Courts." By Robert Bruce Scott. *American Political Science Review*, v. 3, p. 347 (Aug.).

"This paper addresses itself to a consideration of whether the recent use of injunctions by federal courts as to state laws is an unwarranted exercise of power over the states by the federal government. . . .The question became of greatest interest in connection with the case of *ex parte Young* (209 U. S. 123), decided by the United States Supreme Court, March 23, 1908. It was there held that the Attorney-General of Minnesota might be enjoined at the suit of individual stockholders of a railroad from using the state courts to enforce an unconstitutional rate law which affected the state only in its general welfare. . . .

"The court had held in *Davis & Farnum Manufacturing Company* v. *Los Angeles* (189 U. S. 218) and in *Dobbins* v. *Los Angeles* (195 U. S. 223) that where irreparable injury will be inflicted on property rights through a void law or ordinance, an injunction will issue to restrain its enforcement by criminal proceedings, and the earlier case of *Smyth* v. *Ames* (169 U. S. 466) had enjoined proceedings by indictment to compel obedience to the Nebraska rate act; so that in applying the remedy of injunction to criminal as well as civil cases, upon the usual grounds of equitable jurisdiction, the *Young* case established no new precedent. . . .

"The annual output of American legislatures is said to be 15,000 laws. Over-legislation and bad legislation are crying evils of the times. With state legislatures dealing with new and complicated legal and economic problems, usually without expert knowledge or experience, and with much popular (and often proper) hostility to great corporations, it is not strange that many defective and illegal acts are passed. . . .

"De Tocqueville, writing in 1832, said: 'If the sovereignty of the Union were to engage in a struggle with that of the states at the present day its defeat may be confidently predicted; and it is not probable that such a struggle would be seriously undertaken. As often as steady resistance is offered to the federal government, it will be found to yield.'

"Happily, this prophecy did not come true, and that it was not fulfilled is due in no small measure to the jealous way in which the federal courts have safeguarded the authority and powers of the national government, of which the *Young* case is a conspicuous example. To have decided that case otherwise would have been in effect to limit the Fourteenth Amendment so as to make it read: No state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, *unless it shall pass an act for that purpose, in which case the prohibitions of this amendment shall not be operative.*"

Another article on a live topic taken from the law of the American commonwealth is the following:—

"The Initiative and Referendum is Not Constitutional." By D. C. Allen. 69 *Central Law Journal* 148 (Aug. 27).

One of the Nestors of the Missouri bar here contributes views which are of great interest. He says in part:—

"The initiative and referendum, coming from socialism, necessarily brings with it the atmosphere and vices of socialism, and among these is the principle that each man possesses, as his birthright, not merely an equal right of being governed, but an equal right of governing others. It connects the right to govern, not with capacity, but with birth. It is a principle which ignores the inequality established by nature between the mental powers and moral qualities of men. Domination, under such a principle, is that of inferiors over superiors in intellect and morals, which is universally conceded by the best thinkers to be a tyranny equally violent and unjust. As already indicated, such a principle cannot agree with the spirit and purpose of representative government—the spirit and purpose actuating such men as Washington, Madison, Hamilton, Franklin and others in framing our federal Constitution."

The following article throws light on the origin of the President's Cabinet:—

"Historical Significance of the Term 'Cabinet' in England and the United States." By Henry Barrett Learned. *American Political Science Review*, v. 3, p. 329 (Aug.).

"The financial requirements especially conspicuous during Washington's first term, the problems of our commercial and foreign relations, the frontier questions involving our attitude to the Indians as well as to British and Spanish neighbors—all these and other matters called not only for the direction of a sagacious President, but also for the assistance of qualified experts. . . .

"There is no evidence but the term to show that in characterizing the President's advisers we took into account anything but the superficial resemblance to the English institution. What in all probability we did was to adopt a well-recognized English term, the significance of which so far as the average man was concerned had been pretty well settled in the seventeenth century."

Great Britain. "The Lords and the Budget." By Harold Spender. *Contemporary Review*, v. 96, p. 129 (Aug.).

"Will the House of Lords throw out the Budget? That is the question which is at

present exciting and dividing both great political parties. It is too early to make any certain forecast of a situation which will depend on factors still unrevealed. But it is at least clear already—if only from the very significant speech made by Lord Lansdowne on July 16th—that towards the end of the present year the Constitution of these islands will be subjected to a very severe, possibly a breaking, strain. . . .

"The House of Lords must either reject the Finance Bill completely or leave it completely alone. The only possible policy within the Constitution is that of rejection. But that, as we have seen, would reduce the administration of the country to chaos, and is not therefore, as Lord Salisbury clearly perceived in 1894, a policy which can be regarded as practicable or possible by any responsible politician."

The opposite view is expressed in:—

"The House of Lords and the Budget." By J. A. R. Marriott. *Nineteenth Century*, v. 66, p. 195 (Aug.).

"Weakened by the unfortunate predominance of the hereditary element within its walls, rendered unnecessarily timid by the narrowness of the basis on which its position theoretically rests, the English House of Lords has allowed many of its unquestioned rights to fall into practical desuetude. But it is slowly awakening to the important function which it may legitimately perform in the modern democratic state. . . . They can and ought to see to it that no measure of first-rate importance, involving the acceptance of new and unsanctioned principles, shall find a place on the statute book before the will of the electorate has been unmistakably and deliberately expressed."

See Administrative Law, Election Laws, History, Legislative Procedure, Property and Contract, Race Problem, South African Union.

History. "The South Carolina Federalists, II." By Ulrich B. Phillips. *American Historical Review*, v. 14, p. 731 (July).

"To the Republicans of 1801 the historical Republican doctrines were little more interesting than the last year's almanacs. . . . The Jeffersonians had adopted the Federalist policies, and the South Carolina Federalists were drawn more and more into harmony with them and out of sympathy with the filibustering New Englander. . . . The Federalist party in the state was practically dead by 1812. The old Federalist policies, however, championed as they were by the new generation of leaders in spite of their repudiation of the party name and alignment, continued to control the state till about 1827."

Immigration. "Protect the Workman." By John Mitchell. *Outlook*, v. 93, p. 65 (Sept. 11).

"If we are going to regulate immigration at all, we should prescribe by law definite conditions, the application of which would result in securing only those immigrants whose standards and ideals compare favorably with our own. To that end wage-earners believe:—

"First: That, in addition to the restrictions imposed by the laws at present in force, the head tax of four dollars now collected should be increased to ten.

"Second: That each immigrant, unless he be a political refugee, should bring with him not less than twenty-five dollars, in addition to the amount required to pay transportation to the point where he expects to find employment.

"Third: That immigrants between the ages of fourteen and fifty years should be able to read a section of the Constitution of the United States, either in our language, in their own language, or in the language of the country from which they come."

Insanity. See Penology.

Labor Problem. "The Causes of Unemployment." By H. Stanley Jevons. *Contemporary Review*, v. 96, p. 165 (Aug.).

"Several writers have succeeded in connecting periodic variations of the weather directly with economic statistics. Brückner has been, perhaps, the most successful, for he gives good evidence by taking five-yearly averages, that harvests, wheat prices, and the course of trade in grain, vary synchronously with rainfall in a period of about thirty-five years. . . . H. H. Clayton, of the Blue Hill Observatory, finds that commercial panics in the United States have occurred either during, or shortly after, periods of deficient rainfall in the Ohio Valley."

"The Best Way to Prevent Industrial War fare." By Charles W. Eliot, LL.D. *McClure's*, v. 33, p. 515 (Sept.).

"The chief feature of the beneficent Canadian Act called the Industrial Disputes Investigation Act was the requirement that, in the event of a dispute arising in any industry known as a public utility, it should be illegal to resort to a strike or lockout until the matters in dispute had been made the subject of an investigation before a Board of Conciliation and Investigation to be established under specified rules by the Canadian Minister of Labor.

"During the two years from March 22, 1907, to the end of March, 1909, fifty-five applications were received for the appointment of Boards, under which forty-nine Boards were set up.

"There were two cases in which strikes were not averted or ended. Only two cases, therefore, out of fifty-five ultimately resulted in strikes, these two strikes being in perfect accordance with the wise terms of the Act, which permit owners to lock out their men and workmen to strike *after* the public investigation has been completed and its results published."

See Immigration.

Legal History (Wales).

"The Laws of Howel the Good." *Con-*

temporary Review, literary supplement, no. 23, Aug. 1909, p. 12.

"The law of land is very elaborate, and likely to be of the greatest possible value in tracing the growth of English land law. We greatly doubt whether the Welsh word Maenor can be distinguished from the English word *Manor*. The meaning of the words is very nearly identical. The French origin may be due to the admitted early French influence in Wales. The use of the word in England may have come from Wales. There are other words of French or Latin origin, such as Canghellor (Chancellor). We find very similar manorial customs in English and Welsh manors."

Legislative Procedure. "Revisor of the Statutes." By Laura Scott. In "Notes on Current Legislation." *American Political Science Review*, v. 3, p. 421 (Aug.).

"The Wisconsin legislature has enacted a law creating the office of revisor (Laws 1909, c. 546). The appointing power and supervision of the work is vested in the trustees of the state library.

"It is the duty of such revisor: (1) to maintain a loose leaf system of the statutes, separating those statutes in force from those repealed or superseded; (2) to maintain a loose leaf ledger of court decisions referring to the statutes; (3) to present to the committees on revision of each house of the legislature, at the beginning of each session, bills providing for such consolidation and revisions as may be completed from time to time; (4) to keep an alphabetical, subject card-index to the statutes; (5) to formulate and prepare a definite plan for the order, classification, arrangement and printing of the statutes and session laws; and (6) to supervise and attend to the preparation, printing and binding of such compilations of particular portions of the statutes as may be ordered by the head of any department of the state."

Marriage and Divorce. Of the month's contributions on this engrossing topic, the most valuable is distinctly the following, because of the ready applicability of its conclusions to conditions in American Protestant churches:—

"Marriage Law in the Church of England." By Rev. Charles J. Sherbeare. *Nineteenth Century*, v. 66, p. 257 (Aug.).

If the contentions of this writer can be sustained, and they are doubtless not to be challenged on the historical side, the widespread denunciation of divorce, indulged in not only by a certain section of the Anglican Church but by some other Protestant bodies, is based on incorrect assumptions, which would be dispelled by more accurate and complete knowledge of the historical position of the Western Church with reference to marriage.

"The courts," writes Mr. Sherbeare, "have been accused of dissolving an indissoluble bond in many cases where it can be argued on strict ecclesiastical principles that no such bond ever existed. . . . A very small collection of facts and quotations is all that is needed to show that neither in pre-Reformation nor in post-Reformation times did the church at large teach that peculiarly severe doctrine of marriage which finds favor in some Anglican circles at the present moment, the general marriage law of the Western church being in reality both far less simple and far less rigid than English churchmen are in the habit of supposing."

Another writer's contribution to the subject is marked by a somewhat similar spirit of moral sanity:—

"Problems of Marriage and Divorce." By Mrs. Anna Garlin Spencer. *International Journal of Ethics*, v. 19, p. 443 (July).

"In so far as the increase in divorces is a testimony to this movement of women to refuse marital relations with unfit men, it is a movement for the benefit of the family and not for its injury. . . .

"The social need is not for the immediate working out of the details of a uniform law, while yet rapidly changing social and industrial conditions make variety of experimental treatment of cultural value; the social need is rather for a legal provision everywhere which will secure more deliberation before action; more accessible counsel of the wise and good for the foolish and confused, more patient waiting, more earnest trial to patch it up and 'go on' even when things look dark and threatening."

A good comparison between England and America is set forth in:—

"Divorce in America and England." By "Britannicus." *North American Review*, v. 195, p. 296 (Sept.).

"A growing body of opinion is being organized in England against the maintenance of a system so prolific of injustice and so conducive to immorality. . . The British have gone as far towards one extreme as the Americans towards the other; but from the standpoint of the social well-being of the community there cannot, I think, be much question that the American system is the less harmful of the two."

How shockingly bad the English conditions are may be seen from this statement:—

"Notes from London." 25 *Scottish Law Review* 204 (Aug.).

"When Lord Gorell found that the Lord Chancellor's bill made no mention of divorce in the extended jurisdiction of the County Courts, he gave notice of a motion that it was desirable that a limited power of divorce should be included. He made a long speech, dwelling on the points that poor people cannot afford to seek divorce in the High Court—he put the costs of an undefended case at £30 or £40; and that the practice of obtaining separation orders from magistrates, which leave the parties neither married nor unmarried, is a bad system, which encourages

irregular unions. The Archbishop of Canterbury, Lord Halifax, and Lord Halsbury, who represent the Church view, were strongly against the proposed change. They would prefer to do away with divorce altogether rather than give increased facilities for it. They are not moved by the argument that quite poor people are now in the same case as ordinary middle-class people were in before the Divorce Act, when divorce by Act of Parliament was the only method."

Penology. In general, it may be said that to the modern civilized world punishment has come to signify, except where capital sentence is imposed, simply the detention of the criminal in an institution where he will be deprived of all save the bare necessities of life and of the society of his fellow men. Modern morality does not approve of physical cruelty to the prisoner, nor of injury to his health by placing him in unsanitary surroundings or by exacting from him injurious labor, but is satisfied with the penalty of social opprobrium added to that of confinement in a place rendered by no means inviting. Punishment has come to be, therefore, practically detention. The sane and the insane criminal, consequently, are dealt with in the same general way. The essential difference is only that the latter needs sometimes to receive medical attention in a special institution, and may sometimes be justly allowed a fuller share of the luxuries that may enliven the monotony of prison existence.

No doubt there is a tendency to treat prisoners too well, but such a condition of affairs as that disclosed by the following writer is not typical—if it were the need of an anti-Wilberforce to unreform our prisons would be imperative:—

"The Pampering of Prisoners." By One of the Pampered. *National Review*, v. 53, p. 962 (Aug.).

An Oxford graduate, brought up in comfort, if not in luxury, who was a prisoner for a month in a West Country prison in England, has written a study of the situation as he found it. The man has proved himself an optimist of the most pronounced type by naming his article "The Pampering of Prisoners." The title is not, as might appear at the first glance, bestowed in irony, but the ex-prisoner is honestly fearful lest, the beggar discovering the comfort that awaits him in jail, "each starving wretch will tear himself from his groove of misery and rush panting to the cool, secluded cells, and the careless, happy, prison life, where there is no worry, no dirt, no drunkenness; where the food is regular and nourishing; where there is peace and security, and no anxious brooding over the morrow."

The worst deprivation, according to him, connected with prison fare, was the necessity for drinking, if water was to be had at all, the water in which he had washed his breakfast utensils. Of this, even, he writes: "Water with a sediment of stale gruel is not a liquid of crystalline clearness, but it is both healthier and more palatable than much foreign beer to be met with in our restaurants." He says in conclusion:—

"The ideal to which all movement ought to tend is admittedly the lenient prison. But the ideal can only be attained at the coming of that happy era when only the lenient prison is required. At present a much harder and more dour treatment of prisoners is needed, for this is the danger-time when society is being gradually and practically evolutionized. At such a stage of human progress humanitarianism is found to bless only those that give, not those that receive, for there is a ruffianly minority in every state of society, composed of men who do not appreciate kindness at its true value. Against these society is in duty bound to protect itself. No practical system of social reform can be safely attempted if prison is not meanwhile exercising that wholesome restraint over the millions which is the primary object of its existence."

This ideal of the "lenient prison," as this writer says, is wrong; we need to make prison punishment fearful enough to check the evil impulses of criminals. We should not go to the opposite extreme of an ignoble brutality, as may be the case even now in some places where remnants of a barbarous *régime* possibly still survive:—

"Beating Men to Make Them Good." By Charles Edward Russell. *Hampton's*, v. 23, p. 312 (Sept.).

"The Ohio State Penitentiary, here used as an illustration of the old methods of prison management, has long had the reputation of one of the worst penal institutions in the country. The state legislature at its last session undertook some marvelously belated improvements, appropriating $150,000 for new buildings, to be erected on modern and sanitary principles. It prevented the renewal of the existing contracts, but it did not, however, abolish the beatings nor the water cure nor the bull rings nor the spoils system nor the idea of terrifying men into orderly behavior."

It is not only possible, it is obligatory, for the state to avoid the extremes of leniency and brutality alike. Positive morality defines in unmistakable terms what should be the attitude of the state towards the responsible criminal. His punishment unquestionably depends on the seriousness of his harmful act, and the penalty may be anything from a merely nominal one to capital punishment, according to the nature of the act. But in imposing sentence there may be mitigating circumstances to be taken into account, such as (1) the degree of his partial irresponsibility, if responsibility has not been complete, or (2) the chance of his reformation. Such considerations may properly operate to lessen the punishment otherwise imposed.

In the case of the irresponsible criminal, the period for which he should be detained

in custody seems likewise, on moral grounds, to be regulated by the seriousness of his harmful act. Detention in such a case is not punishment but segregation for the public good. The insane person who had committed some grave injury to society, like the crime of murder, would normally be detained for life. But it is impossible to draw the line clearly between responsibility and irresponsibility, and a murderer classed as an irresponsible might in fact have such a degree of partial responsibility as would render it just to impose capital punishment. In the case of the irresponsible criminal, there is always, in determining how the state shall treat him, the possibility of having to consider the aggravating circumstance of a partial responsibility. There is also another possible circumstance to be considered, that of the possibility of a complete cure. The general working out of the problem of disposing of insane criminals, purely from a moral standpoint, is therefore apparent.

This is not approaching the subject from a legal point of view. But it should be as true in law as in morals not alone that the punishment is to fit the crime, but that the detention is to fit the irresponsible act. It is even more important to recognize the fact that because there is no clearly defined dividing line between sanity and insanity, severe punishment of the slightly insane may be justifiable sometimes. This introduction will perhaps serve to show that any view which is aimed at the overthrow of that theory of responsibility which is ingrained in our criminal jurisprudence is false and to be resisted. Such a view, however, is advanced in a noteworthy article:—

"Insanity, Responsibility, and Punishment for Crime." By Professor James J. Walsh, M.D., LL.D. *American Journal of the Medical Sciences*, v. 138, p. 262 (Aug.).

The author of this article emphasizes the fact that there is no agreement among experts as to an absolute definition of insanity. Insanity as a defense for crime is an excuse which may be "extremely difficult to control and keep from being abused." The judgment of the expert, instead of being of aid to the court and to the jury, may be swayed unconsciously even when he is acting in good faith. The abused plea of insanity, together with the defeat of justice by legal technicalities, have brought about "a very serious state of affairs." Dr. Walsh says that statistics have shown a higher percentage of railroad brakemen to have forfeited their lives than of murderers. Ambassador White has consequently declared human life to be cheaper in this country than in any other portion of the civilized world. The author continues to say that the abuses which have brought about this situation are less serious in the medical than in the legal profession, and that the system which tolerates the abuse of the plea of insanity "is founded on certain wrong principles as regards the administration of justice."

"The idea of punishment as revenge is past," continues Dr. Walsh, and the purpose of punishment is now that of preventing repetition of the act by the criminal and of deterring others from like acts. Not only rational children, but even those who are to some degree irrational, can be taught by properly applied punishment the difference between right and wrong. Animals, that are not considered responsible, may be taught by punishment what they are not to do. Defective human beings must be made to realize that certain actions will be followed by suffering. We must not allow the subrational to escape, for otherwise he is encouraged to keep on doing wrong, and his example influences others.

"So far as possible, punishment must inevitably follow crime in the world, in order to impress the subrational and deter them from yielding to impulses. Far from being less deserving of punishment in every sense in which a modern penologist cares to inflict punishment, these individuals are more impressed by it, and, above all, need to be more impressed by it. . . .

"It is for the subrational that we most need to insist on punishment. The cunning of the insane is proverbial, and this extends also to the subrational, and many of these folk realize that their difference from others, their queerness, as their folks call it, is quite enough to make a verdict of insanity in their case assured with the present lax enforcement of law."

From the foregoing abstract of Dr. Walsh's views, it will be apparent that while fundamentally right he blurs the distinction between responsibility and irresponsibility, as a paramount element of the problem with which courts have constantly to deal.

Dr. Walsh summarizes his conclusions as follows:—

"1. The term insanity is so vague that its use as a plea to enable the criminal to escape punishment is not justifiable in the present state of our knowledge.

"2. Responsibility differs in different individuals, but it is never quite eliminated except in the absolute idiot. For those of lowered mentality, even the animals, punishment has a good effect.

"3. Punishment is not revenge, but is meant to deter the individual criminal, and above all to deter others tempted to criminal acts.

"4. Punishment is more needed for those of lowered mentality, of whom the expert may well declare that they are insane, than it is for the normal.

"5. Subrational individuals with the cunning of the insane will take advantage of our leniency if present conditions are allowed to continue, and we shall have a riot of crime by personal violence."

Had Dr. Walsh gone more to the heart of the matter, he might have worked out his views to a more practical application to the problem of the abuse of the insanity plea. As it is, he supplies no available criterion for

ascertaining precisely how the insane criminal is to be dealt with, unless he is to be treated exactly like the sane criminal, which would be unreasonable, and which he could hardly have wished to imply.

Police Administration. "The New York Police in Politics." By Gen. Theodore A. Bingham. *Century*, v. 78, p. 725 (Sept.).

"Under the present 'system,' which during my incumbency in office I made persistent efforts to break down, police officials are supposed to pay for their positions by daily political service. When no election is imminent, the district leaders are scheming for the next campaign. If a police captain or inspector honestly enforces the law, this hurts the ward heelers, the saloon and dive keepers, the gamblers, the pawnbrokers, and all others who live by breaking the law; so this police officer must be suppressed or be transferred. To accomplish this, a visit to the Commissioner, or even a letter from some one identified with the party, should be sufficient."

"Policing our Lawless Cities." By Gen. Theodore A. Bingham. *Hampton's*, v. 23, p. 289 (Sept.).

"New York is not ruled by her brains, her wealth, or her virtue—the city is ruled by the politicians who control the poverty-stricken and criminal aliens of the East Side."

"The London Police from a New York Point of View." By William McAdoo. *Century*, v. 78, p. 649 (Sept.).

"The estimate in which the public hold the police is the measure of police efficiency. The New York police will, in my judgment, under able, honest, and wise leadership, eventually gain a position equal to that of the London police. When that is done, the police question in New York will be solved."

Practice. "The Lawyer in his Office." By Lemuel H. Foster. *Citator*, v. 4, p. 116 (Mar.).

"The lawyer's duty to the public is to continue in the future as in the past to be a leader in every movement calculated to advance the public interests; to be first in peace and first in war; honest as a legislator, and pure and upright as a judge; to advocate those public measures that he believes to be right and condemn those he believes to be wrong; to be a good citizen and an honest man. The ethics of the profession have been too much neglected in the education of young men for the bar."

"Counsel's Fees." By Hugh H. L. Bellot, D.C.L. 34 *Law Magazine and Review* 394 (Aug.).

"It should be a breach of professional etiquette for Counsel to accept a brief without the fee except for good cause. . . . It is matter for regret that the attempt should have been made. . . . to lend official support to that credit system which is one of the causes of the disrepute in financial matters in which the profession of the law as a whole is held in the public estimation."

Procedure. "The Efficiency of English Courts: An Example for America." By Jesse Macy. *McClure's*, v. 33, p. 552 (Sept.).

"Our attorneys do not appear to be dominated by a feeling of veneration for the judiciary; their whole attitude is far removed from that. In England it is the judge and not the attorney, who habitually interrupts, raises objections, and insists upon explanations. If the attorney puts a question to a witness worded in such a manner as to raise a false issue, the judge instantly interferes. He may even assume the chief burden of the examination of the witnesses, or jurors or litigants may be encouraged to question the witnesses. In any event, the examining of witnesses is controlled in every detail by the presiding justice. If, in addressing the Court, an attorney makes a statement which the judge regards as false or misleading, he is immediately interrupted and the errors are corrected. Or, if in the opinion of the Court the remarks of the attorney are not edifying, they are promptly checked. . .

"In the English county court, in which civil cases involving $250 or less are litigated, parties to the suit meet in front of the judge and state their own cases. If there are witnesses, they have already been sworn and are placed at the right and left of the bench. In the most informal manner the judge, the parties to the suit, and the witnesses talk over the matter together. In this court plaintiffs and defendants conduct their own cases, it being quite unusual for them to employ attorneys. The judge comes to be an expert in getting at the essential facts. He settles suits involving a good deal of detail at the rate of one every five minutes. When no legal technicalities are recognized, when there are no opposing attorneys to make objections, with a trained jurist, familiar with the law, who has the litigants and the witnesses before him, it becomes impossible to consume much time in reaching a decision. Procedure in both civil and criminal courts resembles informal arbitration, from which legal technicalities and extraneous topics are strictly excluded."

"The Demoralization of the Law." By Ignotus. *Westminster Review*, v. 172, p. 146 (Aug.).

"The jury system is, indeed, an apt illustration of an institution turned from use to abuse. Originally intended to assist the judge, it has degenerated into a permanent possibility, if not an absolute certainty, of placing in his path a series of snares and pitfalls, which Solon himself could not hope to evade. The summing up is subjected to a minute and critical examination. Molehills are magnified into mountains, and then Ossa is piled upon Pelion until the original case is buried fifty fathoms deep. Now this tremendous superstructure is almost entirely owing to the presence of the jury, and the

bankruptcy of the system is patent to all observers. Nor does the history of this case [the *Stoddart* case, decided by the Court of Criminal Appeal in May of the present year] lend any support to Mr. Lecky's plea for the retention of the jury—that they sometimes saved litigants from the technicality of the bench. The jury did not save Mr. Stoddart from the technicality of the bench."

Professional Ethics. "Ethical Problems Involved in Modern Business." Review of addresses delivered in Page Lecture Series at Yale in 1908. *Current Literature*, v. 47, p. 294 (Sept.).

These considerations apply to the lawyer as well as to the man of business:—

"Despite the acknowledged evils in modern business, there is no reason for losing courage or getting cynical, Mr. Alger affirms. There are many reasons, he thinks, for expecting better things. In a new community—and this is what America has been—a man looks to immediate profit and takes short views of business." But as community life develops "he begins to feel that the 'good name of the house' is his most valuable asset. 'The merchant or the producer who merely makes money loses, and what is more *feels* that he loses, something essential when his practices have got him a bad name.' "

See Practice.

Property and Contract. Three articles dealing with this subject deserve special notice, the first setting forth the supposedly anomalous position of corporations under the doctrine of the *Dartmouth College* case, the second arguing mistakenly that property is created by the state, the third formulating a forceful theory that property is transformed by the state into disability and undermines the life of society. The first of the articles is the following:—

"Confusion of Property with Privilege: the Dartmouth College Case." By Jesse F. Orton, A.M. *Independent*, v. 67, p. 448 (Aug. 26).

This article criticizes the decision of the Supreme Court in the *Dartmouth College* case, and is a vigorous attack upon the doctrine it contains. The reader is informed:—

"The principle assumed to have been established in the *Dartmouth College* case has been refuted and repudiated many times by the federal Supreme Court. The case still has the force of law within a narrowed scope, and it is often referred to in terms of great politeness. But when the Court musters up the courage to overrule it, few arguments will be needed in addition to its own opinions. Certain of the state Supreme Courts, notably that of Ohio, long and persistently stood out against a recognition of the doctrine of this case."

This contention that the Supreme Court of the United States has erred in not squarely overruling the doctrine of the *Dartmouth College* case cannot be sustained. The simple, obvious principle that the legislature ought not to revoke a grant once made may be considered one of the enduring foundation stones of the edifice of modern law.

Mr. Orton thinks that when the *Great Northern–Northern Pacific* merger case came before the United States Supreme Court, the Court in pronouncing judgment practically ignored the bearings of the *Dartmouth College* case. But it is by no means to be inferred from the fact that the Court construed the charter as not giving unlimited authority to consolidate with other corporations that any right under the contract contained in the charter was impaired.

The policy of the law recognizes the fact that the vested property rights which depend upon any legislative grant should no more be disturbed by legislative than by judicial deviation from the principle partially expressed by the doctrine of *res judicata*. The English Parliament may have always had the power to repeal and amend corporate charters, as Mr. Orton says, but that would not constitute a reason why our legislatures should have the same right. In America, such a right would be exercised only with the most confusing and harmful consequences, owing to the multiplicity of the state legislatures, and owing to the important difference between the organic constitution of the two countries. The principle of the inviolability of charters once legally granted is essentially sound, and charters ought not to be, as Mr. Orton urges, "at all times open to repeal or amendment."

Mr. Orton objects to what he calls the serious error in Marshall's decision that Dartmouth College was a private foundation, but this objection is mistaken. It is not only clearly settled in law, but equally clear in reason, that a corporation of a public character may be to some extent and for certain purposes a private body. (Andrews' Am. Law secs. 371, 391; Nichols' Eminent Domain, secs. 193, 203.)

The second error too confidently imputed to Marshall is less significant. Mr. Orton claims that as the royal charter was merely a grant from the Crown, and had never been confirmed by the English Parliament, it was not a contract between the state of New Hampshire and the college. But the assent of Parliament was not required, in confirmation of the rights of the Crown, before those rights should be bodily transmitted to the new sovereign at the time of the Revolution. The *jus publicum* that the Crown had held in public lands, for example, forthwith passed to the states, and their legislatures did not have any more than Parliament to confirm the title thus obtained.

This writer further argues that the contract clause of the Constitution was designed to include only agreements between private parties, but the innovations of Marshall on the Constitution, of which this case affords by no means a marked example, were but the expression of the central spirit of the Constitution itself.

The doctrine of the *Dartmouth College* case has not been materially modified by the

Charles River Bridge case (1837, 11 Pet. 644), which holds that an act contrary to the Constitution is not a legislative act) as this writer implies, nor by the *Granger* cases (1876). In *State Bank of Ohio* v. *Knoop* (1853) and in *Washington University* v. *Rouse* (1869), the Supreme Court held, in effect, that a state cannot by charter deprive itself forever of the power of taxation. In *West River Bridge Co.* v. *Dix* (1848) 6 How. 507, the Supreme Court held substantially that a state cannot alienate the public power of eminent domain. Mr. Orton conceives these decisions as disturbing the authority of the *Dartmouth College* case, but in this supposition he is in error. Whether a charter is an inviolable contract is not so much the point as whether it was in the first instance a contract into which it was competent for the legislature to enter. The repeal of obnoxious charters must be effected by judicial decision rather than by legislative enactment, and then only with due regard to the constitutional safeguards with which the law has wisely surrounded all private property.

That the right of property, because it concerns the individual more directly than the state, is essentially founded on individualism is a widely current fallacy in our day, and many, in escaping from it, flee to the opposite extreme of an equally fallacious view of all property rights as emanating from the state. Neither the individualistic nor the socialistic interpretation of the right of property is the correct one, which lies halfway between. The following author is one inclined to the socialistic view, as will be seen:—

"The Right to Property." By Prof. Frank Sargent Hoffman. *International Journal of Ethics*, v. 19, p. 477 (July).

"The primary and distinctive ground of property is labor," says this writer. A man's "natural right to anything comes from the labor he has expended upon it, and is determined by the extent of that labor." But a "natural right," meaning presumably a moral right, "is not of necessity an ultimate right." For, says this author, showing his conception of the nature of rights to be somewhat confused, "the natural right . . . may justly be sacrificed in case the needs of the community require it. . . . The true state is an organism and individuals are the members of that organism." The proper conclusion which should have been deduced is of course that the moral rights of labor are necessarily regulated by social justice, as are in fact all moral rights. But the author overshoots the mark, and goes to the extreme of saying that "the natural right to property therefore is ultimately resolvable into a state right." The fallacy of treating the state as something distinct from the individual, rather than as an individual multiplied many times, and that of supposing that state rights are a limitation on individual rights, instead of being merely organized individual rights, is common enough in our day. The writer shows a slight socialistic bias which is unfortunate, as when, for example, he says that "the time ought not to be far distant when our national revenues should chiefly be derived from inherited wealth." The chief fault of the essay is its failure to attempt to set forth any intelligent theory of the moral rights of property, considered with reference to hereditary wealth—a subject on which light is to be desired if the investigator is not too impatient of results to employ accurate and painstaking methods of discussion.

The subject of hereditary wealth is evidently in the mind of another writer, who has little to say about property, but who would doubtless gladly restrict the right to hold property to the economically productive members of the community, and remove all the protection with which organized society surrounds the institution:—

"The Policy of Disability." By W. R. MacDermott. *Westminster Review*, v. 173, p. 130 (Aug.).

This author may not consider that he holds a brief for anarchism, but the trend of his views is unmistakable. He takes for his text the words of the Odyssey descriptive of the Cyclops: "They have neither assemblies for consultation, nor judges, but every one exercises jurisdiction over his wives and children, and they pay no regard to one another."

Because of his compressed style, it is impossible to epitomize here anything but some of his more important propositions, which seem to be in substance as follows:—

1. Man is unlike the lower animals, as Max Müller says and as Darwin denies, in his power to form general concepts. Such general concepts crystallize in language, which can express emotions which we do not feel, and occupies a higher intellectual and moral plane than that of individuals and social aggregates.

2. Man's distinctive power to form general concepts gives him consciousness of individuals and social aggregates, and effectively holds the balance for him between extreme individualism and extreme socialism.

3. Individualism and socialism exist on the animal plane, but the prophet or lawyer, the Homeric *themistes*, the mouthpiece of the higher ideals of the race, condemns them on the intellectual plane. The human race is not a creation of individualistic and socialistic action. The factitious or conventional standard established in societies and individuals by *force majeure* is in opposition to an ideal standard as a common mental fact. In every society the social form is in opposition to the ideas of the race.

4. The self-seeking individual is traveling in a path leading to decay and extinction, for his effort to relieve himself of the burden of the struggle for existence is but an effort to place himself in a position of disability.

5. The social aggregate is always tending toward extinction, because association always increases the number of the useless and helpless by evolving destructive forms of parasitism. It invariably increases disability, by

encouraging thrift and allowing those to whom wealth passes in adult life to remain under economic disability. The policy of supporting a people by property, capital, or wealth is destructive and condemned by race intelligence. In the struggle to maintain the political edifice, the social aggregate will tend to place under disability large classes, military or servile, and in struggling to save itself under this condition of disability, instead of to save or to serve the race as a whole, it will surely go to pieces; history affords no instance of the permanent survival of a state. The social aggregate will also often place itself under a form of disability by yielding to the *force majeure* exerted by an ambitious great man, creating a military non-industrial class which can in no sense be considered a product of the race mind.

6. The race thus exists not because of, but in spite of, the action of individuals and of social aggregates, and progress, as history proves, depends not upon social organization but upon social dissolution.

If the foregoing conclusions are submitted to careful tests, nearly all of them will be found either to be totally false or to require material qualification. For example, it is not true that the secure possession of wealth won by labor or by careful employment of capital is a form of disability. Neither is it true that an army actively engaged in protecting the lives and homes of citizens is marked by a condition of disability. It is also wrong to suppose that the morality of the social aggregate, what is usually called "positive morality," is fundamentally distinguishable from racial morality (this author's hypostasized language), if indeed such a thing as racial morality can be supposed to exist in a sense apart from positive morality. Consequently this author's theory of a super-social judgment, so to speak, in condemnation of the social order in general, and of the incorrectly defined disability connected with the social order in particular, is visionary and fantastical. Some of his observations, however, are intensely stimulating because not only partly true, but novel and penetrating.

Race Problem. "The Conflict of Color; I, The World Today and How Color Divides It." By B. L. Putnam Weale. *World's Work*, v. 18, p. 12023 (Sept.).

This first installment is to be followed by a second, on "The Yellow World of Eastern Asia."

"Both Japan and Turkey can take care of themselves; and the developments which have come about in these countries have been very startlingly reflected in the general unrest and dissatisfaction which have spread from one end of Asia to the other. Asia is not content. Asia begins to understand. If China, the other great representative of the politically free peoples of Asia, is either led or forced quickly in the footsteps of Japan and Turkey, a very new era in the relations between Europe and Asia must soon commence. For the question—the discussion of which has apparently been adjourned *sine die*—of the status of the Asiatic in America, in Australia, and in South Africa, will certainly then be reopened and its solution very possibly worked out in a most peculiar way in regions where the white man can least protect himself—that is, in Asia itself."

See South African Union.

Socialism. See Government, Property and Contract.

South African Union. "The Constitutional Union of South Africa." By Walter James Shepard. *American Political Science Review*, v. 3, p. 385 (Aug.).

"The provisions of the fundamental law by which it is proposed to consolidate the four self-governing British colonies of South Africa under one general government, and thereby lay the constitutional basis for a great Afrikander nation, are best studied in comparison with the constitutions of Canada and Australia, from which it has directly borrowed much, and with that of the United States, which has served as the ultimate model for all three. The tendency toward economic and industrial concentration, becoming ever more pronounced, which in the United States is impelling a centralization of government by the extremely laborious and unsatisfactory method of judicial interpretation . . . is pushed a long stride farther by abandoning the federal type of government and uniting the four colonies into a consolidated union. . . Their complete ultimate dependence upon the government of the union . . . leaves them in effect merely important divisions for local government."

"South African Union and the Color Question." By Roderick Jones. *Nineteenth Century*, v. 66, p. 245 (Aug.).

"Natives and colored people who at present possess the franchise cannot be deprived of it: they are beyond the reach even of the two-thirds majority. . . .

"The natives and the colored people will be in a stronger position under the Union than they were before."

See Race Problem.

Stare Decisis. "The Theory of the Judicial Decision as Influenced by the Effect of an Overruling Decision." 29 *Canadian Law Times* 741 (Aug.).

"Blackstone, maintaining that judges do not make, but simply find the law, asserted that a decision never creates a new rule of law but merely embodies a rule or custom which always existed. A resulting corollary of this theory is that a decision is not the law, but merely evidence of it, and an overruling decision does not abrogate or change the law of the overruled, but authoritatively asserts that it never existed. It necessarily follows that an overruling decision, unlike a repealing statute, must have a retrospective operation. Austin and later writers, instancing examples

of judicial legislation, vigorously criticized Blackstone's theory as artificial and fictitious. Although Jessel, M.R., admitted that the equity judges had from time to time invented the rules of equity, the common law judges have steadfastly reiterated the Blackstone theory. But its consequence, that an overruling decision must operate retrospectively, by reason of hardship and mischief in the impairment of contract and property rights acquired in reliance on the earlier decision, has had these results: (1) it has furnished compelling reason for adherence to the doctrine of *stare decisis;* (2) it has led courts when constrained to overrule their decisions, while professing allegiance to the orthodox Blackstone theory, to depart widely from a logical acceptance of it."

Theatres. "Some Cases in the Law Relating to Theatres." By G. Addison Smith. 34 *Law Magazine and Review* 442 (Aug.).

"The vexed question as to whether, if one of the audience leave his seat, can he retain it by placing an article on it, although it is not reserved—*i.e.*, in the sense of its being booked—has been decided in a recent case in the affirmative by the magistrate at the Lambeth Police Court. The defendant entered the theatre some hours after the performance had commenced, and claimed two unreserved seats that had been temporarily left by the original occupants, who had left a coat, and also a lady, in charge of the seats. The defendant in the case refused to move when requested to, on the ground that the seats were not numbered and reserved, and the learned magistrate ruled that it was an unwritten law with all Englishmen that the first occupiers of seats under such circumstances were fully entitled to retain them."

Treaties. "Treaty by Declaration." By Th. B[aty]. In "Current Notes on International Law." 34 *Law Magazine and Review* 471 (Aug.).

"An ingenious method of concluding an international agreement with the United States of North America, without consulting the Senate, was hit upon by Mr. Root and Lord Takahira a few months ago. Writers on the law of contract have been accustomed, since contracts were first studied, to lay stress on the 'union of wills' and the fact of psychological agreement. If they are right, simultaneous identic declarations are very hard to distinguish from contracts, and simultaneous international declarations are equally hard to distinguish from treaties. This Japonico-American case is therefore a striking demonstration of the inadequacy of the '*consensus in idem*' theory. There is a perfect *consensus in idem*. And it is at any rate plausibly represented that there is no contract."

Uniformity of Laws. See Corporations.

Universities. "The Law of the Universities; IX, The University Courts." By James Williams, D.C.L., LL.D. 34 *Law Magazine and Review* 407 (Aug.).

"The jurisdiction of the Chancellor's court is protected by the doctrine of conusance of pleas. . . . Conusance is still competent, having been acknowledged by the King's Bench Division as lately as 1886. . . . A good illustration of the working of the claim is afforded by a seventeenth century case. Plaintiff filed a bill to have a bond for £100 delivered up, the sum secured having been paid. Answer that the defendant was a Doctor of Law resident in Oxford. The Chancellor certified and demanded conusance. The court dismissed the bill."

Miscellaneous Articles of Interest to the Legal Profession

Baconian Controversy. "Francis Bacon as a Poet." By Sir Edward Sullivan. *Nineteenth Century*, v. 66, p. 267 (Aug.).

"I have referred in an earlier article to Shakspere's long and closely reasoned exposition of the Law Salique in 'Henry V,' i. 2, so strongly relied on by 'Baconians' as showing the playwright's lawyer-like knowledge of an out-of-the-way legal subject, which is taken *verbatim* from the pages of Holinshed's 'Chronicles.' How can we imagine Bacon, profound lawyer that he was and author of such learned legal treatises as 'The Jurisdiction of the Marches,' the 'Argument in the Case of the Post-Nati of Scotland,' and the 'Maxims of the Law,' going to Holinshed for his law, and taking it absolutely word for word (including an historical blunder) without the addition of a single new light from himself on the constitutional jurisprudence involved in so important a case?"

"A Last Word to Mr. George Greenwood." By Rev. Canon H. C. Beeching. *Nineteenth Century*, v. 66, p. 283 (Aug.).

"Mr. Greenwood did not call his book 'Loose Meditations on the Facts of Shakspere's Life,' but 'The Shakspere Problem Restated,' and I took for granted that his reflections were directed to prove his case."

Biography. *Blakeley.* "District Attorney William Augustus Blakeley." *Hampton's*, v. 23, no. 3, p. 403 (Sept.).

In Pittsburgh, we are told—

"People have been asking one another whether District Attorney William Augustus Blakeley is destined to be another Folk or Heney as a municipal graft inquisitor. In less than seven months he has had sentenced seven men, and he declares that he is going the limit."

Calvin. "John Calvin, Lawyer." By Rev. Henry Collin Minton, D.D., LL.D. *North American Review*, v. 190, p. 212 (Aug.).

"Calvin's view of everything else took its cue from his view of God, and that view was

based upon certain legalistic conceptions. The integrity of God's government waits for its consummation and its vindication upon His righteous judgment in the end. His law is not only an order for His creatures to obey; it is a principle which regulates even His own dealings with His creatures. He is not legislator only, He is not administrator only, He is the Supreme Judge, and as such, so to speak, He is superior to Himself as the Supreme Ruler of the world. . . .

"The great lawyer of Geneva was easy master of the philosophy of the law. His was a constructive mind, and he lived at an age when such a mind was the supreme necessity. In America he would have been a James Wilson and a Jonathan Edwards in one. . . . We believe that his 'Institutes' could hardly have been written as they are if he had not been trained in the keen logic and dialectic of the law, and that the Reformation would have been without its greatest intellectual prophet if he had not had his wits trained and sharpened in the law schools of Alciati and Peter the Star."

Chatham. "Chatham, 1708–1908." By Charles W. Colby. *American Historical Review*, v. 14, p. 723 (July).

This paper was read before the American Historical Association several months ago.

"It is the glory of Chatham that he possessed an eye which swept the full horizon, a greatness of soul which raised him above insular prejudice and pride. . . . No one ever wrought more for the [Anglo-Saxon] race, or loved it more intensely, or served it more willingly, or viewed its political disruption with greater grief of soul."

Cleveland. "Cleveland's Re-election and Second Administration." By Richard Watson Gilder. *Century*, v. 78, p. 687 (Sept.).

"I do not believe he ever voted for a candidate outside of his party. He might have been willing to do so in certain campaigns in his later years, possibly—owing to what he looked upon as un-Democratic platforms and candidates—if he had not possessed an ever-present sense of obligation because of the great honors and responsibilities his party had bestowed upon him."

McGowan. "Judge Alexander McGowan." *Hampton's*, v. 23, p. 403 (Sept.).

Of the forceful police magistrate of Butte, Montana, we read:—

"With 5,000 cases a year, McGowan has his work cut out for him. He has learned to tell at once the false from the true, and the habitual from the occasional offender, and when the evidence does leave him in doubt, he goes on sleuthing expeditions of his own, sauntering easily in and out of thieves' rendezvous, pool rooms, tough saloons, dance halls, and opium dens. His office hours are from midnight to midnight, and his doorbell is often rung long before dawn by some one who wants him to stop a family row or a neighborhood quarrel before it gets into court."

Romilly. "Sir Samuel Romilly." 29 *Canadian Law Times* 764 (Aug.).

"Probably no one who has taken part in public affairs has ever been held in more universal esteem among his contemporaries than Romilly."

Cuba. "An Englishman's Impressions of American Rule in Cuba." By Sir Harry Johnston. *McClure's*, v. 33, p. 496 (Sept.).

"The impartial traveler cannot but feel a sincere admiration for the results of American intervention in Cuba. Nowhere has the work of the Anglo-Saxon been better done or with happier results than during the five and a half years (1899–1902, 1906–1909) of American administration of Cuban affairs. Yellow fever has been absolutely eliminated, and other diseases abated or abolished. . . . The police force has been entirely reorganized, and crime of all kinds has diminished enormously."

Chinese Problem. "The Yellow Pariahs." By Charles Somerville. *Cosmopolitan*, v. 47, p. 467 (Sept.).

"Once only in all the Western feuds did the Chinese ever mark for death a man not of their own color, and that was when a price of five thousand dollars was placed on the head of Louis O'Neal, of San José, California, now a senator in that state. As a lawyer, he accepted a yearly retainer from one of the big tongs, and his activity in a certain case had come so perilously near to delivering a member of a rival tong to the justice of the American law that it was decided he must be put out of the way. He threw open his office door to enter one afternoon in the autumn of 1899, but he as quickly drew back, pulled the door to with a bang, and hurried down the stairways, taking refuge in a constable's office on the ground floor. As he opened the door he had chanced to look directly into a mirror at the opposite end of the room, and this chance glance revealed to him two Chinamen with drawn revolvers huddled behind the very door that he was opening. He quickly gave the alarm on reaching the constable's office, but the Chinamen had dropped out of a rear window to a shed below and made their escape. Not long after that there was an amicable settlement of the difficulties of the tongs, and it was celebrated with a banquet which was attended by more than one hundred and fifty Chinese. Mr. O'Neal also attended. He saw there his two would-be murderers. They smiled and bowed and later affably told him that in view of what had been brought about they were glad they had not killed him. They told him they meant to shoot just as he closed the door, holding their weapons so closely against his body as to muffle the reports."

Fiction. "A Chinese Solomon." By Sir J. George Scott, K.C.I.E. *Contemporary Review*, v. 96, p. 190 (Aug.).

"The Sawbwa turned to the kneeling crowd

below the dais and said: 'Let the man have forty stripes with the lesser bamboo, now on the spot before us.'

"When the flogging was over, the Sawbwa continued: 'Now that we have got things on a proper judicial and reasonable footing you may say what you have to say.' . . .

"On the whole he was rather a good-natured old gentleman, though, like many such people, he was rather choleric. He was also about the age when both Easterns and Westerns think it necessary to 'make their soul.'

"So he bethought himself of a stratagem. He told the servants he wanted something to eat, and said they were to bring something light. They brought among other things some cane sugar.

"The Sawbwa called the little boy and gave him some to eat, and talked with him for some time. Then he said: 'Here's another piece. Go and give that to your father.'

"The boy was four or five years old, and, though he knew nothing of what all the trouble was about, he at any rate knew his own father, so he ran off and gave the sugar to Tsai.

"The Sawbwa was immensely pleased. He pulled up the legs of his loose silk trousers and smacked his naked thighs, chortling to himself all the while, and then he turned to the crowd which had assembled in the meantime in the free and easy fashion common to Shan courts.

" 'You see,' he said, 'they cannot deceive us. We always detect the wrong-doer, baffle the scheming, uphold the right, punish the wicked, and protect the unfortunate. Not the most cunning, the most crafty, the most deceitful, the most wily, the most specious can dupe and outwit our sagacity and sense of justice.'

"The whole assembly bowed down and murmured in chorus: 'True, O lord, live for ever. The lord is most just. The lord is quick of apprehension like the lightning. The lord is acute beyond earthly wisdom. Surely there is none like him—none.'

" 'That is so,' said the Sawbwa. 'See that you do not forget it. And now we will go on to prove it. The old adage has it: "The thing that is true cannot be made to be false; that which is false cannot be proved to be true." There is another saw which runs: "The wife returns to her first husband; the land belongs to its owner." Therefore do we deliver judgment. The woman will receive two hundred cuffs on the ear, with intermissions on the cheek if she shows signs of becoming giddy, and then she will be restored to her husband. The man will be flogged with four hundred cuts, and will pay the costs of the court. The husband will also pay the costs of the court, and will take away his wife. The little boy will receive the rest of the cane sugar. Now all may go.' "

Foreign Relations. "The 'Harmonizer's' Outlook: Certain International Problems Confronting the Taft Administration." By Marrion Wilcox. *Putnam's*, v. 6, p. 657 (Sept.).

"The new order of things about to arrive in Central America will force upon our country a most important territorial increase, comparable with the acquisition of Texas and the Louisiana Purchase. . . . Every day the very important fact is seen more plainly, that the interests of our Southland and of Central America are united by ties of peculiar intimacy. . . . So many features of this situation recall those which characterized the crisis of 1898, when President McKinley, although desiring peace, could not withstand the clamor for war because he lacked the support of educated men!"

India. "The Foundations of Indian Loyalty." By Sir Bampfylde Fuller, K.C.S.I., C.I.E. *Nineteenth Century*, v. 66, p. 181 (Aug.).

"Why should we, alarmed by difficulties which may be only passing, jeopardize the peaceful continuity of a dominion which the determination of our ancestors has won for us, which we have preserved and elaborated to the credit of our race, and which conduces to the happiness and improvement of millions of people? Let our motto be, as it has been, *Sursum corda!*"

Liquor Problem. "Beer and the City Liquor Problem." By George Kibbe Turner. *McClure's*, v. 53, p. 528 (Sept.).

"One saloon for a thousand persons is ample for the demand of any population. In fact, it has been found in Massachusetts to be more than ample. There is now about one saloon to every three hundred persons living in our cities. In New York and Chicago—which together hold nearly a third of the city population of the United States—two and three and even four saloons appear upon four corners of some sections; and in places like Ashland avenue back of the Chicago stock-yards they are massed by the score. This condition is ruinous from any possible standpoint. It means that three quarters of the retail liquor dealers of the United States have no financial responsibility, indeed, are scarcely more than solvent; and that the fearful pressure of competition compels them to force their wares upon their public, regardless of any law that can be devised."

National Administration. "Six Months of President Taft." *World's Work*, v. 18, p. 11983 (Sept.).

"Any candid student of the first half-year of his administration must conclude that he began his work with unusual promptness; that he has already mapped out a most important program of the most fundamental great tasks; that he has already given a new moral tone and a new earnestness to the Republican party, and has so steered events as probably to have thrown its leadership into the hands of men who represent the people and not corporation-ruled boroughs and states."

Railways. "Two Views of the Railroad

Question: I, Brotherhoods and Efficiency, by William J. Cunningham; II, Authority and Efficiency, by James O. Fagan." *Atlantic*, v. 104, pp. 289, 302 (Sept.).

Mr. Fagan here attacks the difficult problem which confronts the Pennsylvania Railroad on account of its refusal to meet the demand of the railroad brotherhoods for an increased share in the management of the road. The Pennsylvania is the last of the personally managed roads. The other side of the question is taken by W. J. Cunningham, who supports the position taken by the brotherhoods.

"The Position of English Railways." By W. M. Acworth. *North American Review*, v. 195, p. 367 (Sept.).

"It is impossible to suppose that England will submit to an almost unregulated railway monopoly. The present position cannot be permanent. . . . I can see but one outlet from the position in which English railways find themselves, and that outlet is state purchase."

Reviews of Books

HISTORY OF THE HARVARD LAW SCHOOL.

History of the Harvard Law School and of Early Legal Conditions in America. By Charles Warren, of the Suffolk bar. Lewis Publishing Co., New York. 3v. (1908.) Pp. 543, 514+appendices and index 46, alumni roll 397.

MR. CHARLES WARREN of the Boston bar has compiled an extremely readable history of the Harvard Law School, which will be of interest not only to its own alumni but to those of other institutions as well. A great deal of material has found its way into these volumes relating to the history of the legal profession in America, and the part which the Harvard Law School has played in American legal education generally. The first dozen chapters do not deal with the Law School at all, but present a detailed sketch of the bar in Colonial times and from the close of the Revolution up to 1817, the year in which the School was founded. In this introduction, it is not alone the Massachusetts bar which receives attention but that of other states as well.

The treatment adopted in the subsequent narrative is richly flavored with anecdote and is such that every one will find these volumes of interest. The School has educated many lawyers who have achieved an international reputation, as great jurists, advocates, statesmen, or teachers of law, and the volumes are full of information of a distinctly personal kind regarding a multitude of fascinating personalities which have exerted a tremendous if not a controlling influence upon the ideals of the profession in America. The author, moreover, has not only reviewed a large part of the development of the profession itself outside of New England, but also that of the law as molded by many famous decisions which are in one way or another related to the main topic. The early struggles of the School to overcome various material obstructions, for example, lead to much historical exposition of the *Dartmouth College* and *Charles River Bridge* cases. The pages which deal with these cases are intensely interesting, and throw new light on the fascinating personalities which figured in those epoch-making decisions.

The first law professorship established in America was founded in 1779, at William and Mary College, in Virginia, but the first law school in the country was started in a small wooden building at Litchfield, Conn., in 1784. When the Harvard Law School was established, in 1817, legal education in special schools of preparation was not regarded with favor by the majority of the profession, and the growth of the law schools which are now so numerous is a comparatively recent development. The success of the Harvard Law School under the Story *régime* largely led to the growth of American law schools after 1830.

The history of the Harvard Law School and that of the case method of teaching law are closely intertwined. The case system, originated by Professor Langdell, whose services to the school and the profession cannot be overestimated, receives a treatment befitting its importance. As an illustration of

the extent to which this system has influenced legal education in America, Mr. Warren's quotation from a letter written by Professor J. H. Beale, Jr., in 1908, is of interest:—

"The following important schools have come to the Harvard Law School for teachers to such an extent that their policy may be said to be largely influenced by the case method:—

"University of Maine; Fordham, New York; George Washington, District of Columbia; Cleveland and Cincinnati, Ohio; University of Indiana; Northwestern University, Chicago; University of Illinois; University of Wisconsin; University of Iowa; University of Missouri; University of Nebraska and Creighton University, Nebraska; Washburn University, Kansas; University of Colorado and University of Denver, Colorado; University of North Dakota; University of Utah; University of Washington and Spokane Law School, Washington; University of California and Stanford University, California."

This history evidences an immense amount of gleaning from out-of-the-way sources of biographical and historical information, and the volumes are worthy of their subject. Future writers will find in them rich materials for the history of American law that will some day be written.

EQUITY PRACTICE AND PLEADING IN FEDERAL COURTS

Federal Equity Practice; a Treatise on the Pleadings used and Practice followed in Courts of the United States in the Exercise of their Equity Jurisdiction. By Thomas Atkins Street, Professor of Equity in the University of Missouri. Edward Thompson Co., Northport, Long Island, N. Y. 3v. Pp. xc. 1663+appendix 160+table of cases 80+index 200. ($19.50 delivered.)

THE subject of equity pleading and practice in the federal courts is one which has greatly increased in importance of late years, and one of our leading American jurists has produced the first treatise which completely covers the subject. Professor Street has given the profession a voluminous work marked by much fullness of detail and most extended research in what is to a large extent virgin territory. His analysis has been in large measure carried out at first hand from a close study of a vast range of judicial decisions, and he has found little to aid in the execution of a formidable task in the work of previous text-writers. His authorities are mainly the decisions themselves, and his table of cases cited contains upwards of twenty-five hundred headings. Where points were left obscure or unsettled by the American cases, the decisions of the English Chancery have been resorted to for assistance, and the English works of Smith and of Daniell have been utilized to a large extent. Gibson's "Suits in Chancery" has also been used, but for the most part the author has carried out his undertaking with only his own resources to reply upon, and the achievement reflects great credit upon his powers, and is, in fact, a monumental one.

Lawyers engaged in federal practice will be pleased at the full treatment accorded to many special subjects on which relatively little has hitherto been written, such as, for instance, jurisdictional averments, ancillary proceedings, pleas, references and proceedings before master, evidence, injunctions, receivers, ancillary receivers. The treatment of the whole field is eminently complete, exhaustive, and practical. The field had so far developed that it needed exclusive treatment of this sort at the hands of one who could present an authoritative discussion serving the practical needs of the federal practitioner. Professor Street's work will doubtless remain for a long time the standard one covering a subject of great and growing importance, and it will not be duplicated or superseded for many years to come.

NEW BOOKS RECEIVED

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

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

New York State Library. Index of Legislation, 1908. (Legislation 38.) Edited by Clarence B. Lester, Legislative Reference Librarian. University of the State of New York, Albany. Pp. 264. (50 cts.)

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.)

The Basis of Ascendancy: A Discussion of Certain Principles of Public Property Involved in the Development of the Southern States. By Edgar Gardner Murphy. Longmans, Green & Co., New York. Pp. xxiv, 248. ($1.50 *net.*)

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.*)

Principles of Politics, from the Viewpoint of the American Citizen. By Jeremiah W. Jenks, Ph.D. LL.D., Professor of Political Economy and Politics in Cornell University. Columbia University Press, New York. Pp. xviii, 175+index 11. ($1.50 *net.*)

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.

*Latest Important Cases**

Automobiles. See Patents.

Banking. See Usury.

Bankruptcy. *State a "Person" under the Bankruptcy Act—Priority against Debtor's Estate.* U. S.

In the case of *In re Western Implement Co.*, 22 Am. B. R. 167 (D. C., Minn.), it was held that a state is a "person" within the meaning of the Bankruptcy Act, 1898, and where a debt due to a state is entitled to priority under its insolvency law, it is, under section 64b (5) of the Bankruptcy Act, entitled to priority against the debtor's estate in bankruptcy.

Bill of Rights. *Measurement of Arrested Person before Conviction—"Rogues' Gallery" Portraits—Rights of the Accused.* Md.

Where an injunction had been granted in the lower court restraining the police authorities of Baltimore City from measuring and photographing, before conviction, a person arrested on a felony charge, and it was not directly charged that the police intended to put his photograph in their "rogues' gallery" or to distribute copies of it to the police of other cities unless the prisoner was convicted or became a fugitive from justice, the Court of Appeals of Maryland (Schmucker, J.), in *Downs* v. *Swann* (June, 1909, N. Y. Law Jour., Sept. 13, 1909), affirmed an order dissolving the injunction, and held:—

"In our opinion the photographing and measuring of the appellant in the manner and for the purposes mentioned, and the use of his photograph and the record of his measurement to the extent set forth in the answer by the police authorities of Baltimore City, would not constitute a violation of the personal liberty secured to him by the Constitution of the United States or of this state. . . . But we must not be understood by so doing to countenance the placing in the rogues' gallery of the photograph of any person, not a habitual criminal, who has been arrested, but not convicted, on a criminal charge, or the publication under those circumstances of his Bertillon record."

Copyright. *Construction of Contract between Author and Publisher—Newspaper Not Entitled to Book Rights without Express Authority—Its Right to Determine Form of Copyright as Against Trespassers.* U. S.

Two federal courts in different jurisdictions took diametrically opposed views of the character of the copyright of the *New York Times* in Peary's story of his discovery of the North Pole in decisions rendered Sept. 11, one at New York, the other at Chicago. The contract of Commander Peary with the *Times* had contained the following provisions bearing upon the particular point on which Judge Hand and Judge Grosscup failed to agree:—

"The *Times* is to have the sole rights to the news of the discovery, and is to have the exclusive right of its publication in all parts of the world. . . . I am free to sell the magazine and book rights to my best advantage."

Judge Learned Hand, in the United States District Court for the southern district of New York, dissolved the injunction he had granted the *Times* Sept. 9 restraining the *New York Sun* and the *New York World* from reprinting Commander Peary's copyrighted despatches to the *Times* describing the discovery of the North Pole. The Court remarked that had the complainants received the right from Lieut. Peary to publish the story of the discovery in pamphlet form, the copyright would have been perfected by their compliance with the statute requirements with regard to the copyright of pamphlets. "The contract gave to them, however, only the right to a news publication of the story, which I understand to mean that they meant to publish it in what fairly came within the description of being a newspaper. If so, the antecedent publication of a pamphlet was not the publication which the statute requires, for that must be a publication by the proprietor."

The opposite result was reached in the decision of Judge Peter S. Grosscup of the United States Circuit Court, at Chicago, in the suit brought by the *Chicago Tribune* for a similar injunction against four Chicago newspapers,

*Many of these decisions are not yet reported, and no citations can be given. Copies of the pamphlet Reporters containing full reports of such of them as are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

the *Record-Herald*, *Inter-Ocean*, *Examiner*, and *American*. Judge Grosscup, who was aware of the ground taken twelve hours previously by Judge Hand in New York, said:—

"In the absence of the stating of any particular form I should think, at least as against a trespasser, that the publisher was invested with authority to determine the form of copyright. He might not have that right as against the author, when it comes to determining their rights under the contract, but certainly he would have that right on behalf of himself and the author, having the manuscript in his hands, as against a trespasser."

Corporations. *Fiduciary Duties of Promoters—Breach of Trust in Taking Secret Profits—Joint Tortfeasors.* Mass.

The Supreme Judicial Court of Massachusetts, in a decision handed down Sept. 15 in the case of *Old Dominion Copper Mining & Smelting Co.* v. *Albert S. Bigelow*, awarded the plaintiff $2,045,726, and placed itself on record in opposition to the ruling offered by the United States Supreme Court in the *Lewisohn* case, Chief Justice Knowlton and Mr. Justice Norton dissenting in their view of the law and Mr. Justice Hammond with regard to the facts.

The decision follows the Court's former one in 1905, holding Bigelow under liability for a breach of his fiduciary relation to the corporation.

The Court (Rugg, J.) said:—

"It would be a vain thing for the law to say that the promoter is a trustee subject to all the stringent liabilities which inhere in that character and at the same time say that, at any period during his trusteeship and long before an essential part of it was executed or his general duty as such ended, he could, by changing for a moment the cloak of the promoter for that of director or stockholder, by his own act alone, absolve himself from all past, present or future liability in his capacity as promoter.

"Nothing can be said in support of a business enterprise carried on by promoters, which involves the purchase by them of mines, costing and intrinsically worth $1,000,000, with money in substantial part solicited from associates on representations that a corporation is to be formed with a capitalization of $2,500,000, of whose stock $2,000,000 is to be issued for conveyance to it by them of the mines and the rest for cash, the actual organization of the corporation under the laws of a state which permitted the issuance of capital stock for property conveyed only to the real value of the property with a capital of $3,750,000, of which $3,250,000 is issued as fully paid for conveyance of the mines, the settlement with a very great majority of the associates on the basis of a sale for $2,000,000 of stock as at first represented, the promoters retaining 1,250,000 shares as a secret profit, intending also to procure from the public subscriptions for $500,000. . . .

"The ground of the defendant's liability is his breach of trust as a promoter. It follows from what has been said as to the nature of the wrong done by the defendant that he is liable *in solido*. The act of the defendant and Lewisohn was a joint act for the benefit of both. . . ."

The Court further decided that the plaintiff is not barred from recovery by the decision of the Supreme Court of the United States in the case of *Company* v. *Lewisohn*. Bigelow was not a party, nor was there any evidence that he participated in the defence of that case. It further decided that the final decree in that case is not a bar.

Chief Justice Knowlton, in a dissenting opinion, held that the decision of the federal Court settled the merits of the present case. "In addition to the deference that a unanimous opinion of the Justices of the Supreme Court of the United States should receive in any other Court, it is for me a very important consideration that upon questions which will often be litigated in the federal tribunals by reason of the diverse citizenship of the parties the law ought to be the same in the state courts as in the federal courts. It would be unfortunate if in this large class of cases the rights of a suitor should depend on whether he is finally held subject to the jurisdiction of a federal court or to that of a state court."

Corporations. *Personal Liability of Directors—Ignorance Due to Neglect of Duty Actionable.* N. Y.

Thirteen former directors of the Trust Company of the Republic were held responsible in a decision made public Sept. 3 by Justice Van Kirk, for losses sustained by the trust company through loans made in 1902 by its president, Daniel Leroy Dresser, from the company's funds on securities of the United States Shipbuilding Company, for which restitution to the trust company was asked in a suit brought by Charles H. Kavanaugh, a

stockholder, against the directors. The action was tried at Saratoga early in the summer.

The Court held the directors personally responsible for the severe losses which had been due to some remarkable loans, saying:—

"Where the duty of knowing exists ignorance due to negligence of duty creates the same liability as actual knowledge and failure to act thereon. Where trusted officers cause loss the directors who trusted them, and therefore neglected to exercise the care a reasonably prudent man would exercise in his own affairs, cannot escape liability if such care would have avoided or lessened the loss."

The Court held that if directors see fit to intrust the business of the corporation to officers and employees, they assume the responsibility, and may be held responsible for the acts of these employees.

Criminal Law. See Bill of Rights.

Defamation. *Letter Asking Bank to Press a Creditor's Claim and Slurring Character of Plaintiff not Privileged.* Ala.

A caustic letter resulting in the libel suit of *Ferdon* v. *Dickens*, 49 So. Rep. 888, was written by a creditor to a bank, instructing it to present its claim to plaintiff, and if it was not paid to turn it over to a justice of the peace with instructions to sue. It was claimed that the letter was a mere instruction from a principal to an agent to institute attachment proceedings against a debtor, whom the creditor had probable cause for believing to have left or to be about to leave the state, for the purpose of defrauding his creditors. The Court held, however, that the letter was not written to an agent. The mere dictation of such a letter and its subsequent signing and mailing was a sufficient publication to support the action for libel. The circumstances attending its writing and publication did not bring it within the class of privileged communications.

Disorderly House. *Loan Sharks May be Reached by Indictment for Keeping Disorderly House—Usury Statutes.* N. J.

In *State* v. *Martin*, recently decided by the New Jersey Court of Errors and Appeals, where an indictment against the prisoner, who was manager of the Loan Company of Trenton, was found charging him with the keeping of a disorderly house, it was held that "it must be accepted that any place in which illegal practices are habitually carried on is a disorderly house."

The court of last resort further said: "Nor do we think the suggestion sound that the taking of usury is not unlawful because the statute does not prohibit the borrower from paying it. If it is, then the sale of liquor without a license is not unlawful, although prohibited by statute, for there is nothing in the statute which imposes any penalty on a person who purchases liquor from an unlicensed vendor, or which forbids any one from so purchasing."

Evidence. See Procedure.

Indians. *Government Cannot Bring Suits on Behalf of Indians Granted Citizenship—Oklahoma Lands.* N. Y.

Judge Ralph E. Campbell of the United States Circuit Court for the Eastern district of Oklahoma rendered a decision late in August sustaining the defendants' demurrers in the Oklahoma Indian land alienation suits. The action, which was brought by the government to recover land for Indians, was ordered dismissed. Titles obtained from the Indians before the act removing restrictions went into effect are good, decided the Court. The land involved is worth millions.

Judge Campbell, in his decision, insisted that the act of Congress conferring statehood on Oklahoma, including old Indian Territory, conferred citizenship, both state and national, upon all members of the civilized tribes. Thereby the government relinquished guardianship, and had no right to sue for the protection of the Indians any longer. About two million acres of land are involved in the decision.

Intoxicating Liquors. *Constitutionality of State Prohibition Law Upheld Except as Regards Interstate Shipments.* Tenn.

The act of the last Legislature of Tennessee prohibiting wholesale as well as retail sales of liquor in the state of Tennessee has been upheld in all of its provisions, except as regards sales for shipment outside the state, in an opinion handed down in the Chancery Court by Chancellor T. M. McConnell. This is the first decision reached by any court in Tennessee as to the constitutionality of the state-wide prohibition law, which became effective in July. The Court holds that interstate commerce laws take precedence of state laws in the matter of shipments outside the state. The case will doubtless be taken to the state Supreme Court.

Interstate Commerce. *Powers of Interstate Commerce Commission Under Hepburn Act—Right to Fix Zones of Trade Denied.* U. S.

The Interstate Commerce Commission was permanently enjoined from enforcing a lower through rate from the Atlantic seaboard to the Missouri River, in a decision handed down by the United States Circuit Court of the seventh circuit in Chicago August 24, in the so-called Missouri River rate cases. The Commission had sought to establish a "long-haul" rate from the seaboard to the Missouri, somewhat less than the combined rates from the coast to the Mississippi and the Mississippi to the Missouri. Manufacturers and jobbers in the Missouri River region had represented that the seaboard rate of $1.15 to Minneapolis and St. Paul was a discrimination against them. Accordingly the Commission reduced the total rate from the Atlantic to the Missouri from that of $1.47 to that of $1.38 per hundred pounds.

Judge Grosscup and Judge Kohlsaat, of the United States Court, concurred in the view that the Commission had exceeded the powers with which Congress intended to endow it. In his opinion Judge Grosscup said:—

"The question raised in its larger aspects is not so much a question between the shippers and the railroads as between the commercial and manufacturing interests of Denver and of the territory east of the Mississippi River on the one side and the commercial and manufacturing interests of the Missouri River cities on the other. . . .

"We are not prepared to say the Commission has not the power to enter upon a plan looking toward a system of rates wherein the rates for longer and shorter hauls will taper downward according to distance, providing such tapering is both comprehensively and symmetrically applied—applied with a design of carrying out what may be the economic fact that, on the whole, it is worth something less a mile to carry freight long distances than shorter distances.

"But it does not follow that power of that character includes power, by the use of differentials, to artificially divide the country into trade zones tributary to given trade and manufacturing centres, the Commission in such cases having, as a result, to predetermine what the trade and manufacturing centres shall be; for such power, vaster than any one body of men has heretofore exercised, though wisely exerted in specific instances, would be putting into the hands of the Commission the general power of life and death over every trade and manufacturing centre in the United States. . . .

"It must be understood, however, that these orders of the Commission are enjoined solely because, in our judgment, they lay upon the commerce and manufacturing of the localities affected an artificial hand that Congress never intended should be put forth, and therefore are outside the power conferred upon the Commission by Congress; for with the question of a reduction in rate, or a readjustment of rates from which such artificial results have been eliminated, we are not now dealing."

An objection raised in the decision to the order of the Commission was that it did not—and for physical reasons could not—regulate an intermediate rate to harmonize with the rather sweeping changes introduced by the Commission's order. The position of the Commission on this subject is that to have fixed the rate from New York to the Missouri, for instance, under the unfair discrimination clause, it would then be in order to see that rates from Pittsburg and other intermediate cities were made to conform to the standard set in the first instance.

In dissenting Judge Baker declared that the Commission, in ordering the through rates, had done nothing more than the railroads have always done. As the railroads were extended west, he said, new through rates were constantly made, and these rates were less than the joint rates. He declared that had the Commission not acted the railroads would in time, with the growing wealth of the trans-Missouri country, have followed their own precedents and made a through rate from the seaboard to the Missouri. Surely if the railroads have this power, Judge Baker argued, the Commission likewise has it. If this power is too dangerous to be in the hands of commissioners bound by the sanctity of their oaths, did Congress desire to leave it in the hands of unbridled corporations?

The case will be carried to the United States Supreme Court as soon as possible. Commission officials do not believe the Supreme Court will uphold Judge Grosscup. The feeling is strong that a powerful movement is afoot to break down the authority of the Commission. This is seen in the large number of suits being brought by the railroads.

Negligence. *Res Ipsa Loquitur—Employer's Liability.* Wash.

The doctrine of *res ipsa loquitur* is held, in *La Bee* v. *Sultan Logging Co.* 47 Wash. 57, 91 Pac. 560, 20 L.R.A. (N.S.) 405, to apply in case of injury to a servant through the alleged negligence of the master, where the facts eliminate blame on the part of the servant or his fellow servants, but show *prima facie* negligence on the part of some one.

Nuisance. *Mandatory Injunction to Quell Fire Which Has Become a Public Enemy.* Pa.

Within the city limits of Carbondale, Pennsylvania, a fire had been started near a coal mine by dumping hot cinders into an excavation. For some years the fire was so insignificant as to escape attention, but eventually it covered several acres and filled the entire mine. In an effort to check the flame an amount greater than the mine owner's capital stock was expended with no beneficial results. In *McCabe* v. *Watt*, 73 Atl. Rep. 453, a mandatory injunction was sought to compel the mine owner to extinguish the fire on the ground that it constituted a nuisance. The Pennsylvania Supreme Court held that if the fire ever was a nuisance in the legal sense it had long ago spread beyond any limitation, and should, in this advanced and dangerous stage, be treated as a public enemy against which the common interests of all citizens should be united and that the enforcement of an injunction would require the employment and supervision of a large force of men for a long period of time. This the courts would not undertake.

Patents. *Selden Patent on Gasolene Automobiles—A Pioneer Patent.* U. S.

In the United States Circuit Court for the southern district of New York, Judge Hough filed a decision Sept. 15 in the suit of *George B. Selden and Electric Vehicle Company* v. *Ford Motor Company and C. A. Duerr & Co., O. J. Gude Company, John Wanamaker and others, Société Anonyme des Anciens Etablissements, Panhard & Levasseur, André Massenat, and Henry and A. C. Neubauer*, which has been pending in the United States courts for several years, and in which 8,000 printed pages of testimony, comprised in thirty-two big volumes, were taken. The Court held:—

"The statement of the complainants' position seems sufficient to show that the subject-matter of these suits is the modern gasolene automobile. The defendants are severally the manufacturer, seller, and user of the Ford machine (a well-known American make), and the maker and importer of the Panhard, a celebrated and typical French product. If these defendants infringe, it is because the complainants own a patent so fundamental and far reaching as to cover every modern car driven by any form of petroleum vapor and as yet commercially successful.

"If I have correctly apprehended it, there was room for a pioneer patent, and it must be held that on its face and in view of the art Selden's was such a patent. This means that Selden is entitled to a broad range of equivalents." The cases will all be appealed.

Procedure. *Power of Court to Limit Number of Witnesses Called—Cumulative Testimony.* R. I.

Bearing upon the very important question how far the Court may legitimately go, in limiting the number of witnesses who may be called to testify on a particular point, in the interest of judicial expedition and court efficiency, a decision was handed down by the Supreme Court of Rhode Island in July, in *Campbell* v. *Campbell et al.*, in which the Court (per Johnson, J.) reviewed the authorities with much care, and said (reported in National Corporation Reporter, v. 39, p. 107, Sept. 9, 1909):—

"The appellant's counsel was forced either to close his case in rebuttal then and there [at 4.30 p. m., there being an evening session of the court of which he had not been notified] on the testimony which he had already put in, or name the witnesses whom he would call on the following day. The trial justice also told him that he should hold him pretty rigidly to his number of witnesses on the following day. We do not think that this was a proper exercise of judicial discretion. . . .

"It is also urged that in any event his testimony as to the mental condition of James Campbell would have been cumulative. Upon that point we think the language of the court in *Ward* v. *Dick*, *supra*, 45 Conn. 235, at page 237, 29 Am. Rep. 677, is entirely in point: 'We know no better rule than to allow the party holding the weight of evidence an opportunity to bring it to bear upon the jury, when it concerns the real issue.' . . .

"We cannot say that the testimony of this witness outlined in his affidavit would have had no effect upon the jury, or that it might not have changed the result." The Court ordered a new trial.

Res Adjudicata. *Judgment Between Co-Defendants Who Were Adversary Parties a Bar—Joint and Several Obligations.* N. Y.

In *Kohly* v. *Fernandez* (July, 1909, N. Y. Law Jour., Aug. 31, 1909), the New York Supreme Court, Appellate Division, first department, rendered a decision holding the judgment of the Cuban courts between co-defendants who were essentially adversary parties a bar to any subsequent action brought by one of such defendants against the other founded on the same cause of action. The Court (Scott, J.) said:—

"Of course a judgment to be *res adjudicata* as to one of the parties must be so as to both, and therefore, if the judgment in the Cuban court would have been conclusive upon respondent if it had established the validity of the mortgage, it is conclusive upon the appellant to establish its invalidity. The mortgage was clearly a joint obligation of the brothers who signed it. It may also have been several, but it was certainly joint, as was their obligation to pay under its terms. Hence any judgment that determined its invalidity as to one must of necessity equally determine its invalidity as to the other. The fact that the respondent, after entering an appearance in the action, did not answer, but permitted judgment to go by default, did not affect the binding force of the judgment as to him (*Bell* v. *Gittere*, 9 N. Y. Supp. 400, aff'd 134 N. Y. 616). Nor does the fact that appellant and respondent were co-defendants in the action in Cuba deprive the judgment of its conclusive force as between them. They were essentially adversary parties."

Usury. *National Bank May Enforce Usurious Mortgage Held in Good Faith and for Value.*. N. Y.

A mortgage void as to usury under the laws of the State of New York may be enforced when held in good faith and for value by a national banking institution, was the declaration of the New York Supreme Court, Appellate Division, first department, in its decision in the case of *Slade et al.* v. *Bennett* (July, 1909, N. Y. Law Jour., Aug. 23, 1909). On this particular point the Court (Laughlin, J.) said:—

"There is no doubt, I think, that by virtue of the provisions of secs. 5197 and 5198 of the Revised Statutes of the United States the bank, if it be an innocent holder for value, could recover the *principal* due on the bond and mortgage, even though the instruments were tainted with usury (*Haseltine* v. *Central Nat. Bank*, 183 U. S. 132; *Schlesinger* v. *Kelley*, 114 App. Div. 546; *Schlesinger* v. *Gilhooly*, 189 N. Y. 1; *Schlesinger* v. *Lehmaier*, 191 N. Y. 69). . . . The serious question arising on this branch of the case, if it were necessary to meet and decide it, would be, I think, whether the evidence shows that there was any valid consideration for the assignment to the bank which would give it the right to enforce the instruments, if void, as between the original parties."

Usury. See Disorderly House.

James Coolidge Carter

By HARRY R. BLYTHE

Men walked with him and talked with him
  And in his life-work saw
A fight so earnest it was grim,
  For honor, truth and law.

Men wrought with him and fought with him
  But whether friend or foe,
When came at last the Reaper grim
  They saw a hero go.

The Editor's Bag

THE REFORM OF PROCEDURE

PRESIDENT TAFT has strengthened the cause of the reform of procedure by adding the weight of his authority to that of the American Bar Association in urging that technicalities be no longer allowed to defeat justice.

The suggestion that Congress should appoint a commission to report a system "to secure quick and cheap justice in the federal courts," one that "will offer a model to the legislatures and courts of the states," is approved by the Louisville *Courier-Journal* as a good one, in spite of the fact that "Congressional commissions are not notably efficient." The St. Louis *Post-Dispatch* says that the judicial procedure of every state deeds revision, and that a commission of this kind "would supply all the states with a basis for reform legislation."

That the states all have the same interests at stake, and can unite, if they choose, in a uniform system of procedure, is unquestionably true, and the *New York Sun* is unquestionably wrong in saying:—

> "The demand for uniformity and symmetry in the political institutions of the several states constituting a vast republic is based on an assumed likeness in their different communities which does not always exist, The American Bar Association is wasting its time and labor in attempting to devise a uniform judicial system which will be satisfactory to all the states of the Union—including Oklahoma."

The newspapers of the country are practically united in their hearty approval of the work of reform in state courts in which the American Bar Association is interested. With the exception of the *Sun*, and the *New York Commercial*, which thinks that the court traditions of each state "command great popular respect, and legislatures are very conservative in the matter of making court changes," we have found no newspapers adversely criticizing this program of the American Bar Association.

PREPARATION FOR THE BAR

THE *Green Bag* not only agrees with Dr. Saleeby that quality, not quantity, should govern the size of families, but thinks that it should likewise govern preparatory studies for admission to the bar. Referring to the recent action of the American Bar Association, the London *Law Journal* says:—

> "It was no good urging that great lawyers like Mr. Choate, formerly Ambassador to England, and Mr. Root, former Secretary of Foreign Affairs in Washington, fulfilled all the requirements in two years, and that no state has as yet required more than three years' study. Henceforth it is to be four years' work, and no qualifying by means of correspondence schools, which teach plumbing and other useful arts, besides law, will be allowed."

To make the case against a long course of preparation even stronger, the *Detroit Free Press* points out that not one of

our federal Chief Justices ever took a law school degree, and of the present Supreme Court bench "only Justices Holmes and Brewer could comply with the standard for admission that now seems to appeal to the lawyers." Many of America's greatest lawyers, Marshall included, were self-educated.

It is not the length of time spent in preparation, but the quality of the preparation, that is the essential thing. Four years of preliminary study are certainly better than three, but it by no means follows that three years, under the right sort of regimen, may not prove adequate for the turning out of worthy candidates for the bar.

The case book method and the text-book method of teaching law alike have the defects of their qualities. It is undesirable that the law should be learned by rote, simply because it can be more quickly mastered by a process which does not cultivate the powers of legal reasoning and independent research; it is likewise disadvantageous to "plunge" a student into the "chaos" of adjudged cases, in the language of the late Edward J. Phelps, "to grope his way through it as best he may," with the object of supplying him in that manner with adequate preparation for the practical requirements of his profession. We believe that each method needs to be supplemented, to some extent, by the other. The student needs to organize and strengthen the knowledge gained by the case method by studying the great treatises and the common-law codes. The value of the latter, we believe, has been pretty generally underrated. While the dean of the New York Law School goes too far in asserting a regular two-year course to be best, the American Bar Association's four-year period goes to the other extreme. Three years of study should for the average student be sufficient.

MR. BERNARD SHAW POSES AS A COMMONPLACE PERSON

WHETHER Mr. George Bernard Shaw wrote his latest play to help on the reform of criminal procedure is exceedingly doubtful. But according to the London *Law Times*, the scene of "The Showing Up of Blanco Posnet," which was produced in Dublin Aug. 25, after being refused a license by the censor in London, is really a study in jurisprudence:—

> "The scene is laid in the 'Town Hall' of a western town in the United States, and the incidents centre round the trial of Blanco Posnet for the theft of a horse—the most heinous crime, in the eyes of the community, of which a man could be guilty. The 'trial' is conducted by the sheriff, who is assisted by a jury of twelve lynchers, and a length of rope with a noose at the end of it has a prominent place in the proceedings. The play presents an interesting picture of the administration of justice by a wholly uncivilized community, which possesses the vaguest ideas concerning criminal procedure and the law of evidence. Mr. Shaw shows up with infinite subtlety the crude beginnings of our modern system of criminal law and procedure, with all those checks and safeguards which thoughtless persons are so fond of decrying. The author's representation of 'rough justice' or 'the unwritten law' in action is instructive, though not alluring. The sheriff, with sarcastic reference to the system of law that he is administering, declares that 'it would be more seemly to have a witness.' The prisoner challenges the jury, and he is called upon to give his reasons. 'I challenge it on the general ground that it is a rotten jury.' The prisoner then is told that if he does not like the jury, he 'should have stolen a horse in some other town,' and then the trial proceeds. The whole play involves a compliment to modern law and the methods of lawyers that perhaps Mr. Shaw did not intend."

The play, we would judge, confirms the impression of Mr. Shaw as a man

more remarkable for his imprudence than for his jurisprudence. He will certainly lose his reputation for wit and originality if all his intended jokes at the expense of the courts turn out to be only a commonplace plea for justice.

THE OLD DARKEY AND HIS BIBLE

A FRIENDLY subscriber in the Philippines is good enough to send us an anecdote:—

Judge James C. Jenkins tells of a case he had while a member of the Georgia bar. His client was not one of the patriarchs of old, but his name was Abraham Farrow, an old darkey born and reared in ante-bellum slavery days.

His mistress had taught him to read a little and to read the Bible mainly. So Abraham appeared rather well up on Holy Writ, though he could scarcely or rarely ever tried to read anything else. Abraham owned the house and lot where he lived, but borrowed several hundred dollars and gave an absolute deed to it, as he contended to secure the loan. The grantee in the deed was a white woman who strenuously insisted that the deed was what it purported to be, an absolute deed of sale.

The judge says he brought suit for Abraham against the woman to redeem the old negro's home, and the woman employed able counsel, and the case was pending in court and vigorously contested for five years.

There had been successive trials in which numerous witnesses were introduced by both parties; but the court set aside the several verdicts of the jury for one legal reason or another; so that there was a fourth and final trial.

On this last trial there were two witnesses introduced who swore strongly for the defendant woman and against Abraham, neither of whom had testified in either of the three former trials.

When the evidence was all in, and the argument was about to begin, old Abraham approached to his attorney and said: "Mister Jinkins, when you goes to argue dis case, I wants you to read to dat jedge de fifty-ninth and sixtieth vuses of de twenty-six chapter of Matthew, whar it says like dis: *'At de las' came two false witnesses.'* "

The judge says that the court at this point adjourned for dinner, and in the meantime he provided himself with a copy of the New Testament, and when the court convened again in the afternoon he carried it with him and complied with the old darkey's request, without making further argument.

The case on the fourth and last trial was decided in favor of Abraham.

The judge advises all young limbs of the law to read their Bibles.

TWO "FUNNY ONES"

WE have received this communication from a New York correspondent:—

Publishers the *Green Bag*,
Brookline, Boston, Mass.

Gentlemen:—Below you will find a couple of "funny ones"—if they may be called such, which, if deemed worthy, might fit into the next issue of the *Green Bag*. They were picked up around New York, in fact were told to the writer by the persons who claimed to have been present when the incidents occurred, and I have every reason to believe that the incidents really happened.

(1) Judge—— of the New York City Court (a tall, stout gentleman, of German descent and accent) was calling the calendar in his court one morning, and after he had called a certain case the lawyers engaged in the case arose and entered into an argument—one asking for an adjournment of a few days, and the other insisting that he was prepared to go on with the trial that morning. The attorney who wanted the adjournment then launched forth and started in by saying, "It seems to me—," when Judge—— suddenly brought his gavel down with a thump and looking at the attorney who had commenced to speak, almost yelled at him, "It seems to you! It seems to you! It seems to *me* that to me the 'seeming' should belong—I'm de Judge."

(2) A little Hebrew lawyer was trying a case before a Justice in one of the Municipal Courts of New York, when in the course of examining a witness the opposing attorney put in an objection on the usual grounds, which was allowed by the court; whereupon the little lawyer blurted out, "Vill your Honor please give me an exceptance?"

J. T.

THE SANCTION OF INTERNATIONAL LAW

AT a time when there is much controversy as to whether international law possesses or does not possess a sanction, we may perhaps be excused for offering some considerations concerning it in a department which aims primarily to entertain.

Every law emanating from the sovereign is sanctioned. That it may become a law it is not essential that the machinery for its enforcement be already in existence. If Congress when it passed the corporation tax law had provided no means for the collection of the tax, that fact would not make it any the less truly a law. The law is sanctioned from its having been promulgated by the sovereign, and whatever the sovereign people of the United States, through their delegates in Congress, lay down as a rule of social action is law, whether any department of the government is equipped for its enforcement or not and whether the United States Army is able or unable to cope with any insurrection which the attempted enforcement of the law might provoke.

The difference between international morality and international law is to be found in the complete freedom of one from all the attributes of sovereignty, and in the investment of the other with the sanction of the publicly promulgated or clearly implied consent of the nations. In so far as nations tacitly unite in the approval of customs and precedents which have controlled their acts for a long period, or reach a general agreement through regular channels regarding the solution of mooted questions, an actual or positive international law, totally distinct from international morality or *Völkerrecht*, comes into existence. It requires no sanction beyond that of general international consent to render it positive law. There may be no international police in existence to enforce such law, or to compel the execution of the international court's decrees, but the law is made binding by the principle of international sovereignty which it asserts, and when a crisis arrives that sovereignty, because its powers are unlimited, will be able to devise the necessary agencies for its enforcement. It does not follow, because there is no international navy, that a country cannot be compelled to conform to the decrees of the Hague tribunal. The combined strength of the nations greatly exceeds that of the strongest of them, and a complete revolution of international law cannot take place in consequence of the caprice of any one nation which should attempt to foist its own *de facto* rules upon the system of international law and compel the community of nations to accept them.

This view seems to be shared by an eminent scholar who approaches the subject of international law from a purely scientfic standpoint, Dr. E. Von Ullmann, who in his recently published "*Völkerrecht*" avoids a distinctly national treatment and places his doctrine upon as soundly positive a basis as that of such writers as Hall. Yet this writer maintains that international law is based on the sense of international community. The community interest which has developed among civilized nations cannot exist, he maintains, without norms which are held in common, and which, because they are lived up to, exert an actual compulsion. The view of Westlake is not opposed to this. He writes:

> "States live together in the civilized world substantially as men live together in a state, the difference being one of machinery, and we are entitled to say that there is a society of states and a law of that society, without going beyond reasonable limits in assimilating variant cases to the typical case." International Law, pt. I, p. 7.

It is well, however, that the community of nations develops slowly, and that the world moves gradually toward the ideal of a world commonwealth. If it were otherwise, the greatest catastrophes the world has ever known would be in store for us. It is much better to build up the international commonwealth piecemeal, by means of covenants between the separate powers, than at a stroke through a codification undertaken by plenipotentiaries or through the adoption of a written constitution or world legislature. The failure of the American Constitution to define exactly where the sovereignty of the American people was located cost the country a terrible Civil War, and a constitution which endeavored to dispose of the delicate problems of international sovereignty could not fail to excite jealousy and strife, and to bring about a situation wherein nation would rise up against nation and continent be arrayed against continent in an interminable succession of ghastly wars. It is well that the nations should refrain from entering into agreements covering all possible sources of friction for a time, and conduct themselves as best they may, like private individuals adjusting dis-

putes on which the law can throw no light by the appeal to each other's moral convictions, or by the more primitive expedient of brute force. It is well that, for a time at least, reciprocal treaties of arbitration should partake in large measure of the character of private covenants, rather than of that of agreements in which the world state has an interest or to which it is a party. An agreement between three or four leading powers does not create international law. There is no sanction for the universal validity of principles on which they may unite. If there were, the real international law, which is thus far restricted in scope, could not so steadily progress towards a goal of systematic comprehensiveness, and the advent of international peace would be long deferred.

WHISKERED JURORS

AN Illinois judge, whose name we will not give, made a recent address before the Illinois State Attorneys' Association, in which he told of the tricks of lawyers to win cases. Speaking of the prejudices of jurors and of judges, he said:—

"Whiskers play a great part in law-suits. At present the prejudice in Chicago is against jurors with whiskers. It formerly was the other way. I know a judge who thought he was without prejudice and who thought only men with long whiskers made good jurors. The prejudice now is the other way and attorneys here generally reject men with long whiskers."

It is fortunate that this prejudice is not widely prevalent, for if it were there could hardly fail to be a sudden change in men's fashions which would banish the smooth-shaven and moustached from American polite society.

A VIRGINIA JUDGE IN VAUDEVILLE

A REMARKABLY good reproduction of an old Virginia trial court seems to have been given lately in a London vaudeville house. The sketch originated in the enthusiasm of a Virginia saloon-keeper for the stage. He was once taken on as a "supe," to take the part of a Virginia judge, and he carefully copied the manner of Justice J. D. G. Brown of Newport News, whom he knew well. The imitation made such a hit that the manager proceeded to build up the part of the judge into the central character of a more ambitious production. The play took well, and Kelly, the former saloon-keeper, has been getting $600 a week for his performances in London. Virginians abroad have been impressed by the realism of the piece, the colored population appearing on the stage in full force before the bar of justice.

STRANGE CASE OF DUAL PERSONALITY

THE strange case of Judge Joseph R. Clarkson, formerly of Omaha, adds one to the numerous instances of lost or dual personality related by the psychical research societies.

On July 14 he tried a case in the court at Kenosha, Wis., in the morning and spent the afternoon at his office as usual. In the evening, his family being away on an automobile trip in Minnesota, he went down town and had a long conference with this law partner, District Attorney R. V. Baker.

Leaving the office about nine o'clock, he said he was going to a meeting of the Knights of Pythias, and from that time he was as completely lost to the view of his family and friends as though the earth had opened and swallowed him up.

His health apparently was good, and there was nothing in his manner or conversation on the last night when he was talking with Mr. Baker to show that his mind was in any way affected.

On August 6, he was found by his friend, John Burns, who traced him first to a farmhouse where he had applied for work. Curiously enough this farm was in the neighborhood where he had worked as a farm laborer during the period of his former aberration. Through information given by various farmers living in the vicinity, who remembered the missing man on account of his apparent culture, so incongruous with his seedy appearance, Judge Clarkson's friend was enabled to trace him to the button factory of the Iroquois Pearl Button Company at Sabula, Ia. He was known there as John Paul. Finding Clarkson working at a machine, cutting buttons

out of clam shells, the friend addressed him by his right name. Clarkson looked up from his work, noted his friend, called him by name, and then with startling suddenness his memory of former things returned, and his first inquiry was for his wife and mother. Being assured that they were bearing up bravely under the strain of his disappearance, he expressed the desire to go home at once, but before leaving the factory he called together his fellow workmen and made them a little speech, telling them something of how he happened to come into their midst. The two men took the first train out of Sabula, expecting to reach Kenosha late at night. Clarkson's wife and mother, who had almost despaired of ever seeing him again, were overcome with the excess of their joy when the news of his discovery reached them.

This was Judge Clarkson's second adventure of the kind. Eighteen years ago he disappeared in the same way and was found in about the same circumstances. Evidently the character of the self he assumed during these lapses was similar in the two cases.

"This incident," comments the Lincoln (Neb.) *State Journal*, "is a close counterpart of the case of Ansel Bourne of Rhode Island, well known among psychicists. Mr. Bourne, an itinerant preacher of sixty-one, went to Providence to procure money to pay for a farm. Eight weeks later, during which he had been lost to friends, he came to himself at Norristown, Pa. All unconscious of his former self he had gone thither and engaged in running a small store under the name of A. J. Brown. Another somewhat similar case was that of Mary Reynolds of Pennsylvania, who up to the age of thirty-five alternated between two personalities of greatly different characteristics and of no relation to or knowledge of each other."

SHORT WILLS

APROPOS of Mr. Harriman's short, simple will, it is of interest to note that Lord Mansfield, as *Tit-Bits* relates, found half a sheet of note-paper ample for the disposal of his worldly possessions. Sir James Fitzjames Stephen's will began and ended in thirteen words. A dozen lines served to dispose of Lord Russell of Killowen's estate of nearly £150,000; while Lord Brampton of the Court of Exchequer, the brother of Anthony Hope, disposed of his estate of nearly £142,000 in four hundred words.

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

USELESS BUT ENTERTAINING

A southern Missouri man recently was tried on a charge of assault. The state brought into court as the weapons used, a rail, an axe, a pair of tongs, a saw and a rifle. The defendant's counsel exhibited as the other man's weapons a scythe-blade, a pitchfork, a pistol and a hoe. The jury's verdict is said to have been: "Resolved, That we, the jury, would have given a dollar to have seen the fight."

—*Everybody's.*

Heard in the Cardiff County Court. His Honor: "Oh, a case of *damage feasant*, is it?" Indignant female defendant, shaking her umbrella at counsel, whom she had not heard distinctly: "Damaged pheasant! They are barn-door fowls, and not damaged either, for I've kept and fed 'em well. How dare you tell the judge such lies?"

—*London Law Notes.*

A Massachusetts judge was recently confronted by a long list of cases in which, in nearly every instance, delays were asked for because of engagements of counsel. This led his honor dryly to remark: "I am here to look after the business of this Court and I do not care in what order it is presented. But I do not think I ought to act as residuary legatee for the little time left to counsel who are occupied with auditors' hearings and probate matters."

A gentleman lying on his deathbed was questioned by his inconsolable prospective widow. "Poor Mike," said she, "is there annythin' that wud make ye comfortable? Anny-thin' ye ask for I'll get for ye."

"Plase, Bridget," he responded, "I t'ink I'd like a wee taste of the ham I smell a-boilin' in the kitchen."

"Arrah, go on," responded Bridget. "Divil a bit of that ham ye'll get. 'Tis for the wake."

—*Central Law Journal.*

The following American substitute for our "wooden liar" was found posted by a farmer on a tree in Illinois: "Notis.—Trespasers will B persekuted to the full extent of 2 mean mungrel dogs which ain't never ben overly soshibil tu strangers and 1 dubbel barl shot gun which aint loaded with soft pillors; dam if ain't gettin' tired of this hel-raisin' on my farm."

—*London Law Notes.*

The Legal World

Important Litigation

An early decision in the case begun by the government under the Sherman law to break the Standard Oil combination is expected. It is believed by the Department of Justice that it will come shortly in the Circuit Court at St. Louis.

The effect of Mr. Harriman's death on the government suit pending against the Harriman merger of the Union Pacific and the Southern Pacific is uncertain. Before he died it was expected by the Union Pacific that the suits were to be pushed hard this fall.

The officers of the Internal Revenue Bureau who are charged with administering the new corporation tax law have been apprised unofficially of the intention of the corporations to resist the law in the courts and test its constitutionality, but the Treasury officers believe the law will stand the test, and their chief reliance is on the fact that it was drawn by able lawyers who adhered strictly to the Supreme Court decision upholding the right of Congress to tax a corporation for carrying on a business.

The Department of Justice has been preparing to bring Governor Haskell of Oklahoma to trial on indictments charging him with fraud in securing titles to certain Indian town lots in Oklahoma. The trial will probably be called in October, and the officers of the Department of Justice were very hopeful of success until Governor Haskell's attorneys filed motions in the federal court on August 16 to quash the indictments, alleging conspiracy on the part of some of the members of the grand jury, and charging improper conduct on the part of the United States marshal, Grant Victor.

Alleging that sixty-five insurance companies, representing a combined capital of $156,000,000, doing business in Arkansas, entered into a rate combination last December, Prosecuting Attorney Jeffery filed suit at Little Rock, Ark., against these companies Aug. 19 for penalties aggregating $65,000,000 under the state anti-trust statute. Elihu C Irvin, president of the Fire Association, has said: "It is merely a scheme to harass the companies and promote the political fortunes of those bringing them. There is no ground for them, but we intend to fight so that similar action in other states may be forestalled."

The Grosscup decision in the Missouri River rate case in the United States Circuit Court at Chicago, the beginning of a suit in the Des Moines case in which the Commission lately ordered rates reduced, the Willamette Valley case, which is being carried through the Supreme Court for the purpose of finding out whether the Interstate Commerce Commission has the power to regulate rates, and various other phases of the litigation which has been started, are looked on in Commission circles as evidence that the railroads have determined to give the Commission battle at every legal turn. In a great many cases, the Commission's orders have been tied up with injunctions. This has hampered the Commission greatly in the administration of the law. Consequently a square decision of the Supreme Court on the constitutionality of the Hepburn act will tend to reduce these complications and delays. The Commission would like to see the lower federal courts deprived of the right to enjoin the orders of the Commission, a step which was seriously considered when the rate law was passed.

When the Supreme Court of the United States meets in October, it will have several interstate commerce law cases to be heard. The Willamette Valley case is set for Oct. 12, and those of *Chicago & Alton* v. *Commission* and *Illinois Central* v. *Commission* are set for the same date. The roads are seeking to annul the order of the Commission requiring certain cars to be counted in making coal car distributions. On that date the Supreme Court will hear the famous Chicago live stock terminal charge case of *Stickney et al.* v. *Commission*, a bill to annul the order of the Commission requiring carriers to desist from exacting the $2 terminal charge on each car of live stock sent into Chicago from western territory. Still pending in the Circuit Court at Kansas City is the noted St. Louis elevator case, of great importance to the grain trade, the case of *Diffinbaugh et al.* v. *Commission*. Important questions as to the powers of the Commission in establishing through routes and joint rates are raised in the Portland gateway case, that of *Northern Pacific* v. *Commission*. One of the first cases to come up in the October term will also be the Monon route case, in which the government is seeking to require the C. I. & L. to desist from accepting advertising in payment for transportation.

Important Legislation

The whole code of prohibition laws, including the drastic Fuller bill, passed the Alabama senate with little opposition and was signed by the Governor Aug. 25. There was no vote in the Senate against the elimination of that section prohibiting newspapers and magazines from advertising liquors.

The juvenile delinquency law went into

effect in New York on Sept. 1. Under the law a child of more than seven or less than sixteen years, who commits a crime, except crimes punishable by death or life imprisonment, shall not be known as a criminal but as a juvenile delinquent. The punishment is the same as it was previously.

Senator Cummins of Iowa has a plan for the enactment of legislation by Congress which would give the Interstate Commerce Commission the power to establish a general schedule of freight rates for the entire country. This plan is similar to one adopted in England. He also proposes to make the orders of the Interstate Commerce Commission official as to rates, except where the constitutional question of confiscation is involved. The project promises to attract some attention in Congress next winter.

The model pure food law proposed by Dr. E. F. Ladd of North Dakota was referred to a special committee for investigation and report at the thirteenth annual convention of the Association of State and National Pure Food and Dairy Officers, held at Denver in the latter part of August. The advocates of the Ladd law maintain that the federal law is not suitable for the needs of all the states, and also that the national law should attempt no more than the regulation of interstate commerce. The opponents of the Ladd law, on the contrary, assert that any breaking away of the states from the federal laws would result in chaotic conditions.

The prospects grow that Congress will be confronted by a notable program for corporation legislation when it assembles in December. President Taft appointed several of the government officials chiefly concerned with corporation matters to confer as a commission for the purpose of finding what should be done to amend the Sherman act and the interstate commerce law. This commission consisted of Attorney-General George W. Wickersham, Solicitor-General Lloyd W. Bowers, Secretary of Commerce and Labor Nagel, Interstate Commerce Commissioners Knapp and Prouty, and Representative Townsend of Michigan. The commission has held conferences in New York City at the New York Bar Association in West 44th street for several days, but the result of these will not be made public till the commission has completed its work. It is believed that the commission is giving much consideration to the question of the functions of the Interstate Commerce Commission and the supervision of stock and bond issues of corporations engaged in interstate commerce, and that it may recommend making the Interstate Commerce Commission a quasi-judicial body exclusively, its investigating functions being transferred to the Bureau of Corporations and the Department of Justice. President Taft may announce the Commission's findings on his return from his Western and Southern trips. Among the things which the President is reported to favor are some curtailment of the powers of the Interstate Commerce Commission, some extension of the power to make physical valuations of railroads, a change in the commodities clause excluding common carriers from all other business than that of transportation, and a prohibition of the holding company device in the case of railroads. Attorney-General Wickersham has expressed the opinion that the legislation desired by the President can be framed constitutionally and that a detailed program can be worked out before November. President Taft takes the conservative position that as practically every corporation of appreciable size throughout the entire country does an interstate business to undertake to license all would work a hardship. He has attempted, therefore, to state the broad general principle that federal license or supervision should be limited to those having the power "or the temptation" to effect restraints of interstate trade and monopolies.

Personal— The Bench

Judge Needham C. Collier, formerly of the Supreme Court of New Mexico, has become editor-in-chief of the *Central Law Journal*. Alexander H. Robbins, the former editor-in-chief, continues as managing editor.

Sir Henri Taschereau, Chief Justice of the Court of King's Bench, Quebec, recently asked to have his leave of absence extended until May, 1910. No doubt existed that his request would be granted. His Honor was last reported to be enjoying the invigorating air of the Mediterranean.

Henry S. Hulbert of Detroit was on Aug. 25 appointed associate judge of the Probate Court in that state. He was the first and only choice of Probate Judge Durfee, with whom he had been associated for seventeen years as register of probate. Among his new duties will be the charge of the Juvenile Court, in which department, it is thought, his experience in the management of boys will make him most successful.

According to current reports Associate Justice John M. Harlan of the United States Supreme Court has no intention of retiring from the bench at this time. Justice Harlan will be seventy-seven his next birthday. Moreover, a rumor has been in circulation to the effect that Associate Justice McKenna is about to retire, but this is emphatically denied by his friends.

Associate Justice William H. Moody of the United States Supreme Court arrived at his home at Haverhill, Mass., Aug. 31, suffering from an attack of rheumatism. As he was crippled in his lower limbs, and his frame was worn with the effect of his long illness, he was moved to his home in an ambulance, under conditions of secrecy, the desire having

been to shield him from disquieting publicity. His confinement has not prevented him from being a diligent reader of novels and even of more serious books, and his physicians have reported him to be recuperating.

Personal—The Bar

William Travers Jerome, District Attorney of New York county, has offered himself as a candidate for re-election. He has been District Attorney for nearly eight years, having been first elected on the reform ticket headed by Seth Low. His presence in the campaign will doubtless tend to make it more picturesque.

To look after the interests of the government in litigation incident to the administration of the customs laws, Attorney-General Wickersham on Aug. 12 appointed D. Frank Lloyd as Deputy Assistant Attorney-General of the United States. Mr. Lloyd is the first assistant United States Attorney for the southern district of New York. William A. Robertson, Edward R. Wakefield and Martin T. Baldwin, assistants to the solicitor of customs, were appointed special attorneys to assist the new Deputy Assistant Attorney-General.

Henry M. Hoyt, who has been selected to fill the new position of Counselor of the State Department, will have special supervision over all treaties. He will be the authority on international law for the department. Mr. Hoyt was Solicitor-General of the Department of Justice for several years. Mr. Hoyt received his education at Yale and the University of Pennsylvania law school. He was formerly president of the Investment Company of Philadelphia, but soon found that he could not resist the attractions of the profession he had chosen as a young man.

Bar Associations

The lawyers of Athens, Georgia, met August 28 to plan the reorganization of the Athens Bar Association. More than twenty-five of the city's leading attorneys were present.

The tenth annual meeting of the Bar Association of North Dakota was held at Minot, N. D., Aug. 12. There was a fairly large attendance representative of nearly every city and town in the state. President F. H. Register delivered his annual address.

The Dallas Bar Association of Dallas county, Alabama, held a recent meeting to take action by way of protest against the repeal by the legislature of the Dallas county laws governing juries. The lawyers of that county consider the local law about as near perfection as it can be made.

Congressman Martin of South Dakota addressed the South Dakota Bar Association on "Federal Control of Corporations" at the annual meeting held at Deadwood, S. D., Aug. 12–14. He favored federal license by charter. Officers elected included: president, E. E. Wagner; vice-presidents, Chambers Keller, Westley B. Stuart; secretary, J. H. Vorhees, Sioux Falls; treasurer, L. M. Simons. The next meeting will be held in Sioux Falls in January.

Only routine matters were attended to at the annual meeting of the Michigan State Bar Association, held at Detroit, on August 26. The committee on the Christiancy Memorial Fund reported that the sum of $1100 had been subscribed for the purpose of procuring a marble bust of Judge Isaac M. Christiancy, one of the four greatest jurists which Michigan has produced; this bust is to be placed in the capitol building library at Lansing, as a companion piece to the bust of Judge Campbell now located there. The following officers were elected for the ensuing year:—president, Harry A. Lockwood, Detroit; vice-president, Charles W. Perry, Clare; secretary, William J. Landman, Grand Rapids; treasurer, William E. Brown, Lapeer.

The Colorado Bar Association gave considerable time to a discussion of what is known as the "third degree." In Colorado this practice is a felony, and H. E. Kelly of Denver, who drew the law now a part of the statutes of that state, said that it was not only cruel and atrocious but unconstitutional everywhere in the Union. A notable feature of the meeting, which was held at Colorado Springs Sept. 3–4, was the address of Henry Latchford, M.A., formerly of the Inner Temple, London, who spoke on "Life in the Inner Temple, or the Haunts of the Muses." Mr. Latchford is a graduate of Trinity College of the University of Dublin. Addresses were made in the afternoon by President Wilbur F. Stone and C. C. Butler of Denver. Mr. Stone's subject was "The Ancient Laws of Babylon," and Mr. Butler discussed "Lynching." Former Mayor Henry C. Hall of Colorado Springs delivered an address one morning on "Municipal Charters." The ever present subject of the relief of the congested condition of the state supreme court caused lengthy discussion. Officers were elected as follows: president, Lucius W. Hoyt, Denver; first vice-president, Henry C. Hall, Colorado Springs; second vice-president, E. L. Regenitter, Idaho Springs; secretary-treasurer, W. H. Wadley, Denver.

The twenty-seventh annual meeting of the Missouri State Bar Association took place at Pertle Springs, near Warrensburg, Mo., on September 18 and 19. Among those present from Kansas City were Judge John F. Philips, Judge James Ellison, Judge W. O. Thomas, O. A. Lucas, F. W. Gifford, Jesse J. Vineyard, Rees Turpin, L. A. Laughlin, Pierre R. Porter, Thomas H. Reynolds and Edwin A. Krauthoff. The annual address of the president, F. N. Judson, was an elaborate review of the legis-

lation of Missouri and other states, together with a comprehensive discussion of the present movement for a reformed procedure. The newly elected president is J. W. Halliburton, of Carthage, Mo. Interesting papers were read on "Industrial Insurance," by J. M. Atkinson, Assistant Attorney-General of Missouri, and on "Employer's Liability," by Tyson S. Dines of St. Louis. M. E. Rhodes of Potosi, Mo., chairman of the house committee on revision in the last General Assembly, delivered an address on the manner in which the work of the revision committee had been done during the session. Then R. F. Walker and Homer Hall explained the manner in which the revision commission of 1909 was publishing the statutes. The feature of the occasion was the annual address, delivered by Mr. Justice Riddell, of the Court of King's Bench, Toronto, the subject being "The Judicial Committee of the Imperial Privy Council." There was also an address upon "The New Code of Civil Procedure in the State of Kansas," by Judge Stephen H. Allen of Topeka, Kans. The annual banquet was addressed by Judge Philips, Mr. Justice Riddell, Judge Allen and F. W. Lehmann of St. Louis. An important feature of the meeting was the adoption of the following resolution: "That the incoming committee on constitutional and statutory amendments be directed to formulate and present a scheme for the unification and simplification of the judicial system of the state of Missouri, whereby a system of judicature will be created adequate to promptly dispose of all the judicial business in the state of Missouri." The plan is to be reported to the 1910 convention.

Necrology—The Bench

George S. Purdy of Honesdale, Pa., President Judge of the twenty-second judicial district of Pennsylvania, died September 1 at Mount Clemens, Mich.

Judge Reuben James McNutt of Silverton, Colorado, died on July 31. He was born in Albany, N. Y., in 1841, and left for California in 1860. He was a member of the last territorial legislature of Colorado and served as county judge.

Judge L. C. Johnson, aged eighty-eight, died in Beauvoir, Miss., on August 14. He was widely known throughout Mississippi. He had held several positions of honor, having been chancery clerk of Marshall county for many years. He was a man of considerable learning.

Judge Benjamin F. Hoffman, formerly a judge of the Ohio Court of Common Pleas and for twenty years one of the leading lawyers of Youngstown, O., died recently at his home in Pasadena, Cal., where he had lived for twenty years. He was ninety-eight years old. He had been private secretary to David Tod, Governor of Ohio during the Civil War.

Captain Samuel C. Lemly, U.S.N., who was Judge Advocate General of the Navy during the Spanish War, and prominent in the Schley Court of Inquiry, died September 4, at Washington, D.C., after an illness of about a year. He was born in Salem, N. C., March 14, 1853, and graduated from the United States Naval Academy in 1873. He served three terms, of four years each, as Judge Advocate General, retiring in 1904.

Hon. William T. Wallace, formerly Chief Justice of the Supreme Court of California, died at his home in San Francisco, Aug. 11, in consequence of a stroke of paralysis. He was one of the most prominent jurists in the history of California. He was born at Mount Sterling, Ky., March 22, 1828, and went to San José, Cal., in 1850. In 1856 he was elected Attorney-General. In 1870 he was elected a Justice of the Supreme Court, being Chief Justice from 1872 to 1879. In 1871 and 1879 he was a candidate for the United States Senate, but was defeated. Later he was a superior judge in San Francisco, from 1887 to 1899. While on the bench he was responsible for Chris Buckley being deposed as a Democratic boss.

Judge Norman S. Buck, formerly associate judge of the Supreme Court of Idaho, a member of the last Washington legislature, died at Spokane August 20. On the bench in Idaho in 1885 he rendered a decision of national interest, on the ownership of the Bunker Hill & Sullivan silver-lead mine. The mine was discovered by one O'Rourke and his partner as a result of the pawing of a stray pack mule uncovering the outcropping. The owners of the mule later appeared, and claimed and were awarded a grub-stake interest in the mine by Judge Buck.

Necrology—The Bar

Branch H. Giles, formerly Deputy Attorney-General of Colorado, of the Denver bar, died August 29 at the age of about forty years.

Frank M. Mayfield, of Jeffersonville, Kentucky, died August 29. He was born in 1870, in Washington county, Ind. He was twice elected Prosecuting Attorney of Clark county, Kentucky.

Richard K. Cross of Baltimore died August 28 at Wianno, Mass., at the age of sixty-one years. He was a graduate of Princeton University and the Maryland Law School, and was well known as a lawyer in Baltimore.

Harry P. Waitneight of Phœnixville, Pa., one of the most prominent members of the Chester County bar, and president of the

Phœnixville board of education, died suddenly August 18, at the age of about forty-five.

The first negro lawyer to be admitted to the bar of Illinois, Lloyd Garrison Wheeler, is dead. He was born in Hillsboro, Ohio, in 1849. He had been business agent of the Tuskegee Normal and Industrial Institute since 1903. Mr. Wheeler died at Tuskegee, August 28.

John C. Pegram, a noted lawyer of Providence, R. I., president of the Rhode Island branch of the American National Red Cross, and identified with the principal financial institutions of that city, died Aug. 11. He was sixty-seven years old and was born at Owensboro, Ky.

Alonzo W. Church, whose attainments as a lawyer and as a man of high intellectual ability were recognized throughout the country, died at his home in Newark, N. J., Aug. 12. He was once Librarian of the United States Senate, and had been general counsel for the Chicago & Alton Railroad.

Col. Charles Eaton Creecy, a lawyer of marked ability and polish, of Washington, D.C., died at Atlantic City, N. J., on Aug. 9. He had practised before the Supreme Court of the United States, the Court of Claims and committees of Congress, representing the largest shipbuilding concerns in America.

Hugh C. Ward of Kansas City, Mo., the wealthy law partner of Governor Hadley of Missouri, died of apoplexy Aug. 15 in a private sanitarium in New York City. He was forty-six years old. The Young Women's Christian Association of Kansas City lately received $25,000 from Mr. Ward, the last of many acts of benevolence.

William F. Carr, one of the best known corporation lawyers in Cleveland, died in that city September 1, after an illness of four years. He was born at Canal Fulton, Ohio, in 1849. He was admitted to the bar in 1871, and shortly after being admitted to the Ohio Bar Association he became its president. The study of corporation law was his chief pleasure.

Albert Gerald, an able young lawyer of Providence, R. I., who had achieved considerable success in his profession, was shot under circumstances which the coroner said indicated suicide, on August 19. He was educated at Brown University and Harvard Law School, and was a member of the firm of Edwards and Angell. No reason is known for the act.

Alexander Grant, a lawyer and financier of Newark, N. J., died there August 17. He was fifty-six years old. Mr. Grant was educated at the Newark Academy and at Harvard University. He was admitted to the New Jersey bar in 1882. He was a member of the American Bar Association and one of the founders of the Lawyers' Club of New Jersey. Since 1895 he had been counsel for the Franklin Savings Institution.

A prominent young San Francisco lawyer, Frank G. Drury, died August 14, of nervous prostration. He was born in Smartsville, Yaba county, Cal., in 1869. For several years he was associated with General James F. Smith and Judge F. J. Murasky in the law business, and later entered into partnership with C. W. Lynch. He held one political appointment as assistant prosecuting attorney in Police Judge Joachimsen's court.

One of the oldest practising attorneys in Vermont, Harvey K. Fowler, died of apoplexy at his home in Manchester, on August 17. He was one of a family of thirteen children, having been born in Poughkeepsie, N. Y., January 1, 1818. He was admitted to the Vermont bar in 1842. Since that time he had practised continuously. He was Judge of Probate and Registrar of Probate for twenty-seven years.

Col. William Nutt, formerly state senator and trial justice, died August 31 at his home in Natick, Mass. He was born August 5, 1836, at Topsham, Vermont. He was admitted to the Middlesex bar in 1868, and then began a long and honorable career as a lawyer, holding many positions of public trust. He helped to free Kansas and to form the Republican party, and was offered the United States Senatorship from Virginia by the "carpet bag" government, but declined it.

The death of District Attorney William L. Ammon of York, Pa., whose body was found in a stable loft August 24, is variously explained as due to heart failure, or possibly to suicide. Mr. Ammon, for fifteen years secretary of the Standard Building and Loan Association of York, had misapplied large sums of the funds of the association, according to his own admission made on the night before his death. He was elected county District Attorney in November, 1907.

Stephen Moody Crosby died at North Cohasset, Mass., August 31, at the age of eighty-two years. He was born in 1827, and was graduated from Dartmouth College in 1849, and from Harvard Law School in 1852. He was a member of the Massachusetts lower house in 1869, and of the state senate in 1870–71. Actively interested in several banking and other institutions, he was also president of the New Hampshire state branch of the Order of Cincinnati.

Samuel C. Miller, an aggressive, forceful lawyer of Kansas City, who had held many positions of trust there, died at Colorado Springs Aug. 13, where he had gone for the benefit of his health. He was forty-eight years old. In 1896 he was elected County

Attorney of Wyandotte county. He was the nominee of the Republican party for judge of the Circuit Court, which office was subsequently declared unconstitutional. Comparatively few men, cast upon their own resources at the age of sixteen and handicapped by the loss of both legs, had risen to greater heights and overcome greater difficulties.

Crime and Criminal Law

Justice Zeller, in the Court of Special Sessions in New York City, suspended sentence Aug. 31 on Felix L. Droit, a professional chauffeur and participant in the Vanderbilt cup race, for speeding when the latter promised never again to drive an automobile in New York state.

The mayor of Des Moines, Ia., has declared in favor of allowing defendants in criminal courts to plead under assumed names. Commenting on this, the Haverhill (Mass.) *Gasette* says: "To make procedure less public would decrease the probability of fair trial and equal justice, at the same time taking away that greatest check to law breaking, a fear of public criticism through newspaper publicity."

Thomas Dudley Wells, chairman of the committee on the parole of life prisoners, says, in his recent report submitted to the American Prison Association, that in states where the life sentence is rigidly enforced, the ratio of insanity among life convicts is nearly three times as great as in the general body of felons, and that only the dictates of social safety justify the state in putting a prisoner's reason in peril.

The New York police department have received a long report from the detectives Tony Vacris and John R. Crowley, who went abroad after the assassination of Lieutenant Joseph Petrosino in Palermo on March 12, to continue the Black Hand investigation which he had begun. After Police Commissioner Baker had conferred with the detectives, he said that their report had been decidedly encouraging, and might lead to the detection of the assassins of Lieutenant Petrosino.

The American Prison Association has lately held its annual meeting in Seattle. Topics discussed included the abolition of sheriffs' fees, the indeterminate sentence, the juvenile court, outdoor employment for prisoners, the sterilization of criminals, and medical examination before trial. Amos W. Butler of Indiana was elected president. Mr. Butler is not a practical prison administrator. The next session will be held in conjunction with the International Prison Congress, which will meet in Washington, D.C., in October, 1910. This meeting will be of deep interest to penologists and criminologists everywhere.

"The grand jury ought to be abolished or the city magistrates should be done away with for the advantage of the community," said Magistrate Cornell Aug. 27 in Yorkville Court, New York City, in connection with an alleged swindle in a horse deal. Counsel for the defendant asked for his discharge on the ground that the complainant did not appear, and said that the grand jury would throw out the case. Magistrate Cornell made the above statement, and added: "The magistrates are trained in law and when after an examination they hold defendants for trial there is a miscarriage of justice when a grand jury composed of laymen who are overwhelmed with business hastily throws out the cases."

Meeting of Attorneys-General

The National Association of Attorneys-General, meeting east of the Mississippi river for the first time, held its annual convention in Buffalo, Aug. 27–28.

Attorney-General O'Malley of New York, who was instrumental in bringing the convention to Buffalo, delivered the opening address. He said that the conservative states of the East might learn from the young and vigorous methods of the middle and extreme West in almost any matter of state administration, for they had profited by the mistakes made in early days by the East. Little of the state's legal business being with the average citizen, the state in dealing with large interests must contend not only with lawyers of great ability, but also with unlimited means to conduct litigation. Legal departments must be efficiently organized. "In my judgment," said Mr. O'Malley, "an efficient state legal department must of necessity embody at least three essential things:—

"First—Salaries should be paid sufficient to attract to the public service, if not the best, at least lawyers of high standing.

"Second—There should be a sufficient number of deputies or assistants to take care of all the ordinary legal business of the state. So far as possible, special counsel should be done away with. Special counsel is generally expensive, and the work done is not, on the whole, as satisfactory as with an office force. The terms of deputy attorneys-general should be for a longer period than that of the Attorney-General. The term of Attorney-General in this state is for two years. In my judgment this is too short.

"Third—I believe all the law business of the state should be conducted by and under the Attorney-General."

The second day of the convention was marked by a discussion of the problems of delinquent corporations and of liquor associations. Resolutions were adopted favoring a radical change in court procedure by requiring dilatory pleas to be presented at the same time as the answer and summarily disposed of; against the practice of employing special counsel by an Attorney-General; against the indiscriminate use of the federal injunction to stay the hands of state officers in the

enforcement of state laws; declaring for uniformity of laws in the regulation of trusts, and for co-operation by Attorneys-General in the correction of corporate abuses.

The officers elected for the ensuing year are: president, Fred S. Jackson, Kansas; vice-president, U. S. Webb, California; secretary and treasurer, James Bingham, Indiana.

Miscellaneous

More than two-thirds of the American law schools have lengthened their average course from two to three years, according to a New York educator.

The fire which occurred in the Parliament buildings at Toronto September 1 totally destroyed the Mowat law library, said to be one of the finest collections in Canada.

The women lawyers of Ohio will form an association in September at a conference to be held in Columbus. The leader of the movement is Nellie G. Robinson of Cincinnati. The association will have members belonging to Cleveland, Toledo, Springfield, and Sandusky, as well as to Cincinnati and Columbus.

The courthouse at Washington, Mason county, Kentucky, in which "Uncle Tom" of "Uncle Tom's Cabin fame" was sold, was struck by lightning and destroyed Aug. 13. The building was erected in 1794. It was the sale of the aged negro at this place that gave Harriet Beecher Stowe the basis for her story.

The New York State Association of District Attorneys was organized at Albany, September 2. William Travers Jerome of New York was elected president; Beecher S. Clother of Glens Falls, vice-president, and Rollin B. Sanford of Albany, secretary and treasurer. The annual meeting will be held next February, when the pending criminal code legislation will be discussed.

The National Association of Real Estate Exchanges, through a committee on uniform laws, is considering the drafting of proposed uniform laws covering the topics of conveyancing, notarial acknowledgments, filing of *lis pendens*, probate, and releasing of mortgages, deeds of trusts, etc. The committee is conferring with a similar committee of the American Bar Association.

The *Revue de Droit International Privé* had the misfortune to lose the services of its founder and editor, who died a few months ago. This valuable review, however, bids fair to continue the international studies so ably prosecuted up to the time of the death of M. Darras, and the current issue displays the undismayed energy of the new editor, Professor A. De Lapradelle, who is attached to the faculty of law of the University of Paris, and is an associate of the *Institut de Droit International*. On the continued excellence of the scholarship of this publication, under its able new editorship, the world of learning can confidently rely.

A special committee of the New York County Lawyer's Association which was appointed to look into the requirements for admission to the bar has made a report in which it finds the present system of legal training fundamentally wrong in these particulars: "The average student when he applies for admission has no or a very inadequate knowledge of his various duties. The student is not instructed in the real nature and function of his office. The educational tests, preliminary and general, are wholly insufficient. Students are uninstructed in their outside unprofessional relation to the community." The report also speaks of the deterioration of the bench in New York county: "The spectacle of the elevation to a judgeship of a lawyer known and appreciated by the bar is a rare one. If the names of most of the candidates for judicial honors were submitted to the profession they would be overwhelmingly repudiated. In the main the bench is below the average. The lawyers of New York City today freely talk of the judges. They specify names, they say to one another, 'Keep away from that court,' 'Avoid that judge,' meaning beware of their slothfulness, ignorance, or immaturity. . . . Whether the power of nominating judges can be taken from political organizations is a question. . . . So long, however, as the system exists there necessarily will be an inferior class of judges." The *New York Sun* denounces this criticism as an "abusive attack upon the judges," and "a misleading diatribe," and Judge Alton B. Parker, in a letter to the *Sun*, declares that most of the judges are really very good indeed, this being "strongly evidenced" by the fact that some of the New York lawyers recently gave a complimentary dinner to the Appellate Division. The *Outlook* laconically observes that this letter throws more light upon Judge Parker himself than upon the facts in question and explains "why he was defeated as a Presidential candidate in 1904 by a popular majority against him of two and a half million votes and by an electoral majority against him of 196 votes." But the committee is not attacking the judges personally, but the system by which they are selected. Mr. John R. Dos Passos, a prominent New York lawyer, in a subsequent letter to the *Sun*, assumes responsibility for the report, and says of it: "It is the system under which judges are nominated which is inveighed against and not the individuals who are upon the bench. I am on terms of friendly relationship with all of them. They are creatures of the system. It will be a great disappointment if we do not have the support of the press of our state in an earnest effort to amend the rules of the courts relating to admission to the bar, which lawyers concede are inadequate to produce as a whole either capable lawyers or fully equipped judges."

JUDGE JAMES GRANT

GREAT LAWYER AND STURDY PIONEER OF IOWA

FIRST PRESIDENT OF THE CHICAGO AND ROCK ISLAND RAILWAY

From a photograph made about the year 1866

[See page 556]

The Green Bag

Volume XXI November, 1909 Number 11

The Jones County Calf Case

By J. S. Woodhouse

FOUR calves, the market value of which was twenty-five dollars, were the cause of the greatest lawsuit in the history of American jurisprudence. The litigation started by their sale extended over a period of twenty years, was tried in seven different counties before one hundred and fourteen jurors, was four times appealed to the Supreme Court of the state, wrecked the fortunes of eight men, entailing fees amounting to $75,000 for an army of lawyers, and concluded with a final judgment for $1,000 and court costs amounting to $2,886.84.

This litigation—a monument to the cost at which legal redress may be secured by a persistent litigant—is known as the "Jones County Calf Case," from Jones county, Iowa.

Robert Johnson of Anamosa, to vindicate himself of a criminal charge preferred against him by a "Horse Thief Association" of pioneer days, fought through this long period against seven opponents. Since the conclusion of the case five of the defendants have died without property and two yet live, but have never regained a foothold since the famous lawsuit consumed their wealth. Johnson has prospered, but by strange destiny of fate in his every enterprise he must cross swords with the opponents in his long legal duel. When he became a candidate for mayor of his city last spring, fifteen years after the settlement of the suit, his opponent was B. H. Miller, a relative of one of the defendants in the twenty years' litigation. Johnson's record in the "Calf Case" for being a persistent fighter, together with a platform for strict law enforcement and a moral city, won him the election. He is mayor to-day.

C. E. Wheeler of Cedar Rapids, as a young law graduate of Notre Dame, received his first retainer from Robert Johnson. He made his maiden speech in the "Calf Case" and remained in the litigation from beginning to end. He won his victory after opposing before the juries such brilliant orators as Ex-Governor Horace Boies of Waterloo. When final judgment was rendered he was a gray-haired old man and a lawyer of experience.

In the early days of Iowa Robert Johnson was a stock buyer in Jones County. In June, 1874, he sold to S. D. Potter in Greene County fifty head of calves. A short time later John Foreman, one of his neighbors, asserted that four of the calves belonged to him, and

in a Greene county justice court, by replevin proceedings, recovered their possession. To reimburse Mr. Potter for the value of the calves Mr. Johnson gave him his note. He explained that he had bought the animals from a stranger who gave the name of Smith. In a country store at Olive the proprietor and several loungers heard the bargain made between Johnson and the stranger. Shortly after this proceeding an indictment was returned in Jones county against Johnson, charging him with having stolen the four calves. Johnson and a brother then went to Greene county and had Potter point out the four claimed by Foreman. They proved to be high-grade calves, whereas Johnson had bought scrubs of Smith. Then Johnson discovered for the first time that he had not handled the Foreman calves at all and began to believe he was the scapegoat for another's crime. He refused to pay the note he had given Potter, on the ground there was no consideration. Suit was commenced against him in justice court, and after a long and expensive litigation Johnson was defeated and had to pay the note, on the ground it was in the hands of an innocent purchaser.

ROBERT E. JOHNSON

Who only after twenty years of tedious and costly litigation fully vindicated his innocence of having stolen the four calves

When he was indicted Mr. Johnson filed a motion to quash because of a defect. The prosecution of Johnson was prompted by an organization of those early days known as the "Horse Thief Association," perfected as a protection against the prevailing wholesale stealing of stock. A few days before the court gave consideration to this motion Johnson found on his horse block near his home a note, accompanying a piece of rope tied in a hangman's knot. It read:

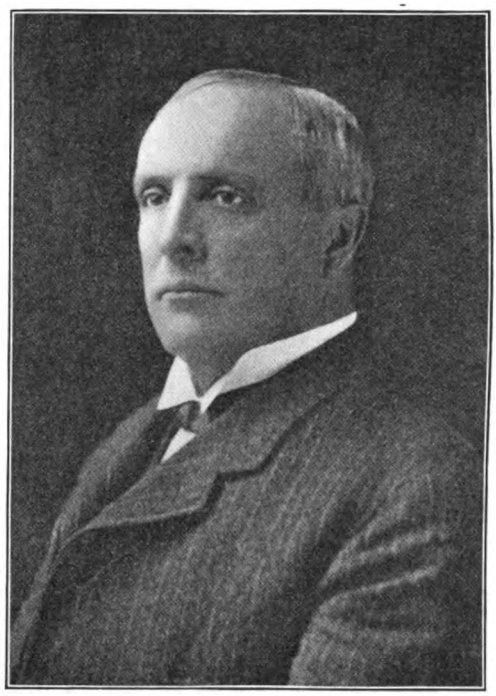
"In view of the present indictment we understand that you are under, we understand that you calculate to have the indictment set aside. We advise you to appear and be tried under the indictment with the defect, if any exists, or take the lamented Greeley's advice and go West, or take this—"

WE, THE COMMITTEE.

Johnson was a fearless man. He pursued his motion. The indictment was quashed. Another was returned. A change of venue was taken to Cedar county. He was tried, and the jury disagreed by a vote of eleven for acquittal and one for conviction. Then one night his house and barn were myste-

riously burned to the ground. He was tried a second time and acquitted.

Johnson determined to have revenge and vindication. He gathered information concerning the membership of the "Horse Thief Association," and on May 23, 1878, started suit in Jones county for malicious prosecution, demanding $10,000 damages from E. V. Miller, David Fall, George W. Miller, Abe Miller, John Foreman, S. D. Potter and Herman Keller. A change of venue was taken by the defendants to Linn county and from there a change was taken to Benton county. The case was tried here first with a disagreement of the jury. It was tried a second time and Johnson recovered a verdict for $3,000. The court set the verdict aside. A change of venue was then taken to Clinton county. At the conclusion of the trial there Johnson secured a verdict for $7,000. The court set that verdict aside. A change of venue was then taken to Blackhawk county. There Johnson again won. This time the jury said he should have $5,000. From this verdict the defendants appealed to the Supreme Court of Iowa and the case was reversed. On the next trial in Blackhawk county, Johnson was awarded, by the jury, a verdict for $6,000. From this the defendants appealed to the Supreme Court and again the case was reversed by this highest tribunal. On the last trial in Blackhawk county, Johnson recovered a verdict for $1,000 against six of the defendants, the court having instructed the jury to return a verdict for the defendant, Herman Keller, whose connection with the "Horse Thief Association" was not proven. The six remaining defendants filed one motion to arrest judgment and another for a verdict for the defendants on the ground the findings were in conflict with the general verdict, the judge having submitted certain specific questions for the jury to answer. Both motions were overruled and judgment rendered against the six defendants. Thereafter they appealed and judgment of the lower court was affirmed, January 27, 1891.



CHARLES E. WHEELER

The attorney who fought Mr. Johnson's long battle in the courts to a successful issue

When it came to the payment of the trial costs the defendants against whom the verdict stood wished to pay but six-sevenths of them, contending the exonerated defendant should pay his share of the defense. They once more went to the Supreme Court on this question and the higher tribunal directed the six to pay the total costs of the defense. This last ruling was made December 20, 1894, so the case consumed from the beginning twenty years.

E. V. Miller, Abe Miller and H. D. Keller died about the close of the litiga-

tion without property. John Foreman died about six years ago and David Fall three years ago. George Miller is now living in Anamosa at the age of ninety years, with but little property. S. D. Potter is still living in Greene county, but has no property.

Robert Johnson is now seventy-one years old, having been born in Delaware county, Ohio, in 1838. He was married in Jones county in 1861 to Miss Mary Saum and they raised a daughter and son to womanhood and manhood during the progress of the Jones County Calf Case. Concerning the suit, Mr. Johnson, who is wealthy and recently gave a substantial contribution for the building of a new church, says:

"I know I was right in this case. I do not regret the tiresome litigation. My honor and integrity were questioned. It pays to fight under such circumstances. I lost my farm of one hundred and sixty acres and all my property, but I feel well repaid. My wife, my children and my friends know now I was innocent and I can look any man in the face without a blush."

An Old Boston Firm of Law Publishers in a New Home

THE *Green Bag* deems it appropriate, in connection with the removal of the publishing house of Little, Brown & Co. from the location on Washington street, Boston, which it had occupied for about eighty years, to a new site on Beacon Hill, to present to its readers a short sketch of a firm which has had a long and honorable history and is familiarly known to lawyers as one of the foremost in the country in the publication of law books.

The former headquarters of the concern served as a general meeting place for leading members of the American bench and bar for years. This is known to be one of the three or four oldest American firms of law publishers and booksellers now doing business. Its origin dates back to 1784, when Ebenezer Battelle kept a bookstore on Marlborough street, then that part of the present Washington street south of School street and north of Eliot street.

The business changed hands several times until Timothy H. Carter, an apprentice, left in sole charge of the bookstore (when it was owned by Jacob A. Cummings and William Hilliard), foresaw the importance of law books. After he was admitted as a partner in 1821 the firm name became Carter, Hilliard & Co. Mr. Carter devoted most of his time to the production of law books, and from that time the number and importance of the legal text-books commenced to increase. Finding the work too much for him, Mr. Carter advertised for a clerk, and Charles C. Little was hired. When Mr. Cummings died and Mr. Carter had withdrawn from the firm, Harrison Gray came in, and in 1827 a new firm, under the title of Hilliard, Gray & Co., was formed, the "Co." being Mr. Little.

In 1830 the firm moved to 112 Washington street, afterwards changed to number 254. There its business in law

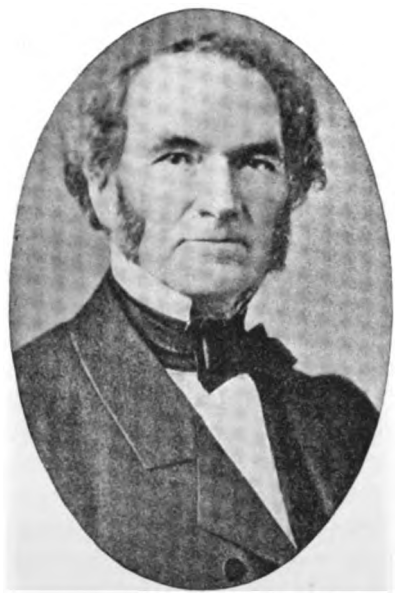
JAMES BROWN, 1800-1855

Who had charge of the importations and rose to a position of enviable distinction among American publishers

books, and the importation of foreign books as well, became an even greater factor, so that in 1837, when Mr. Little and James Brown, the latter of the firm of Hilliard & Brown, proprietors of the University Book Store at Cambridge, became the sole owners, the foundation of a foremost law-publishing and bookselling house had already been laid. From Charles C. Little and James Brown, in 1837, the firm name was changed to Little, Brown & Co. a few years later, and this name is likely to remain unchanged.

It was Mr. Little who had control of the law department until his death in 1869, Mr. Brown assuming charge of the foreign importations. Mr. Little was born in Kennebunk, Me., July 25, 1799. Early in life he went to Boston, and entered a shipping house on Long Wharf. Remaining there a short time, he went to Charleston, S. C., for the winter, and upon his return entered the employ of Carter, Hilliard & Co. His career as a business man was a long and honorable one. "Integrity, uprightness, and great prudence characterized all his business transactions, and his conduct towards his assistants was gentlemanly and courteous"—was the verdict of one of his contemporaries. He died in Cambridge, August 8, 1869.

James Brown was born in Acton, Mass., in 1800. When eighteen years old he began as clerk and general assistant in Hilliard's Cambridge bookstore. He was but twenty-six years old when he became a member of the firm of Hilliard & Brown. He died suddenly in March, 1855, his death coming as a great shock not only to his intimate friends but to the bookselling world generally. On Mr. Brown's first visit to London, in 1841, he met John Murray, who treated him with a "cordial and hospitable kindness"; and he named



CHARLES C. LITTLE, 1799-1869

Who in the course of a long and memorable business career brought out many works which have since become noted legal classics

THE ORIGINAL BUILDING

At 254 Washington Street, Boston, the home of the concern from 1830 until the fall of 1909

his youngest son after the eminent London publisher. Mr. Brown was a man of fine presence and affable manner, cultivated and liberal. At the time of his death he had won the enviable distinction of being considered by his fraternity the most representative member of the profession he loved so well, and to which he was an honor.

After Mr. Brown's death, Augustus Flagg, who entered the employ of Little & Brown when he was twenty-one, and who was admitted to partnership in 1846, became purchaser abroad of foreign books for the house. From 1869, when Mr. Little died, to the time of Mr. Flagg's retirement from business, in 1883, he was managing partner—and no one was better acquainted with the book trade of a half century ago. He was succeeded by John Bartlett, author of "Familiar Quotations" and other works. On Mr. Bartlett's retirement, John Murray Brown, the youngest son of James Brown, became the senior partner, and he remained at the head of the firm until his death in April, 1908, maintaining the high publishing standard which his father and his associates had established.

In the present firm are associated Charles W. Allen, James W. McIntyre and Hulings C. Brown, who, through years of training in this house, and backed by its traditions, are carrying the work along in the same lines, but are gradually widening and broadening its scope.

The old Little & Brown store at 254 Washington street, in a building owned by Harvard College, came to be the rendezvous for those who sought the standard or the newest legal literature, and for lovers of the best and rarest

THE NEW BUILDINGS

At 34 Beacon Street, on Beacon Hill, overlooking Boston Common

books as well. Rufus Choate was a great lover of fine books and he frequently visited Little & Brown's. Daniel Webster was a large buyer of costly English books, but it used to annoy him to have people following him and watching him when he was making his purchases.

Wendell Phillips was a good customer, and anything pertaining to American history, no matter in what language, would bring George Bancroft, the historian, to the store. Justice Story was a large buyer, particularly of books on civil law. He is said to have been a rapid talker, and many animated conversations took place at 254 Washington street between Story and Chancellor Kent.

JOHN MURRAY BROWN

Who as senior partner maintained the worthy traditions of the firm with ability until his death in 1908

It is not surprising, therefore, that the firm's list of legal authors included such names as Kent, Story, Greenleaf, Parsons and Washburn, whose early treatises through frequent and careful revision have retained their prestige. Perhaps no house has brought out more works of American statesmen. Among the most notable have been "The Life and Works of Washington," by Jared Sparks, in twelve volumes, Sparks' American biography in two series, twenty-five volumes in all, a ten-volume edition of the works of John Adams, Edward Everett's works, Winthrop's speeches, also Daniel Webster's works, which have been recently added to and brought out in a new subscription edition. The works of Francis Parkman, by some considered greatest of American historians, Palfrey's "New England," Bartlett's "Familiar Quotations," Captain Mahan's epoch-making works on sea power, the first standard library edition of Dumas, and the translation of the historical novels of Henryk Sienkiewicz are among the firm's achievements in general literature, a branch which has been greatly developed since the acquirement of the publishing business of Roberts Brothers in 1898.

In forsaking the Newspaper Row of Boston, so called, for larger and better quarters on Beacon Hill, Little, Brown & Co. are one of the three particularly noted publishing firms of New England which have taken for offices and salesrooms houses overlooking the historic Boston Common, and formerly occupied by Boston's foremost families, the other two firms being the Houghton, Mifflin Co. and Ginn & Co. Now, without the uproar of traffic and the cry of the newsboy to disturb them, the present-day lover of fine books or the seeker after any legal treatise may enter the well appointed sales rooms located at the corner of Beacon and Joy streets and leisurely examine the well-stocked shelves, undisturbed save by the rustling leaves on the Common or the honk of the passing motor car.

James Grant, a Model American

By Willis Bruce Dowd, of the New York City Bar

BY whatever undeserved good fortune it was, I found myself in the year 1908 a director of the New York County Lawyers Association, of which Hon. John F. Dillon was President.

From my membership in that board and that acquaintance I became possessed of the desire to look up particularly the essential features of the life of the subject of this sketch. Then followed the intent to write the sketch and the act itself.

It happened in this way: After a meeting of the board of directors of that Association, one day in the late winter of 1909, it so happened that Judge Dillon and I went uptown in the same car on the elevated road. We sat together, and presently he inquired of me whether he was correct in his information that I was a native of North Carolina. I said, "Yes." Thereupon he commenced to run off the names of the great lawyers of that state with whose lives and works he was familiar; William Gaston and Chief Justice Ruffin, Judges of the Supreme Court, eliciting his most cordial approval. He was in a sort of half-abstracted reminiscence in alluding to these men, and lapsed into complete silence after he had finished speaking of them. Then in a few minutes he began talking again, as if he were giving me some information for my own good.

"I think I owe more of my success as a lawyer, whatever it may have been," he said, "to a native of North Carolina than I do to any other human being."

"Who was that?" I inquired.

"Judge James Grant of Iowa," said Judge Dillon with emphasis. "When I was a boy he was the most conspicuous lawyer in my town, Davenport, if not in the whole state of Iowa, and, owing to my desire to become a lawyer, he urged me to make free use of his library, which I did. It was a large satisfactory library for those days, and I derived great benefit from my use of it. I am sure it was while I was reading Judge Grant's books that I conceived the idea of writing my own book on 'Municipal Corporations,' which is now about to be issued from my hands in its fifth edition after the lapse of many years."

It is well to observe that Judge Dillon was in his seventy-seventh year when he made this remark, and that he passed the seventy-sixth year of his career in more painstaking labor, especially on his book on corporations, than he had ever expended in any other year of his life.

Now, it is doubtless to my shame that I had never heard of Judge Grant before, but it is true, and I said so.

"Well, he was a great man," said Judge Dillon; "a son of the state in which you and he were born, and a member of the profession to which you and I belong, he did at least one thing that, I suppose, no other lawyer ever did since the beginning of the profession."

"What was that?" I inquired.

"It was this!" he said. "After the Civil War, when all his people in the South were impoverished to the point of starvation, he sent down there and offered to move his poor relations to the

West, and I believe that he did transport about twenty of them and established them in new homes in Iowa and elsewhere, so that they became prosperous and useful citizens."

"That was certainly a striking fact in a man's life," I thought, and I said so, and I warned Judge Dillon that I should call upon him to help me brush away the dust of time from the figure of this strong man, and perhaps help me make it stand out prominently before the people of the country who knew him as a lawyer, man of affairs and benefactor.

We shall see that he was, indeed, one of the most sterling, worthy, helpful, interesting and delightful characters that ever ornamented the profession of law, or blessed any commonwealth by his work and labors.

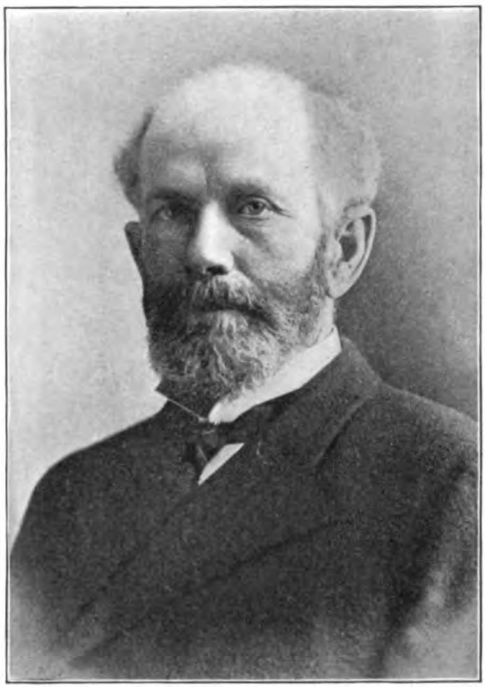
There is something about the writing of a biographical sketch like the building of a nest by a bird. Here one fact is found and there another, like so many straws, and so the progress goes on until the work is finished. It was so in this case. From Judge Dillon I obtained the addresses of three nephews of Judge Grant, all shining lights of his benefaction, one of whom, Ex-Gov. James B. Grant of Denver, responded in person, when in New York on business, to my solicitations for information about his illustrious uncle. Another nephew, Dr. William West Grant of Denver, also assisted with his pen in giving valuable data, and yet another nephew, who was formerly the law partner of Judge Grant, Hon. Whitaker M. Grant of Oklahoma City, aided with valuable reminiscences about our subject's career on the social and domestic side. Then there were books and papers that turned up, wherefrom additional data and information were obtained, and thus all the material which seemed to be necessary for the making of this sketch was discovered and made of avail.

HON. JOHN F. DILLON

As he was about 1879, when he left Davenport for New York

Judge Dillon, who found encouragement in the early years of his legal career in the example of Judge Grant, and traces the source of his work on "Municipal Corporations" to that jurist's great library, dedicated the second volume of his "Circuit Court Reports" to his long-time friend and benefactor, as follows: "For five and thirty years we have lived in the same town, and during the latter half of that period much of my time has been spent in your library. It gives me pleasure to avail myself of a graceful usage to record my high regard for you as a lawyer and a citizen, and my sincere attachment to you as a friend."

Now, there was a James Grant among the Highlanders who were transported to this country by order



EX-GOV. JAMES B. GRANT
of Denver, Col.
Nephew and protégé of Judge Grant and his partner in mining and smelting

of King George II, after the Battle of Culloden. He settled at Norfolk, Va., but afterwards moved to North Carolina and took up his residence at Enfield in Halifax County, where the family estate is still located.

There was another James Grant, the father of the subject of this sketch, who was born and reared on that estate and had a numerous family, and then James Grant the third made his entrance upon the stage of life there on December 12, 1812. While it is peculiarly appropriate, as will presently appear, to bear in mind the seven stages, quoted so often from Shakspere, it does not behoove us to linger upon that phase of our subject's life which saw him an infant,

"Mewling and puking in the nurse's arms,
And then the whinning school boy with his satchel
And shining morning face, creeping like snail
Unwilling to school."

It is well to observe, however, that he was a precocious child, and after a primary education at a country school where the classics were taught, he was prepared for the University at Chapel Hill, North Carolina, at the early age of thirteen years. When he went down with his father, who also had attended the University, to matriculate, his entrance was frowned upon because he was so small and so young. Under the advice of the president of the University he was taken back home and put on the farm for outdoor exercise for two years. Then in 1828, at the age of fifteen, he returned to the University and graduated high up in the class of 1831. He was so advanced when he returned to the University after his vacation, that he was able to enter the sophomore class, and thus finished the curriculum before he was nineteen years of age. He was a most proficient student, ranking high in all things, but especially in mathematics and the classical languages.

After graduation he taught school about two years at Raleigh, the capital of the state, and while there he studied law, having decided upon a career at the bar.

This brings him to twenty-one years of age, when we discover in him the first manifestation of that combination of intelligence and courage which made him the great man he became.

Let us take a look at him and see what his physical appearance was at that time. Of small stature, being not over five feet eight inches in height, he had a frail and delicate body, which gave no promise of developing strength and ruggedness. Indeed, he was always a man of delicate health. He had, however, well-shaped limbs, and a head larger than the ordinary, which was

surmounted by an abundance of dark hair. His eyes were of that changeble gray which is associated so often with genius. His movements were quick, and he gave every indication of being a person of nervous but decisive temperament. His nose was prominent and his mouth was somewhat broad and firm, and his voice deep and commanding. On the whole, his personality, as he came to maturity, could not have been considered heroic, but it bore every impress of great capacity and great determination.

He had somehow acquired an aversion to slavery and for that reason he desired to emigrate from the South. He loved and respected his parents and therefore he did not communicate his aversion for slavery to them; he did not wish to cause a discussion which might give annoyance or distress to his mother and father. Hence he resolved to find a path over the hills of his native state, and into the partly undiscovered West. He saddled his horse, and with a few hundred dollars, which he had saved out of his earnings as school teacher, he headed for the Blue Ridge, as the mountains of North Carolina were and are familiarly called, and thence wended his way into the blue grass of Kentucky. Then, somehow, things drifted in the wind from the Northwest that there was a place on Lake Michigan, called Chicago, which had about five hundred inhabitants, and a great future. Young Grant took his chance with many other persons and headed for Chicago. There he obtained a license to practise law in January, 1834; and it is noteworthy that he had a fist fight over his first client. It is hard, perhaps, for the young lawyer to have to suffer corporal punishment for the sake of his client's cause, but the client is not likely to forget the fact or to scrutinize the bill too closely under such circumstances. Young Grant found ample proof of these truths in a short while, for we

JUDGE GRANT'S OLD RESIDENCE IN DAVENPORT
From a photograph taken in 1878

find him presently enjoying the fruits of a large clientage, and making and saving money.

The people of Davenport, Iowa, have reason to say that it is an ill wind that blows nobody good, for the lake winds at Chicago impaired our subject's health, and his physician advised him on that account to locate further west. We may say, therefore, with entire regard for the truth, that he was blown west to a site near the present city of Davenport, Iowa. He settled there on the 18th day of June, 1838. At that time the state of his health was so poor that he seriously contemplated spending the remainder of his years on a farm, and for that reason he bought a place on the river about twelve miles from the site of the present city of Davenport, and took up his residence there. At that time, Davenport proper was not in existence, but when the settlement commenced to grow up he moved into Davenport and continued to reside there for many years. Now, Iowa was not even a territory at that time, but it was created one five days later by an act of Congress; so it appears that young Grant exercised good judgment in locating at a place which would be securely within the protection of the laws of the United States government.

DR. WILLIAM WEST GRANT
of Denver, Col.

Nephew and protégé of Judge Grant, and the first surgeon to perform a successful operation for appendicitis, January 4, 1885

On the 8th day of January, 1839, he married his first wife, Sarah E. Hubbard of Massachusetts, but she unfortunately died in June, 1842. Then in January, 1844, he married Ada C. Hubbard, who had emigrated from Vermont to Scott county, Iowa, of which Davenport was the county seat. She, too, died about two and one-half years later, and then in the month of June, 1848, James Grant took unto himself a third wife, Elizabeth Brown Leonard, who was a native of Griswold, New London county, Connecticut, who proved to be in all respects a model helpmate, and survives her husband to this date, enjoying a green old age with her people in the West. Although a child was born of each the first and second marriages, neither of them survived the tender years.

We now have our subject firmly attached to the soil of Iowa, in which he was destined to spend his great energies, and to achieve lasting fame. It is well enough to take note of some of the essential qualities upon which he relied for success.

He was conscious, of course, of a strong capacity to see, understand and utilize the material things that were around and about him. His education had been thorough and he had been equipped in mind to make his calculations within the smallest fractions of exactness. He was prepared to do his life's work without much waste. He was trained to look at the essential and dispense with the non-essential thing. All of these elements of his mentality resulted in what Judge Dillon himself has characterized as "practical sagacity which amounted to genius." But by reason of his power of elimination and his conscious strength to perceive and utilize the essential thing, he was made bold to take hold of large problems. From first to last his mind was broad and daring.

HON. WHITAKER M. GRANT
of Oklahoma City, Okla.

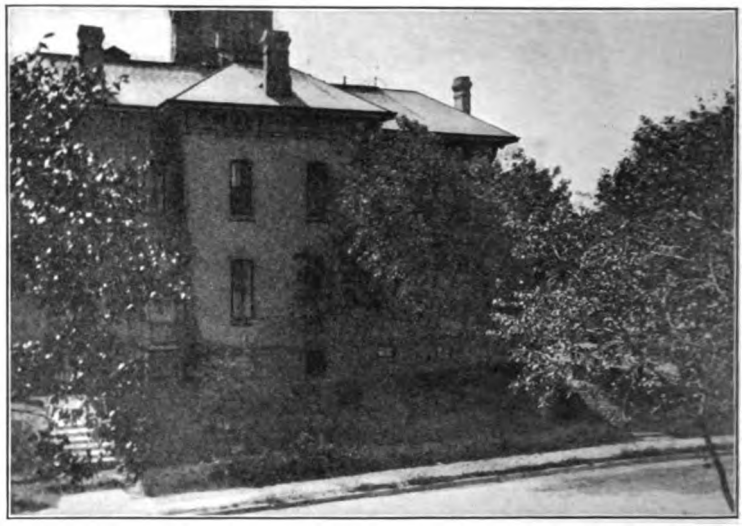
Sometime law partner of Judge Grant, and United States Attorney in Alaska 1885–1889, under Cleveland

We see him as a lad planning a university course, and as a youth the principal of a school in the capital of his native state, and as a young man just turned his majority a pilgrim on horseback on what he himself called a forty days' journey from Raleigh to Chicago by way of Kentucky. Afterwards a bold pioneer to the West taking up his residence on a farm near Davenport, but laying the foundations for the greatest legal career that any man ever achieved in that state.

It was part of his great plan of life to possess all the implements of his profession and to have them easily at hand. He seemed to realize the truth of Sharswood's maxim, that the lawyer's difficulty "is not so much to know the law as where to find it." Therefore he commenced to accumulate law books, and in the course of time possessed the largest and most satisfactory library in the state of Iowa. It was indeed the largest law library in the Northwest, and contained more than six thousand volumes, which were accumulated at an expense, since most of the volumes were extremely rare, of something like fifty thousand dollars. This library was offered to the practising attorneys of its owner's acquaintance, and many of them freely consulted his books when working up cases against him. Concerning this library, Judge Dillon relates the following interesting fact:—

When the legislature required a term of the Supreme Court of the state to be held

twice a year at Davenport, it was made a condition that it should be without cost to the state, a species of economy, by the way, which has nothing to recommend it. The better to accommodate the court and the bar, Judge Grant fitted up a room for the use of the court above his library, and set it apart for them for several years, neither receiving nor expecting compensation. The judges and bar of the state cannot but feel how much they are indebted to him for access to a library which was until recently the only one in the state at all complete.



JUDGE GRANT'S LATER RESIDENCE IN DAVENPORT

He was a great and a systematic worker. It was his habit to rise early, sometimes as early as four o'clock, and he was often found by members of his household delving into books by candle light. The wonder is that he had time to study so many things and become thorough in them. It is surely a great task for any man to master the profession of law, but he became, as we shall presently see, a master of railroading and mining and smelting also. He was not an experimenter in anything, but he was a schooled and graduated expert in law, metallurgy and railroading.

One would think that his time was all devoted to work, but it was not so. Under the roof of his Davenport home, after the war, he had a household such as has seldom been seen in this or any other country. The following account of it was given by his nephew, Hon. Whitaker M. Grant: "When I went to his house in 1868, the family consisted of himself and wife, his mother-in-law, three of his wife's nephews and nieces, and two of his own; I made three. Within a year he had three more of his own and one of his wife's, and besides these he had three more of his own off at school, who some part of that time were at the house." All of these nephews and nieces were under age, and the eldest was seventeen. Judge Grant had surely assumed a great task in undertaking to care for and educate these children. He had, to be exact, twenty-four nephews and nieces in the South, and his offer was to each and every one of them that he would transplant them at his own expense and provide for them amply if they would emigrate to the West. Twelve of them accepted his offer. He was not a rich man at that time, and his fortune did not exceed seventy-five thousand dollars when he undertook this prodigious work of kinship and humanity. He threw himself, however with his accustomed zeal and thoroughness into the duties of *pater familias* for all his nephews and nieces who had accepted his offer to come to

the golden West and grow up with it. He laid down certain hard and fast rules by which they were to be governed, and he would tolerate no departure from those rules. One of those rules was that the children were all to be in bed at ten o'clock at night; another more important one was that they were to render an account to him of the expenditures of all the money he advanced to them. He had no patience with deception or duplicity of any kind. It is highly profitable to note that his demand upon himself was for the truth on all occasions, enabling him to become an expert in detecting an error or falsehood in other people. That is one of the secrets of a great lawyer.

It was one of his ideas in hygiene that fruit should not be eaten after nightfall, and therefore he commanded the occupants of his household to observe this rule. The idea provoked a great deal of merriment among the youngsters, who thereupon took delight in concealing apples in their beds and eating them immediately before going to sleep. On one occasion, the Judge had his suspicions aroused that his orders were not being obeyed in this particular, and he unexpectedly burst into the room where several of the children were about to go to sleep. They gasped at his appearance and tried to conceal among the bedclothes the apples they were eating. They were fairly caught, but the Judge suppressed a broad grin, and left the room immediately, saying, "I advise you to keep the rest of them until breakfast."

In all essential things he was adamant; in things desirable but not vital he had the softness and sweetness of a rose.

He was always fond of horses and chickens. He had high-bred horses and game chickens about him. He was for a number of years president of the American Trotting Association. It would be unfair to conceal the fact that he took great delight in seeing game cocks fight, and he personally pitted his game birds against those of any of his neighbors who might wish to challenge him. He undoubtedly drew his fondness for this sport from the South, where it was formerly a favorite pastime among men generally.

It is both useful and highly interesting to consider more minutely the relationship between Judge Grant and his nephew, James B. Grant. The Governor would not himself admit any favoritism, and doubtless none was intended, but circumstances created it, and perhaps the secret of it lay in the fact primarily that the nephew's name was James. From the time of George II there had been at least one James in the family.

When young James B. Grant reached Davenport and consulted his uncle, he found no disposition to select a career for him, or to hamper him in whatever career he might select for himself. Judge Grant told him that if he wished to become a lawyer he would help him to that end to the exent of his ability; but the young man did not like this profession, for the reason, given by him, that he had not a classical education. The upshot of it was that he chose the profession of civil and mining engineer and went to Cornell for that reason, where he was graduated in 1875; he then went to Freiburg, Germany, for two years, returning by way of Australia and New Zealand and San Francisco, which was a long journey in those days. His education at home and abroad had cost his uncle about eight thousand dollars.

One would think that the Judge might well have left his nephew to shift for himself at this point, but it was not so. Not a great while after the young man

returned from Germany, but after he had essayed some independent work of his own selection, his uncle voluntarily loaned him five thousand dollars with which he advised him to buy a mining property in Colorado. This the young man did and received two thousand more with which to open the mine. Then he found to his chagrin that he had opened only a hole in the ground; that all of his engineering and mining skill, acquired at so great an expense, had gone for nothing. He had lost his uncle's money and had made a dismal failure of life.

It did not seem so to his uncle. The judge promptly sent for the nephew, and his wife wrote an affectionate letter telling him not to bother about the lost money, that it was not a great amount, and that the Judge would not worry over it. When young Grant came to the presence of his uncle he was amazed to hear the older man say that he had expected the loss of the money and was rather glad of it because it would help to develop the bump of caution on his nephew's head. He then informed his nephew that he had planned to give each of his nephews and nieces the amount of twenty thousand dollars by will, but that he would give the share set apart for James B. Grant to him at that time, if the nephew would accept it, and go in partnership with him and build a smelter at Leadville to cost not less than forty thousand dollars. Judge Grant proposed to put up the other twenty thousand dollars himself. This proposition so astounded the young man that he thought he had better have a few days in which to consider it, and at the expiration of that time, he went back and told his uncle that he felt he could not accept the offer, that if it was all the same he would wait until his uncle's death for the money that was coming to him. At this, the Judge laughed heartily, and said he would not be done out of his project to utilize the highly educated talents of his nephew in work with himself. He therefore submitted another proposition which was to the effect that he himself would supply all the capital and take all the risk, and that young Grant must go out and build the smelter and operate it, and if it should become profitable the two would become partners upon certain terms which were made by the originator and proposer of this daring enterprise. As the result of this last proposal on the part of Judge Grant, the young man went to Leadville, which was then in the beginning of its renown as a mining centre, and bought a property which proved highly profitable. This was in the year 1877. During ninety days of operation of the smelter, in 1878, they made a profit of thirty thousand dollars, and in one month of 1879 they made thirty thousand dollars, and in 1880, after fifteen months and seven days they had three hundred and sixty thousand dollars profits. The judge got back his advancements with eighty thousand dollars profits, having made the most liberal allowance to his nephew for producing these splendid results.

Judge Grant then became very much interested in mining enterprises and had at one time about half a million dollars invested in these properties.

An extraordinary circumstance in his life was that when he was past the age of sixty years he went to the Boston Institute of Technology and took a course in metallurgy, placing himself on an equal footing with the other students and reciting with them. This required, of course, several months. Afterwards, when one of his friends inquired why he did this extraordinary thing, he stated

that in the course of his dealings with his nephew, James B. Grant, while they were operating a smelting property at or near Leadville, that gentleman politely informed him that he knew little or nothing about that business and that it would be to their joint interests if he would return to Davenport and devote himself to his chosen occupation of practising law. He said he could not stand to have any nephew of his say that he did not know all about any business in which he was engaged. We may be quite sure that thereafter he was not afraid to talk about minerals with his expert partner, who bore diplomas from Cornell and Freiburg.

Perhaps the reader will infer that this course of conduct towards James B. Grant was exceptional, but it was not. It was characteristic of Judge Grant. He never made any small plans. He never did anything by halves. He was all for his work and for the project in hand. Like a mariner who knew his port and was confident of his craft, he feared no sea or weather, but rather enjoyed the uncertainty of the deep and an occasional tempest.

Further evidence of his daring is seen in the fact that on one occasion he proposed to two of his nephews, young James B. Grant and William Keiser, that he would equip them with a letter of credit for fifty thousand dollars if they would go down to Texas, buy three thousand head of cattle and drive them over the country to the Chicago market. This was in 1871. The boys reluctantly accepted the proposition, got on their horses and rode twelve hundred miles through woods, over plains and across the lands of many Indian tribes to the cattle country, but there the project came to an end. They found the cattle, but concluded not to buy because the journey overland homeward, with such a large herd, would be hazardous, in view of the uncertain reputation of the Indians who had to be encountered *en route*. They therefore returned and delivered to the Judge his large amount of money, receiving a smiling look but no reproof for their failure to bring the cattle.

This was the real man, always able and anxious to take a hand, always blazing his own paths and always turning from the disappointment of one task to find another and a bigger one.

It is not profitable to dwell at length upon the offices which he held, for they were only surface indications of the real career of the man, but we may make brief mention of some of them. While he lived in Chicago he was appointed by Gov. Joseph Duncan prosecuting attorney for the sixth district of Illinois, an office from which he resigned in 1836 to give more particular attention to his home practice. He rode this circuit on horseback and covered about three thousand miles a year. In 1841, after he had removed to Iowa, he was elected a member of the House of Representatives of the Fourth Iowa Territorial Legislative Assembly, and in 1844 he was elected delegate for Scott county to the first constitutional convention, and in 1864 he was the sole representative of that county to the second constitutional convention of the territory, and it is hardly necessary to say that in both conventions he rendered noteworthy services. He was appointed by Gov. Chambers of Iowa, against his protest, prosecuting attorney, and in the year 1847, after the adoption of the Constitution under which Iowa was admitted into the Union, he was elected a judge of the District Court of Iowa and served during his term of five years, declining a re-election. His last appearance upon the stage of life as a legislator was in

1852, when he was Speaker of the Iowa Legislature. He had now tasted all the sweets of official position, and being full of the expanding energy of his day and generation, and realizing the great demands of the time in the great West, he set himself to do a much greater and more enduring work as a man. He returned to the practice of his profession, giving special attention to railroad cases. He also became personally and financially interested in railroad enterprises, and was the first President of the Chicago and Rock Island Railroad Company.

From that date, during some twenty odd years, he devoted himself with unremitting energy to his professional and business matters, and had at one time the largest practice of any man in the United States, perhaps, before the Supreme Court at Washington. He made at one time in a railroad case a fee exceeding one hundred thousand dollars.

No record of Judge Grant's career would be reliable or honest which did not take account of some of the infirmities of his character. The very celerity of his mental operations made him sometimes intolerant of dullness or sloth in others. He was full of wise saws and sayings and tried to confine his life to them, but temptation often beset him. One of his main maxims was that "civility and politeness cost nothing, and pass current in all the markets of the world," which he often quoted in his office and at home. Another one of his firm beliefs was that cheerfulness and good humor should always go with a good appetite to the family table. He insisted that there should be good humor and merriment always in his family at meal times. Nevertheless, he could not always control his temper, and on one occasion, when his nephew, Whit. M. Grant, was found by him having a hot altercation with a man, he called the young man aside after the affair was over and said, "Son, a soft answer turneth away wrath. You should not have scolded that man, but let him think he was having his own way." A few days after that, the man with whom the nephew had had the altercation came back and had an angry dispute with the Judge about the same subject-matter. Judge Grant lost his temper completely and knocked him down, whereupon, the nephew, who could not resist the temptation to have a laugh at his uncle's expense, approached him and said, "Uncle, why didn't you try the soft answer on him?" The Judge immediately regained his composure and laughed, saying, "Yes, yes, I should have done so." He was a constant reader of the Bible, and often quoted it, but like most other men he was not quite able always to live up to its precepts.

We find him now, after the lapse of fifty years from his matriculation, at the University of North Carolina, returning to deliver an address to the Alumni at Chapel Hill on the 6th day of June, 1878. Here, surely, we shall find some outcroppings of that secret man who had been planning and achieving so much in all those years. "The motions of his spirit" must necessarily be felt somewhere in this notable address, which he delivered in the maturity of his powers to the alumni of the university at which he received his most effectual training for his life's work, and before a large gathering of graduates, some of whom had been in his class of the year 1831.

Accordingly, we find that he retained a strong affection for the people and institution of his native state, and that he did not undervalue the work of the

university which had drilled into his mind and heart the principles upon which he had built the edifice of his life's work. Said he:—

> In all my wanderings, the old North State has never lost its place in my memory or affections. To me, in the full maturity of manhood's days, in the enjoyment of the recollections of a long life, there is always a well-spring of happiness in the memories of the past which cluster around the humble home of childhood's hours; and I rejoice that the poverty-stricken boyhood, which stimulated me to go to the other, and, as I think, a better land, was passed in the pine-barrens of your sea coast, and that the sturdy manhood, the independent spirit, the indomitable will to succeed, were all made a part of my existence in the quiet shades of these college grounds.

That surely is a noble appreciation of life, worthy of remembrance by every youth who bears the name of an American.

His address discloses the most thorough and complete understanding of the progress of the world in his day and time, and particularly of the development of steam power, including the origin and growth of railroads, which was a particular pet of his mind. He thought, of course, that his half century of active life had been in the golden age of the world, since it had seen the progress of railroading from the time of a protest to Parliament against the passage of an act which would permit a train, with passengers, to travel more than twelve miles an hour, to the operation of trains between New York and San Francisco within six days, and giving to travelers the comforts of sleeping accommodations *en route*.

Let us hear him a moment on this subject:—

> The first railway for the carriage of passengers was the Stockton and Darlington, thirty-seven miles long, built in 1825. The carriages were drawn by horses. At this period the only improved means over the common highway of intercourse between different marts on land were canals, which in the northern part of the temperate zone were, like the rivers, frozen over for one-half of the year. The business was so badly conducted that the transport of a bale of cotton from Liverpool to Manchester is said to have occupied as long a time as that required for an ordinary voyage across the Atlantic in sailing vessels. All the commerce between the Atlantic and Ohio was by wagons.
>
> Mankind, even in the face of all our progress, is slow to adopt anything new. The fate of Fulton is not peculiar. Howe, the sewing machine man, long after his invention was in practical use, was thought to be a cracked-brain enthusiast. The canal interests in Britain had such influence in Parliament as to delay for years the passage of a bill to construct a railroad from Liverpool to Manchester. The act was passed in 1828. The line, when begun, was to be used to convey goods, and the wagons to be drawn by horses. When the proposal was made and a prize offered to induce the use of steam power, an eminent authority, in a serious treatise on the subject, "hoped he might not be confounded with those enthusiasts who maintained the possibility of carriages being driven on a railway at such a speed as twelve miles an hour."

It is noteworthy that there is no mention of dining cars, wireless telegraphy, phonographs, typewriters, telephones, dirigible balloons, aeroplanes, radium, electric lights, or other modern contrivances in this address, which reviews with so much satisfaction the achievements of the half century between 1828 and 1878. None of them was known at that time. It is a wise man who perceives that the coming age will outdo his own. Nevertheless, it is well for each age to appreciate its own achievements. Judge Grant was not overestimating the world's achievements of his day and generation. That he knew and appreciated those achievements, whether in science, art, or in practical matters, is fully manifested in this address from which we have been quoting.

But is there not somewhere among his spoken words on this the most notable occasion in his life some suggestion of that innermost motive of his life, which impelled him to utilize all the gifts and advantages with which it pleased Providence to surround him for the benefit of his fellowmen? Yes, and it is a brief but convincing passage. We find it at the close of the address:—

> Brothers Alumni! What part have we acted in this grand drama of human life, during this period of progress in the world, in which we could not, if we would, have been merely spectators? Have we so lived in the service of mankind to be a guardian god below? Have we employed the mind's brave ardor in heroic aims, such as might raise us over the common herd and make us shine forever? That is life.

That surely is a great and noble concept of the plan of creation and of life. In the Heavens one God, and on earth every man, according to his power and his volition and habit, a guardian god of his less capable and less achieving brethren.

It behooves us now to trace his career down to its close, and we shall find that even to his last hour he exemplified the best characteristics of human nature. In the year 1880, realizing the commencement of the decline of his powers, he went to California and invested considerably in mining and agricultural properties in that state. He took up his residence near Fresno. He devoted much time to the cultivation of fruits, and was particularly anxious to set an example to the rural population in the cultivation of the soil. He was born on a farm, he had lived while in active practice much of the time on a farm, and now he retired to a farm for the end of his career.

He and his wife were now removed far from the scene of their most active days, but they were by no means idle. Their home was so much less frequented by visitors, however, that on one occasion when James B. Grant, his nephew, now ex-Governor of Colorado, was on a visit to them, he inquired of his uncle whether he did not feel lonely in his remote surroundings. To this the Judge replied with a smile on his face, "No, I am not, I want you to understand that I am good company for myself."

We may believe that he was, since it was his habit to read the great plays of Shakspere two or three times a year, and it was a delight of his life, even to the end of it, to pore over the familiar pages of Virgil and Cicero, which he knew almost by heart, so much so that he had the reputation in certain quarters of talking Latin. It is said on good authority that his warm attachment for Senator Wade Hampton of South Carolina, and also for Senator Matt. Whitaker Ransom of North Carolina, to whom Judge Grant was a first cousin, was based largely upon the fact that they were so much at home in Latin. This was doubtless an exaggeration, but the fact remains that each of these men was a highly proficient classical scholar.

Of course, Judge Grant was never lonely, since he was ever in mental and spiritual communication with the greatest and best men in the world's history. He possessed in a large measure the "King's Treasuries," which John Ruskin has so beautifully described.

Now, at last, we see him in his seventy-eighth year stricken and abed in his California home, now at Oakland, conscious of his impending dissolution. His good wife, realizing his condition and knowing the desire of his heart, sends messages to his favorite nephews to come quickly if they desire to see their uncle again before his death. A tinge of romance is given to the picture when we see ex-Gov. Grant alone re-

sponding in time; the others arrived too late. He speeds from Denver to that distant California home and finds the aged jurist and man of affairs far spent and about to depart for that undiscovered country from which "no traveler e'er returns."

He arrived on Saturday and spent most of the next ensuing forty-eight hours near the bedside of the dying uncle. He was anxious to know whether that uncle would say anything on the subject which had been always avoided by him, his religious convictions, but not once did the mind of his uncle give forth a word thereon. That he was a man of deep religious convictions there is no doubt, but the privilege he yielded to others he exercised himself, to worship God in his own way. The following passage from an address which he delivered before the Scott County Pioneer Settlers Association at Davenport on June 9, 1872, sufficiently attests that fact:—

> We organized society in the desert. We who survive enjoy civilization in its highest form and whatever is found to be most useful in the arts. Whatever of happiness there is in morality and in intelligence, in the school and church, in education and refinement, in constant and easy intercourse with our fellows, in confidence and cheap transit of trade, and sale of products of labor, in the telegraph and printing press—is ours to-day and to the end of our lives.
>
> Most of the old settlers of this country survived the privations, the wants, the perils and poverty of frontier life. They endured most suffering from 1833 to 1834, but they lived to greet the dawn of a better day for themselves. They saw the bright sunshine of the rosy fleeced morn of prosperity, and lived to feel its meridian splendor on themselves and their families.
>
> Surely goodness and mercy attended them all their days and they shall dwell in the House of the Lord forever.

Now, he himself was ready to join the pioneers who had gone before.

His ship had sailed what time it might the inland seas of life, and now it was putting out again for the shining port across the immeasurable deep. The captain was not afraid. From his character and career, we may well believe that he held the sentiment of Tennyson's lines:—

> Sunset and evening star,
> And one clear call for me!
> And may there be no moaning of the bar,
> When I put out to sea.

Accordingly, in the twilight of the next Monday evening, while the nephew was sitting by the bedside, the uncle alluded to the fact that he was growing weaker. Then the nephew said: "I trust not, uncle. I hope you will take a turn for the better and soon be up and in good health."

"No, son," said Judge Grant, "I am dying," and with that, he extended his right hand, placed it in a friendly clasp upon the hand of his nephew, and quietly passed away March 14, 1891.

He had been abashed, like Lincoln, by the multitude of creeds and formulas with which men had been pleased to hedge about the Deity, and realizing the sacredness of the relationship between man and his Creator, and the sanctity of life itself, he had gone about the doing of the work which he was sent to do with a hearty good will, and having achieved it, he went to his rest without any misgivings, and happily, without any apparent suffering.

By his will he left a fortune amounting to more than six hundred thousand dollars to be divided between his wife, his nephews and nieces. He had lived an open-handed life, moreover, giving freely to all that asked of him, and including a handsome donation to his Alma Mater.

Thus was begun and continued and ended the life of James Grant, a model American.

The Lawyers' Court of Compulsory Arbitration

THE new Lawyers' Court of Compulsory Arbitration of Allegheny county (Pittsburgh), Pa., seems to be working to the satisfaction of the Allegheny County Bar Association. A committee of the Association reported October 1 that the new Court had saved the work of the judges and of the Common Pleas Courts in cases tried and settled without appeals. It had also had a deterrent effect upon unmeritorious litigation.

Between June 23 of this year, when the first set of arbitrators was appointed, and September 30, eighty-three cases had been docketed, forty-nine of which were tried, twelve settled, four abandoned and eighteen pending. One hundred and thirty-four attorneys practised before the Court. Of all the cases tried appeals were taken in less than one-quarter, a percentage of twenty-three.

The procedure in this court is marked by simplicity. Counsel waits until the cause is regularly at issue in the Common Pleas, by the filing of the plea when necessary, and is entered in the issue docket. This prevents loss of time in case an ordinary trial in the Common Pleas is subsequently made necessary by an appeal from the decision of the Lawyers' Court, as the case retains its place on the issue docket.

Counsel for either party can refer the case to the Lawyers' Court by getting from the Prothonotary, on payment of a nominal fee, a rule to choose arbitrators. The rule must be served on opposing counsel or party at least fifteen days before the date fixed for the selection of arbitrators. The Prothonotary will fix any date counsel suggests if it is within thirty days after the rule is issued. If opposing counsel declines to accept service, which has been rare, proof of service is by affidavit of the party who made the service.

At the time fixed for choosing arbitrators counsel who took out the rule must attend. Usually counsel for both parties have been ready to leave the nomination of arbitrators in the hands of the Prothonotary, who chooses them from the official list. But under certain conditions some person other than Official Arbitrators can be named, so long as there are at least two Official Arbitrators in the case.

The Prothonotary then issues the rule to refer, which fixes the time and place for the first meeting of the arbitrators, which must be held in not less than ten nor more than twenty days. At that time the arbitrators must meet and be sworn; failing in this their award will be void. It has been found in practice that at least two of the Official Arbitrators attend, and that counsel indorse an agreement to proceed before the two if the third is absent. The Official Arbitrators then try the same case in exactly the same manner as it would proceed before a judge and jury.

The Official Arbitrators usually announce their awards within a few minutes after the trial. They may, however, adjourn the case; if they do not, their award must be filed within seven days.

Either party may appeal from an award within twenty days, and this he does by making affidavit that the appeal is not taken for the purpose of delay, and so on, by paying costs accrued to that time, including witness and arbitration fees, and by giving bail for future costs. If no appeal is perfected within the twenty days exception may issue as on any other judgment.

The probability is that the practice in the Lawyers' Court will be strengthened considerably by the adoption of additional rules for which the more earnest advocates of the court are working. One of these proposed rules is so framed as to allow litigants to have questions of law certified by the Official Arbitrators, so that such questions of law can be passed upon by the Common Pleas without re-trying questions of fact.

Some doubts are likely to be thrown on the Lawyers' Court of Compulsory Arbitration as possibly interfering with the right of trial by jury in civil cases, and as improperly restricting appeals. J. McF. Carpenter of Pittsburgh has prepared a brief and argument for the committee of the Allegheny County Bar Association, in which he quotes from high authorities to show that the purposes of the Lawyers' Court are legal and laudable. He urges that the Official Arbitrators also be clothed with power to hear

suits in equity, except applications for injunctions and arguments on demurrers, and also with power to act as masters in divorce proceedings. "The law should be so framed," he declares, "as not to interfere with any powers the courts now exercise, but merely to provide assistance in the administration of justice."

The Assignment of Prominent Lawyers to Criminal Cases

FOLLOWING a custom adopted recently in the New York General Sessions of assigning prominent lawyers to defend prisoners charged with murder, too poor to employ counsel for themselves, Judge Malone on Sept. 24 called upon William B. Hornblower, De Lancey Nicoll, and Samuel Untermyer to conduct the defense in three murder cases.

A meeting of judges had been called and letters were sent to many of the most able lawyers in the city, asking them if they would be willing occasionally to take criminal cases on assignment. A goodly number volunteered and a list was drawn up of about one hundred and twenty-five lawyers on whom the judges could call.

Samuel Untermyer, who was assigned to defend an Italian woman charged with killing her husband, commended the Judge for this action, and said he would accept the assignment:—

> I shall certainly accept the assignment. I can conceive of no higher or more important professional duty, and it never occurred to me for a moment to try to evade it. It is a mistake to suppose that the busy men of the bar are so absorbed in the defense of private interests that they have become callous to their sworn duty as lawyers.

"Such talk from a man who can and does command very large fees," says the *Hartford Courant*, "is wholesome and may be expected to be helpful in bringing about a better state of affairs. It has long been notorious that rich men accused of crime could keep their cases before the courts for a long time. That many poor men, especially in the great cities, like New York and Chicago, were convicted after trials in which their rights were inadequately defended has been evident to those who have given the matter serious thought."

The *New York Press* takes a more cynical view of "the generosity of these gentlemen in assuming a professional obligation they might have gone on shirking," and adds:—

> "We think it only fair that the poor culprit should have as good a chance to beat the law as the wealthy one. If the able attorneys who take up the fight for obscure and friendless murderers will exhaust their ingenuity in the raising of technicalities and the fighting of appeals, they will sacrifice many thousands of dollars they might be earning in fees from litigious clients able to pay handsomely."

Mr. Untermeyer also said:—

> If the criminal bar of this city is in a shocking condition we lawyers are to blame. It is only with us, and principally in New York City, that the flower of the bar has been drawn away from the higher sphere of advocacy by the temptation of money, to become highly paid clerks to financiers and too often to assist them in keeping prayerfully within the law. As soon as we realize that the defense of life, liberty and reputation is more important to the community than the mere championship of money interests, there will be a change for the better. In every civilized country except our own the leaders of the bar are proud to be selected to defend life, liberty and reputation, while, strange to say, it has grown to be almost a reproach in this city to find a man engaged in the practice of criminal law, however upright and able he may be. As a result we are to-day, of all the great cities of the world, without a recognized leader at the criminal bar. What a contrast to the days when men like Hamilton, Webster, Beach and Fullerton were proud of the distinction!

"What is true of New York," comments the *Baltimore News*, "is largely true in almost every large city in the North and, to a less degree, in the South. There is not so wide and inviting a field in civil practice in the South as in the North, while, on the other hand, there are more criminal cases. The eloquence of leaders of the bar in the South who made their reputation in the conduct of criminal cases still lingers in the ears of Southerners." The ambition to imitate their example "has not yet entirely died out, consequently the criminal bar of the South is not generally subject" to the above reproach.

A Letter on the Improvement of Procedure

By Hon. William L. Putnam

Judge of the United States Circuit Court for the First Circuit

To the Editor of The Green Bag:—

I THANK you for publishing in your September number sufficient extracts from what I have written in reference to the improvement of legal procedure to illustrate what I regard as the fact, that the improvement is to be brought about by vigilance at every point, and not as the result of any special fad which is expected to give universal and perpetual relief. It may also well be said that any sweeping comparison between procedure in England and procedure here, which puts our courts generally at a disadvantage, is far from justifiable. The English courts have certain habits which would not be tolerated in this country; and, moreover, some are now becoming choked with business, so much so as to cause great complaint. Parliament has also been compelled by a sense of justice to give in criminal cases a universal right of appeal, which theretofore depended on the discretion of the Attorney-General, a fact which has done as much as any other fact to expedite criminal proceedings, and a fact as to which the late adoption of the universal appeal approved the practice prevailing so largely by statute in the United States.

You begin your extract with quotations to the effect that, like one principal cause of disaster with steam railroad trains, one principal cause of disaster in the courts is the matter of getting behind time without due reason therefor. This comes from an easy disposition on the part alike of the courts and of the profession. It does not appear to have been of modern growth. It is so full of mischiefs that the causes for delay which are recognized usually as sufficient are exceedingly numerous, while the judge who refuses to delay when requested by plaintiff and defendant alike would be regarded as harsh, and indeed as tyrannical. On the other hand, delays of the character I refer to are rarely admitted in the English courts. By a recognized practice which has almost the force of law, both senior and junior counsel are usually retained. The junior counsel are sometimes regarded as understudies, and so required to go on with the case even when the senior has some conflicting engagement of the character which generally permits a delay or a continuance with us. Of course, the standard penalty of £10, with sometimes full costs in addition, which the English courts have imposed on dilatoriness, has taught solicitors to fight shy of that carking evil; yet an improvement here of a thorough kind would very much advantage our own legal procedure.

The President, in his address at Chicago, animadverted severely alike on the legal profession and on the courts. He said of the legal profession that too many lawyers "had been prone to think that litigants were made for the purpose of furnishing business to courts and lawyers"; and he added: "More than this, I am bound to say that in the matter of reducing the cost of litigation, and indeed the time of it, Congress and the federal courts have not set a good example." Against such observations it is sufficient to appeal to the bound volumes of the reports of the proceedings of the American Bar Association since the day of its organization. However, I am not touching upon this for the purpose of making an issue on these observations. I am merely noticing it in the way of leading up to illustrations of what I have just now in mind.

In the spring you were good enough to ask me to express to you my views in reference to the general topic of legal procedure. I have not been able to find the opportunity for accomplishing this; but I have from time to time been making investigations for the purpose of illustrating from concrete and practical examples the causes of the more serious grounds of complaint with reference to the present topic. This investigation I never have been able to complete; but at every point I am turned back to what you have quoted from me, namely, that there are existing evils, as there always are in all human matters, which can be remedied, and "that there will be new evils springing up in lieu of those now existing unless vigilance is constantly exercised in all directions."

A very striking example of the second proposition is found in the Criminal Code just

enacted by Congress after several years of consideration, and approved by the President, notwithstanding his observations at Chicago. At the common law in England, all crimes involving the penalty of life with confiscation of estates, and perhaps some others, were known as felonies. Statutory crimes and minor offenses were known as misdemeanors. As all offenses which can be prosecuted in the federal courts are wholly statutory, and as the common law forfeitures of estates are prohibited by the Constitution, and the offenses punished by death are very few, and as the Constitution makes no general distinction between felonies and misdemeanors, but only with reference to "high crimes and misdemeanors," there was no occasion for any extensive provisions in the federal statutes as to felonies. It is true the Constitution uses the word felony with regard to the privileges of members of Congress; but this is in an incidental manner, and perhaps only with reference to the laws of the various states. It also uses the word with reference to interstate extradition; but there it clearly has relation to state laws only. Nevertheless, Congress long since provided that, on the trial of a capital offense, a prisoner should be entitled to twenty peremptory challenges; "on the trial of any other felony" to ten; in all other cases, of course including misdemeanors, to only three. Whatever might have been the attitude of the federal courts aside from this, it became necessary, in view of this, that they should ascertain what are felonies within the meaning of this statutory provision. Of course, they fell back upon the common law definitions; but even this left the great majority of offenses which are triable in the federal courts to be regarded as mere misdemeanors, as to which the number of peremptory challenges is only three. Not only on account of the increased number of such challenges, but for other reasons, offenses which have been, or may be, determined to be felonies within the meaning of the statutes of the United States, are accompanied with greater difficulties in procedure than misdemeanors. Nevertheless, the new code has classed all offenses against the federal laws punishable by more than a year's imprisonment as felonies, thus, by a single sweep, creating, as will be found, more embarrassments for the federal courts, and greater possibilities of failure, than come from almost any other statute of a general character passed by Congress.

In connection with this provision of the new code, there is a curious incongruity in its re-enactment of section 5390 of the Revised Statutes; but I have no occasion in this communication to observe on this fact, except to express my gratification that it is not chargeable to the courts.

The President drops into strengthening an erroneous impression which exists to a certain extent, when he says: "We must make it so that the poor man will have as nearly as possible the same opportunity in litigating as the rich man; and, under present conditions, ashamed as we may be of it, this is not the fact." It seems to me impossible that any careful observer of the ordinary course of litigation should hold an opinion of this kind. By and large in the courts the poor man has the advantage of the rich man, especially of rich corporations. This comes from the human tendency which underlies the courts, and was well exhibited by Lord Eldon when he said that a plaintiff suing *in forma pauperis*, who had applied for a rehearing, had already been given five rehearings, but that, as he was a poor man, he would give him another. In view of this impression what becomes of the alleged failure in criminal proceedings? The prosecutor, that is, the United States or the state, has all the wealth of the entire people behind it; and yet, according to a too common impression, it is always at a great disadvantage. Whatever disadvantages there are come plainly from the people themselves, and in no way from the existing judicial system. One of the evils in this direction is emphatically pointed out by the President, when he says that the popular expression in many sections refuses the judges sufficient power in the trial of questions of fact; in which sections he might have included the conservative state of Maine.

A more serious difficulty is that the people might make judicial positions sufficiently attractive in all respects to induce the leaders of the bar to be always ready to accept them, as they always are in England, where the judges, with reference to fully two-thirds of the reported cases, decide them on the spot, and decide them intelligently and with sufficient citation of authorities, although, of course, not always absolutely correctly. The people might, also, which they are very far from doing, employ to protect their interests the best legal talent of the locality involved. The people might also refrain from breaking up into fragments the active power of prosecuting criminals, by refraining from dividing

it} among an innumerable number of the weakest kind of centres by establishing an innumerable number of petty counties. Other illustrations might be given of what the people might do, but this is enough for my present purpose.

The President suggests that there are two provisions which might be made for the relief of the poor man. One is by limiting the number of appeals; the other is by reducing the cost of litigation. As to the former, until the act establishing the United States Courts of Appeals in 1891, every civil appeal required that a considerable pecuniary amount should be at stake; and there were no appeals in criminal cases unless by accident, or by a certain moulding of judicial proceedings which the Supreme Court had more than once reproved, when two judges sat and disagreed. All this was wiped out in the Court of Appeals Act, framed by such eminent and experienced lawyers as Senator Evarts, Senator Edmunds and Senator Hoar, which gives a universal appeal in both civil and criminal matters, and which has lately been followed by legislation in England in criminal matters, as already said. Not only was this the mature judgment of the eminent Senators and jurists we have named, but of the mass of the people who had given the matter any attention.

On the other hand, the reduction of costs inevitably tends to increase the number of appeals. Perhaps more than by anything else appeals have been shut out in England by the enormous bills of costs involved, in connection with the fact that the barrister or the proctor is a *quasi*-judicial officer of the court. I have in mind a case of a collision on the ocean, with reference to which I was general counsel, and in a general way guiding the litigation in behalf of one of the colliding ships. Sir Robert Phillimore, one of the most eminent of the admiralty judges in England, awarded against our ship the equivalent of about $70,000. His tribunal was of the first instance. In this country, as the matter then stood, we would have undoubtedly appealed to the Circuit Court, and, if beaten there, again to the Supreme Court. The same lawyers who were the proctors would have been the solicitors enlisted in behalf of their clients. They would have said: "Oh, let us take our chances; the costs are small!" On the other hand, in England the costs taxed included retainers for both senior and junior counsel, as well as refreshers, the latter being from five to ten guineas for every day after the first judicial day of five hours; and the bill of costs paid by our ship taxed in the admiralty court was many times larger than the corresponding bill of costs would have been in the United States. The question of appeal was submitted to the judgment of the senior counsel, who said only that he felt strongly that the decision was erroneous, but that it was difficult to reverse Sir Robert Phillimore; and he added, "the costs of appeal would be so large!" Of course the litigation stopped.

In my investigations to which I have referred, I developed fully what I had before seen, that it would be a serious obstacle in the way of the courts, and perhaps choke some of them entirely, if in civil and criminal cases, or in either, the appellate tribunal was to revise the entire record, and determine whether or not the total result of the proceedings below had worked injustice. The American Bar Association and many other Associations have suggested amendments to the law in this direction. The broadest provision of this character is in the late English Criminal Appeals Act to which I have referred. Of course, in view af the rigid provisions of the Constitution of the United States with reference to the right of trial by jury, not much apprehension in respect to the federal courts in this behalf need trouble us; and the same is true as to states where like constitutional provisions exist. Nevertheless, while the use of stenographers in the courts has doubtless facilitated trials in criminal cases, and in civil cases where proofs are taken orally, yet their use has introduced a new element which the courts have not yet been able to control. In the first place, it has increased enormously the mass of testimony in equity suits, and wherever else the case is heard on the record; and it has also become a new source of delay in litigation. While it has wiped out any occasion for the frequent former suspicion that some judges were inclined to trim bills of exceptions in cases tried by themselves, it too frequently induces the bringing up to the appellate court of the entire notes of the stenographer. There are not at the present time sufficient skilled stenographers to meet the requirements of the courts, and there is no ground of present expectation that this difficulty will soon be remedied. Stenographers suited for that purpose require a high degree of education and training, and are everywhere overworked. I have now in hand a case tried in May, where the parties insist

on bringing up the entire record, so that even to the present time it has been practically impossible to complete the bill of exceptions. Other cases illustrate this difficulty in a more marked manner. I found one indictment on which the trial commenced on September 23, and ended on October 3, 1902. The entire record came up, and the stenographer's notes were so voluminous that, principally on account of the delay in taking them off, the bill of exceptions was not filed until October 17, 1903. I found another indictment where the trial occupied about two months, ending March 19, 1903. A motion for a new trial intervened; but the record was so voluminous that, largely, if not principally for the same reason, the bill of exceptions was delayed until August 10, 1906. The stenographer's notes covered practically four thousand pages of typewritten matter. Each was in a court which moved ordinarily with promptness, and yet each was a case of "getting behind." On the other hand, by the provisions of the Criminal Appeals Act in England, these cases would probably have gone up on the judge's notes, and would have been brief affairs compared with such stenographers' notes as I have referred to, and such as may be found in many cases. Consider what would be the progress of appeals if the propositions to revise the entire record and reach a general conclusion thereon, to which we have referred, were adopted, so that the trial courts were always, or generally, required to await voluminous stenographers' notes before certifying up the case! While this class of legislation may be practical and welcome in England for the reasons we have shown, the advantage of its adoption here would be very doubtful. It would substitute for trial according to law, to which our people are accustomed, a *quasi* discretion of the judges. In addition are the differences in certain methods of practice which the people of the United States have never adopted, and apparently never will adopt. In England the trial commences with a brief to the barrister, which cuts a channel through which the case is to flow, and which renders it improbable that it will overrun the banks; and while, also, in England the close of the litigation would still be confined within the comparatively narrow limits of the judge's notes, the end here would be in a flood of an indefinite extent.

The compact opinion of Master of the Rolls Jessel, in *Earl De La Warr* v. *Miles*, 19 Ch. D. 80, illustrates pretty thoroughly the practice in the English courts with reference to the short notes of the trial judge, and the strong inclination there not to make use of the notes of the shorthand reporter. It also illustrates very effectually one leading reason why, in England, the simplicity both of procedure and of the issues on appeal contrasts so strongly with analogous matters with us. Nevertheless, it would be impossible to induce courts and counsel in the United States to turn back to a practice which involved so much labor on the part of both, and also so much opportunity for claims of incompleteness in the record, as did the methods in vogue before the modern stenographer was known. It seems, therefore, inevitable that there is necessity in our procedure that methods should be found by which instances of sending up of cases on the full records should be diminished rather than increased.

In a trial before me at the Circuit at Boston in May, 1907, in which one of the United States marines was arraigned for murder at Guantanamo, the procedure was quite as expeditious as that described in your September number with reference to the trial of Dhinagri, the East Indian student charged with murdering Sir W. Curzon Wyllie. In the trial in the Circuit Court, there were serious dangers of technical difficulties arising from the locality of the offense. There were also circumstances which indicated the necessity of examining into the condition of the accused with reference to his mental responsibility from the point of the criminal law. There were also circumstances which led the jury to reduce the penalty to imprisonment for life, which reduction received the approval of the court. The trial involved a plea of not guilty, a complete development of proofs as to every fact necessary to sustain the charge, and a consideration by the jury of something more than an hour; and yet the whole was concluded within five hours, and in such a manner that everybody was satisfied, not only that the law was fully regarded, but that justice was done. All the punctilios and niceties required in federal procedure with reference to capital offenses were observed; and yet it was plain that the system was not at fault, because the whole was completed in so brief a time.

It will be asked, how was this brought about? It was accomplished simply because the court had the assistance on each side of competent

counsel; for the United States so experienced and well known a lawyer as the present District Attorney, Hon. Asa P. French, and for the prisoner such equally well-known and distinguished lawyers as Hon. B. B. Jones and Mr. John H. Casey, who came into the case even before the indictment was returned, at the request of the court, in accordance with the loyal instincts of the bar. The gentlemen on both sides took up the investigation at the earliest possible moment so that, with their assistance, the court moved with absolute confidence. Therefore, this instance illustrates that, with due caution and the assistance of proper counsel, even capital cases may advance quite as satisfactorily in the United States as in England.

However, in view of the fact that my purpose was simply to follow out the line of your article in the September magazine to which I referred, and to show by concrete illustrations the necessity of proper vigilance, rather than the advocacy of any attempt at a royal road to relief, this communication has gone far enough, and perhaps too far.

Portland, Maine, Sept. 24, 1909.

The Defeat of Judiciary Reform in New Jersey

NEW JERSEY is one of the states possessing an antiquated and needlessly cumbersome system of courts. As there has been no change in it since the adoption of the present state constitution in 1884, the system has been outgrown, the business growing too fast to be accommodated and the wheels of justice becoming clogged. The leaders of the New Jersey bar, as well as the judges, have long realized the need of reform. Five of the ablest lawyers in New Jersey were appointed to a commission authorized by vote of the legislature, and prepared an amendment to the constitution making the needed changes in court organization. The amendment was approved by the State Bar Association at a meeting held in September, 1906, the Association voting to make an active campaign on its behalf.

The amendment substituted for the existing Chancery Court, Supreme Court, Court of Errors and Appeals, and Circuit Court, one Supreme Court consisting of an Appeals Division, a Chancery Division, and a Law Division. It reduced the number of judges in the higher courts from thirty to twenty-one and their total compensation from $243,500 to $213,000. The amendment also established one court for each county, with all the powers of the present Quarter Sessions, Common Pleas, Oyer and Terminer, Orphans' and Circuit courts.

The State Bar Association by a large majority supported the amendment, as did also the Hudson County Bar Association and other representative professional bodies; its passage was earnestly advised by the judges of the highest state courts; two sessions of the legislature passed the amendment; Governor Fort, who was formerly a Supreme Court justice, was one of its most zealous and able protagonists, and it was endorsed by the leaders of the New Jersey bar with but few exceptions. The press of the state, with the exception of a small opposing minority, also conducted an earnest publicity campaign in favor of the amendment.

There was, to be sure, some opposition, though most of it did not come from influential quarters. The objections made were so specious as scarcely to require answering. For example, the mistaken assertions were made that the proposed amendment abridged the right of trial by jury, that it conferred on the Supreme Court the dangerous prerogative of making its own rules of practice, that it abolished the right of removing judges by impeachment, that it invaded the province of the legislature, that it conferred on the Governor a dangerous appointive power that might be used for partisan purposes, that it would mean greatly increased expense, and that it would deal a blow at popular government by eliminating the lay element from the *personnel* of the new Appellate Division of the Supreme Court. The frivolity and baselessness of these objections was exposed in the course of a vigorous publicity campaign.

Every one in the state had ready means of knowing all about the proposed amendment when he went to the polls to vote for it, and the enlightened opinions of disinterested men upon whom he could safely rely for advice were set before the eyes of every voter. On September 14 the amendment,

with two other judicial amendments depriving the Circuit Court of its chancery powers in foreclosure suits and reorganizing the Court of Pardons, and with two more increasing the pay and terms of office of legislators and other officers, separating state from municipal elections, and dealing with several points of minor importance, were submitted to the voters at a special election. In spite of the expectations of those interested in judiciary reform both within and without the state, the amendments were all beaten by decisive majorities, all in about the same proportion, only about fifteen per cent of the voting population recording its choice, and the majority amounting to about 25,000. The total vote cast was only 65,000, as compared with a vote of 467,000 cast in the last state election.

The result of course cannot be attributed to the lightness of the vote, as the advocates of the amendments would take as much pains to vote as their opponents, and possibly more pains.

This defeat is to be traced to a combination of causes rather than to a single one. The attitude assumed by the State Federation of Labor was most extraordinary. Its counsel, in a carefully prepared opinion, reported that there was nothing in the five amendments injurious to the cause of labor. The Federation, however, through its various branches, decided to defeat them on the ground that they did not include jury trial in cases of contempt of court where the contempt has not been committed in the presence of the court.

The result was also brought about by the political conditions which have inspired the "New Idea" movement in the state and called forth reformers like Fort, Colby and Fagan. The power of the bosses who had been able to govern New Jersey through a sort of "rotten borough" system was not easily to be shaken. The party machines dared not show their colors, but were ready to fight in the dark. The partisan leaders did not want the separation of state and municipal elections, nor the election of Assemblymen by districts rather than by counties. The Democratic State Committee and the Republican State Committee, the former in advising resistance, the latter in not advising support, may or may not have been deliberately mercenary, but there can be no question of their failure to deal with the subject with unbiased public spirit. The machinations of the party bosses, however, though they may have encompassed the defeat of the amendments, were unable to make them an actual party issue, for in Montclair and elsewhere the Democrats joined the Republicans to work for their adoption.

Another factor in the defeat of the amendments was possibly the distrust which lawyers who have attained eminence in private practice, but hesitate to curry public favor, are apt to provoke when any suspicion of their being at work for their own advancement or to further some class interest can be invented. The subject was too technical for the average layman to understand. He was shocked when he read the printed statement that the chief amendment had been drafted by an eminent corporation lawyer. Instead of accepting the judgment of learned and skillful guides, he allowed himself to be misled by the freely circulated opinions of demagogues, socialists and selfish partisans.

The *Newark News*, which most ably championed the cause of the amendments throughout, described with some detail the character of the opposition. A week before they were voted on it said editorially:—

> When the constitutional amendments campaign was begun, it was stated by Judge Charles C. Black that there was but one logical opposition to the proposed changes, and that that would come from the special interests. He pointed out that these wealthy interests found in the prevailing judicial system an ally to enable them to maintain litigation against their poorer antagonists and tire out the latter in their appeals to the courts for justice. He further asserted that it might be expected that these interests would secure assistance in their plan to defeat the amendments by underhanded means, and that they would secure aid from forces that would be deceived into working against the best interests of the people.
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> These predictions have been confirmed. It is a peculiar combination that has been formed for opposing the amendments at the polls one week from to-day. At the head of the opposition are men connected with the greatest monopolies in this state. They have aligned with them the Democratic organization controlled by the Smith-Nugent machine. They have had the satisfaction of witnessing the declarations of labor leaders in opposition to the proposed changes. They have succeeded in securing the silent backing of some of the most powerful bosses in the Republican organization. The socialists have also joined hands with these other forces and have urged the 'common people' to fight under the same banner with these remarkable allies. The Republican ringsters at Atlantic City have also come out in a declaration warning all their friends to oppose the amendments.
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> This is a singular situation, but it is just the one anticipated by Judge Black.

While the political machines and labor unions have won their victory, and re-organization of the courts of New Jersey by constitutional amendment is made impossible for another five years, the victory is but temporary, as the public will bitterly resent the grounds of this hostility as it awakes to the extent of the set back popular government and a democratic system of justice have received. It would seem as if New Jersey should first purify its politics, if it hopes to succeed in rehabilitating its courts.

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*Review of Periodicals**

Articles on Topics of Legal Science and Related Subjects

Banking and Currency. "Is a Central Bank Desirable?" By A. Barton Hepburn. *Century*, v. 78, p. 950 (Oct.).

The writer, who is president of the Chase National Bank, New York, and former Comptroller of the Currency, favors "a government-controlled central bank of issue, where banks of the country in good credit can discount their receivables, receiving the proceeds thereof in bank-notes."

He says: "A government bank, from the fact of its paternity, would possess great moral influence, and supplemented with material power would exercise a most wholesome effect in bringing about uniformity and preventing abnormal fluctuations in the rate of interest; it should act as fiscal agent of the government, and would certainly keep in the channels of commerce funds which are now arbitrarily withdrawn whenever the government's revenues exceed its disbursements; it would prevent the embarrassment and injury to business which result from the absorption of these funds by our sub-treasury system, even during a crisis, and the subsequent deposit of the same in the banks in lump sums, in an effort to offset the injury."

Corporations. "Liabilities of Directors who do not Direct." By P. B. McKenzie. 18 *Bench and Bar* 100 (Sept.).

"In the absence of legislation . . . or of some special ground of equity jurisdiction, it would seem from the authorities cited that the action, when brought by the corporation or by a receiver, must be an action at law, and several suits must be brought against the various directors, except as two or more are chargeable with the same wrongful acts or omissions of the officers. Where the situation is such that a stockholder may sue, his action is in equity, and all the negligent directors may be sued in one action, even though they are not liable for the same acts."

"'Ultra Vires' Acts of Corporations." By Nathan Wolfman. 6 *Commonwealth Law Review* (of Australia) 264 (July–Aug.).

"It is respectfully submitted that the proposition heretofore advanced, *viz.*, that the effect of incorporation of an association of individuals is to create a legal person with the powers of every other legal person with respect to contracts and acts, subject to such prohibitions upon the exercise of certain powers as the charter may impose, will solve the difficulty attending the confusion and hardship of the doctrine of '*ultra vires*,' in that by its application it will work justice without imposing upon the scientific construction of the law; that it will do away with the confusion among authorities, and thereby cause uniform rules; that it is in harmony with the common law, while the existing theories are not; that it will be in accordance with the intention of the legislature as interpreted by settled principles of construction; and that its source will be the legislative will, as expressed in the statute while the existing theories are virtually but the will of the courts."

Declaration of London. "The Declaration of London." By Paul S. Reinsch. *North American Review*, v. 190, p. 479 (Oct.).

"It is to be hoped that the Declaration of London may receive the ratification of the American Executive and Senate. In it are embodied many of the results of American diplomatic experience and of the best reasoning in our State Papers. The part which our State Department has taken in bringing about the creation of an International Prize Court and the formation of this admirable code of prize law should be crowned by a speedy adoption of both conventions by the American government."

Government. "The Political Theories of Jean Jacques Rousseau." By Prof. William A. Dunning, LL.D. *Political Science Quarterly*, v. 24, p. 377 (Sept.).

*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.

A noteworthy analysis of Rousseau's theory of the state. The writer brings to his task an ideal equipment as an able historian of political thought. He says:—

"Rousseau thus contributed largely to promote the theory of the national state. His main purpose, however, was apart from this. Consciously he aimed only to devise a theory of sovereignty through which liberty and authority should be reconciled. His metaphysics and psychology, however ingenious, were not, as we have seen, equal to the task. He could offer no self-consistent reasoning by which it should appear that an individual's will was certain to be expressed in the general will, except in the same sense in which the individual's will was certain to be expressed in the will of a monarch to whom he had submitted himself. Rousseau failed, in short, to prove that the sovereignty of the community was any more compatible with individual liberty than the sovereignty of a monarch or an oligarchy. But his earnest and confident declamation about the virtues of the general will and the significance of the general interest brought those concepts into the foreground of political theory, and evoked from more subtle reasoners than Rousseau more refined and self-consistent solutions of the problem he propounded. If their results were ultimately no more successful than his, that was due rather to the *a priori* conceptions of liberty and authority that were the common basis of this whole school of speculation than to any flaw in the logic by which the deductions from these conceptions were made. The assumption that true and perfect liberty could be predicted of only the non-social man was fatal to any theory of political authority. Nothing could come out of this assumption save the empty paradoxes of Rousseau, the paralyzing transcendentalism of Kant, Fichte and Hegel, Rousseau's legitimate successors, or anarchy pure and simple. . . . In the eighteenth century the Aristotelian way of approaching politics made small appeal to intellectual men, and least of all to Rousseau."

"Darwinism and Politics." By Sidney Low. *Fortnightly Review*, v. 86, p. 519 (Sept.).

An article on "The Cult of the Unfit" was published in the *Fortnightly Review* for August and was treated by the *Green Bag* at the time as deserving more than passing notice (see 21 *Green Bag*, 459, 477). The writer, Mr. Iwan-Müller, endeavored to apply the Darwinian theory to the problems facing the modern state, and condemned what he called the "cult of the unfit" as illustrated by such legislation as the Old Age Pensions Act, and "as translated into practice by the present Chancellor of the Exchequer." The article was a vigorous plea for the natural competition of human society as something to be preferred to artificial attempts to place mediocrity and inefficiency in a more favored position than that in which they find themselves under the operation of normal social forces. The conclusions of this article were substantially sound though they might perhaps call for modification in some minor particulars.

Mr. Sidney Low now enters the arena with an article in the same review in which he assails Mr. Iwan-Müller's position with an ardor that suggests partisan energy more strongly than scientific zeal. He thinks that the struggle for the survival of the fittest, as portrayed by Mr. Iwan-Müller, would not only be brutalizing but that it would be destructive of society itself, association being as strong a characteristic of the race as competition, and the protection of the weak by the strong being as natural a phenomenon as the survival of the fittest. Mr. Low conducts this argument with much brilliancy and resourcefulness.

This is properly not a subject for lay discussion. Nothing but skillful scientific investigation can throw much light on the actual relations between the egoistic and the altruistic activities of mankind and the forces which act upon them and determine to what extent one set of functions shall predominate over the other. Mr. Low is at a disadvantage in this controversy in that he probes a problem which Mr. Iwan-Müller for the most part wisely avoided. Mr. Iwan-Müller did not exalt the law of self-preservation above everything else, or fail to see the complexity of the concept of fitness, which may be made up in part of altruistic elements. Mr. Low, on the contrary, appears to think that self-preservation is nothing and that philanthropy is everything.

The action of the individual in relation to the race is in part associated, in part dissociated. Association for protection and defense has come down from prehistoric times. With the triumph over the enemies of the community, the usefulness of association for other purposes, beyond the underlying purposes of the family and community which are at the bottom of our civilization, has made man a more social animal than he appeared to Aristotle. It is very easy for a temperament prone to accept socialistic distortion of facts, deceived by the phenomena of association everywhere visible, to be blinded to the individualistic forces at work in society. The natural competition of individuals has been in no way removed by association, nor can association ever insure a livelihood to the weak even though its tendency is obviously to make life easier for the whole community. It is a melancholy fact that the weakest must generally suffer. Humanitarian enthusiasts like Mr. Low, in urging that the strong should help the weak, are apt to forget that the strength of the strong is limited, and that their strength will not admit of their aiding all the weak, nor in fact of their aiding even the few found specially deserving. The combined resources of a great nation, tremendous as they are, are insufficient to wipe out all the poverty and suffering which are nature's penalties for ill-adaptation.

Mr. Low's view that the fittest to exist are not the morally fittest is by no means profound. The survival of the fittest, every one ought to admit, may mean the survival of

those possessing qualities inferior from the point of view of individual action, yet qualities that are deemed superior by the social judgment and are properly rewarded. The physically unfit may thus be morally fit, but their moral fitness is derived from the principle of association, instead of coming from nowhere, as some writers would like to assert.

"The Startling Growth of State Power." By Hannis Taylor, LL.D. *North American Review*, v. 190, p. 454 (Oct.).

"During the period that divides Jefferson from Lincoln a transformation has taken place in our internal economic conditions, whose results have reversed the fundamental proposition upon which Jefferson's political theories were founded. Just as he and his followers demanded that governmental power should be limited to the greatest possible extent, and that the circle of individual rights surrounding the citizen should be widened to the greatest possible extent, a majority of the American people, *including those who still profess to follow Jefferson*, are now demanding that governmental power, state and federal, shall be so widened, even at the sacrifice of individual rights, as to protect them against the incorporated battalions the new collectivism is hurling against them. . . .

"Chief Justice Baldwin, thoroughly equipped as he is on the historical and scientific side of law as well as on the practical, is a fine example of what an American judge should be. With such arbitrators standing between the individual and the state we have nothing to fear. The solution of mighty and delicate problems still awaits them. In extending national supervision over corporations engaged in interstate traffic such discrimination must be made as will preserve legitimate corporate enterprise from destruction."

"Shall United States Senators be Elected by the People?" By Henry Litchfield West. *Forum*, v. 42, p. 291 (Oct.).

"The opposition to the proposed change is, however, based principally upon the danger of making any alteration in the system of government devised by our forefathers. The conservatives shrink from changing the Constitution and insist that a convention, called for the purpose of securing a new method of electing United States Senators, would open Pandora's box. This is, unfortunately, true. . . . Taken by itself, a proposition to elect United States Senators by the people is entitled to serious consideration. If it is to succeed, however, at the cost of a Constitutional Convention, which is the method suggested by the legislatures of thirty states, it would be better to let well enough alone."

See History, International Politics, Interstate Commerce Commission, Taxation.

History. "The Attorney-General and the Cabinet." By Henry Barrett Learned. *Political Science Quarterly*, v. 24, p. 444 (Sept.).

The subject is discussed from a historical point of view. "The place and functions of the Attorney-General remained for many years after 1789 subjects of reflection on the part of thoughtful men. . . . The act of 1870 making the Attorney-General head of the Department of Justice apart from its more technical details . . . was a mature and honest effort to realize an ideal with respect to the Attorney-General that had been occasionally formulated since Andrew Jackson's day."

India. "Political Assassination in India." By Sir Andrew H. L. Fraser, K.C.S.I. *Blackwood's*, v. 186, p. 437 (Sept.).

"It is a noteworthy fact that on the very day on which the Lord Chief Justice of England condemned Madan Lal Dhingra to death for murder, he also passed sentence on an English printer for criminal carelessness in publishing articles by Mr. Krishnavarma, which his lordship described 'as being deliberate and direct incitings to murder, and a wicked attempt to justify these incitings by suggesting that political assassination is not murder.'"

That the present situation in India is the result of a radical dissimilarity of race and institutions is not to be denied. The English have earnestly tried to understand the Hindus, they have not totally failed, and in the future they may even partly succeed. But the fact remains that only by complete emancipation from such Occidental prejudices as that, for example, directed against the institution of caste, can the West approach the problems of India sympathetically. For most Hindus undoubtedly share the views of the following writer:—

"Why I Am Not a Christian." By P. Vencata Reo. *Fortnightly Review*, v. 86, p. 402 (Sept.).

"Hinduism is much more a matter of social intercourse and domestic life than of religion, in the proper sense of the word. It is bound up with our family rites and observances. The religious sentimentalism of the Hindus is chiefly directed to the maintenance of caste. . . .

"The destruction of caste would mean social chaos among us. But I see no signs of that calamity. I do not say that caste is eternal; but I may hazard the conjecture that it will, perhaps, last as long as Christianity."

The British policy of governing dependencies, as far as possible, through their own laws and institutions, ought to be, and probably will be, more strongly emphasized in the future administration of that country. When, therefore, a British review prints as its first article a paper containing a declaration that "the curse of India is caste," one is tempted to think that his misconception is one shared by Little Englanders rather than by true imperialists:—

"Some Misconceptions about the Unrest in India." By Rev. J. A. Sharrock. *Nineteenth Century*, v. 66, p. 361 (Sept.).

"What India wants is a combination of Indian gentleness with English strength, justice and straightforwardness. We must be strong, and quit us like men, as well as be sympathetic and loving. The Indian Mutiny would never have come to a head if it had not been for the weakness of the officers, and our present anarchy is largely due to the weakness displayed as regards Sir Bampfylde Fuller."

The truth of course is that India does not want a "combination with English strength." It wishes at the bottom of its heart to be governed sympathetically and tolerantly by a foreign nation simply because it does not know how to govern itself. That it does not is the opinion of this writer:—

"The Effects of British Rule in India." By Sir Edmund C. Cox. *Nineteenth Century*, v. 66, p. 542 (Sept.).

"Mr. Dhingra . . . considered that we have no right to be in India at all, and that Indians, by which he meant Hindus, should manage their own affairs. . . . These things they have never been able to do. The result of our withdrawal from India would be bloodshed and carnage throughout the land."

The upshot of India's incapacity is of course not that the English should be too indulgent; firmness must be combined with tolerance:—

"The Effects of British Rule in India." By Elliot G. Colvin, C.S.I. *Nineteenth Century*, v. 66, p. 527 (Sept.).

"The truth is that the policy of devolution of power to the natives of the country is set about with a thousand dangers and difficulties, and every dictate of wisdom and prudence requires that *festina lente* should be the guiding principle in its pursuit. There are many competent judges who think that the Government of India, under the spur of Lord Morley's radicalism, are at present going too fast and are yielding almost too much to popular clamour."

Lord Morley's policy truly has its dangers, as will be seen from the following:—

"British Rule in India: Its Successes and its Failures." By Sydney Brooks. *Century*, v. 78, p. 905 (Oct.).

"Lord Morley's scheme of reforms is not an innovation upon, but an extension of, the uniform practice of British rule in India. It is, however, a very large and far-reaching extension. . . . Any one, too, who ponders the deep and peculiar cleavages of race, creed, and caste that run through Indian society will perceive the enormous difficulties under Lord Morley's scheme of securing the proper representation of minorities and of saving whatever electoral system is ultimately adopted from becoming an added source of racial and religious strife. Those difficulties have already begun to show themselves in the fears of the Mohammedans lest they be swamped under Hindu votes."

Immigration. See Race Discrimination.

International Law. See Declaration of London.

International Politics. "The International Organization of Society." By Pitt Cobbett. 6 *Commonwealth Law Review* of Australia) 243. (July–Aug.).

"One may fairly believe that the form which international organization is likely to take in the immediate future—whether beneficent or otherwise—is likely to depend in no small measure on the outcome of that inevitable struggle which both the teachings of the past and the warnings of the present show us to be depending between Germany and Great Britain; a struggle, let it be noted, in which our own future destiny, as well as that of the motherland, is surely involved."

"Alliances With and Against France." By Prof. Edwin Maxey. *Forum*, v. 42, p. 344 (Oct.).

"On the whole, the alliances and *ententes*, not amounting to alliances, formed by France must be considered as making for the preservation of the peace and equilibrium of Europe. They must also be looked upon as a skillful and effective attempt in the direction of isolating Germany. True, a number of circumstances have united to make the work easier for France. But, notwithstanding this fact, we cannot fail to admire the skill which has been shown in removing obstacles, the good judgment used in the handling of what was at best a delicate situation and the substantial progress that has been made."

"The Manchurian Muddle." By Edward Harkness. *Putnam's*, v. 7, p. 99 (Oct.).

"Political as well as commercial supremacy in Manchuria, as elsewhere, is a question of transportation control, and until Manchurian railways cease to be political instruments and are exploited, in the language of the Portsmouth Treaty, exclusively for commercial and industrial and in no wise strategic purposes, the Manchurian problem will continue to threaten the peace of the East."

Interstate Commerce Commission. "The Conflicting Duties of the Interstate Commerce Commission." By H. T. Newcomb. *North American Review*, v. 190, p. 464 (Oct.).

"The public is plainly entitled to an impartial forum in which the relative rights of the buyers and sellers of interstate railway services may be determined, and it is only too plain that perfect impartiality cannot long survive in the unfavorable atmosphere of prosecution. When a member of the Commission who has had such long experience in its work comes forward publicly to declare in unequivocal terms that it cannot continue to exercise its executive duties and remain 'a body adequate to the trust' of its 'tremendous jurisdiction' to hear complaints and redress transportation wrongs, it is clear that the necessity for a change is imperative. . . . For the proper performance of such duties an

unbiased and impartial tribunal is necessary, and with the curtailment of its duties the Commission can be expected to become such a tribunal."

Law Reform. "Looking Forward." By James J. Hill. *Putnam's*, v. 7, p. 62 (Oct.).

"The greatest service to the nation, to every state and city today, would be the substitution for a term of years of law enforcement for law-making. Get the laws fairly tried, weed out those improper or impracticable, curtail the contempt of law that now flourishes under the American system of non-enforcement, and make the people understand that government means exact and unsparing justice, instead of a complex game. This is the only safeguard if respect for and confidence in the governing system itself are not to be gradually undermined."

Liberia. See Negro Problem.

Marriage and Divorce. "Divorce Laws." By George W. and M. C. Freerks. *Central Law Journal*, v. 69, p. 184 (Sept. 10.).

"Let those who deplore social abuses and unsatisfactory conditions preach and teach against them. But if the divorce laws are to be remodeled, let this be done with a full understanding of what the laws now really are and of the probable effect of proposed new laws upon the abuses aimed at, as well as of the danger of their detrimental effect upon the natural rights of mankind. Uniformity in statutes on this subject might be very desirable, but more important than this it is that default cases be given a stricter scrutiny under existing law by the judges, before granting decrees, and that some person have the duty to properly bring to the knowledge of the court the real facts, so far as ascertainable."

Negro Problem. "Exit the Black Man?" By Judge Harris Dickson. *Hampton's*, v. 23, p. 497 (Oct.).

"The American negro is on a toboggan slide skidding down to death. The logic of his present status is extinction. He alone can save himself—and yet he keeps pouring the grease upon the slipping places. If he does not stop short and rebuild his shattered vitality, his grave will take its place beside the Maori, the Hawaiian, and the North American Indian, among the races of men who have perished from the earth."

Liberia. "Can the Black Man Stand Alone?" By Edgar Allen Forbes. *World's Work*, v. 18, p. 12155 (Oct.).

"Liberia has been making a desperate fight for existence during the last few months—not because of organic weakness nor of internal agitation, but because the time had apparently arrived for Great Britain to close the net that had been spread. That the British government or the Sierra Leone government, or both, have been working out a deliberate plan that would end in the annexation of Liberia nearly everybody in the republic firmly believes. Some of the events that have happened recently admit of no other interpretation."

Penology. "Beating Men to Make Them Good." By Charles Edward Rusell. *Hampton's*, v. 23, p. 484 (Oct.).

This is a second article on the American prison system. The author summarizes conditions in a large number of states, and then adds:—

"From all this stands out one fact upon which I can put no emphasis too great.

"As a general rule, subject, of course, to some exceptions and modifications, where there is contract labor there is corporal punishment; where there is no contract labor there is no corporal punishment.

"In these days, therefore, corporal punishment survives not for reasons of discipline, because discipline is maintained easily enough without it, *but to extract from the prisoners the profits of speculators in misfortune.* And the men that are subjected to the unspeakable degradation and pain of the lash suffer not so much for their own misbehavior as for *the greed of those into whose hands the punishment of our stumblers was never legally committed.*"

Procedure. "The Proposed Universal Court." Editorial. 18 *Bench and Bar* 94 (Sept.).

This article discusses the recommendations of the American Bar Association for a single court in each state having universal jurisdiction.

"The division of courts into superior and inferior courts, the latter for the trial of small cases, with judges who are accorded less honor and who receive less emolument than the judges of the former, is one of the great mistakes of our present system. . . . The day must surely come when the fallacy of deliberately committing small causes to judges of small calibre and on small pay will be clearly recognized and universally condemned."

"The Demoralization of the Law, XV." By Ignotus. *Westminster Review*, v. 172, p. 303 (Sept.).

"It is not uninstructive to inquire into the reasons why Anglo-Saxondom, which rightly claims to be in the van of civilization, is so unmistakably behind in the domain of the law. First, as regards this country. Our notorious impatience of strict logical methods, and our preference for haphazard 'muddling through,' is largely to blame But there is more than this. There is the fact noticeable all through our history that our predilections are strongly political. . . . We watch our politicians pretty closely; we keep them up to the mark; our interest reacts upon them favourably. . . . Compare this with the sentiments we entertain for our judges. We absolutely ignore their work, except on a rare occasion when they have blundered. . . .

"These considerations apply in full measure

to the United States. . . . The evil centres round the method of selection of the judges. That method stands condemned for having done the greatest of all possible dis-service to a country; it has brought the administration of justice into contempt. . .

"The United States bench is suffering from a more insidious disease than corruption. It is suffering from super-subtlety, the besetting sin of the legal as distinguished from the judicial mind. Super-subtlety can no doubt be pressed into the service of corruption, but it flourishes on the English bench without a suspicion of corruption. Corruption is the vice of base judges; no judge, however honorable, is safe from the vice of super-subtlety if he is not possessed of the true judicial faculty, an invaluable gift which a well-ordered community would jealously guard from being prejudiced by the practice of advocacy."

Professional Ethics. "The Lawyer's Function." By Donald R. Richberg. *Atlantic Monthly*, v. 104, p. 489 (Oct.).

"It is the present intention to show that there are certain plain lines of distinction between the function of harmonizer and that of parasite, which can be borne in mind by every practising lawyer to the advancement of his own self-respect and for the promotion of society's esteem for the profession.

"A lawyer's activities may be divided into three classes: advice, litigation and law-making. . . .

"Every time a lawyer counsels controversy for the establishment of a right as recognized by existing law, or for the promulgation of new law beneficial to the majority of society, he is exercising his true function, and the charge which he lays upon his individual client and, through him, upon industry and progress in the mass, if reasonable in amount, is well earned and should be cheerfully paid. When, however, a lawyer gives the other kind of advice, the expense, perhaps cheerfully borne by the client who profits personally therefrom, must be finally laid upon society as a whole, which is thereby paying for its own injury, and naturally resents the charge. . .

"The lawyer who endeavors by every means to present fully and completely all the elements of his client's cause, and to point out, with all the directness consistent with courtesy and calm, the defects in his opponent's presentation, is fully meeting his responsibility to give a conscientious judge all the information obtainable bearing upon the question at issue. He is therefore promoting speedy as well as just settlement. On the other hand, the lawyer who, by every artifice at his command, endeavors to cloud the strength of his opponent's cause, not striving to show the real weaknesses of testimony, but, by befuddling witnesses, attempting to create false weaknesses; who endeavors in his own case, not so much to bring out all of the strength of his actual position, as to build up a situation mixed of truth and supposition which may give his client an advantage—this lawyer is not only breeding distrust of the law in the minds of every one in the court-room, but is making for ultimate injustice for both his client and his adversary. . . .

"A mass of law-making, in fact, one might almost say the mass of law-making to-day, is devoted to the promotion of special interests, regardless of whether the common good is served or not. The lawyers who devise such schemes, and the lawyers in the legislature who allow such bills to become laws, are remarkably plain examples of the parasitical class. . . .

"It would seem reasonable to expect that lawyers, as those who face daily the problems of the fulfillment and breach of obligation, and hence are keenly observant of the moral growth of a community, will strive to better their works in even greater degree than their fellows. The position of counselor is indeed difficult to fulfill for one who does not feel that he possesses a keener, deeper insight into the complex questions of right and wrong than is within the comprehension of the one who comes to him for advice."

Race Problem. "The Conflict of Color; II. The Yellow World of Eastern Asia." By B. L. Putnam Weale. *World's Work*, v. 18, p. 12111 (Oct.).

"It would be well for European statesmen to realize that in eastern Asia the most knotty of world-problems may have presently to be solved by force. . . . What can very easily happen is that the federation of eastern Asia and the yellow races will be so arranged as to exclude the white man and his commerce more completely than any one has yet dreamed of. And this is equivalent to saying that the entire economic situation throughout the world is in danger of being radically altered and the present balance of power entirely upset from the fact that eastern Asia, led by Japan, may step by step erect harriers so as to restrain the white man."

Race Discrimination. The problem of race discrimination arises from the latent if not always articulate conviction of the American people that each individual deserves to be dealt with on his merits, and from the absence of clear proof that the same logic which applies to individuals applies to races also. The proposition that the Chinese or the Japanese can be excluded from immigration without unjust discrimination between individuals is of course absurd, but men sometimes refuse to see the absurdity, and that perversity creates the problem that would not otherwise exist. The phases of this problem which are concerned with the "Chinese and Japanese in America" are discussed in the latest number of the *Annals of the American Academy of Political and Social Science*, which has over a score of papers by well-informed writers dealing with the general topic. From these we select the four or five likely to be of greatest interest to the legal profession:—

"Misunderstanding of Eastern and Western

States Regarding Oriental Immigration." By Associate Justice Albert G. Burnett of the District Court of Appeals of California. *Annals*, v. 34, no. 2, p. 37 (Sept.).

"The West is not unduly or at all excited over the question of immigration from Japan; it is only determined. It has heard from Washington that the Mikado's government is going to refuse permission to its subjects to come to the United States. It hopes this will be done, but it is somewhat dubious when it hears rumors from day to day of the vast numbers of Japanese who are debarking in British Columbia and stealing their way across the border. . . . Those now living there propose that it shall continue to be a home for them and their children, and that they shall not be overwhelmed and driven eastward by an ever-increasing yellow and brown flood."

"Un-American Character of Race Legislation." By Max J. Kohler, A. M., formerly Assistant United States Attorney, New York. *Annals*, v. 34, no. 2, p. 55 (Sept.).

"It is apparent that the desire to exclude the Chinese laborer has worked incalculable harm both to them and to us, at least in excluding non-laborers and causing much unnecessary and unintended hardship. If cheap pauper labor, competing on unequal and unfair terms with American labor, be involved, such labor can be excluded under general laws, not applicable to the Chinese merely, and not making exclusion the rule and a few enumerated classes of non-laborers the exception. It must be apparent, however, to justify even such reversal of our established beneficent and satisfactory American policy of a century and more, that the danger be general and continuous, and not temporary and spasmodic, and that it is one that cannot be cured by effective distribution, so as to deprive sections needing such labor badly of the benefits to which they also are entitled."

"Treaty Powers: Protection of Treaty Rights by Federal Government." By Dean William Draper Lewis, Ph. D., University of Pennsylvania Law School. *Annals*, v. 34, no. 2, p. 93 (Sept.).

"The means which are unquestionably within the power of the federal government, if properly used, would appear to be ample to enforce all treaties. The doubts, and they are many, which surround the subject, . . . are . . . as to the extent of the treaty power, not as to the right of the United States to maintain respect for, and punish violations of, those treaties which it may lawfully make."

"The Legislative History of Exclusion Legislation." By Chester Lloyd Jones, Ph. D., *Annals*, v. 34, no. 2, p. 131 (Sept.).

"The excitement was for the time at least allayed by an expedient included in the immigration act of 1907. . . . Congress authorized the President to exclude from continental United States any immigrants holding passports not specifically entitling them to enter this country. . . . The 'Japanese question' was for the moment out of politics. It is by no means certain, however, that the seeds of future disagreement are removed. . . . The whole subject of Japanese immigration is one which calls for careful settlement by a treaty which shall at the same time avoid antagonizing a proud nation and remove an element which unregulated can hardly avoid causing increasing uneasiness and ill feeling on the west coast."

"The Exclusion of Asiatic Immigrants in Australia." By Philip S. Eldershaw, and P. P. Olden. *Annals*, v. 34, no. 2, p. 190, (Sept.).

"No expense is grudged to keep unsullied the policy, and more than a policy, the ideal of a 'White Australia.' This, as has been shown, is not a passing ebullition of feeling. It may be not inaptly described as the Monroe doctrine of Australia, only it should be borne in mind that we are acting with reference to Eastern Asiatic peoples only. . . .

"Any attempt in derogation of this doctrine would be viewed with grave apprehension by Australia, under the ægis of the British empire, and resented as an unfriendly act."

Taxation. "A Forgotten Chapter in Scottish History." By a Philosophical Radical. *Blackwood's*, v. 186, p. 424 (Sept.).

"To be logical, Mr. Asquith should ordain that when manufacturers' profits, lawyers' fees, and workingmen's wages rise above a certain point, toll should be levied on the increase, even on the plea that as the various parties' abilities remain the same the increased value must necessarily be the creation of the community. In this matter the socialists are more logical than their Liberal colleagues. They see no reason why the capitalist's profits should not be placed in the same category with the landowner's rents, and thus pushing the Ricardian theory to its logical conclusion, they demand the nationalization of capital as well as land. That way anarchy lies."

"The Increment Tax: The Land Clauses Neither Unprecedented nor Socialistic." By Alfred Mond, M. P. *Nineteenth Century*, v. 66, p. 377 (Sept.).

This writer considers just, and by no means socialistic, the "great principle of obtaining for the community, by means either of local or national taxes, a reasonable share of the increased value of land which is generally recognized to be mainly due not to the efforts of an individual, or even a group of individuals, but to the growth of the population and the consequent necessity for land to live on."

Uniformity of Laws. "States with Ideas of their Own." By Philip Loring Allen. *North American Review*, v. 190, p. 515 (Oct.).

"The various legislatures, notably those of New York and Wisconsin, through their

library bureaus, are making it their business, before passing important new legislation, to find out the experience of their neighbors with similar questions. This means, even in the most superficial aspect, that state legislation is likely to become progressively less deserving of the ridicule and contempt it has so often received in the past. No far-reaching national policy, but only the simplest mechanism of friendly co-operation, is needed to eliminate many of the needless and annoying differences in state policy. That we are getting this co-operation in larger measure is one of the answers which the states have made to their critics. Of all possible ways of securing uniform legislation surely the best is the voluntary copying of those statutory details which have worked well in the states of their origin and the dropping of those which have worked badly."

Wills and Administration. "Executors as Trustees." By William P. Borland. 11 *Kansas City Bar Monthly* 102 (Oct.).

"A trustee, as such, has by law very few rights, very limited powers, and practically no discretion. He must point to the trust instrument, the will, for such powers as he may exercise, and especially is this so if the power involves a discretion. . . . The office of an executor, originally that of a pure trustee, accountable only to a court of equity, is by process of time and change of conditions reduced to a mere statutory office controlled by a statutory court; and then enlarged again, by a division of powers, into two distinct offices, each hedged about by its own legal right."

Miscellaneous Articles of Interest to the Legal Profession

Armaments. "The Ominous Hush in Europe: An Outline of the Situation between England and Germany." By H. R. Chamberlain. *McClure's*, v. 33, p. 598 (Oct.).

"The wild and innocuous peace agitation, with its leagues and conventions in various countries, is scarcely worth serious consideration as a practical factor in dealing with the present crisis. . . . The moment may not have arrived, but it is close at hand, when a drastic remedy must be found for the gigantic evil that is beginning to undermine civilization itself. The initiative unquestionably belongs to America. She alone among the Great Powers is above suspicion in motive. Her share of the general burden, which is piling up so rapidly, has not yet become crushing. Disinterested common sense is her sufficient incentive and justification."

Asiatic Problems. "The Clark University Conference on the Far East." By James L. Tryon. *Advocate of Peace*, v. 71, p. 212 (Oct.).

An editorial report of the Conference, the object of which is stated to have been "not to criticize any particular country's policy in the Orient, or to subject the attitude of Oriental countries to unfriendly scrutiny, but to help the United States to enter into more sympathetic relations with them. It sought to get at the truth as a basis for intelligent action. It was inspired by a love of modern scholarship and international justice."

Hayes. "A Review of President Hayes's Administration." By James Ford Rhodes. *Century*, v. 78, p. 883 (Oct.).

"The organization of civil service reform associations began under Hayes. . . . The brightest page in the history of the Republican party since the Civil War tells of its work in the cause of sound finance, and no administration is more noteworthy than that of Hayes. . . . Hayes had decided opinions of his own and did not hesitate to differ from his Secretary of the Treasury."

Labor Unions. "Trade Unions and the Individual Worker." By Jonathan Thayer Lincoln. *Atlantic Monthly*, v. 104, p. 469 (Oct.).

"If the cause of unionism is made identical with the cause of labor, and thus ministers to the social progress of every workingman, we may believe that trade-unionism still has a work to accomplish; but if the movement is to minister to a class of workingmen only, its usefulness is already at an end."

Legal Burlesque. "Notes from London." *Scottish Law Review*, v. 25, p. 228.

"It may be, as has been said, that Sir Theodore Martin's knowledge of affairs, even more than his literary ability, qualified him for writing the 'Life of the Prince Consort.' Certainly training in law is a fine preparation for many kinds of writing. Could it have been this which enabled Martin, a young man of twenty-eight, to write the preface to Sir Thomas Urquhart's translation of Rabelais which won the praise of Dr. John Brown? It may, at any rate, have been the legal element in Rabelais' work, for one thing that attracted him. Even after 'Pickwick,' the greatest burlesque and parody of law and lawyers ever written is still to be found in Rabelais. '*Bardell* v. *Pickwick*,' in fact, is infantile by the side of it."

North Pole Discovery. "Legal Proof of the Discovery of the Pole." Editorial. 18 *Bench and Bar* 87 (Sept.).

"As to the negro who accompanied Peary, if he is only an ordinary darkey of moderate intelligence, then what was said by Hughes, D. J., in *The Emily A. Foote*, 73 Fed. Rep. 508, 512 (cited in 2 Moore on Facts, p. 1161), might apply. 'The testimony of ignorant colored witnesses in behalf of their employers,' it is written, is 'generally more compliant with the wishes of the latter than truthful for the truth's sake.' "

Personalities. *Gaynor.* "The Psychology

of the Demand for Justice Gaynor." Editorial. 18 *Bench and Bar* 85 (Sept.).

"Justice Gaynor's position on all questions with which the community is now concerned is already known or may be confidently surmised. His integrity, his courage, his independence, and his ability to deal with new and complicated conditions as they may arise is proven by his past. It is for these reasons that *Bench and Bar* believes that Justice Gaynor's election, now that he has signified his willingness to stand, is logically assured."

Lindsay. "The Beast and the Jungle." By Judge Ben B. Lindsay, of the Juvenile Court of Denver. *Everybody's*, v. 21, p. 433 (Oct.).

This attractive leading feature of the number in which it appears is the first installment of Judge Lindsay's autobiography. There is a trace of innocent and amiable demagoguism in the frankness of these reminiscences that lends charm to the ardent personality of their whole-souled writer. He tells how he was led to forsake the path of corporation practice and to dedicate himself to the public good.

Police Administration. "Finger Prints: Their Use by the Police." By Jay Hambidge. *Century*, v. 78, p. 916 (Oct.).

"A telephone in the Finger-Print Department of the New York Police Headquarters having rung, the officer in charge, after identifying the speaker, receives the following cabalistic message from the Borough of Brooklyn:

" 'Please give me 9 over 7, O I over I O, 16.'

" 'All right, Lieutenant; hold the wire.'

"Two minutes later the inquirer receives the following report:

" 'The prisoner is Michael Cohen, *alias* Shifty Mike, wanted in Scranton and Toledo, suspected in connection with a job in the Bronx. Hold him.'

"This mystic conversation means that a police official at a metropolitan substation has taken finger-prints of a criminal, and that on his request a corresponding record has immediately been picked out of twenty-five thousand cases! Later, to make assurance doubly sure, an impression of the finger-print is sent to headquarters and verified."

Reviews of Books

THREE IMPORTANT BANKRUPTCY PUBLICATIONS

A Treatise on the Law of Trustees in Bankruptcy, by Albert S. Woodman of the Maine bar. Little, Brown & Co., Boston. Pp. xci, 837 + appendices and index 265. ($6.50 *net*.)

The Law and Practice in Bankruptcy, under the National Bankruptcy Act of 1898. By William Miller Collier. 7th ed., revised and enlarged by Frank B. Gilbert of the Albany bar. Matthew Bender & Co., Albany. Pp. lxvii, 854 + 455 (General Orders, Forms, Statutes, etc., and index). ($7.50.)

A Digest of the Bankruptcy Decisions under the National Bankruptcy Act of 1898, reported in the American Bankruptcy Reports, Volumes 15 to 20 inclusive (1906–1909). By Melvin T. Bender and Harold J. Hinman, of the Albany, N. Y., Bar. V. 2. Matthew Bender & Company, Albany, N. Y. Pp. xiii, 393 + table of cases 61. ($4.)

MR. WOODMAN has aimed not to cover the general subject of bankruptcy, but to treat only those portions of the law with which trustees in bankruptcy are concerned. He is right in saying that there is a demand for a book written from the standpoint of the trustee, covering a field which is very closely related to practice and procedure. He has produced an admirable volume from every point of view. One of its conspicuous merits is the caution displayed in discussing the important doubtful questions. The author declares it to have been his controlling purpose to furnish a *safe* guide for trustees. He even apologizes for this caution, but he will not be found fault with on this score.

Mr. Woodman, by specializing in one important branch of the subject which had not yet been fully covered, and treating it in accordance with the most approved method of text-writing, has rendered a notable service. He has provided a well-written exposition which in fullness of detail and sense of proportion could scarcely be improved upon, and the grouping of the authorities in the footnotes at once economizes the attention of the reader who wishes to follow the author's train of ideas and presents the important decisions in convenient juxtaposition to the text. The book offers in a form that could not be improved upon information regarding all questions relating to the estate of a bankrupt.

The notes and authorities are present in abundance, and excerpts from leading de-

cisions are plentifully included. The author is able, because of his experience in bankruptcy practice, to write very instructively of practice under the act. The citations are both to the Federal and to the Bankruptcy Reports.

Collier on Bankruptcy has never lost its place as the standard treatise, notwithstanding the appearance of other works of great value, and its merits of completeness, accuracy, and learning have been appreciated by the bar, which has found its usefulness to have increased with the appearance of each of its seven editions.

When Mr. Collier originally prepared this work he expressed fears that the task of "blazing a way" in interpreting the statute, at a time when the courts had not construed its provisions, made it necessary to ask the leniency of critics, but the attitude of the courts toward the treatise at once established for it an enviable reputation. The needed modifications and enlargements of the text to conform to the decisions since rendered, owing to the care and skill exercised by Mr. Eaton, Mr. Hotchkiss and Mr. Gilbert, no longer furnish any ground for the original author's misgivings with regard to the probable shortcomings of a pioneer work. Its latest edition sees it more reliable than ever as an authoritative exposition of the national bankruptcy law.

Practically the entire text has been rewritten and many new subjects have been dealt with. The arrangement renders the material most accessible, as in the former editions. Each section of the act is treated exhaustively in a distinct chapter, and the cross references are numerous. A new index of increased utility has been prepared.

The edition of this year has 243 pages more than the sixth edition, and contains as a new feature a section on general orders, annotated, all the cases relating to them being treated and digested. This is, we believe, the only work in which the practitioner will find the general orders separately treated.

The second volume of Bender & Hinman's Bankruptcy Digest, an important standard publication, has now been issued. While treatises are useful to economize the time that would otherwise be required of the practitioner for the careful analysis of statutes and decided cases, he must also have ready access to the judicial decisions themselves for data which even the most voluminous treatise could not possibly supply. The text-books will give him the main principles, but a certain case may possibly contain a *dictum* of importance bearing on the specific matter in hand, or it may be necessary to ascertain the facts as well as the law of an important case. The lawyer who has much to do with bankruptcy practice will therefore find the American Bankruptcy Reports serviceable, with their accompanying Digest. With the appearance of this second volume, digesting the cases decided during the past three years, he has within reach, within the compass of a thousand pages or less, the law of all the decisions under the national bankruptcy act reported in the twenty volumes of the American Bankruptcy Reports.

The authors say that they were able, because of their experience with the first volume, to make some improvements in the classification in the second one, but no objection was to be made to the first in this respect, which received the commendation of the bench. The Table of Cases Cited and Table of General Orders Cited are offered with the expectation that they will prove a valuable feature for quick reference to the cases under any particular section of the statute or under any of the Orders. The volume is elaborately cross-indexed.

McELROY ON TAXABLE TRANSFERS IN NEW YORK

The Transfer Tax Law of the State of New York. By George W. McElroy, Assistant Chief Clerk in the Transfer Tax Bureau, State Comptroller's Office. Matthew Bender & Co., Albany, N. Y. 2d ed. Pp. xlii, 595, appendix and index 167 ($6.)

THE second edition of this standard work greatly enlarges the treatise to conform to the new Consolidated Laws, which took effect February 17, 1909, and covers all amendments to June 1 of this year.

In its enlarged form, the work is a complete treatise on the Inheritance and Transfer Tax Law of New York State, giving sections 220 to 245, inclusive, of the Tax Law (Consolidated Laws, c. 60), with annotations and references, the material being presented largely in the form of a digest of cases. Each section of the statute receives careful detailed treatment, and the statute is printed section by section with the material conveniently grouped after each section under numerous sub-headings.

The second edition will be found useful as a complete treatment of the subject, in-

cluding the taxation of non-residents of the state. The author's purpose has been to collate all the decisions bearing on the matters under consideration. Over two hundred new cases are cited and commented upon. Chapter III has been rewritten and enlarged, many new subjects have been treated, the type has been entirely reset, and information is given regarding practice and procedure under the statutes as amended up to June 1 of this year. An appendix also contains the full text of chapter XIII of the Consolidated Laws, in which are incorporated the former statute and code provisions relating to wills, descent and devise, and executors, administrators and trustees. A complete set of forms applicable to transfer tax proceedings is also given.

AN EXCELLENT TREATISE ON REAL PROPERTY LAW

A Treatise on the Law of Real Property. By Alfred G. Reeves, Professor of Law in the New York Law School. Little, Brown & Co., Boston. 2v. Pp. cxxiv, 1588 + index 71. ($13 *net*.)

AS an example of America's best grade of legal scholarship, we welcome the appearance of Professor Reeves's up-to-date treatise on the law of real property. The merits of this work are conspicuous. The author has arranged his subjects in accordance with a classification admirably simple and easily understood, and has collated with learning and diligence copious materials bearing on each topic considered. The treatise is marked by lucidity of style, aptitude of illustration, and logical unity. It will be found by the law student of great help in overcoming the complexities and technicalities of a subject which in the hands of Professor Reeves is by no means dry and irksome. It will also be useful to the practising lawyer because of its admirable clearness of arrangement, its voluminous contents, and its full citations.

The treatise is aimed primarily at the presentation of the modern law of real property regardless of local jurisdictions. The subject receives a thoroughly national treatment, but the author has paid much attention to the New York law, not so much for the purpose of providing a text-book for the use of lawyers of that state as because of a conviction that New York's codification is of importance not only as the local system but as a typical code which has served as the model for the legislation of many other states. "Thus it is sought," to quote the author, "to make a practically complete treatise on New York real property law, yet without materially encumbering the text or notes with anything that is purely local or special." The New York references are so effectually subordinated to the general scheme by condensing a large mass of material in separately grouped foot-notes that the general non-local character of the work is strongly sustained throughout.

Professor Reeves is a leading authority on real property whose treatise on "Special Subjects of the Law of Real Property" is recognized as an authority by the courts. He is one of the ablest scholars ever graduated by the Columbia Law School, and was one of the principal framers of the Torrens system of transfers, which became a law in New York last year. His work on "Special Subjects" makes up part of the present treatise, which is about double the size of the former and covers the subjects left untouched at that time. The task of constructing a well-rounded treatise has resulted in the production of an admirable, symmetrical work.

The author is to be congratulated upon the production of a work so highly creditable to American scholarship and so well executed for permanent utility.

NOTES

Professor James Morton Callahan, of the department of history and political science of West Virginia University, has written a study of "The Evolution of Seward's Mexican Policy," which has been issued in the West Virginia University Studies in American History. Seward consistently maintained the doctrine that the continuance of free Republican institutions throughout America was required for the safety of the institutions of the United States. This principle furnishes the key to his diplomatic policy.

Papers of general interest read before the Colorado Bar Association a year ago included "The Doctrine of the Turn-Table Cases," by Albert A. Reed, "Modern Tendencies and the Supreme Court," by C. C. Hamlin, "The National Public Domain," by James W. McCreery, and "The Chicago System of Municipal Courts as a Substitute for Inferior Courts," by Fred A. Sabin. These papers, together with Wilbur F. Stone's anecdotal address on "The Pioneer Bench and Bar of Colorado," are printed in the report of the proceedings of the eleventh annual meeting, now issued.

The printed volume recording the twentieth annual meeting of the Virginia State Bar Association, held in August, 1908, is made up chiefly of material of local interest. It contains, however, several papers that will appeal widely to the pro-

fession. Chief among them is the address of President Taft on "The Administration of Justice: Its Speeding and Cheapening." Other papers are those of Hon. William Lindsay, on "The Man and the Corporation," and the president s address delivered by Hon. Wyndham R. Meredith on "Federal Control of Intra-State Commerce."

NEW BOOKS RECEIVED

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

"Mr. Justice Raffles." By E. W. Hornung. Charles Scribner's Sons, New York. ($1.50.)

"Select Essays in Anglo-American Legal History." By Various Authors. V. 3. Little, Brown & Co., Boston. ($12 *net* for the set of three volumes.)

"Equity; also, The Forms of Action at Common Law." By the late Professor F. W. Maitland. Cambridge University Press; G. P. Putnam's Sons, New York. Pp. 407 (index). ($4.)

"Practical Suggestions for Drawing Wills and the Settlement of Estates in Pennsylvania." By John Marshall Gest of the Philadelphia bar. T. & J. W. Johnson Co., Philadelphia. Pp. xx, 141 + index 10. ($2 *net*.)

"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.

"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*.)

"Grounds and Rudiments of Law." By William T. Hughes. 4v. Usona Book Co., Chicago. 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. (Sheep $16, buckram $15.)

"International Incidents for Discussion in Conversation Classes." By L. Oppenheim, LL.D., Whewell Professor of International Law in the University of Cambridge. Cambridge University Press; G. P. Putnam's Sons, New York. Pp. xi, 129. Alternate pages left blank for notes. ($1.)

"A History of English Law." By W. S. Holdsworth, M.A., B.C.L., Vice-President and Fellow of 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.)

"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*.)

*Latest Important Cases**

Appeals. *Admissibility of Evidence as to Fraudulent Intent— Verdict will not Be Set Aside for Inconsistencies Which are not Substantial.*

The United States Circuit Court of Appeals, seventh circuit, reviewing a writ of error in the case of *Walsh* v. *U. S.*, decided Oct. 5 (Chicago Legal News, Oct. 9, 1909), affirmed the judgment of the trial court, dealing with several questions brought up in the voluminous record of the case. On the question of admissibility of evidence as to fraudulent intent, the Court (Humphrey, District Judge) said:—

"It is urged on behalf of plaintiff in error that the verdict is not sustained by the evidence because the record as a whole does not show any guilty intent, and also that the trial court erred in permitting the jury to consider evidence of other acts of the defendant of a kindred nature, not counted upon in the indictment.

"Where fraudulent intent is an essential element of the offense charged, evidence of other acts of defendant of a kindred nature is competent to illustrate the character of the transaction in question, and throw light on the intent with which this particular act was done. We see no error in admitting evidence of similar transactions to prove intent."

The Court also held:—

*Many of these decisions are not yet reported, and no citations can be given. Copies of the pamphlet Reporters containing full reports of such of them as are cited in the National Reporter System may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.

"The objection to the verdict on the ground of inconsistency and repugnancy we do not think is well taken. None of the alleged inconsistencies are substantial, nor of such a character as the law will recognize. A verdict will not be set aside as inconsistent because it finds differently as to counts in which there is no material difference. So long as there is no inconsistency in the verdict as to the substance of the matter charged in the various counts, the verdict will not be disturbed. If the *gravamen* of the charge in each count, on which there has been a verdict of guilty, is the same, there is no inconsistency in the verdict. If in contemplation of law, the legal effect of the allegations in the various counts on which there has been a verdict of guilty is the same, the courts will not upset the verdict on the ground of inconsistency, where the only inconsistency is in respect to immaterial particulars concerning the means by which the crime was committed. *Griffin* v. *State*, 18 Ohio State 438; *Reg.* v. *O'Brian*, 1 Brit. Crown cases, 9; *Hudson* v. *State*, 1 Black Ind. Rep. 317; *Hathcock* v. *State*, 88 Ga. 91; *Tabler* v. *State*, 34 Ohio State 127; *People* v. *Sullivan*, 173 N. Y. 122; *Lyons* v. *People*, 68 Ill. 271; *Langford* v. *People*, 134 Ill. 444."

Appeals. *Errors of Law in Charge to Jury Immaterial, when the Verdict is Found Strictly on the Evidence.* O.

In an action recently brought against the city of Cincinnati, the jury found for the plaintiff strictly upon the evidence, though it allowed a less amount of damages than was claimed and the facts may have warranted. The solicitor for the city appealed from the verdict of the jury because of a technical error of trial.

The Circuit Court of Hamilton county, O., in denying the writ of error laid down as a principle of law the proposition: When uncontradicted evidence shows liability for whatever damage resulted, and also that the plaintiff suffered greater damages than were allowed him, errors of law in the charge to the jury, or in the admission or rejection of evidence at the trial, become immaterial.

The Ohio Bar Association has said that this decision should be preserved in bronze, for the reason that "it anticipates by a half-century the evolution of judicial procedure, which will bring with it that ideal administration of the law where justice shall be done, even if errors have to be ignored."

Appeals. *No Reversible Error in Admission of Incompetent Evidence Which Could not Have Influenced Verdict.* Okla.

One convicted of murder appealed. It was apparent that the wounds of the victim had not been self-inflicted, and further to establish this fact testimony of physicians was introduced. For the error in the admission of this evidence a new trial was sought on the ground that the prosecution, having offered this evidence as a part of its case, was estopped from denying its injurious effect. In *Byers* v. *Territory*, 103 Pac. Rep. 532, the Oklahoma Court of Criminal Appeals refused to be bound by or to follow the line of authorities, which it condemned as technicality run mad, repugnant to reason, demoralizing to respect for law, and destructive of justice. "If the evidence, the admission of which was error, could reasonably have had any effect on the jury, this decision might have been different, but it is the fixed policy of this court to refuse to reverse convictions upon mere technicalities or exceptions which do not deprive the defendant of a substantial right."

See also Defamation.

Corporations. See Interstate Commerce.

Defamation. *No Reversal on Writ of Error for Mistakes not Prejudicial—Evidence of Mental Suffering Admissible, Even if Arising from a Subsequent Publication.* U. S.

The United States Circuit Court of Appeals, second circuit, refused to reverse the judgment of the court below for error, in the libel suit of *S. S. McClure Co.* v. *Philipp*, where the plaintiff in the court below had secured a verdict for $15,000 damages in an action for an article which had appeared in *McClure's Magazine*, in the Circuit Court for the southern district of New York. "It is impossible that an action like the present," said the Court (Coxe, J.), "which was fiercely contested for five or six days, can be tried without some ruling being made which would not have been made if the court had been aware at the time of its full significance. But unless these mistakes are prejudicial a just result should not be disturbed."

On the subject of the admissibility of evidence of mental suffering in an action of libel, the Court said:—

"The first assignment of error which, in our judgment, requires serious consideration challenges the action of the trial court in permitting the plaintiff to describe his feelings after

reading the articles in question. He testified, after objection and exception, that when he read the January article he was much distressed because of the effect it would have upon his family, friends, business acquaintances and his social and financial standing. He was then asked, 'How did you feel after you read the article that was published in the April magazine?' The answer was, 'I felt worse.' It is well settled that in an action of libel the jury may in awarding damages consider the mental suffering of the plaintiff attributable to the libelous article. It is quite true that in, perhaps, the majority of cases the question is presented to the jury as a deduction from established facts. In the case at bar, with all the facts relating to the plaintiff's domestic, social and business relations established, argument as to effect of the false charges upon his mind might, it would seem, have been presented as effectively without the testimony complained of as with it. Before coming to the question of damages the jury necessarily had to reach the conclusion that the defendant had falsely accused the plaintiff of being a criminal, and the conclusion that he had suffered great mental anguish from such a charge would naturally follow. But what may be considered by the jury may be proved, and where the question relates to the mental suffering of the plaintiff no witness can speak *ex cathedra* but the plaintiff himself.

"Regarding the April article, which was introduced by the defendant as a retraction of the January charges and to show that the January article was not written maliciously, we see no reason why the plaintiff was precluded from showing that it did not have the effect upon his mental condition which the defendant thinks it should have had.

"To illustrate: Assume that in an action for malpractice the defendant admits that the initial treatment prescribed by him was improper, but that at a later date, by giving the proper remedy, he effected a complete cure. It will probably not be contended that the plaintiff in such an action is precluded from showing that his health was worse after the alleged cure than it was before; in other words, that the wound was not healed."

Elections. *Voting "by Ballot" Cannot Include Use of Voting Machines.* O.

The Ohio constitution provides that all elections shall be by ballot. In *State* v. *Board of Deputy State Supervisors of Elections*, 89 N. E. Rep. 33, the purchase and use of voting machines was objected to on the ground that it transgressed this provision. Cardboard ballots are attached to the machine; they do not pass into the custody of any vote or by the act of voting into the control of the officers of the election. The Ohio Supreme Court said that to speak of such cardboard as the ballot of the constitution is obviously paying but mock deference to that instrument. However consistently with the intention of the designer the machine may operate and however simple its manipulation may be to those who have become familiar with it, it is in contemplation that it shall be used by the body of the electors, most of whom have no knowledge whatever of its operation, and that from the necessities of the use but little time can be allowed to acquire such knowledge and understanding, one minute being the time allowed by the statute to each elector for that purpose. The Court declared the use of this voting machine unconstitutional.

Evidence. See Appeals, Defamation.

Indictment. *"Willful Misapplication" Without Conversion—General Allegation of Wrongful Intent Will Cure Defect of Indictment Which Does not Set Forth Case of Conversion.* U. S.

Judge Hough of the United States Circuit Court dismissed fifteen of the sixteen counts of the indictment charging F. Augustus Heinze and others with conspiracy, in a memorandum filed in New York City Sept. 11. The Court said:—

"This indictment seems to me to charge in counts one to fifteen this and no more, *viz.*: That with intent to defraud the bank of which he was president, and for the benefit of others unnamed, defendant caused the bank to discount single named commercial paper, and the bank lost the amount paid on the discount. The sixteenth count varies from the others only in stating that the person responsible for the discounted note was insolvent to the knowledge of the defendant at the time of discount.

"The crime of which the defendant is guilty, if guilty at all, is willful misapplication. The one characteristic or essential of this crime on which the Supreme Court has always insisted is conversion. No method of being guilty without converting the funds, money, or credits of the bank has been pointed out. The word conversion has supplied the legal

measure which the court has not been able to find in willful misapplication. If the facts stated in the indictment do not set forth a case of conversion, the indictment is bad, and a general allegation of wrongful intent will not cure it."

The Court also said:—

"That the statements setting forth overt acts cannot be resorted to to aid or supplement defective averments in the indictment proper is plain law. The technical reason for this rule is stated by Judge Woods in the *Britin* case, 108 U. S. 199. Laying aside therefore the 'overt acts,' the statement of conspiracy under section 5440 to commit an offense under section 5399 is clearly insufficient under *Pettibone* v. *United States*, 148 U. S. 197, in that secretion is not charged. No point other than this is now considered."

Interstate Commerce. *Transactions of Foreign Corporation not Licensed to Do Business in the State are Interstate Commerce.* Colo.

Without having secured permission from that state, a foreign corporation, through its traveling representatives, sold goods in Colorado. The vendees were sued for the purchase price. A statute provides that no foreign corporation shall prosecute a suit in the state until it has complied with the law. The Colorado Supreme Court in *Herman Bros. Co.* v. *Nasiacos*, 103 Pac. Rep. 301, held the transaction a contract of interstate commerce, and ruled that it was not within the power of the state to interfere with the business of the foreign corporation so long as its transactions in the state were confined to transactions of interstate commerce. It was not doubted that the states might exclude foreign corporations entirely, or that they might exact such security for the performance of their contracts with its citizens as in their judgment would best promote the public interest, but statutes imposing obligations upon foreign corporations will be construed as not applicable to corporations engaged solely in interstate commerce.

Landlord and Tenant. *Consolidation of Actions—Claims against Tenant Holding Over After Expiration of Lease.* N. Y.

In the case of *Kennedy* v. *City of New York*, the plaintiff, a landlord, had brought two actions for the rent of the years 1898 and 1899, on a lease held over after the expiration of the term. The two actions were consolidated by order of the court, and the plaintiff appealed from the judgment rendered in the consolidated action.

The Court of Appeals of the State of New York, in a judgment rendered Oct. 5 (N. Y. Law Jour., Oct. 11, 1909), held that while the plaintiff might have grouped his several causes of action in a single suit, he was not legally bound to do so, as each suit was based upon a separate cause of action. The Court (Werner, J.) said:—

"A tenant who holds over after the expiration of a definite term for a year or years may be treated by his landlord as a trespasser or as a tenant from year to year. If the landlord elects to treat the tenant as holding over for another year, the conditions of the original lease apply, except as to duration (*Haynes* v. *Aldrich*, 133 N. Y. 287; *Adams* v. *City of Cohoes*, 127 id. 175). Under such a holding over a tenant is bound for another year not by virtue of an express contract, but by implication of law springing from the circumstances (*Herter* v. *Mullen*, 159 N. Y. 28, 43). The only logical deduction from the choice thus given to the landlord of treating a holdover tenant either as a trespasser or as a tenant for another year is that each holding over, where acquiesced in by the landlord, constitutes a new term, separate and distinct from those which preceded it and related to each other only in the conditions of the original lease which the law reads into the new tenancy. Some of the text-writers and a few of the earlier decisions seem to have confused the subject by referring to tenancies from year to year arising by operation of law, as continuations of the original terms, when it would have been more correct to characterize them as new tenancies subject to the original conditions. The later decisions in this court have, however, defined this species of tenancy with a precision that admits of no misunderstanding."

Edward T. Bartlett, J., dissented in a lengthy and carefully prepared opinion.

Legislative Power. *Congress May Delegate Power to Determine Facts on Which Operation of a Statute Depends—Constitutionality of Twenty-Eight Hour Live Stock Law—Unit of Violation the Shipment and Not the Carload.* U. S.

In *Southern Pacific Co.* v. *U. S.* (N. Y. Law Jour. Oct. 5, 1909), decided by the United States Circuit Court of Appeals for the ninth circuit in July, the plaintiff contended that the Twenty-eight Hour Law (Act

Cong. June 29, 1906, c. 3594, 34 Stat. 607, U. S. Comp. St. Supp. 1907, p. 918), authorizing the shipper of cattle or the person accompanying them to extend the time of their confinement to thirty-six hours, was not such a delegation of legislative power as would render the law unconstitutional. For, said the Court (Gilbert, Circuit Judge), "While a Legislature may not delegate the power to legislate, it may delegate the power to determine some fact on which the operation of its own act is made to depend. Although the act in question herein incidentally protects the owners of live stock, its primary and important purpose is to prevent cruelty to animals in transportation. It needs no argument to show how great is the evil which it is intended to remedy. We find no ground for saying that the law as framed by Congress is not complete in itself. No part of it is made by the shipper, nor is he given the option to say that the carrier shall not comply with its provisions."

The Court also held that the unit, in the case of violation of the act, was the individual shipment of live stock and not the carload as contended by the plaintiff, finding controlling reason for so holding in the proviso of section 1:—

"That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours."

Legislative Power. *Congress May Not Delegate Power to Create and Define Crimes—Unconstitutionality of Statute Making it Criminal to Violate Rules of Department of the Interior.* U. S.

A federal statute made it a criminal offense to violate rules which should thereafter be made by the Secretary of the Interior. The regulation in question prohibited the pasturing of stock within the forest reserves without a permit. In *United States* v. *Grimaud*, 170 Fed. Rep. 205, the defendant, having been arrested for pasturing sheep within a reserve, contended that the statute was void because it did not define the acts to be punished, and because it delegated legislative power to an executive officer. It did not declare the grazing of sheep to be a crime, nor make any reference thereto, but declared that whatever the executive prohibited should be punishable. There was no way by which a person examining a statute could conclude that the act referred to was criminal. The executive officer by the statute was allowed to define and determine crimes, which according to all the authorties is a legislative function. The United States District Court held that there could be nc crimes except those created, expressly defined, and penalized by an act of Congress, and that the indictment could not be sustained.

Municipal Corporations. *Ordinance to Regulate Rag-Picking Invalid—Ordinances in Restraint of Trade Passed for Protection from Fire Require Legislative Sanction.* Mass.

A city ordinance of Chelsea, Mass., passed after the great fire, forbade the use of any building for the picking, sorting or storage of rags without a written permit from the chief of the fire department.

In *Commonwealth* v. *Maletsky*, the validity of this ordinance was called in question.

The Supreme Judicial Court of the state, in a decision rendered Sept. 23, held the ordinance void, saying:—

"Neither expressly nor by necessary implication is the chief of the fire department required to base his action in granting or refusing a permit upon the danger of fire involved. . . .

"This is not a case where the city government has general control of the subject-matter of the ordinance and may impose such conditions as it pleases. . . . The power of the city of Chelsea to deal with this subject is only what is given by Revised Laws, chap. 104, . . . , and the city authorities can in no respect transcend the authority thus given.

"We need not doubt the power of the Legislature to establish such regulations as this or to delegate that power to city governments or other boards if it desired to do so, and to make licenses or permits from an administrative officer necessary to the exercise of trades or kinds of business that might involve a public danger. . . . But, as has been already pointed out, the effect of the enforcement of this ordinance by the chief of the fire department may be wholly to prohibit the carrying on of the specified business in Chelsea. . . . The pursuit of a lawful business, not of itself harmful, though it may be regulated, is not, without legislative sanction, wholly to be stopped by municipal ordinances for the prevention of fire or for safeguard against some other apprehended danger."

Perpetuities. *Validity of Charitable Trust.* U. S.

A philanthropic citizen wishing to alleviate a state's financial burden deposited money in trust to be accumulated for the benefit of the state of Pennsylvania. The instrument provided that the trustee should invest the money and all its accumulations in the public stocks of the state whenever they could be purchased for a certain price, otherwise in government or other stocks, until the time should arrive when the fund so accumulated, together with any other sums which might be deposited with the trustee for like purpose should be equal to the debt at that time owed by the state, when it should be paid over to the treasurer of the state for the purpose of discharging its entire indebtedness, and for no other purpose whatsoever. The amount deposited was $2,000; the indebtedness of the state at that time was $40,000,000. In *Russell* v. *Girard Trust Co.*, 171 Fed. Rep. 161, the United States Circuit Court held that as the state took no vested interest in the fund but was to receive the benefit of it only on a contingency which might never happen, or might happen at some indefinite time in the future, which might exceed the limitation of the rule against remoteness of accumulations; the trust was void and the fund was recoverable by the personal representative of the settler upon his death.

Procedure. See Appeals.

Unfair Trade. *Common Law Trademark Which Had Been Registered—Mark Not a Necessary Incident of Manufacture.* U. S.

The plaintiff, a nail manufacturer, had registered a trademark, also held valid at common law, consisting of a pattern of small checks stamped upon the head of horseshoe nails, and obtained a decree in the lower court enjoining defendant from using this trademark. In *Capewell Horse Nail Co.* v. *Mooney*, decided at New York City August 20 (N. Y. Law Jour., Oct. 4, 1909), the United States Circuit Court of Appeals affirmed the judgment of Judge Ray, Judge Lacombe finding no error in his conclusions, and saying:—

"The most we can say is that the proof leaves it doubtful whether or not the defendant could economically and efficiently manufacture its nails without a gripping surface on its small roller which would impress permanent marks on the front face of the nail head.

"On this branch of the case defendant, who cannot reasonably dispute that his mark there placed is substantially like complainant's, has the burden of proof. But we concur with Judge Ray in the conclusions that, 'if it was necessary to have a gripping surface on the roller it was not necessary to use the only one of many which would produce (on the face of the nail head) the exact counterpart of complainant's distinguishing mark, which had come to be known in the trade and among manufacturers and dealers in and users of horseshoe nails'; and that 'the production of *this* check mark on the defendant's nails is not a necessary incident of manufacture.' "

Wills and Administration. *Distribution per Capita and Per Stirpes—Legal Interpretation.* N. Y.

A testator, an eminent lawyer who knew the precise meaning of the terms he employed, bequeathed the residue of his estate one-third to the heirs of A, one-third to the heirs of B, and one-third to the heirs of C, "to be divided among them *per capita* as well as *per stirpes*, equally and in all respects, share and share alike." The Surrogate's Court of Nassau county, New York, in *Matter of Curtis et al.* (Aug. 1909, N. Y. Law Jour., Sept. 7, 1909), the Court said:—

"The words '*per capita* and not *per stirpes*,' we may assume, were familiar to him, and if he intended what they mean, would he not have used them? The mere fact that he did not indicates that he had something else in mind when he used the words in question." He therefore intended only that the thirds should first be divided *per stirpes* and then *per capita* among the children of the legatees benefited by the distribution *per stirpes*."

The Editor's Bag

THE CRIME OF FERRER

WHAT was the crime of Ferrer? With reference to the facts which have come to the attention of the American public, what is to be said of the policy which brought about his execution?

In every country the dissemination of anarchistic views, even by persons whose private lives are irreproachable, should be punishable when those views incite others to acts of violence. The statement has been freely made that Ferrer was a philosophical anarchist. The evidence on this point is not fully accessible. That Ferrer was a socialist is clear; that his opinions were not only anti-clerical, but anti-Christian, is evident; but it is doubtful whether he was not more a republican than an anarchist. The question in the present case is more specific, being not whether he held anarchistic views but whether the expression of anarchistic views incited the rioting in Barcelona. This disturbance does not clearly appear to have been different in character from an ordinary revolutionary riot. Such a riot attracts not only anarchists to take part in it, but malcontents of every description—socialists, nihilists, republicans, all enemies of the monarchical *régime*. As there is not even the probability that the Barcelona uprising sought the overthrow of all government, rather than the establishment of a republic, the offense of Ferrer, if offense there was, is more likely to have been that of rebellion against the lawful government than of complicity in an anarchistic disturbance. The former offense is the lesser, for unlike the latter it may be merely political.

The deposition of the Director of Police at the trial, that Ferrer was an active anarchist, may probably be set down to prejudice. Some of the other testimony pointed to complicity in a republican insurrection. It was said that Ferrer had invited the mayor of Premia to proclaim a republic. It was also testified that he had been seen among the rioters. The evidence of not less than seventy witnesses had been hostile to him at the preliminary hearing.

His connection with the riots may therefore have been sufficiently a matter of reasonable belief to serve as a basis for a charge of inciting to rebellion.

Ferrer might therefore have been charged with an offense against public order which is punishable in many countries. Whether he could have been convicted, however, in a regular trial is improbable. If he had been tried by the ordinary procedure of courts of law in Spain, and had had the usual rights of an accused person, there is little doubt that he would have been acquitted. If convicted, the sentence could not have been of undue severity.

But Ferrer, instead of being tried in the regular way, was tried in a court of

martial law, by the summary procedure peculiar to such a court, with the imposition of a penalty so severe as to be justifiable only by military necessity. Were such extreme measures proper under the circumstances?

In any country, the occurrence of such disturbances as those at Barcelona last July would have furnished occasion for armed resistance to revolt and the establishment of martial law. Millions of dollars' worth of property had been destroyed, priceless works of art reduced to ashes, and atrocious acts of vandalism perpetrated. The police were powerless to deal with a situation of such turmoil. A resort to martial law and military justice, under such conditions, may have been not only just but necessary.

In the United States, if an insurrection like that in Spain were to arise, the army could not, in attempting to put it down, deprive those not actually engaged in the rebellion of the right of *habeas corpus*, and martial law is subject to limitations imposed by the United States Constitution. *Luther* v. *Borden*, 7 How. 1; *Ex Parte Milligan*, 4 Wall. 2. But such limitations on martial law are matters of municipal law, and need be the same in no two countries. The international law of war has to a notably large extent defined the rights of military occupation, including those of substituting martial law for the law prevailing in the occupied region, but none of these rules is of binding application to the law of internal war. Hence, while international law takes, in general, a humane and lenient view of the methods by which martial law is to be administered, this does not show what course is legal or illegal in Spain, the municipal law of which may authorize most drastic measures for suppressing armed insurrection.

When Francisco Ferrer was shot, however, the insurrection in Barcelona was under control. The conditions which call for extreme measures of precaution seem to have been absent. It was undoubtedly necessary to rely on the presence of the armed military force for the continuance of order, but there appears to have been no necessity for suspending the jurisdiction of the ordinary civil courts so completely as to make the charge against Ferrer triable only before a military tribunal. Foreign spectators have been unable to see the justification of any real necessity or danger for the trial of Ferrer by a court of martial law. It is probable that the course pursued was technically legitimate under Spanish law, but that does not make it reasonable or moral from the standpoint of the enlightened world.

The character of Maura, the deposed prime minister, has been blackened, but he was the instrument of the forces which seek the protection of life and property and the maintenance of social order, and as such he was more bigoted than villanous. In a monarchical country socialism is a far more serious menace to social order than in a republic, for popular government provides a free outlet for pent-up radicalism and prevents explosions which might otherwise occur. Ferrer, while personally by no means to be classed as a criminal, may easily, therefore, have been regarded a dangerous enemy of public order. To treat him as such was to misunderstand him, but Ferrer had himself misunderstood modern society, as he showed by his socialistic teachings. He had laid himself open to misconstruction. Error, like truth, may have its martyrs, but those of the former are not equally glorious. Ferrer died a lamb of sacrifice on the altar of the heathen cult of socialism. The crime of Ferrer was that he mis-

understood and consequently was misunderstood. Imprisonment would have been sufficient.

THE CALL TO ARMS

WHEN the beautiful Mlle. Helen Miropolosky made her *début* recently as a member of the Paris bar. it is said that she made a most pleasing impression. She was attired in a simple black gown relieved by the conventional white barrister's bib. Her costume was further accentuated by the black toque which crowned her jet black hair. She appeared to every one an irresistible legal belle.

We do not believe in disparaging the right of women to be treated with consideration when they choose to earn their livelihood at the bar. There is nothing in either the federal or the female constitution which prohibits them from using their powers to the best advantage. If the ladies of the United States would more generally emulate the example of the charming Mlle. Miropolosky, the beauty of woman would vie with the dignity of man in raising the general tone of the profession. There would be more ladies of whom it could be said, to imitate Steele's immortal phrase, that to know them was a legal education. We often hear this or that distinguished attorney called an "ornament" of the bar, but how quickly the light of such luminaries would pale before the withering rays of lovely woman!

In Denmark a woman has achieved judicial eminence. In this country the worthy profession of the law can point with pride to Mrs. Esther Morris of the bench of Wyoming, Mrs. Catherine Waugh McCulloch of the bench of Illinois and Mrs. Mary Cooper of the bench of Kansas. Even thus so noble a type as that of Deborah, the wife of Lapidoth, who judged the people of Israel for forty years, is enshrined in immortality in the heart of the American people!

Toward the corporation of Harvard University, which has denied a lady admittance to the Harvard Law School, our only feeling is one of holy and chivalrous regret. Like the shot that was once heard at Bunker Hill, the corporation's snap of its fingers at Miss M—— has been heard round the world. But democracy will be vindicated! Arise, sisters, and avenge your fallen comrade!

"A CASE OF RARE JUSTICE"

A LAWYER of Moultrie, Ga., sends us the following amusing reminiscence:—

The writer, while representing a local road as "cow coroner," was called to an adjoining town in the "Sticks" to defend his road in a "hog" case.

Upon getting off the train he was accosted by a stranger who inquired if he was the railroad's lawyer, and asked other and numerous questions. Seeing that he had an interest in me and possibly some connection with the case, I inquired if he was the plaintiff or one of the witnesses. He modestly informed me that his interest was only this, that he and the Justice of the Peace who was to try the case had up a bet between them of a five-dollar hat, the Justice betting him that I would lose the case. This did not tend to increase my already doubtful spirits, but I determined to have my try before the jury at any rate.

After the conclusion of the evidence and an impassioned plea upon behalf of my client by myself, the Honorable Justice opened the Code of Georgia about the section covering divorce laws, turned upside down, wiped his specks, took a fresh chew of tobacco with majestic mien, cleared his voice twice in a thundering manner which quite cowed the admiring throng, and proceeded to charge the jury, an excerpt of which I recall:—

"Gentlemen of the Jury, I am the Law, I give you the Law, you must believe it whether it is right or not. You must not pay

any attention to the lawyers. Gentlemen, I charge you that when this case was tried before me I gave a verdict for the plaintiff, and I charge you, gentlemen, to do likewise. Retire and make up your verdict."

Of course you know the rest.

SHOWING THE HONOR IN WHICH JUDGES WERE HELD

PRESENTS from suitors to judges were not uncommon, nor, perhaps, unexpected, in New Hampshire in the eighteenth century under the colonial government, says a writer from whom Charles Warren, in his interesting history of the Harvard Law School, quotes an interesting story:—

On one occasion the Chief Justice, who was also a member of the council, is said to have inquired, rather impatiently of his servant, what cattle those were that had waked him so unseasonably in the morning by their lowing under his window; and to have been somewhat mollified by the answer that they were a yoke of six-feet cattle, which Col. —— had sent as a present to his Honor. "Has he?" said the judge; "I must look into his case—it has been in court long enough."

SWIFT JUSTICE IN ENGLAND

JUDGE EDWARD PIERCE of Boston was much impressed with the rapidity with which the business of the English courts was transacted, in a recent visit abroad. He was also struck with the feeling of mutual respect between the judges and the lawyers. He says:—

What impresses a stranger who is visiting the English courts is the thorough manner in which a judge goes into a case, and the complete mastery he has of the subject-matter in dispute, including all its minor details. The Chief Justice heard, and disposed of four separate murder cases in ten days, and yet each case was so carefully and completely heard that the rights of each of the defendants were carefully protected. In the English courts, technical and extraneous matters are eliminated, and court, counsel and jury get right down to the main facts, without unnecessary delay.

TO FRIENDS ACROSS THE PACIFIC

WE regret to note that the existence of the *Commonwealth Law Review* of Australia has been terminated after a useful and dignified career of six years. The editors express the fear that Australia may not yet have been ready for such a publication, that its lawyers are possibly more interested in the Trade of the Law than in the Science of the Law. We are confident, however, that the work of these scholarly editors has not been in vain, and that the legal profession in Australia will soon awake to the fact that a publication of such high standards as the *Review* is indispensable.

HOW THE VILLAIN ESCAPED

AS a burglar was trying to break into a house of a citizen of a foreign city the framework of the second story window to which he clung gave way and he fell and broke his leg. Limping before the justice the next day he indignantly demanded that the owner of the house be punished.

"You shall have justice," said the judge.

The owner, being summoned, claimed that the accident was due to the poor woodwork, and that the carpenter, not he, was to blame.

"That sounds reasonable," said the judge; "let the carpenter be called."

The carpenter admitted that the window was defective. "But how could I do better," said he, "when the mason work was out of plumb?"

"To be sure," replied the judge, and he sent for the mason.

The mason could not deny that the coping was crooked. He explained that while he was placing it in position his attention was distracted from his work by a pretty girl, in a blue tunic, who passed on the other side of the street.

"Then you are blameless," said the judge, and the girl was sent for.

"I admit," said she, "that I am pretty, but

that's not my fault, and if the blue tunic attracted the mason's attention the dyer, not I, is responsible."

"That's good logic," said the judge; "let the dyer be called."

The dyer came and pleaded guilty.

"Take the wretch," said the judge to the thief, "and hang him from his doorpost."

The people applauded this wise sentence and hurried off to carry it out. Soon they returned and reported that the dyer was too tall to be hung from his doorpost.

"Find a short dyer and hang him instead," said the judge with a yawn; "let justice be done at any cost."—*Law Student's Helper.*

THE JUSTICES GREAT READERS

Members of the Supreme Court probably take out more books from the Congressional Library than all the members of either the Senate or the House of Representatives combined, says the Washington correspondent of the *Boston Herald.* Chief Justice Fuller is a great reader, and hundreds of books on a great variety of subjects are sent to his house every year. Justice Holmes is a great student and reads much in French and German.

MY PAPA

My papa is a lawyer man,
He tells me lots of things
At night when he is smokin' an'
A blowin' big smoke rings.

He laughs an' says, "My boy, ha! ha!
When you're a man you'll see
The reason why your nice mamma
Is my life mortgagee.

He uses awful words, I just
Can't find the meaning for,
He says I'm *cestui que trust*
And he the obligor.

He talks so much I fall asleep,
Then wakes me with a nudge
An' says his talk must be too deep,
I act just like the Judge.

H. R. B.

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

In *Smith* v. *Fuller* (Iowa 1908) 115 N. W. Rep., at page 915, Deemer, J., said: "No presumption can make a woman the widow of two living and undivorced husbands."

—*Law Notes.*

A colleague of the late Henry W. Paine approached him on one occasion with the offhand inquiry, "Mr. Paine, what is the law on such and such a subject?" The famous counselor took out his watch, studied it a moment, and shook his head. "I don't know," he answered. "The Legislature hasn't adjourned yet."—*Boston Transcript.*

"Pray, my good man," said a judge to an Irishman, who was a witness on a trial, "what did pass between you and the prisoner?"

"Oh, then, plase your lordship," said Pat, "sure I sees Phelim atop of the wall. 'Paddy!' says he. 'What?' says I. 'Here!' says he. 'Where?' says I. 'Whist!' says he. 'Hush!' says I. And that's all, plase your lordship."

—*Christian Register.*

It was a clever lawyer in a Boston court recently who took advantage of the nautical knowledge he possessed to work upon the mind of a juryman who did not seem to show much comprehension of a case of suing a street railway for damages.

The dull member was an old sailor, who, though doubtless very keen of perception along some lines, was, nevertheless, rather slow in his understanding of the points involved in the case being tried. The lawyer noticed this and made his strike with this particular man. Approaching the jury box he addressed himself to this one juryman and said:—

"Mr. Juryman, I will tell you how it happened. The plaintiff was in command of the outward bound open car, and stood in her starboard channels. Along came the inward-bound closed car and just as their bows met she jumped the track, sheered to port, and knocked the plaintiff off and ran over him."

The sailor was all attention after this version of the affair, and joined in a $5000 verdict for the injured man.

—*Gloucester* (Mass.) *Times.*

The Legal World

Important Litigation

The government suit to dissolve the alleged anthracite trust is likely to come to trial in the United States Circuit Court at Philadelphia this fall. The New Jersey Central, the Reading Company and the Erie are named as defendants.

Judge McAllister Campbell in the federal court at McAlester, Okla., issued a temporary order, Sept. 27, restraining the state officials from interfering with the piping of gas out of Oklahoma. This decision was rendered in spite of the anti-trust law of Oklahoma, which prohibits foreign corporations from engaging in this business within the state.

After two years of agitation against race track gambling in New York State marked by the passage of the drastic anti-betting bill, generally called the Hart-Agnew law, the Kings county (Brooklyn) grand jury handed up indictments Oct. 4 against the two big Kings county race tracks, three police officials, five private detectives and twenty-five bookmakers. The defendants will raise the question of the constitutionality of the law.

The Irish land bill, a measure of vast importance, passed through its final stage in the House of Commons Sept. 17 by a vote of 174 to 51. All estates and untenanted lands of Ireland were put into the power of a body of commissioners who may fix the price for their sale. Under this bill loans for Irish land purchases amounted to $915,000,000. The Lords passed the bill to its third reading Oct. 26, with some important amendments which there was doubt of the Commons accepting.

The case of the United States in the Newfoundland fishery arbitration between Great Britain and this government was sent Oct. 4 to the British embassy, and the case of Great Britain was forwarded to the American embassy in London by the British foreign office. This is the first step in the arbitration of the Newfoundland fishery dispute. It is the first case between the United States and Great Britain to be referred to the Hague Court for arbitration under the general arbitration treaty of April 4, 1908.

After an extended discussion of the terms of settlement in the $30,000,000 suit brought in New York by the Pennsylvania Sugar Refining Company against the American Sugar Refining Company, Judges Willson and Audenreid in the Common Pleas Court at Philadelphia agreed Sept. 24, to act as arbitrators and determine finally whether the compromise offered by the American Sugar Refining Company should be accepted. The indications in October were that there would be an amicable settlement of the case by the acceptance of the terms offered by the so-called "trust" when the case was on trial in New York several months ago.

A suit against the United States for $61,287,800 probably will be tried this winter. This suit was instituted by the Missouri, Kansas & Texas Railroad Company, one of the land grant railroads, by the filing of a petition in the United States Court of Claims, in which it was alleged that by acts of Congress the United States had agreed to convey to it the fee simple title to every alternate section of land to the extent of ten sections per mile on each side of its line through the Indian Territory and Kansas, and that subsequently many of these lands had been deeded to the Indians in severalty and had otherwise been disposed of to the great loss of the railroad company.

Important Legislation

It is the consensus of opinion in the American Bankers' Association, which held its thirty-fifth annual convention in September, in Chicago, that "the bill of lading question, one of the greatest commercial problems of the day, will soon be settled to the satisfaction of bankers, carriers and shippers." The cry of the bankers has long been for a bill of lading which will make the carrier issuing it responsible so that it will be a safe negotiable instrument.

The Interstate Commerce Commission is said to be in favor of President Taft's proposal to recommend to Congress the establishment of a federal court with exclusive jurisdiction over appeals from the decisions and rulings of the commission. This agreement with the President follows the conference on interstate matters held not long ago in New York, at which the President, many of his Cabinet, and Commissioners Knapp and Prouty were present. Such a court would strengthen and consolidate the powers of the commission rather than weaken them, according to the belief of the commissioners.

The province of Alberta, Canada, after consultation with Judge Ben B. Lindsey, Judge George S. Addams of Cleveland and J. J. Kelso of Ontario, has passed a new children's act. Alberta now proposes to hold the cruel or negligent parent accountable for the proper care of the child, and its officials can fine or imprison offenders. In cities of over 10,000 there is to be a refuge for temporary detention of children that are held for trial, or are neglected; probation officers look out for children's interests, children's courts are

to be established, no child may be confined with persons charged with crimes; and children held for trial must be tried immediately and outside of the regular court-room.

Frank H. McCune, the rate expert, who was the principal witness for the people of Spokane in the first fight before the Interstate Commerce Commission for equitable freight rates, uges the people of the country to support the Trans-Mississippi Commercial Congress in its efforts to secure the adoption by the United States Congress of an amendment to the act to regulate commerce, "requiring railroads to quote rates in writing when so requested by shippers, and that rates so quoted be protected to avoid loss to the shippers, and assessing a reasonable penalty against the carrier making the misquotation, so that the provision of the act against rebating may be kept inviolate." He thinks that such an amendment should have the indorsement of every commercial body in the United States.

Personal— The Bench

Justice N. D. Denson of the Supreme Court of Alabama, who is retiring from the bench, declares it to be his intention to practise law at his home town, Lafayette, Ala.

The election for city court judge of Ashburn, Ga., September 20, resulted in a majority for Colonel R. L. Tipton of 47 votes over his opponent, Colonel John J. Story.

Judge Martin Lehmayer, who succeeds the late Judge Conway W. Sams on the Supreme Bench of Maryland, took his seat September 15, amid the congratulations of his friends.

W. E. Scofield of Marion, O., received his commission from Gov. Harmon to succeed the late Boston G. Young as common pleas judge in that locality.

Judge John C. Gray, who has been appointed Superior Judge of Butte county, Cal., to fill the vacancy caused by the death of Judge Warren Sexton, was sworn into office a short time ago.

Judge N. H. Mapes recently resigned his office of county judge in Colfax County, Neb., in order to attend a law school. Speeches and an oyster supper marked the appropriate observance of the occasion by his friends of Schuyler, Neb.

George A. Cooke, a Democrat of Aledo, Mercer county, is the new member of the Illinois Supreme Court to succeed the late Justice Guy C. Scott, chosen in the special election held September 25. He defeated Milton McClure, the Republican nominee, by 2,882 votes.

James M. Morton of Fall River, Mass., Associate Justice of the Massachusetts Supreme Judicial Court, reached his seventy-second birthday September 12. He was appointed by Governor Brackett in 1890, having been one of the leading lawyers of Bristol county.

Christopher Francis Parkhurst, Associate Justice of the Rhode Island Supreme Court, who was elected to his present position Feb. 21, 1905, recently passed his fifty-fifth birthday. He was graduated from Brown University in 1876, and was admitted to the Rhode Island bar in 1879.

Associate Justice Brewer of the United States Supreme Court, speaking at the annual banquet of the Vermont Fish and Game Association which occurred at Hotel Champlain, Vt., devoted the greater part of his address to urging the prevention of the pollution of the country's rivers and lakes.

Judge James B. Richardson of the Massachusetts Superior Court is much interested in the claim that Samuel Morey of Orford, N. H., and not Robert Fulton, was the inventor of the steamboat. Judge Richardson spends his summers at Orford, and has been forced to agree with the townspeople of Orford in this belief.

Chief Justice James Pennewill, Resident Judge Henry C. Conrad of Sussex county and Judge-at-Large Victor B. Woolley took their places on the bench of New Castle County, Del., recently for the first time. Until his appointment last June, Chief Justice Pennewill had served as resident judge of Kent county for twelve years. Judges Conrad and Woolley were not on the bench before.

Marcus Morton of Newtonville, Mass., has succeeded the late Judge Gaskill as judge of the Superior Court. Mr. Morton is forty-seven years old. His father was Chief Justice of the Supreme Judicial Court of Massachusetts, and his grandfather was a Justice of the Supreme Court and also Governor of Massachusetts. He graduated from Yale in the class of 1883 and also from the Harvard Law School.

Vice-President Sherman, while in Kansas City recently, talked informally with Judge Guinotte. "I understand you have held the office of probate judge here about fifty years," he said, jokingly. "You do not look to be a man of more than forty. I understand, also, that you have these lawyers so well trained that they are willing to come right up and eat out of your hands. That's the system." Judge Guinotte made no comment except to say he had held the office of probate judge for twenty-three years.

Personal—The Bar

Walter S. Newhouse of New York read a paper on "The Legal Relations between Mill and Selling Agent," at the semi-annual meeting of the National Association of Cotton Manufacturers, held at the Mt. Washington House, N. H., not long ago.

William Rotch Wister celebrated his sixtieth anniversary as a member of the Philadelphia bar October 6. Mr. Wister is also one of the oldest members of the University of Pennsylvania Alumni. He is considered by many as the "father of American cricket."

The Georgetown Law School of Washington, D. C., has a valuable addition to its lecturing staff in Wade H. Ellis, assistant to the Attorney-General, who lectures on international and mining law. Another new instructor is Adolph A. Hoehling, Jr., who lectures on evidence.

Secretary of War James M. Dickinson was presented on September 28 with a gold medal "for heroic daring," on behalf of the United States government, by Assistant Secretary of the Treasury Hilles. More than fourteen years ago he rescued James F. Joy, a Detroit lawyer, from drowning in the Detroit river.

Roland B. Harvey of Baltimore, a graduate of Johns Hopkins University and the Maryland University law school, has been appointed Secretary of Legation and Consul-General to Roumania and Servia, and secretary of the diplomatic agency in Bulgaria. Until a few years ago he was an assistant States Attorney.

Ralph Otto, Mayor of Iowa City, Ia., has been chosen by the Ohio State Board of Education to take the place on the faculty of the State University College of Law left vacant by Professor Lawrence M. Byers, who died early in the summer in London. Mayor Otto will not give up his duties as chief official of Iowa City.

G. R. Hutchens of Cedartown, Ga., was appointed by Governor Brown, October 1, as a member of the Prison Commission to fill the vacancy caused by the death of Judge Turner of Eatonton. Mr. Hutchens is considered one of the strongest as well as one of the best known lawyers in north Georgia. He is less than forty years of age.

Adolph O. Eberhart, the new Governor of Minnesota, was born in Sweden thirty-eight years ago, but came to Minnesota in 1881. He studied law and worked hard for the success of the Republican party. He was at one time clerk of the United States Courts and later was United States Commissioner for the District of Minnesota. In 1903 and 1904 he was elected to the state senate. In 1906 he was elected lieutenant-governor and was re-elected in 1908.

Mr. Edwin W. Smith of the law firm of Reed, Smith, Shaw & Beal, Pittsburgh, Pa., and the classmate of President William Howard Taft of the Yale class of 1878, was appointed by President Taft as the representative of the United States at the third international conference on maritime law, held at Brussels this fall. The other representatives from the United States were Judge Walter C. Noyes of the United States Circuit Court, of New London, Conn., Charles C. Burlingham of New York city and former Governor A. J. Montague of Virginia.

Bar Associations

The Wilkes County Bar Association, a branch of the Georgia Bar Association, was formed September 15 at the courthouse in Washington, Ga. The following officers were elected: Hon. William Wynne, judge of the city court of Washington, president; Hon. F. H. Colley, vice-president; I. T. Irvin, Jr., secretary and treasurer.

The Bar Association of San Francisco held its first quarterly dinner at the St. Francis September 15. Mr. C. H. Lindley, president, spoke on "The Sporting Theory of Justice." Mr. F. H. Norcross, Chief Justice of Nevada, addressed the bar on "Criminal Law Reform." Mr. Thomas E. Hayden spoke on "The Lawyer in Public Life," and Mayor Edward R. Taylor made an informal address.

The Allegheny County Bar Association, meeting at Pittsburgh October 1, unanimously adopted strong resolutions, on a motion of Attorney Charles D. Gillespie, condemning the proposed amendment to the Constitution of the State of Pennsylvania which provides that in cities' election boards be appointed instead of elected. The amendment fails to say who shall appoint the board, and this, the lawyers allege, makes it a vicious proposition.

The annual meeting of the Wisconsin State Bar Association was held in Milwaukee on August 31 and September 1. President Neal Brown opened the meeting with an address, in which he paid his respects to muckrakers. The annual address was delivered by S. S. Gregory of Chicago. Other addresses were "The Spirit of Nullification and Secession in the Northern States," by Robert Wild, Jr., of Milwaukee, and "Some Features of State Regulation of Public Utilities," by John H. Roemer, State Rate Commissioner. The officers elected for the ensuing year were: President, James G. Flanders of Milwaukee; secretary, R. B. Mallory of Milwaukee; treasurer, J. S. Sanborn of Madison.

Necrology—The Bench

Judge W. G. Crowley of Smithville, Tenn., died September 10, at the age of eighty-three. He held the position of Chancellor of the Fifth Division of Tennessee for nineteen years.

Judge H. H. Wallace of the forty-seventh judicial district, Texas, died September 13, at Tascosa, Texas. He was the youngest district judge in Texas at the time of his appointment.

Judge Henry W. Seney of Toledo, Ohio, died September 2 at the age of sixty-two years. Judge Seney had been twice elected circuit judge in the third judicial district of Ohio, resigning in 1895.

Judge Benton G. Young of the Ohio Court of Common Pleas died suddenly at Marion, Ohio, August 31. He was serving his second term on the bench, and was said to be one of the most learned jurists in Ohio.

Judge Joseph Frease, who was one of the oldest members of the Ohio bar, died at Canton, O., September 3, at the age of eighty-two. He was Prosecuting Attorney and later Common Pleas Judge of Stark county.

Judge Warren T. Sexton of the Superior Court of Butte County, Cal., died suddenly September 14. He was one of the best known attorneys in northern California. He was twice elected district attorney of Butte county. He was forty-eight years old.

Gen. James Shackelford, for four years United States Judge for the District of Oklahoma and Indian Territory, from 1889 to 1893, died September 7 at Port Huron, Mich. He was born July 7, 1827, at Danville, Kentucky, and was a brave officer in both the Mexican and Civil Wars.

Judge C. H. Grote, county judge in Juneau County, Wisconsin, for twenty years, died September 10, at Mauston, Wis. He came to this country from Germany in 1857. He retired from the bench in 1890, and had reached the age of eighty years at the time of his death.

Judge A. W. Patrick died in New Philadelphia, O., September 26. He was eighty years old. He was county prosecuting attorney of Franklin county probate judge and state senator. He also was delegate to the national Democratic convention in 1900 and received the Ohio indorsement for vice-president. For half a century he was a leading lawyer in Tuscarawas county.

Judge M. H. Dent, formerly of the West Virginia Supreme Court bench, died at his home at Grafton, West Virginia, September 11. He was sixty years old. In 1892 he was elected to the West Virginia Supreme Court of Appeals for a twelve-year term as a Democrat. In 1906 he was defeated as Democratic candidate for Congress.

Samuel Gustine Thompson, a prominent member of the Philadelphia bar, once for a short time Justice of the Supreme Court of Pennsylvania, died September 10 at Narragansett Pier, R. I., at the age of seventy-two. He was the son of James Thompson, late Chief Justice of the Supreme Court of Pennsylvania, and was a native of Franklin, Penn.

Judge Harvey B. Shiveley, one of the best known jurists in Indiana, died at Wabash, Ind., September 10. He was born in Preble County, Ohio. He was elected to the state legislature in 1882, and was elected judge of the Wabash Circuit Court in 1890, and again in 1896. During the twelve years of his service he never had a decision reversed by the Supreme Court until near the close of his last term.

Judge Joseph Sydney Turner, Chairman of the Georgia Prison Commission, former legislator and ex-judge of the county court of Putnam, Ga., died at his home in Eatonton, Ga., September 29. As a young man he taught in the Eatonton Academy and educated himself at the Law School of the State University at Athens, Ga. He rapidly won laurels at the Bar, and when appointed Judge of Putnam County was the youngest county judge in Georgia.

Judge William L. Norwood, one of the most widely known jurists in North Carolina, died at his home in Waynesville September 26. He was born in Asheville in 1841. At an early age his family moved to Waynesville. In 1896 he was elected judge of the Superior Court of Haywood county and held that office for six years, resigning in 1902. He was one of the most popular members of the North Carolina Bar Association, and was regarded as a learned member of the profession.

Hon. Conway Whittle Sams, Associate Justice of the Supreme Bench of Baltimore City, Md., for many years secretary, and then president, of the Maryland Bar Association, died September 5 in Atlantic City. Judge Sams was an expert on taxation, being formerly President of the Appeal Tax Court and the author of a system of revision and equalization of assessments which put a stop to the lax methods prevailing before his elevation to the bench. Born in South Carolina in 1862, he had shown himself one of the most versatile members of the Maryland bar.

Judge Martin F. Morris, former Chief Justice of the Court of Appeals of the District of Columbia, died in Washington September

13, at the age of seventy-five. He was born in Washington, December 3, 1834, and received his education in Georgetown University, graduating in 1854. He appeared as counsel for John H. Surrat, one of the alleged conspirators against President Lincoln, securing an acquittal. He was appointed Associate Justice of the Court of Appeals in 1893, and later Chief Justice. He retired from the bench in 1905, and had since occupied himself with writing, as well as with the practice of law.

Judge Eugene Williams of Waco, Texas, aged fifty-four years, dropped dead on a street car, in that town September 21. He was born in Gainesville, Ala., September 15, 1855. He attended the Virginia Military institute and the University of Virginia, receiving his law degree in 1877. He located in Waco in 1878. In the early eighties he was elected county attorney of McLennan county and was later appointed by the governor district judge of the nineteenth judicial district, to fill out the unexpired term of Judge B. W. Rimes, and afterwards, in 1886, was elected to the judgeship before the people. From 1895 to 1905 he was general attorney in Texas for the American Cotton company.

Judge Celora E. Martin, former Associate Judge of the Court of Appeals of New York State, died September 10 at his home in Binghamton, N. Y. He was born in Newport, N. Y., August 23, 1834. He was admitted to the bar in 1856, and in 1877 he was elected to the Supreme Court bench. After eighteen years of service he resigned in order to become a candidate for the Court of Appeals in 1895. He served until 1904, when he retired under the age limit of seventy years. He wrote the opinion in the *Percy-Gray* race-track case, in which the validity of the act permitting betting on race tracks in New York was upheld by the Court of Appeals, and which was repealed by the passage of the Hart-Agnew law two years ago.

Newton Webster Finley, former Chief Justice of the Texas Court of Civil Appeals, for the fifth Supreme judicial district, died in Dallas, September 23. He was born in Lauderdale County, Mississippi, in 1854. In June, 1876, he was admitted to the bar by District Judge William H. Bonner, and practised law at Tyler, Tex., until 1893, when Governor Hogg appointed him Associate Justice of the Court of Civil Appeals of the fifth district, at Dallas. In 1894 he was elected to the same position. In 1897 he was appointed Chief Justice of the same court by Governor Culberson on the retirement of Chief Justice Lightfoot. In 1898 he was elected, and continued in this position until April, 1900, when he resigned to re-enter the practice of law in Dallas, as the head of the firm of Finley, Harris, Etheridge & Knight, of which the present firm of Finley, Knight & Harris is the successor. He was a member of the board of regents of the University of Texas, and served in that capacity until he died.

Necrology—The Bar

Henry Clay of Tamaroa, Ill., died September 3, aged seventy-seven. He was well-known throughout the state, and was the oldest practising lawyer in Perry County, Ill.

William Bayard Van Rensselaer, president of the Albany, N. Y., Savings Bank, is dead. He was graduated from Harvard in 1879, spending the following year at the Harvard Law School.

James B. K. Lee, a well-known patent lawyer of Manhattan, died September 18, aged thirty-eight, at Babylon, L. I. His partner was an elder brother, Lawrence. Mr. Lee was a graduate of Harvard.

Thomas H. Robinson, a Chicago attorney, was found dead in bed September 20. He was thirty-eight years old and had practised law in Chicago since 1896, when he was graduated from Harvard University.

John R. Von Seggern, a lawyer well known in Cincinnati, O., died September 10 at the age of sixty-five. He was elected a state senator in 1897, and fathered a bill creating the insolvency court of Cincinnati.

Charles H. Farnam died September 24 at Denver, Colorado. He was sixty-three years old and graduated from Yale in the class of 1868. He then studied law at Columbia. He formerly practised in New York city.

Charles Dorrance Foster of Wilkesbarre, Pa., died September 29, aged seventy-three years. He achieved success as a practitioner in the Orphans' Court. He was also interested in many large business affairs. He was elected a representative to the legislature in 1883–84.

Pierson C. Conklin, seventy years old, for many years a lawyer of Hamilton, O., died September 15. He was born in Reily, O., January 24, 1833, and educated in Miami University, where he was an associate of President Benjamin Harrison. He was admitted to practice in 1856.

J. Warren Tryon of Reading, Pa., died recently at his home in Germantown, Pa., aged sixty-seven. He studied at the Harvard Law School and was admitted to the Berks bar in 1863. He took an active interest in county politics. During 1875 he was solicitor for the County Commissioners.

George C. Greene, general counsel of the Lake Shore & Michigan Southern Railway, died September 13, at his home in Buffalo, at the age of seventy-six. Before his service as general counsel he was in the practice of law in Buffalo and Lockport, and was attorney for the New York Central system for years.

H. B. Miller, a lawyer of Nashville, Tenn., died September 17. He was well known throughout the state on account of his connection with the legal department of the Nashville, Chattanooga & St. Louis Railway Company, and his former connection with the state comptroller's office.

James J. Gray, a lawyer and Democratic politician, died at his home in Chicago, September 2. In recent years he had transferred his allegiance from the Democratic party to the Independence League. He was chairman of its county central committee and ran a strong race as candidate for sheriff.

James A. Douglas, a practising attorney of New York City, died at the Hotel Cecil, London, England, on September 7. He was born in Delaware County, New York, fifty-two years ago, and practised law for several years in Delhi. He was connected with the Law Reporting Company of New York.

E. D. Martin of Baltimore, Md., died September 20. Mr. Martin was a prominent lawyer of that city and head of the judicial department of the Fidelity Trust Company. He formerly took an active part in politics, serving in the legislature. He was graduated from St. John's College in the class of 1874.

John A. F. Hey died September 22, at his home in Clarion, Pa. He was born in New Bethlehem, Pa., in 1864. He was counsel for three national banks, two trust companies and several coal mining and other corporations. He was a member of the Pennsylvania House of Representatives from 1897 to 1903.

S. Proctor Thayer of North Adams, Mass., died September 2. He was born July 1, 1853, and was a graduate of Williams College, and later of the law school of Boston University. He served a term in the Massachusetts senate, was special justice of the local court, and served in the state House of Representatives in 1880 and 1881.

John Henry Colby, a Boston lawyer, and formerly a representative in the Massachusetts Legislature, having also been a councilman and alderman in Boston, died of heart failure at Mount Vernon, N. H., September 11. He was born in Randolph, Mass., June 13, 1862. He was a graduate of Dartmouth College and of Boston University Law School.

George Harvey Christy, aged seventy-three years, of Christy & Christy, patent lawyers, died September 27 in Pittsburgh, Pa. Mr. Christy was born in Kinsman, O., and was educated in the public and high schools and was graduated from the Western Reserve College, then at Hudson, O., now the Western Reserve University of Cleveland. After serving in the Civil War he came to Pittsburgh and practised law with William Bakewell. Later he took up the practice of patent law exclusively.

Joseph T. O'Neal, aged sixty-one years, who was one of the best-known attorneys of Louisville and Kentucky, died September 21 at Louisville. He was local attorney for the Louisville and Nashville railroad, and represented the Louisville and Eastern when it was first organized. He was born near Versailles, Woodford County, Ky., February 14, 1849.

Albert Gimbacker of Ellsworth, Wis., one of the most prominent attorneys of the Pierce county bar, died September 18. He had been for several successive terms district attorney. He was born in Somerset, St. Croix County, Wis., and was fifty-two years of age. He studied law in the office of Senator Moses E. Clapp of Minnesota, and located at Hudson, Wis.

Charles A. Greene of the New York law firm of Underwood, Van Vorst & Hoyt, died September 25 at New Haven, Conn. He was thirty-four years of age, and a graduate of Yale, 1899, and the Yale Law School, 1902. He had been associated with this firm for five years, making a specialty of corporation law. He died on the eve of his intended marriage, and the ushers were chosen to act as pallbearers.

Roger M. Lee of the firm of Lee & McMarty, Cleveland, Ohio, committed suicide, September 2, by shooting. He was probably worried by ill-health and the delay in trying his cases. He was about forty-four years old, and a graduate of the University of Michigan law department. Later he became the partner of Judge D. H. Tilden. Mr. Lee taught admiralty law in the law department of the Western Reserve University.

John Cornell Schenck, a former practising lawyer in Brooklyn, died at his home in that city September 29. Mr. Schenck was graduated in law from Columbia College in 1860. In the early years of his active life he was town clerk for the township of New Lots, and later became Associate Justice of the Court of Common Pleas of Kings County. He was born in the old Schenck homestead, on Jamaica avenue, Brooklyn, on February 27, 1837.

Murray F. Smith, a lawyer and politician of Vicksburg, Miss., died September 27. He was a member of the law firm of Smith, Hirsch & Landau, counsel for the Yazoo and Mississippi Valley railroad. In 1887 he was elected to represent Warren county in the lower house of the legislature and was a member of the constitutional convention of 1890. In 1896 he was elected state senator. He was a delegate from the state at large to the national Democratic convention of 1892.

The death of Governor John A. Johnson of Minnesota cut short the expectations of his friends that he would receive the Democratic nomination for the Presidency in 1912. The son of immigrant parents of no superior traits,

he was a self-made man, who became a political figure of national importance, whose influence was always exerted in support of wholesome ideals, and whose life, in the words of the Minneapolis *Journal*, "has left Minnesota a legacy which she can never lose."

Edward Flint Brown, who had practised law in New York for more than forty-five years, died September 26. He was seventy years old, and was born in Sebago, Cumberland county, Me. Mr. Brown was a graduate of Yale in 1863, and afterward spent a year in the Columbia Law School. For five years he was an examiner of candidates for the bar, and he was a member of the Committee of Character of the Bar Association. Later he acted as an examiner for the State Board of Law Examiners. He was well known as a reformer.

James M. Flower, for many years one of the leading lawyers of the Northwest, died September 3, in California. He was born March 10, 1835, at Hannibal, Oswego County, N. Y., but removed with his father and mother to Wisconsin in the fall of 1844. He entered the preparatory school of the Wisconsin University, and graduated in its second class. He was selected as clerk by the commissioners appointed to revise the Wisconsin statutes, and later served as police justice of Madison, Wis. In his law practice he was entrusted with the care of important corporation litigation, and for forty-two years he practised in Wisconsin and Illinois.

Col. Joel B. Erhardt, president of the Lawyers' Surety Company of New York, died suddenly September 8, of heart failure, at the Union League Club, New York City. He had been United States marshal for the southern district of New York, and Collector of the Port of New York from 1889 to 1893. Working his way as a youth through the University of Vermont, his first position after leaving college was as a school teacher at Upper Jay, N. Y., where the school was practically run by a strapping big bully. Young Erhardt's first act was to take off his coat and give the bully a thrashing, while the other pupils looked on and applauded.

Edmond Kelly of North Mountain, Nyack, N. Y., formerly counsel for the Princess de Sagan, died in New York October 4. He was graduated from Columbia in the class of 1870, and was a classmate of Seth Low. He removed his law office to Paris, where he became known as an authority on international marriages. He was counselor to the United States embassy in that city and also represented the Equitable Life Assurance Company and the Panama canal interests. His real life work was socialistic rather than legal, however. He was the author of "The Tramp Problem," "Evolution and Effort and Their Relation to Religion and Politics," now used as a text-book at Harvard, "Government and Justice," and "Government; or Human Evolution."

Colonel William R. Morrison, for many years a leader in the Democratic party and a veteran of the Mexican and Civil wars, died in Waterloo, Ill., September 29. Familiarly known as "Horizontal Bill," he was born in Monroe County, Ill., in 1825, and was educated in the public schools and at McKendree College. He took his seat in the 38th Congress, December, 1863. He failed of re-election, and practised law from 1865 until 1873, when he again entered Congress. In his career in Congress he was widely known as an advocate of radical tariff reduction. The bill of 1884 embodied the famous "horizontal" reduction scheme. It was defeated by a slender majority. In 1885 Mr. Morrison was defeated for election to the Senate by John A. Logan. President Cleveland appointed him a member of the Interstate Commerce Commission in 1887, and he served until 1897, for the last six years being chairman of the commission.

The Administration Program with Regard to Interstate Commerce

President Taft outlined the amendments to the Sherman act and interstate commerce law which he would ask Congress to enact, in a speech at Des Moines on September 20. His more important remarks are retained in the following greatly condensed abstract of his speech:—

"One of the defects of the present interstate commerce law is the delay entailed by litigation in the court over the correctness of the orders of the Interstate Commerce Commission. It is proposed now by a number of gentlemen of my cabinet who have conferred with some members of the Interstate Commerce Commission to create a separate interstate commerce court of five members, which shall sit in Washington and which shall be the only court to which petitions to set aside or nullify the orders of the Interstate commerce Commission can be made. I am strongly inclined to think that such court, except that an appeal ought to lie from it to the Supreme Court, will serve the purpose of expedition and the despatch of business in respect to the orders of the Commission.

"A second change in the interstate commerce law ought to give to the commission the power to hear and entertain complaints against unjust classification of merchandise for transportation. It is proposed now to authorize the commission to postpone the date at which a new rate classification is to take effect, provided that within thirty days of the date of the order a complaint be filed that such rate of classification is unreasonable or unjust. I am inclined to think that this is a fair change in the provisions of law.

"A third amendment should provide that the commission may, by order, suspend,

modify or annul any changes in the rules or regulations which impose undue burdens on shippers. Another most important amendment is a prohibition against any interstate railroad company holding stock in any competing railroad and the further amendment that no railroad engaged in interstate commerce shall issue additional stock except with the approval of the commission, based upon a finding by the commission that the same are issued, first, for purposes authorized by law, and, second, for a price not less than par for stock and not less than the reasonable market value for bonds. By these provisions we shall gradually abolish that evil which is involved in the union of competing roads by one road owning the stock of another; and we shall prevent the over-issue of stock and bonds.

"All combinations to suppress competition, or to maintain a monopoly in whole or in part of interstate trade are, and should be, in violation of the anti-trust law and should be punished as such; and there is no room for the expression reasonable or unreasonable, in this general view of the statute. If the statute were limited to combinations to restrain trade with intent to monopolize interstate trade, it would probably not include within it denunciation of the boycott against goods going into interstate trade, because such a boycott is a restraint against interstate trade not with intent to suppress competition.

"It would probably seem wise to establish an accusatory bureau in the department of justice to institute prosecutions for violations of the interstate commerce law and of the anti-trust law, while it would be wise to continue the bureau of corporations, enlarging its scope somewhat perhaps to maintain the registration of corporations and the investigation into their operations so far as interstate trade is concerned.

"It has been found most difficult to separate the administrative from the quasi-judicial functions of the Interstate Commerce Commission; but it is thought that it would be wise to take away from them any responsibility in regard to the investigation of the validity of their orders before the Interstate Commerce Commission court and to leave the maintenance of those orders to the Department of Justice when the appeal comes on to be heard in the court."

Crime and Criminal Law

A committee of leading lawyers and business men, judges and professors in the State University, all of Madison, Wis., are organizing a Wisconsin Conference on Criminal Law and Criminology, to be held at the University of Wisconsin November 26–27. Edward A. Ross, Professor of Sociology in the State University, and Vice-President of the American Institute of Criminal Law and Criminology organized at Chicago last June, is taking a prominent part in the preparations for the Conference. The principal subject-matter of the program will be the recommendations of the three sections of the National Conference on Criminal Law and Criminology held at Chicago. After organization and an address by Roscoe Pound, Professor of Law in the University of Chicago, the Conference will break up into several committees to which will be referred groups of related proposals. At the conclusion an address will be given by Professor J. H. Wigmore, Dean of the Northwestern University Law School and President of the American Institute of Criminal Law and Criminology.

The report of C. H. McGlasson, of the department of prisons and prisoners, to the Attorney-General of Pennsylvania, shows conditions at the Western Penitentiary of Pennsylvania so distressing as to demand the consideration of the proper public authorities, and the transfer of all federal prisoners. The population of the penitentiary was reported to be 1301 by Wade Ellis, as acting head of the Department of Justice. "Of this number more than half are at all times idle, and more than half are confined two in a cell. The cells are unusually small, and the cots take up almost the entire length of each, the room for moving about being a space eight feet long and eighteen inches wide. There are more than three hundred prisoners suffering from tuberculosis, and seventy-nine cells are now occupied by those showing advanced stages of this disease. The prison is filled with vermin of all kinds."

Miscellaneous

The International Congress of Maritime Law opened at Brussels, Belgium, Sept. 28. M. Beernart, former Belgian minister of state, presided, and twenty-five countries, including the United States, were represented. The questions submitted included new rules relating to collisions and assistance to distressed vessels, and regulations dealing with the privileges and liabilities of ship-owners. The majority of the countries had already signified their acceptance of the propositions formulated.

In an investigation of the affairs of the American Sugar Refining Company undertaken at the request of the Boston stockholders, it developed that a large majority of the whole capitalization of $90,000,000 was held by investors in the New England states. The report stated that the margin of profit in refining had been materially reduced by competition, but that the company's income from other sources fully offset this loss, and stockholders need feel no uneasiness regarding the earning power of the corporation.

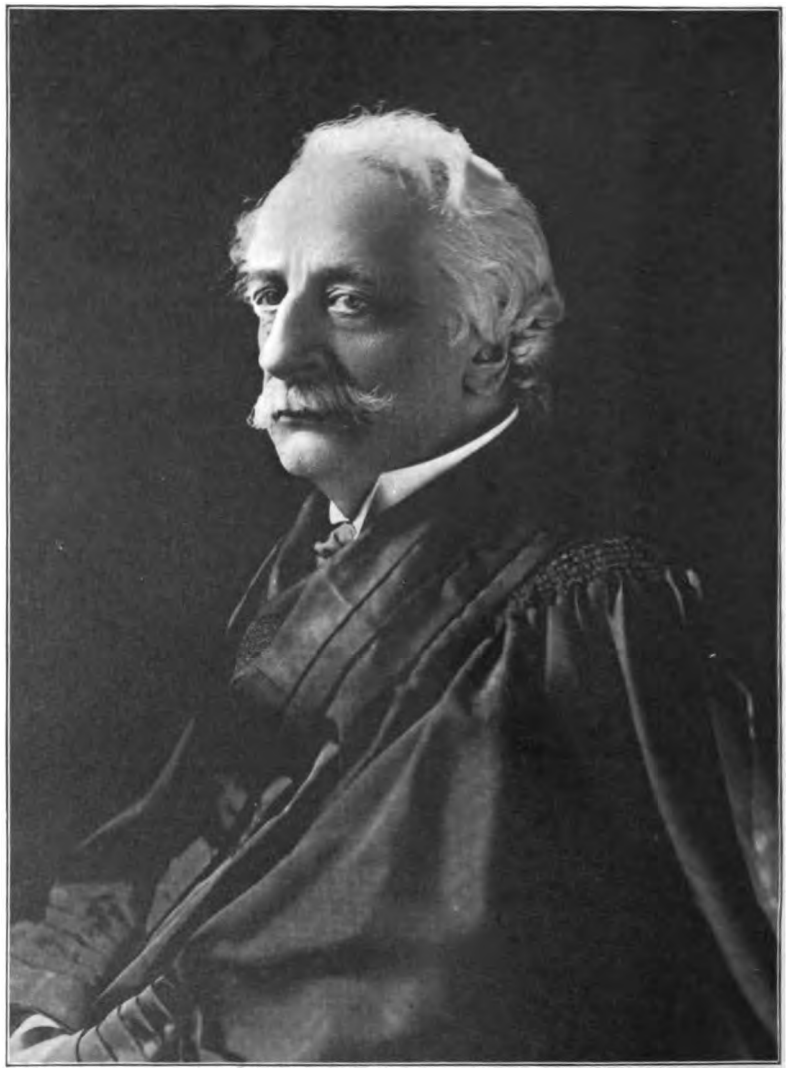
The International Tax Association at the Conference on State and Local Taxation held under its auspices at Louisville, Ky., late in September, adopted resolutions referring the corporation tax law to a meeting of Governors of all the states which the Association asked

be called by Governor Willson of Kentucky. The chairman of the resolutions committee, Professor Charles J. Bullock of Harvard University, announced that the committee had found the adjustment of national to state and local taxation a matter of such vital concern, requiring such serious consideration on the side of both the state and the federal governments, that the Association could do no better than this. The Association resolved, moreover, to disclaim any inclination to discuss the federal income and corporation tax questions from a political partisan as opposed to a scientific standpoint. Committees will investigate as to whether the "failure of the general property tax is due to defects in the system, or to weakness in its administration," and also the taxation of insurance companies.

Dr. Otto Friedrich Gierke, Professor of German Law in the University of Berlin, and a delegate attending the recent inaugural ceremonies at Harvard University, gave the initial Lowell Institute lecture on October 4 in Boston, describing the principles underlying the government of the German Empire. The difference between American public law and German, he maintained, is less significant than that between the German and the English, or the American and the French. The fact of Great Britain having no written constitution he considered a fundamental difference between that nation and the United States. The President, he said, is more powerful than the Kaiser, the latter being no true monarch, except as King of Prussia. He referred to there being surprising resemblances in spite of the differences between the republican and the monarchical forms of government. Under both governments the people regard the constitution with sacred feelings, and whether German or American attribute the rapid growth of the country to the powerful unity due to it.

The inauguration of Abbott Lawrence Lowell, LL.D., as president of Harvard University, on October 7, was not without interest purely from a legal standpoint. Mr. Lowell's high attainments as a scholar in political and legal science rendered him the fitting host of an assemblage of distinguished delegates from over all the world among whom were several jurists of world-wide distinction. The new president's recognition of the important place which legal scholarship occupies in modern civilization was evinced in his characterization of those on whom were conferred honorary degrees. The Rt. Hon. James Bryce was referred to as "guide honored and beloved by all students of political science, Professor Otto Gierke of Berlin was lauded for his "unmatched knowledge of legal and political thought since the Middle Ages," Professor Frank J. Goodnow of Columbia was described as "clear of brain and tireless of work" as an expounder of administrative law and municipal government, Dean John H. Wigmore of Northwestern University was epigrammatically characterized "a jurist in a day when lawyers are many and jurists rare," and President Henry P. Judson of the University of Chicago was spoken of as a scholar in law and political science." With the exception of Ambassador Bryce, who received the degree of Doctor of Letters, the foregoing delegates were all awarded the honorary degree of Doctor of Laws.

The speech delivered by President Taft at Chicago on September 16 is important because of his reiterated emphasis on the evils of our court procedure. He devoted the first half of his speech to the subject of labor and said he intended to recommend to Congress in his first message legislation to carry out the platform promise as to injunctions—that no injunction or restraining order be issued without notice except where irreparable damage would result from delay, in which case a speedy hearing should be granted. He considered, however, that the present administration of both civil and criminal law furnished much more ground for complaint and more need for reform than the decisions in injunction cases. The tendency of legislation in this country, he said, was to deprive the judge of his power to control the trial and to permit the jury to follow its own sweet will, with the consequence of a needlessly protracted trial. He thought that one of the serious defects of our criminal procedure was the system which enabled counsel "to mouse through the record to find errors that in the trial seemed of little account but are developed into great injustices in the court of appeal. A judgeship is a great office," said the President, "and the man who holds it should exercise great power, and he ought to be allowed to exercise that in a trial by jury." As for our civil procedure, "there is undue delay, and this always works for the benefit of the man with the longest purse." He thought tha appeals should be limited in cases involving small sums so that there should be a final decision in the lower court, giving the poor man the advantage of speedy justice before his resources have become exhausted by litigation. In reducing the cost of litigation, "Congress and the federal courts have not set a good example." While suits at law and in equity probably could not be united in one form of action in the federal courts, procedure, he believed, could be greatly simplified. He conceived the time ripe for the appointment of a Congressional commission to investigate the law's delays in the federal courts and to report a system "which shall not only secure quick and cheap justice to the litigants in the federal courts, but shall offer a model to the legislatures and courts of the states by the use of which they can themselves institute reforms." As one means of cheapening litigation President Taft favored the abolition of payment of court officers by fees.



THE LATE HON. RUFUS WHEELER PECKHAM

ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Born at Albany, N. Y., Nov. 8, 1838
Died at Altamont, near Albany, N. Y., Oct. 24, 1909

[See page 614

The Green Bag

Volume XXI December, 1909 Number 12

The United States Corporation Tax Act of 1909

By Henry V. Poor, of the New York City Bar

SECTION 38 of the Act of Congress of August 5, 1909,[1] provides that corporations doing business in the United States "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by" such corporations "equivalent to one per centum upon the entire net income over and above five thousand dollars" received by them "from all sources" during the year.[2] The Constitution requires that "direct taxes" shall be apportioned among the states in proportion to the census,[3] while the only provision in respect to "duties, imposts and excises" is that they shall be uniform throughout the United States.[4] There is no provision in the Act of 1909 that the tax shall be apportioned as required by the Constitution in the case of direct taxes, so that if the tax imposed by Section 38 is "direct" in the constitutional sense and not, as the act recites, an excise, that section must be regarded as unconstitutional.

In the *Income Tax* cases[5] the Supreme Court held that the income tax imposed by Sections 27 to 37 of the Act of August 15, 1894,[6] so far as t bore upon the income from real estate and from invested personal property, was a direct tax which was unconstitutional because not apportioned according to representation,[7] and that the Act was also unconstitutional so far as it affected the income from municipal bonds, because of the lack of power on the part of the federal government to tax the obligations of the states or of their instrumentalities. In view of the

[1] "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909.

[2] The Act provides that the net income shall be ascertained by deducting from the gross amount of income received within the year from all sources, (1) operating expenses, rentals and franchise payments; (2) losses not covered by insurance, depreciation, etc ; (3) interest upon the bonded or other indebtedness to an amount of such indebtedness not exceeding the paid-up capital stock; (4) taxes; and (5) dividends upon stock of other corporations subject to the tax.

[3] Art. I, sec. 2, cl. 3; sec. 9, cl. 4.

[4] Art. I, sec. 8, cl. 1.

[5] *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.

[6] 28 Stat. at L. 509.

[7] Section 27 of the Act of 1894 provided that there should be assessed "upon the gains, profits and income" of individual citizens of and residents within the United States, over and above four thousand dollars, a tax of two per centum per annum "whether said gains, profits or income be derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation . . . or from any other source whatever," and a like tax "upon the gains, profits and income from all property owned and of every business, trade or profession carried on in the United States by persons residing without the United States." 28 Stat. at L. 553. Section 32 provided for "a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses and interest on bonded and other indebtedness" of all corporations doing business for profit in the United States. 28 Stat. at L. 556

instances in which taxation on business, privileges or employments had "assumed the guise of an excise tax and been sustained as such" the court refrained from commenting on so much of the Act as related to this subject,[8] but held, nevertheless, that all the sections in reference to an income tax together constituted one entire scheme of taxation, the whole of which was rendered invalid by reason of its unconstitutionality in respect to the income from real and personal property.[9]

The tax imposed by Section 32 of Act of 1894 was "on the net profits or income" of the corporations subject to the tax, while that imposed by Section 38 of the Act of 1909 is expressed to be "a special excise tax with respect to the carrying on or doing business . . . equivalent to" one per centum upon the entire net income. The language of the present act is borrowed from the War Revenue Act of 1898,[10] Section 27 of which provided that every person, firm, corporation or company "carrying on or doing the business" of refining sugar or refining petroleum, whose gross annual receipts exceeded two hundred and fifty thousand dollars, should be subject to pay annually "a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars."[11] This tax was sustained in the case of *Spreckels Sugar Refining Company* v. *McClain*[12] as an excise, on the ground that the tax was imposed not "upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar." The court said: "It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the Act as 'a special excise tax,' and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of levying and collecting excises."[13] The use of the words "special excise tax with respect to the carrying on or doing business . . equivalent to" one per centum of net income, in the Act of 1909, is obviously an attempt to bring the tax within the decision in the *Spreckels* case. If, however, the tax is not in fact an excise, its character cannot be changed by calling it one. This is expressly recognized in the *Income Tax* cases, where it is said that "the name of the tax is unimportant"[14]; that "it is the substance and not the form which controls"[15]; that the limitations of the Constitution cannot be "frittered away" by calling a tax indirect when it is in fact direct[16]; and that the court must decline to extend the scope of the earlier decisions "so as to sustain a tax on the income of realty, on the ground of being an excise or duty."[17] The language used in the *Spreckels* case is not in conflict with this view, for the court does not there regard the designation given the tax by Congress as conclusive upon the question of its real character. The fact that the Act of 1909 recites that the tax thereby imposed is "a special excise tax with respect to the carrying on or doing business" cannot, therefore,

[8] 158 U. S., p. 635.
[9] *Id.*, p. 637.
[10] 30 Stat. at L. 448.
[11] *Id.*, p. 464.
[12] 192 U. S. 397.
[13] *Id.* p. 411.
[14] 157 U. S., pp. 580, 581.
[15] *Id.*, p. 581.
[16] *Id.*, p. 583.
[17] *Id.*, p. 579.

change the nature of the tax if it is in fact direct.[18]

The following taxes have been held to be duties, imposts and excises and not direct taxes within the meaning of the Constitution: a tax on the use of carriages[19]; on manufactured tobacco[20]; on sales of property at exchanges and boards of trade,[21] and of shares of corporate stock[22]; on the circulation of state banks,[23] and on the business of insurance[24] and sugar refining[25] companies; an inheritance or succession tax[26] and a tax upon individual incomes.[27]

It would seem to follow from these cases that the distinction between an excise and a direct tax is based upon the theory that while the former is a tax upon a particular commodity, the transaction of a particular business, or the exercise of a particular right or privilege,[28] the latter is a tax upon property and income generally, imposed merely because of ownership.

So in the case of *Patton* v. *Brady*[29] a tax on tobacco and snuff "however prepared, manufactured and sold, for consumption or sale," was held to be "not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use"[30] and therefore an excise. So also in the *Spreckels* case[31] the tax was not upon the gross earnings of the company, but upon the business of sugar refining; in *Pacific Insurance Company* v. *Soule*[32] upon the business of insurance; and in *Veazie Bank* v. *Fenno*[33] upon the circulation of state banks. On the other hand, the tax condemned in the *Income Tax* cases was levied upon incomes generally, and this seems to have been the real ground upon which it was held to be direct by the majority of the court. The court regarded "a tax upon property holders in respect of their estates, whether real or personal or of the income yielded by such estates" as direct[34] and held that this was the sense in which the term was intended to be used in the Constitution. On the rehearing the court said: "Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution . . . authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds? There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of the framers defeated."[35] This is also the view adopted in the later

[18] See *Knowlton* v. *Moore*, 178 U. S. 41, 81. A stamp tax on a foreign bill of lading is in substance a tax on the property covered by the bill of lading and therefore a tax or duty on exports, under Art. I., Sec. 9, cl. 5 of the Constitution *Fairbank* v. *United States*, 181 U. S. 283. A state tax on the shares of stock of savings banks and loan and trust companies, based on the capital, surplus and undivided earnings of the companies, and assessed to the companies and not to the individual stockholders, is a tax upon the property of the companies, and is therefore invalid so far as it affects United States bonds in which the capital is invested. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503: "The slight concealment afforded by the omission of the property *eo nomine* is not sufficient to disguise the fact that in effect it is the property which is taxed." *Cf. Delaware, Lackawanna & Western R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Powers* v. *Detroit & Grand Haven Ry. Co.*, 201 U. S. 543.

[19] *Hylton* v. *United States*, 3 Dall. (U. S.) 171.

[20] *Patton* v. *Brady*, 184 U. S. 608.

[21] *Nichol* v. *Ames*, 173 U. S. 509.

[22] *Treat* v. *White*, 181 U. S. 264; *Thomas* v. *United States*, 192 U. S. 363.

[23] *Veazie Bank* v. *Fenno*, 8 Wall. (U. S.) 533.

[24] *Pacific Insurance Co.* v. *Soule*, 7 Wall. (U. S.) 433.

[25] *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

[26] *Scholey* v. *Rew*, 23 Wall. (U. S.) 331; *Knowlton* v. *Moore*, 178 U. S. 41; *Murdock* v. *Ward*, 178 U. S. 139.

[27] *Springer* v. *United States*, 102 U. S. 586. See in regard to this case 157 U. S. p. 578.

[28] See *Thomas* v. *United States*, 192 U. S. 363, 370.

[29] 184 U. S. 608.

[30] *Id.*, p. 619.

[31] *Supra.*

[32] 7 Wall. (U. S.) 433.

[33] 8 Wall. (U. S.) 533.

[34] 157 U. S., p. 558.

[35] 158 U. S., pp. 627, 628.

succession tax case of *Knowlton* v. *Moore*.[36]

The tax imposed by Section 38 of the Act of 1909 is not a tax upon certain kinds of property, like a tax upon particular commodities, or a tax upon certain kinds of business, like banking, insurance and sugar refining: it is "equivalent to" one per centum upon the entire net income of corporations generally, as such. The tax is thus not in fact laid with respect to the business carried on by the corporation, but with respect to the corporation itself, because of its ownership of an income, and this is a tax laid "merely because of ownership" as much as the income tax of 1894.[37] The only distinction between the two statutes is that the Act of 1894 imposed a tax of two per centum "on the net profits or income" of corporations, while the present tax is "equivalent to one per centum upon the entire net income." The difference is merely verbal and must be disregarded if the substance and not the form of the statute is to control.

The operation of the statute is the same by whatever name the tax is called. Suppose the Act had provided that every corporation should be subject to pay annually "a special excise tax with respect to the carrying on or doing business by such corporation equivalent to one per centum upon the assessed value of the real estate owned by it." Can there be any doubt that this would be in fact a direct tax upon the land? Or suppose that the Act had provided that every corporation should be subject to pay annually "a special excise tax with respect to the carrying on or doing business by such corporation equivalent to one per centum upon the entire net income derived by it from its real estate." Would the tax be in fact any less direct because it is called an excise?

The answer to these questions seems clear, for the tax would in each case be the "essential equivalent" of a tax on the property or its proceeds generally.[38] But it makes no difference in the result that the tax imposed by the Act of 1909 is expressed to be equivalent to one per centum upon the entire net income of the corporation. The income received "from all sources" is to be included, and so far as any part of that income is derived from real estate, the tax is as much upon the income of the real estate as in the case supposed. The same is necessarily true of the income from municipal bonds and from other invested personal property. So far, therefore, as the income of any corporation is derived from real estate and from invested personal property, the tax falls directly within the decision of the Supreme Court in the *Income Tax* cases.[39]

[36] 178 U. S., 41, 82: "Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court [in the *Income Tax* cases]—First, that no sound distinction existed between a lax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

[37] See *Nichol* v. *Ames*, 173 U. S. 509, 521: "A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

[38] 178 U. S., p. 82.

[39] The case may be supposed of a corporation owning either real or personal property, or both, all of which is employed in its business and from which it derives no income except in the form of profits from its business. As to the net income of such a corporation the tax would not fall strictly within the decision in the *Income Tax* cases, although on principle it would seem to be governed

If the tax is to be regarded as invalid so far as it affects the income from real and personal property, the further question is presented whether, in consequence, the whole of the section in reference to the taxation of corporate incomes is not void. A similar question was raised in the *Income Tax* cases and answered in the affirmative, upon the ground that the income from real and personal property formed a vital part of the scheme of taxation embodied in Sections 27 to 37 of the Act, and that that scheme must be considered as a whole.[40] The same reasoning is applicable to Section 38 of the Act of 1909. The scheme of taxation is as much a whole as that contained in the earlier Act. It contemplates a tax measured by the entire net income of corporations received during the year from all sources, and the income from real estate and invested personal property is as vital a part of this scheme as in the case of the Act of 1894. Section 38 of the present Act permits the deduction, in determining the amount of the net income subject to taxation, of dividends received by the corporation from shares of stock owned by it in other corporations subject to the tax. If, however, the income from all real estate owned by corporations within the United States, and also the income from all other invested personal property be stricken out, certainly a large part of the anticipated revenue would be eliminated, and the tax would cease to be upon the entire net income as contemplated by Congress. A tax upon net income received from all sources except from invested capital, is wholly different in operation and effect from a tax upon entire net income from all sources. If any part of the tax is invalid, it would therefore seem that the whole must be regarded as void.[41]

by that decision. See Seligman, Essays in Taxation, p. 218: "An individual can indeed obtain a professional income without any capital; but in the case of a business with capital invested, it is impossible to say how much of the profits are due to the capital, how much to the personal management. Without the capital there would be no profits at all, because there would be no business. Therefore in taxing profits we are really taxing property, or rather the proceeds of property."

[40] 158 U. S., pp. 636, 637.

[41] It has been suggested that the Supreme Court might decline to follow the *Income Tax* cases if the questions there decided were again presented for decision. E. B. Whitney, 20 Harv. L. R. 280, 288. The possibility of such a course may be admitted. The court has, however, heretofore always been slow to overrule itself upon questions of such importance where they have only been decided after the most careful consideration. "It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil." Swayne, J., in *Gilman* v. *Philadelphia*, 3 Wall. (U. S.) 713, 724. The *Income Tax* cases were argued twice at great length and were fully considered by the court. While the decision was widely criticized at the time it was rendered as overruling the earlier cases, all those cases were examined and distinguished on grounds more or less satisfactory. The later decisions recognize these distinctions as valid and uphold the authority of the *Income Tax* cases themselves. *Nichol* v. *Ames*, 173 U. S. 509, 519, 520; *Knowlton* v. *Moore*, 178 U. S. 41, 52, 53, 79–83; *Fairbank* v. *United States*, 181 U. S. 283, 296; *Patton* v. *Brady*, 184 U. S. 608, 618; *Thomas* v. *United States*, 192 U. S. 363, 370; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 413. Even if the decision was not in harmony with the previous cases, it had the effect of overruling them, *Asher* v. *Texas*, 128 U. S. 129, 131, 132. Four of the Justices who took part in the decision of the *Income Tax* cases still remain on the bench—Chief Justice Fuller and Mr. Justice Brewer, who voted with the majority of the Court, and Justices Harlan and White, who dissented. In the later cases of *Spreckels Sugar Refining Company* v. *McClain*, and *Knowlton* v. *Moore* (*supra*), the opinions of the court were delivered respectively by Mr. Justice Harlan and Mr. Justice White. Each of these Justices in these opinions recognizes the principles established in the *Income Tax* cases as settled, 192 U. S., p. 413; 178 U. S., pp. 52, 53, and no dissent therefrom has been expressed by any of the members of the court since the time the decision was rendered.

Mr. Justice Peckham and the Sherman Act

By Arthur W. Spencer

THERE are other means of extirpating the evils of monopoly than by the enactment of a drastic statute like that of King James I.[1] Exclusive franchises, despite the ancient rule against monopolies, seem not to have been always void at common law, and they are not an unmixed evil, for the early economic development of the United States was somewhat advanced by the granting of such franchises. One of the merits of American federal jurisprudence, up to 1890, was the fact that while curbing the powerful corporation from working public injury to interstate commerce, it checked the state legislatures from arbitrarily impairing property rights exercised without detriment to the public welfare. The effect of this juridical policy was not to legalize monopoly, but to narrow the definition of unlawful monopoly in accordance with justice, so as to include only practices savoring of business oppression.

Until 1890, the year in which the Sherman act was passed, Congress left the law of monopoly practically in the hands of the Supreme Court. The result was that the law developed piecemeal, by gradual amplification, and was molded into a far more satisfactory form than would have been the case if the process had been hastened or interrupted by legislative enactments. The principle that a corporate charter is not to be tampered with, unless there are special circumstances analogous to those recognized under the British Constitution justifying legislative interference, has thus been preserved intact since the decision in the *Dartmouth College* case.[2]

The *Dartmouth College* case has provided a powerful check on the popular impulse to impose unreasonable restrictions on business supremacy. The fundamental principle of this case, that franchises granted by charter are inviolable, was but a new phase of the ancient doctrine that no freeman shall be disseised of franchises and privileges granted him by the king.[3] The theory that a corporate charter is a contract to which the state is a party is of course strange to the common law.[4]

[1] 21 James I, c 3.

[2] 4 Wheat. 518, 4 L. ed. 629.

[3] Coke, Inst., pt. II, c. 29, (4), 3.

[4] At one time it may have looked as if the relation between king and subject was "the outcome of agreement," and as if "the law of contract threatened to swallow up all public law." (Pollock and Maitland, History of English Law, v, II, p. 233.) But that was in the age when feudalism was at its high-water mark. The grants which beginning with the borough charters and documents of liberties of the realm subtracted from the royal power marked the beginning of the decline of the feudal system, and it seems to have been not by agreement but by compulsion, not by contract but by gift, that a new relation of the king to his subjects came into being, and the private law of contract showed itself unable to cope with problems of public constitutional law. Instead of viewing a grant of liberties as made in expectation of the crown receiving the benefit of the strengthened allegiance of his subjects, it would perhaps be better to regard it as a concession practically without consideration. As Bracton put it, "a liberty is an evacuation of a servitude, and they regard each other as contraries, and do not remain together." (De Legibus et Consuetudinibus Angliae, book I, chap. 24, sec. 3.) Where, on the other hand, there was consideration, as in the case of the trading privileges and borough charters which were sometimes sold by the crown for increased revenue, it is to be remembered that the modern law of contract was practically non-existent before the time of Edward I; thus there arose no doctrine of the necessity of consideration to validate an agreement under seal. On the contrary, the modern common law rule that a contract under seal will be enforced without proof of consideration

The problem confronting Chief Justice Marshall was that of ascertaining how proceedings so clearly violative of the spirit of the Constitution as those under discussion in the *Dartmouth College* case could be clearly shown to be in conflict with its letter also, and this problem was solved by a somewhat artificial interpretation of the clause relating to the obligation of contracts.[5] Whether the expedient could have been avoided is a question which need not be considered. That the end achieved justified the means is indubitable, for it was clearly the intention of the framers of the Constitution to protect the rights of private property as truly as the obligation of private contracts.

Round the fundamental principle of the *Dartmouth College* case, a principle of such importance that it properly became in Marshall's hands virtually a corollary of the federal Constitution, have successively clustered a group of subsidiary principles which have protected the public from its employment as a possible instrument of oppression. Thus an exclusive or permanent franchise is not to be presumed to have been granted without express words to that effect in the charter.[6] A monopolistic privilege therefore can arise only by express grant.[7] The holder of such a privilege, if it has been granted in consideration of anticipated benefits to the public,

may be historically traceable to the binding character with which charters were invested long before they could have come to be considered as partaking of a contractual nature. A deed of gift has always been, and now is, not less binding on the grantor than a formal contract meeting the requirements of the statute of frauds. In Magna Carta and the Charter of Liberties of Henry I there is phraseology suggestive of a grant without consideration. The rights of the grantee of a royal charter being protected by the common law rule that royal grants are irrevocable, as securely as rights against the private grantor were protected by the doctrine of estoppel by deed, there was no occasion for the creation of an artificial theory declaring the contractual character of all charters The Supreme Court could have formulated a doctrine of the constitutional security of rights granted by charter without invoking the aid of the contract theory, and could have done this notwithstanding its decision in *Satterlee* v. *Mathewson* (2 Peters 380). See, for example, Marshall's remarks about the limits of legislative power in *Fletcher* v. *Peck*, 6 Cranch 87.

[5]The disagreement between Marshall and Justice Johnson in the important forerunner of the *Dartmouth College* case, *Fletcher* v. *Peck* (6 Cranch 87) is interesting, the former holding that the contract underlying the grant was executed on one side and practically executory on the other ("a grant implies a contract not to reassert the right of the grantor," p. 137), the latter that it was executed on both sides and therefore "*functus officio*" (p. 145). Whether the legislative side of the contract is executed or not depends on whether the legislative obligation is deemed to be that merely to make a valid and secure grant, or that to exercise a continuing protection of the terms of the grant. But just as the doctrine of estoppel *in pais* involves no theory of executory covenants, so the doctrine of the inviolability of charters need involve no similar theory. Marshall remarked *obiter* in *Fletcher* v. *Peck* that "a party is always estopped by his own grant" (p. 137). He did not develop the point. Had he done so he might have felt that it was totally unnecessary to propound any theory of contract, an innovation unnecessary with respect to the common law, which amply provided for the security of rights conferred by charter. Thus it was held, for example, by the Supreme Court before the *Dartmouth College* case came to be decided, that a legislative grant or confirmation of lands for educational purposes could no more be rescinded than other grants. *Terrett* v. *Taylor*, 9 Cranch 43. Moreover, four years before the decision was rendered in the *Dartmouth College* case, the Supreme Court, Justice Story writing the opinion, held without any reference to the doctrine of contract, that the legislature of a state which had succeeded to the rights of the Crown could no more defeat the intent of a royal grant contained in the charter of a township, setting aside a specified share of the land granted for "a glebe for the Church of England," than such a grant could have been defeated before the Revolution. *Pawlet* v. *Clark*, 9 Cranch 292.

[6]*Charles River Bridge* v. *Warren Bridge*, 11 Peters 420, 9 L. ed. 773.

[7]The learned dissenting opinion of Justice Story in the *Charles River Bridge* case can only be treated with the greatest respect, but without regard to the accuracy or inaccuracy of his contention that the ancient common law rule that grants of franchises are to be construed in favor of the grantor applied to grants out of the King's bounty as opposed to those marked by a money consideration, one cannot readily agree with his remark that the rule of strict construction of charters is not so well suited to the American as to the English sovereign, for the American people so far recognize the public value of these franchises as to be unwilling to concede more than they actually stipulate for in terms. Regarded in this light, the decision in the *Charles River Bridge* case appears to have been reasonable.

will not be disturbed in the enjoyment of it so long as public health and public morals do not suffer harm from the acts which the franchise permits.[8] A carrier holding such a privilege, however, cannot use it to oppress the public by charging extortionate rates for the public service performed.[9] The holder of a monopolistic privilege, therefore, can often be prevented from using it as an instrument of oppression. And the corporation may also be divested of its rights under proper exercise of the power of eminent domain,[10] or may be divested of them to enable the legislature to give effect to a public trust which cannot be abdicated.[11] Corporate privilege, notwithstanding the seemingly sweeping but actually incomplete decision in the *Dartmouth College*[12] case, thus found itself properly subordinated to public right.[13]

The convenient term "reasonable" is useful in the law because of its very vagueness. It is one of the openings by which ethical concepts trickle through the wall of technical verbiage into the cold territory of the law to crystallize into frozen formulas. In the law of negligence, the term "reasonable care" originated from a notion of propriety rather than of legality. "Reasonable charges," likewise, are charges which are felt to be morally just rather than legally valid. And "reasonable restraint of trade" signifies nothing more nor less than an interference with competition which is not regarded as giving the public unfair treatment.

In consequence of the decisions dating from *Munn* v. *Illinois*,[14] a new concept of monopoly has arisen—a monopoly so unlike the old monopoly that it may safely be permitted to exist so long as it does not assert its monopolistic privilege in such a manner as to do the public any injustice. In *Munn* v. *Illinois*, a certain mode of corporate action was substantially condemned as unreasonable. Property devoted to a public use thereby becomes subject to public control for the common good. That principle was a point of departure for a new legal era, for we were then beginning to make over our law of monopoly. This new form of unlawful monopoly condemned by the law up to the time of the Sherman act was the monopoly of business oppression committed by means of unfair or unreasonable charges. The state could make contracts with corporations which took the form of charters granting a franchise that involved complete suppression of competition, and the law did not declare such suppression of competition wrongful, finding the remedy rather, in the case of public service corporations, in the prohibition of unreasonable charges.

In the light of these considerations the Sherman act, prohibiting all contracts, combinations, and conspiracies in restraint of trade, was to be interpreted. The phrase "in restraint of trade" was taken from the law of those covenants wherein one party promises to refrain

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[8] *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516, 6 S. C. 252; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036.

[9] *Granger* cases, 94 U. S. 113, 24 L. ed. 77; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 S. C. 418.

[10] *West River Bridge Co.* v. *Dix*, 6 How. 507, 12 L. ed. 535.

[11] *Illinois Central R.R. Co.* v. *Illinois*, 146 U. S 387, 36 L. ed. 1018.

[12] *Supra.*

[13] Analogous results have been reached in patent law. Patent rights, like other property, are subject to the paramount claims of society, and the manner of their use may be regulated. *Patterson* v. *Kentucky*, 97 U. S. 501. The government may maintain suits to set aside a patent when necessary, that the patentee may discharge public obligations, or even to enforce the rights of an individual. *Mowry* v. *Whitney*, 14 Wall. 434; *United States* v. *Bell Tel. Co.* 167 U. S. 224, 264; *Same* v. *Same*, 128 U. S. 315.

[14] 94 U. S. 113, 24 L. ed. 77.

from carrying on the same business as the other party within a certain period of time or within a certain territory. Such contracts are clearly within the phraseology of the act, as are obviously all contracts of natural or artificial persons, so far as they relate to interstate commerce.[15] But it is unnatural to suppose that the framers of the Sherman act intended to repeal the rule which legalizes the so-called ancillary contracts, when they are only in "reasonable" restraint of trade.[16] Neither is it to be supposed, in case the act applies to the contract between a state and a corporation, conferring on the latter an exclusive franchise, that it was intended to prohibit the granting of exclusive franchises which the law had not previously discountenanced. If then the act legalized ancillary contracts in restraint of trade when not oppressive, and legalized some charters of monopoly, and then prohibited commercial contracts "in restraint of trade" whether oppressive. or not, its framers succeeded only in concocting an absurdity. But this was plainly far from their intention. It was designed only to prevent unreasonable restraint of trade, and the distinction which had previously prevailed in the case of ancillary contracts should have been imported into the law governing all contracts. The phraseology of the act might be vague, but it was not radical. The act was not intended to take a more drastic attitude toward monopoly or practices savoring of monopoly than the rigorous statute of King James. It did not radically alter existing law; it merely gave it statutory form and put more readily within reach of the Departmentof Justice the weapons for the prosecution of acts of business oppression.

Suppose the phraseology of the act, instead of prohibiting contracts "in restraint of trade," had forbidden contracts "interfering with competition." In their popular sense, the two phrases have the same meaning. But there would have been no question that Congress intended only to proscribe unreasonable interference with competition.

The "restraint of trade," in fact, which Congress sought to forbid was simply business oppression. Problems of business oppression had been before the Supreme Court in the *Granger* cases[17] and many other cases, and the test of "reasonableness" had frequently been applied with most satisfactory results. The Court did not need to have ancillary contracts in mind, to apply the same test to problems arising under the Sherman act.

The interpretation of the Sherman act which was to follow was destined to magnify public at the expense of private right in a somewhat startling manner. This was to come about only

[15]President Taft, when a judge of the Circuit Court of Appeals, writing the opinion of the court below in the *Addyston Pipe* case, took pains to point out that the contracts which under the common law are upheld as permitting a reasonable restraint of trade are "merely ancillary" to the main contract (85 Fed. Rep. 271–302), and Mr Justice Holmes had the same distinction in mind when he wrote the dissenting opinion in the *Northern Securities* case (193 U. S. at p. 404). This principle has been clearly brought out by Mr. Charles E. Littlefield in an article on the Sherman anti-trust law (see 20 *Green Bag* 587). Can it be supposed that Congress ever intended to abolish the distinction?

[16]President Taft in his speech to the committee which notified him of his nomination, speaking of needed amendments to the anti-trust law, citing the case of a corporation obligating itself to a purchaser of its good-will not to go into the same business within states covered by its previous business, and citing the illustration of a lawful strike of employees of an interstate railway, said that "neither case ought to be made a violation of the anti-trust law," "suggestions for the necessary amendment" of which have been made "*to prevent its application to cases which it is believed were never in the contemplation of the framers of the statute.*"

[17]94 U. S. 113, 24 L. ed. 77.

by the bare majority of one vote in the highest tribunal of the land, the members of which were by instinct conservative; and this result is to be explained not so much by the radical leanings of any of the judges as by an attitude of mechanical obedience to a command of Congress, in a spirit which seems to have assumed that Congress was seeking to create rather than to restate juridical principles.

The artificial interpretation of the law dates from the opinion rendered by Mr. Justice Peckham in the case of *United States* v. *Trans-Missouri Freight Association*,[18] in which he held that the Sherman act applied to reasonable as well as unreasonable restraints of trade, without any distinction whatever. When he wrote this opinion he had before him the opinion in the case of *United States* v. *E. C. Knight Co.*,[19] in which case Mr. Justice Harlan had recognized, in a dissenting opinion prepared with much care, the propriety of a reasonable partial restraint of trade, citing *Oregon Steam Navigation Co.* v. *Winsor*,[20] and many other cases. Mr. Justice Peckham was not bound by precedents within the United States Supreme Court to hold the Sherman anti-trust act applicable to contracts in reasonable restraint of trade. He did, however, feel .himself bound by what appeared to him the obvious intent of the framers of the statute. Justice White, dissenting, declared that this construction of the Sherman act would be "tantamount to an assertion that the act of Congress is itself unreasonable" (p. 344). With Justice White also dissented Justices Field, Gray and Shiras. This artificial decision, reached only by a bare majority of the court, has had the effect of molding the law of interstate commerce in conformity to the imputed will of Congress. If the doctrines laid down by the Supreme Court had been controlled by such reasoning as that of Mr. Justice Harlan in the *Knight* case,[21] of Mr. Justice White in the *Trans-Missouri Freight Association* case,[22] and of Mr. Justice Brewer in the *Northern Securities* case[23] the present situation would not have arisen. It was by no means incumbent upon the Supreme Court to adopt a literal, narrow construction of the Sherman act. It was within their province to interpret the spirit of the act and to differentiate clearly between the evil combinations which Congress wished to suppress under the authority of the interstate commerce clause, and the combinations which are not injurious to the public welfare and are not condemned as dangerous monopolies by the common law. Instead of the decisions of the Supreme Court being molded absolutely by an exceedingly strict construction of the act, the development of the law could have been brought about within the Supreme Court itself without violence to the statute, through the natural expansion of the common law to render it applicable to the phenomena of the modern industrial world. This, in fact, would have been the normal way of proceeding.

Mr. Justice Peckham in the next important case to come before the court, *United States* v. *Joint Traffic Association*,[24] refused to overrule the *Trans-Missouri Freight* case,[25] three out of eight Justices dissenting, and he

[18] 166 U. S. 290, 41 L. ed. 1007, 17 S. C. 540.
[19] 156 U. S. 1, 39 L. ed. 325.
[20] 20 Wall. 64.
[21] 156 U. S. 1.
[22] 166 U. S. 290.
[23] 193 U. S. 197.
[24] 171 U. S. 505, 43 L. ed. 259.
[25] 166 U. S. 290.

was bound by the authority of these two cases in *Addyston Pipe and Steel Co.* v. *United States*,[26] and in *Montague & Co.* v. *Lowry*.[27] How easily any slight pressure of conviction on this subject could have affected the equilibrium of the court can be readily seen from the small majorities. Mr. Justice Peckham did not write the opinion in the *Northern Securities* case,[28] it being rendered by Mr. Justice Harlan in accordance with the doctrines established in these earlier cases in which the late Justice had expressed the judgment of the court, and it is to Mr. Justice Peckham's credit that in this case he concurred with Mr. Justice Holmes's dissenting opinion, which was to the effect that when the restraint of trade is self-imposed, so as to affect only the parties to the agreement and not outsiders, such voluntary repudiation of competition is not to be viewed as unlawful. It is also to his credit that in the famous wall paper case,[29] which held that debts to an illegal combination cannot be collected, he was one of the four dissenting Justices.

From a reading of Mr. Justice Peckham's opinions one gains an impression of logical cogency, clearness of style, and level-headed conservatism, and he was a judge whose chivalrous love of justice made him one of the most dignified ornaments of the modern bench. His decisions are models of lucidity. His labors were marked by great industry, remarkable purity, freedom from partisan bias, and a deep sense of duty, and he was one of the most forceful and likable of the nine Justices. It would hardly be contended, however, that he was the equal in learning or acumen of some of his colleagues. In his judgment in the *Addyston Pipe* case[30] is an intimation to the effect that it is unnecessary to prove any diminution in the quantity of sales to show a restraint of trade, and the logical consequences of such a theory, supposing it tenable, receive no consideration.[31]

In consequence of these decisions the Supreme Court, having adopted an artificial construction of an act which must stand on account of the operation of the principle of *stare decisis*, has virtually put Congress in the position of having enacted a piece of experimental legislation which in its practical working has turned out to be injudicious. As a matter of fact the Sherman act was not an experiment, and had it been construed differently its usefulness might well have been permanent. As the Supreme Court is committed in this instance to the motto ***nulla vestigia retrorsum***, the only means of exit available from a difficult position is for Congress to repeal or substantially amend the Sherman act, treating it as a wasted opportunity. It would be better, moreover, to have no federal anti-trust statute whatever, than to have another which, like this, were again to impede the symmetrical and proper development of the law of interstate trade.

[26] 175 U. S. 211, 44 L. ed. 136.
[27] 193 U. S. 38.
[28] 193 U. S. 197.
[29] *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227.
[30] 175 U. S. 211.
[31] 175 U. S. 244-5.

Hints to Witnesses

By Ira Jewell Williams, of the Philadelphia Bar

"A child should always say what's true;
And speak when he is spoken to;
And behave mannerly at table,
At least so far as he is able."

STEVENSON'S "The Whole Duty of a Child" might be so paraphrased as to cover the whole duty of witnesses. For of course, above everything, a witness should tell what is true. He is sworn to tell the truth, the whole truth and nothing but the truth; and this undertaking, whether regarded as a mere promise, binding upon his honor, or as a solemn obligation made more impressive, under the old oath, by the phrase "and so you shall answer to God at the last great day," even though entered upon with the best of intentions, is discharged but ill unless the witness prepares himself, so far as possible, to properly play his part in the drama of justice.

To "say what's true" seems such an easy thing, and yet, of course, there is implicated therein the conception of truth itself, as to which there has been conflict ever since the Roman Vice-regent first questioned, "What is truth?"

In the first place, if there is any legitimate way in which a witness's recollection can be refreshed as to what actually did happen, and how it happened, these accessories should be availed of. A witness should never go on the stand to testify to a matter which partly transpired in writing, whether such writing was a contract or correspondence, or whether there are in existence memoranda which were made at the time, without going over carefully all these things, and, so far as he may, placing himself again in the midst of the scenes which he is about to describe. It is a trite saying that human memory fails, but that *writing never forgets*. Forgeries are so rare that it may be safely said that where recollection differs from the document, human memory is almost sure to be at fault. No witness, therefore, discharges the solemn duty which rests upon him without making sure that the thing as he recalls it is not contradicted or displaced by some writing which *must* be correct. There is another thing which an intelligent witness should be able to do, and that is to see to it that his testimony does not conflict with the conceded or assumed facts in the case. Both sides may be at one as to a large part of a certain set of facts, and yet a witness is called on one side or the other, part of whose testimony runs counter to that which both sides are willing to concede. It may be that one side has conceded too much, and under those circumstances, of course, the witness should not be criticised; but self-interest is such a powerful factor that it is not lightly to be assumed that the other side has conceded too much, and the chances are that the witness has "spoken in haste." If he had known before he went on the stand what the conceded facts in the case were, his confidence in his recollection to the contrary might well have been dispelled.

It is perhaps impossible to describe the golden mean between hesitation and overpromptness. The time which it takes to grasp a question and begin to reply depends, of course, partly upon the character of the question and in part upon the mental characteristics of the witness. Assuming, of course, that the witness intends to tell, and is telling, the whole truth as he knows it, an ethical obligation rests upon him to endeavor to tell the truth *in such a way as to endeavor to promote confidence and belief*. For, being sure that he is right, *ex hypothesi* the judgment will not be right unless he is believed, so that the conscientious witness is pardonably a zealot for his side to the extent that he wishes his own testimony to be accepted as true and correct. Now, extreme reluctance or over-hesitation is likely to be as fatal to belief as overreadiness in replying. The former, however, while it may lead to a possible question as to the entire frankness of the witness, is the safer side on which to err, as it permits of an opportunity to fully understand the question and its exact purport, and to decide, first, whether the witness knows of his own knowledge the answer, or any part of it, and if so, just *what* the witness does know. Perhaps one of the most prolific sources of miscarriages of justice is stupidity or want of real conscientiousness of witnesses in judicial proceedings. Intentional perjury less rarely results in a legal wrong than stupidity or carelessness on the part of witnesses.

Stupidity is incurable and no more to be ministered to than a mind diseased. Possibly a very able and conscientious solicitor may, however, by going over and over a witness's testimony and applying to it the searching light of his own experience, lead the witness, in perfectly good faith, of course, to eliminate that which is manifestly impossible or contradictory to the undisputed facts, and further, to some extent, by cross-examination in the office, to warn the witness against some of the more obvious pitfalls which may be laid for him by opposing counsel.

Carelessness in a witness may be prayed over but cannot be guarded against. Even the dictates of manifest self-interest do not seem to be sufficient to guard against this vice. By carelessness, I mean a failure to grasp the exact scope and purport of the question. What is behind the question may or may not be apparent,—according to the intelligence of the witness. His interlocutor is, of course, shooting from masked batteries, but what the question means should be plain and clear to the witness before he attempts to answer it. It is astonishing how often a palpable trick, such as the use of loose language, or words having a double meaning, or a question calling for a conclusion not of fact but really of law, or questions calling for a conclusion which may be a conclusion of law *or* of fact, is permitted to succeed. One of the favorite devices in clever cross-examination is to ask for an explanation when no explanation is possible and then to evoke by the persistent "why" an imagined chain of mental processes which can be made to look absurd in the light of unquestioned facts. The "why" question is one which should never be answered offhand. I venture to say as a matter of psychology that it is very rarely that a witness can say, especially as to an unimportant part of the transaction, just *why* he did one thing rather than another, or did a thing in a particular way rather than in another, and yet the old device is used again and again and witnesses go on to their own detriment and downfall,

painfully attempting to manufacture reasons which can be shown to be ridiculous or impossible. I recall one case where there was a contract which did not call for the delivery of stock with power of attorney attached. This contract, which was an option for the purchase of the controlling stock in a corporation, was in fact delivered, together with the stock itself, with power of attorney executed in blank, to the plaintiff. Afterwards, one of the defendants being bribed to sell his stock to another for a large price, got access to the stock by pretext, and destroyed the formal power of attorney and sold to the plaintiff's enemy the stock which he had agreed to sell plaintiff, carrying with it the control of the corporation. In cross-examining the plaintiff as to the delivery of the stock and power of attorney, the opposing attorney got the witness to say that it was delivered *in accordance with the agreement*. This admission was regarded by the trial judge as of great importance. The fact was that nothing was said as to the character of the delivery of the stock and the power of attorney, but they were delivered in order to protect the plaintiff in his option. This incautious admission, however, lost the plaintiff his case. If he had been a shrewd and careful man, he would have answered in such a way as to show merely what the contract was; that after the contract was executed and delivered, one of the defendants had thereupon delivered to him the certificate of stock, together with a power of attorney executed in blank, and that at that time nothing was said as to why that was done. If pressed as to the reason *why*, he could either have declined to give a reason, or he could have said that the delivery was made in order to assure to him the certain exercise of the rights given by the contract.

Like Stevenson's child, as a rule, the witness should only speak when he is spoken to. He should not volunteer anything except that when he is asked a question which with apparent innocence could readily be answered "yes" or "no," he has a right to qualify a plain "yes" or "no." This, of course, happens most often in the case of experts. The "yes, but I will explain" and "no, but I will explain" of one of the distinguished expert witnesses for the Commonwealth in the case of *Commonwealth* v. *Quay*, which was tried before Judge Biddle in the Court of Quarter Sessions of Philadelphia County several years ago, still linger in the writer's memory.

It is a mistaken notion that a witness is bound to answer "yes" or "no." It is surprising that such should have ever been the received theory, but then, the hunting down of witches and the expounding of the doctrine of witchcraft were regarded as proper judicial functions only a century or two ago. The theory as to a categorical reply was completely exploded by the gentleman who propounded the question "When are you going to stop beating your wife" and demanded a categorical answer. If the lawyer attempts to tell you that you must answer "yes" or "no," you have the right to say that the question is one which is not susceptible of a categorical answer. This should floor counsel for the moment.

Mannerly behavior on the part of witnesses includes keeping one's temper under almost all provocations. Cross-examination for the purpose of testing your memory is not intended to be and should not be regarded as insulting. It should, therefore, not be resented. If the cross-examination transcends all bounds and your patience is exhausted,

a sharp retort will not necessarily injure your testimony with the jury. The jury sympathizes with the witness more than with the lawyer, and while mere smartness for the sake of being smart, or because of a too expansive personality, is to be deplored, you will be sure of a sympathetic audience if you are in the right and counsel in the wrong.

Do not repeat the question as it is asked you by counsel. If you do not understand the words of the question, ask to have it repeated. Some witnesses have an annoying habit of repeating every question. This, of course, results in loss of time and is likely to cause irritation on the part of the judge and is fairly open to the criticism that the witness is shuffling or evading instead of meeting the question fairly and frankly as it is put. Of course, here is the underlying difficulty of human testimony. A man's manner may inspire confidence, either because of his actually telling the truth or because he is a good actor, and a man's manner may be so unfortunate as to throw a cloud upon his testimony when in fact he is the soul of truth and honor. These, however, are the exceptions.

Occasionally a witness comes to the stand who insists upon qualifying every answer by some phrase as "to the best of my knowledge." I once heard a judge say that he was of opinion that a witness that did that habitually and constantly was throwing a sop to his conscience and was unworthy of implicit belief. While this may have been an extreme criticism, not fairly applicable even in a majority of cases, still a witness by using this form of expression may affect the weight of his testimony. While a witness, believing as he does in the truth of his own testimony, must, if the fact testified to is the very foundation of the case, therefore believe in the rights themselves of that cause, yet he should be careful not to identify himself with that cause if he is not in fact a party. This is more apt to occur if he is an employee of or directly connected with one of the parties. I remember very effective use being made of the slip of a witness, an employee of the defendant, who referred to the defendant's attorney as "*my* lawyer." If his story was believed, there should have been a verdict for the defendant, yet the verdict was for the plaintiff. It was argued to the jury that he had so completely identified himself with the defendant's case, that he was, of necessity, somewhat biased.

Hugo Münsterberg in "On the Witness Stand" has given the results of many experiments in connection with the "reaction time" in the same subject, and by a comparison of the length of the pause before an answer is given to a question with the time usually taken by the same person, has attempted to frame a test of the spontaneity of the response as bearing upon the good faith of the answer. This, of course, assumes that every delay is caused by deliberation over not what the true answer is, but what the witness considers it is most convenient or desirable to reply.

In "Truth in the Witness Box" in the *Spectator* for December 21, 1907, the author gives a reminiscence of a noted murder in which the prisoner went on the stand in his own defense and while suffering under the weight of obviously false denials made previously or shortly after his arrest, yet secured belief in his innocence. The prisoner had also attempted to manufacture an *alibi*, the fact being that he had been with the murdered woman the night of the murder but two or three hours previously to its perpetration. We quote:—

"And yet, astonishingly foolish as that pretense was, the very folly of it grew into a point in his favor. The *alibi* he tried to set up was useless. It only accounted for his actions till midnight. The woman was murdered at three in the morning. Once more the case becomes topsy-turvy. If he was the guilty man how could he have tried to set up so ridiculous an *alibi*? With the woman's blood hardly washed off his hands, with the sight of her body still blotting his eyes, with the remembrance still vivid in his mind of walking out from that haunting room into the cool silence of an autumn morning, would a guilty man's mind work and puzzle over the harmless hours between six and eleven the night before? Of course not. It would be the morning hours that would be crying out to him. He would be trying to get away from the dawn, not from the night.

"From one point of view it was perhaps in Wood's favor that throughout the trial he never seemed to realize that he was in danger. A guilty man could not be supposed to have such confidence. But what a curious, pitiful picture such a prisoner made in the witness-box. Could anything be more baffling to counsel than his shortsighted prevarications, his quibbles, his dramatic attitudes, his apparently complete inability to understand that he must for his own sake, tell 'the truth, the whole truth, and nothing but the truth'? At one time his concern seems to be to deny that he frequents public-houses, at another to repudiate acquaintances with loose women, at another to be unnecessarily polite; but not, first and foremost, to blurt out the truth. 'Did you kill Emily Dimmock?'—the blunt, straight-flung question demands a direct answer. 'It's ridiculous,' is the reply. 'Is Crabtree's evidence true?'—'I ask God to destroy me this moment if I have ever been in the house with Crabtree.' 'Have you been in the habit of using the "Rising Sun" '? 'I have lived in the neighborhood all my life, within a stone's throw of it. I may have gone there occasionally with a friend. I must be with a friend before I go to a public-house as a rule.' He is unable to see, apparently, how little it matters in the urgent, present case, a case of murder, whether he goes alone into a public-house or with a friend, 'as a rule.' Pressed on the most important point of all, as to why he was so anxious to cover up his doings on the Wednesday night, his reasons are more wrongheaded still. He had his people to consider; he had himself to consider, he urges, unaware of the irony of the plea; he knew the 'Rising Sun' had a rather bad reputation—he did not wish to hurt the proprietor's feelings in saying so—and he thought it would be very unpleasant to be associated with such people. At intervals it is only with the greatest difficulty that he can be got to give a plain answer. He is shown a charred fragment of paper on which there are scraps of his writing. 'It has the appearance of a copy,' he assents, apparently thinking that his counsel does not want him to own the writing. His counsel reassures him: 'It is my handwriting,' he admits. For a moment, apparently, he had thought it might be unsafe to tell the truth. Yet all the while he is an innocent man, he knows himself to be innocent and cannot understand that only the truth will help him to prove his innocence.

"It may be that the law which allows an accused man to give evidence on his own behalf has hanged as many criminals as it has helped. But what is unquestionable is that an innocent man determined to speak the absolute truth, concealing no single detail, even though this or that detail looks to him as if it were damning evidence against him, stands in an almost impregnable position. He may find himself making admission after admission which apparently tightens the rope around his neck; his own story may seem so unlikely as to be incredible. But he will never be shaken out of his story; and suddenly, perhaps by the oddest, most contradictory chance, light breaks in; his seemingly wild contention becomes probable, possibly becomes established and unquestionable by means of one of the very admissions which seemed to him likely to tell most against him. An innocent man telling the truth, indeed, is like a man crossing a cataract by a bridge of which the wood is apparently rotten in places, but is in reality strengthened and secured by a core of steel. His only chance of getting to the other side is going forward boldly. To distrust the planks is either to go back or in trying not to step on them, to slip into the river. In the case which has just ended there was more than one moment when the accused man looked like slipping; his counsel held him on his way, and the steel took him over. He may not come out of the case with an increased respect for himself, but there is possibly no one who has followed the course of a very remarkable trial who has come out of it with a greater respect than he for the truth."

Review of Periodicals*

Articles on Topics of Legal Science and Related Subjects

Accord and Satisfaction. "Acceptance of Check for Less Than Debt: Discussion of Question as to Whether or Not Action will Lie for the Balance Due." By Horace A. Reeve. 7 *Law and Commerce* 297 (Oct.).

"If . . . there is a real dispute between the parties as to the amount due from the debtor to his creditor, the former may tender money, a check or any other property to the creditor on the express condition that if received by creditor it is to be in full payment, accord and satisfaction. . . . In such case, both parties understanding the terms upon which the tender is made, if the creditor accepts the tender, the law implies an acceptance also by him of the terms under which the tender is made and that there has been an 'accord and satisfaction' between the parties."

Armaments. "England and Germany—Peace or War?" By Dr. Gerhardt von Schulze-Gaevernitz, Pro-rector of the University of Freiburg. *American Review of Reviews*, v. 40, p. 602 (Nov.).

"Between equals the question of disarmament at sea could be seriously discussed, disarmament for us possible only on the basis of a balance of power between the great nations. England, the United States, Germany, Japan, France, and possibly ultimately also Russia and China, will represent in the twentieth century the single nations that would form such a system of maritime balance of power. The age of dominance at sea by any single nation is approaching its end, to the advantage above all of the United States, for the Monroe Doctrine was never safe from attack under the dominance of a single state."

"Peace or War—I." By Lord Courtney of Penwith. *Contemporary Review*, v. 96, p. 385 (Oct.).

"The citizens of the United States are not always thinking about Canada, but I believe the unrevealed thought of almost every one of them is that Canada will in the fullness of time be joined on to the United States and become one with them. . . . I do not myself accept this dream with acquiescence, much less with satisfaction, and again still less with desire. The political organization of Canada is, in my judgment, better than that of the United States, and it possesses a flexibility and a power of self-adjustment which the citizens of the Republic might well envy. . . .

"Mr. Root well observed a few months since that diplomatists and statesmen are powerless unless backed up by the great body of the people who stand behind them, and he deplored the inconsiderateness and thoughtless unwillingness to make concessions too often characterizing popular opinion. Be it his care, on one side, and that of Canadian statesmen, on the other, to strengthen and develop a more sober and sustained temper of mutual friendship."

See European Politics.

Attorney-General. See Interstate Commerce, Legal History.

Bailments. See Contract.

Capital Punishment. "Capital Punishment." By Ben G. Kendall. 43 *American Law Review* 667 (Sept.–Oct.).

"Capital punishment necessarily excludes the reformatory object. It excludes also the punitory theory, for the ancient rule of a life for a life as just, *per se*, is entirely obsolete in nations of advancement. It is therefore dependent solely for its legitimate infliction upon the prohibitory principle.

"Whatever is necessary to be done, or most expedient to be done, in the preservation of the political organization, may be done. This right is subject to one limitation only, namely, that unnatural or brutal penalties may not be levied. . . . If the right in society to preserve itself is admitted, the right to inflict whatever penalties that are deemed necessary to accomplish this preservation inevitably follows. . . . The abatement of the death penalty would leave no substitute as a punishment for the crimes to which it is incident, at all adequate to their gravity."

See Evidence.

Casablanca Case. The documents of this case, including the decision rendered by the Permanent Hague Court of Arbitration May 22, 1909, are printed in 36 *Journal de Droit International Privé*, pp. 1246–1255.

Codification (Great Britain). "The Codification of the Law of Trusts." By Walter Gray Hart, LL.D. 44 London *Law Journal* 585 (Oct. 2).

"A distinguished judge of the Chancery Division wrote: 'I strongly deprecate any such attempt as the present to codify the law of trusts. I fail to see any necessity for it, and I believe that the result of an act of that nature would seriously hamper the administration of justice.' With the greatest possible respect to so eminent an authority it may be

*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.

pointed out that the codes we already have do not seem to have hampered the administration of justice at all. On the contrary, Sir Mackenzie Chalmers testifies in regard to the Bills of Exchange Act, 1882, that 'merchants and bankers say it is a great convenience to them to have the whole of the general principles of the law of bills, notes and cheques contained in a single act of a hundred sections.'

"Another eminent judge expressed the opinion that if the bill became law the administration of justice in the Chancery Division would be seriously interfered with, adding that 'it appears obvious that equity, which to a very large extent owes its origin to exceptions from common-law rules of universal application, is that branch of law which is least susceptible of codification; or, in other words, of being itself reduced to a series of rules of universal application.' Much the same point was taken by a distinguished Chancery counsel, who is himself the author of an excellent text-book on the law of trusts, and who wrote that the bill was entirely misconceived in principle, and that 'to crystallise equity (the very nature of which is to modify legal rights in particular cases where they would cause injustice and necessarily implies large judicial discretion) seems to me a negation of its first principles.'

"It is respectfully submitted that the Partnership Act, 1890, proves these criticisms unfounded. The law of partnership is very largely the creation of equity. The Act has been in operation nearly twenty years, and it does not seem to have interfered with the administration of justice in the Chancery Division. On the contrary, it appears to have proved itself a great convenience to all concerned. This objection to codification is, in fact, of the same character as that so frequently urged by its opponents, and, indeed, put forward in slightly varying language by several other critics of the Trusts Bill—namely, that a code lacks the flexibility of uncodified law and stifles development. This has always been the main contention of those opposed to codification from Savigny to the present time, but it seems to be sufficiently answered by the test of experience. The growth of law does not appear to have been stifled in those countries which have codes, and Savigny's own country years ago framed and passed into law the completest and most scientific series of codes that have ever been promulgated. No country that has codified its law has ever indicated the slightest desire to revert to the uncodified system."

Contempt. "The Summary Process to Punish Contempt, II." By John Charles Fox. 25 *Law Quarterly Review* 354 (Oct.).

"At the present day there can be no complaint that this branch of the law is administered in an arbitrary manner by the judges, but there are some blemishes in principle which it might be well to remove. Thus, the power to examine an offender by interrogatories might be entirely abolished; a right of appeal might be given in all cases of contempt in which the right does not already exist; a limited power to fine and imprison might be given in the case of contempts punished by summary process; contempts punishable by indictment or information might be clearly defined."

Contract. "The Relation Between Contracts of Service and of Bailment." By C. B. Labatt. 45 *Canada Law Journal* 537 (Sept.).

"In England the distinction between the two classes of contracts . . . has become less important since the passage of a statute under which bailees of chattels, etc., may be found guilty of larceny if they fraudulently convert such chattels to their own use. Enactments of the same tenor are presumably in force in most, if not all, of the British possessions and of the American states."

See Accord and Satisfaction, Pleading, Property and Contract.

Copyright. "De la Revision en 1908 de la Convention de Berne pour la Protection des Œuvres Littéraires et Artistiques." By Joseph Dubois. 36 *Journal de Droit International Privé* 954.

"Nous sommes personellement très convaincu qu'ainsi que l'a déclaré le journal *le Droit d'Auteur*, organe official de l'Union, 'la Convention nouvelle réalise à peu près le maximum des concessions que peuvent être obtenues dans la phase actuelle de l'évolution du régime international en matière de droit d'auteur.'"

"An English-Speaking Copyright League." By W. Morris Colles. *Fortnightly Review*, v. 86, p. 659 (Oct.).

"The revision of the Berne Convention must inevitably involve the whole question of the copyright relations between Great Britain and her Colonies and Dependencies. . . . It is, again, perfectly well known that Germany and the United States have entered into an arrangement whereby the patents of each country are to rank as though they were manufactured in the other. There is not, it will be admitted, any *prima facie* reason why a similar discriminating arrangement should not be concluded between Great Britain and the United States."

Corporations. "Legal Characteristics of Japanese Business Associations: A Comparison Between such Associations and American Partnerships and Business Corporations." By Yai Hang Yang. 58 *University of Pennsylvania Law Review* (Oct.), 61 (Nov.).

"The business associations known to the Japanese law are . . . six in number. The partnership of the Civil Law, the four associations recognized by the Commercial Code, and the *Société en Commendité* organized under the first Commercial Code. Indeed, this *société en commendité* under the Code of 1893 is still the most popular form of business

organization, though, of course, no new organization of this kind can now be formed."

"The Companies (Consolidating) Act, 1908." By Frank Evans. 25 *Law Quarterly Review* 348 (Oct.).

"These little defects do not prevent the Act being described as, on the whole, a well-drawn statute. It has, we believe, been so far found impossible to make a consolidation Act perfect. The Act compares most favorably with its predecessor, the Employers' Liability Insurance Companies Act, 1907. This is an example of the very worst style of legislation."

See Interstate Commerce, Monopolies.

Criminology. "Hereditary Criminality and its Certain Cure." By Judge Warren W. Foster, Court of General Sessions, New York County. *Pearson's Magazine*, v. 22, p. 565 (Nov.).

"Vasectomy is known to the medical profession as 'an office operation' painlessly performed in a few minutes, under an anæsthesia (cocaine), through a skin cut half an inch long, and entailing no wound infection, no confinement to bed. . . .

"While scientists have studied this subject, fraught as it is with appalling public importance, popular ignorance touching it is amazing. It certainly deserves the most careful consideration of all who are interested in the diminution of crime and the uplifting and betterment of the human race."

Declaration of London. "La Declaration de Londres de 1909 sur Divers Points de Droit Maritime." By Prof. N. Politis. 36 *Journal de Droit International Privé* 897.

A detailed exposition of the subjects covered by the various articles of the Declaration and of the proceedings of the Conference, with little in the way of criticism.

"Jamais encore Conference n'avait été préparée de manière plus méthodique. Chaque Pays élabora un mémorandum exposant ses vues ou sa pratique sur les différentes questions indiquées. . . . Suivant la juste observation de M. Louis Renault, ces bases de discussion pouvaient être considérées comme des photographies de la coutume maritime. Les Gouvernements n'avaient qu'à y faire les retouches nécessaires pour arriver à un accord."

The text of the Declaration is printed in full in French in this same number, pp. 1231–1246.

"The Declaration of London." *Quarterly Review* 421, p. 464 (Oct.).

"The unforeseen increase of international intercourse, and the political developments during the two following generations, have brought about that alteration of conditions which has made possible the birth both of the Conventions produced by the Peace Conferences at the Hague and of the Declaration produced by the Naval Conference of London. An unprejudiced examination of this latter must lead to the conviction that, on the whole, the interests of this country are not only not endangered by its stipulations, but are rendered even more secure."

"Enemy Character after the Declaration of London." By L. Oppenheim. 25 *Law Quarterly Review* 372 (Oct.).

"There remain several points unsettled, since neither the Second Hague Peace Conference of 1907 nor the Naval Conference of London of 1908–9 succeeded in agreeing upon a compromise concerning the old controversy whether nationality exclusively, or also domicile, should determine the neutral or enemy character of individuals and their goods, and further, whether or not neutral vessels acquire enemy character by embarking in time of war, with permission of the enemy, upon such trade with the latter as was closed to them in time of peace (Rule of 1756)."

Defamation. "Absolute Immunity in Defamation: Judicial Proceedings." By Van Vechten Veeder. 9 *Columbia Law Review* 600 (Nov.).

Continued from the June number of the same review (see 21 *Green Bag* 402). A model treatment of the subject, with copious footnotes treating the decisions bearing upon the points brought out in the text.

"It is commonly stated in this country that the court or tribunal must have jurisdiction of the proceeding. But there is no modern case in which immunity was denied for want of jurisdiction. . . .

"It was formerly the rule in England that publications in judicial proceedings were absolutely privileged only when they were relevant or pertinent to the proceeding. But this limitation has now been abandoned in England, and immunity attaches, as pointed out above, to every publication in the course of judicial proceedings which has reference or relation thereto, although it may be immaterial or irrelevant to the issues involved. In this country, however, it is almost universally held that the publication must be relevant or material to be absolutely protected. The only exceptions are that in Maryland the English doctrine has been adopted with respect to witnesses, and in Vermont with respect to jurors, although the courts of Kentucky, Alabama and Texas have expressed opinions favorable to that view. Much judicial eloquence has been expended in support of the American doctrine."

Equity. See Mutuality, Pleading.

Ethics. See Government.

European Politics. "The Terror on Europe's Threshold." By E. Alexander Powell, F. R. G. S. *Everybody's*, v. 21, p. 692 (Nov.).

This writer says that five men run Europe. "Five men—King Edward, Monsieur Isvolsky, William Hohenzollern, the Archduke Franz Ferdinand and Cardinal Merry del Val—comprise 'Europe'; these five and no more. There used to be two others; but one of them, Von Bülow by name, has passed into that realm

of obscurity from which few statesmen return, and the other, the most sinister figure of them all, is a prisoner in a Salonikan villa."

Franz Ferdinand of Austria he calls "one of the most mysterious figures in the Europe of today. Forty-six years old, a student, a thinker, horticulture his only hobby, married morganatically to the Countess Sophie Chotek, . . . if he had not been born an archduke he would have been a Jesuit."

Between Emperor William and Franz Ferdinand of Hapsburg—"was ever a more ill-mated pair—lies the fate of Europe."

Evidence. "Circumstantial Evidence." By Clark Bell, LL.D. 27 *Medico-Legal Journal* 56 (Sept.).

A reprint of the recent symposium in the *New York Herald* on the question: "Would you, if you were on a jury, send a man to the electric chair on purely circumstantial evidence "

"Always lawyers have taken opposing yiews, one side arguing that circumstantial evidence is the best possible, the other that no man ever should be deprived of life on any testimony that is not absolutely direct."

Extradition. "De l'Extradition en Matière De Crimes Soidisant Politiques." By S. G. Archibald. 36 *Journal de Droit International Privé* 1015.

This is a note on the facts of the *Rudowitz* case and is based on Professor Maxey's article in the April (1909) number of the *Green Bag* (21 *G. B.* 147). The author does not attempt to throw any light on the difficult question of the exact definition of a political crime:—

"La difficulté inherente à toutes ces questions d'extradition consiste en la nature complexe de certains crimes politiques, et il est impossible de poser une règle que permettrait de déterminer infailliblement si certains crimes sont en principe politiques, ou en principe d'ordre privé."

Government. "The Share of America in Civilization." By Joachim Nabuco. *American Historical Review*, v. 15, p. 54 (Oct.).

"Certainly there are elements fundamentally English in the American democracy, as there are others that are Græco-Latin. One cannot break the chain that binds through history the evolution of an idea or of a sentiment, but the American democracy is genuinely new, a new design; the ancients did not produce it, nor would Europe have produced it. So you can claim it for America as a contribution to civilization, not because the republican government could be called à higher form of civilization than the monarchical parliamentary government, but because by its competition and by the silent lesson of immigration, it has exercised the most beneficent influence on the evolution of the monarchical government in Europe.

"'Security' or the Single Chamber?" Editorial. *Fortnightly Review*, v. 86, p. 567 (Oct.).

"The United States have a system so difficult to change that we might say that 'superfluous stability' is its chief defect. They have the written Constitution, the Senate, the Supreme Court, each of them exercising a strong check on financial policy. . . . No society except the United States has a greater series of guarantees against sweeping and adventurous change of any kind than the German Empire enjoys. . . .

"The real constitutional question before this country is whether it shall adhere to the system based on the idea of social and national 'security' characteristic of the United States and Germany and France, or whether we shall adopt the system characteristic of Servia and San Domingo."

"Ethics and Politics." By R. M. MacIver. *International Journal of Ethics*, v. 20, p. 72 (Oct.).

This article, while not of any considerable scientific value, suggests a great number of points requiring to be handled with a method of rigorous analysis. The subject calls for greater precision of statement and directness of logic. The general drift of the article is indicated by the following extract:—

"Just as economic science investigates one form of social activity, political science investigates and abstracts another. These various sciences give the basis of ethics, which must regard man in the total humanity into which the different social relationships enter. But since conduct is an expression of the whole character of a man, the sciences just mentioned can never be truly normative. Ethics alone stands out as the science of conduct, because it alone can look beyond the various particular spheres, and, regarding man as in his complete self-consciousness he presents the world of his activity to himself, can thus alone lay stress on motive, the inward and vital principle of action."

See Interstate Commerce, Legislative Powers, Taxation, Waters.

International Law. See Casablanca Case, Copyright, Declaration of London, Extradition, Treaty Power.

Interstate Commerce. "The President Reports Progress." By Henry Beech Needham. *Everybody's*, v. 21, p 615 (Nov.).

"Of the regulation of the great corporation in general, nothing had been accomplished. President Roosevelt had tried—had tried in vain; for Congress would not act on his recommendations. Within less than five months, President Taft succeeded in this all-important matter. Through the exercise of the taxing power, the affairs of all corporations, intrastate as well as interstate, are brought within the purview of the United States government. . . . The measure, which is to the sole credit of President Taft, gives to the federal government an unprecedented power

in controlling the trusts. . . . A radical and revolutionary weapon against the trusts has been provided."

"The Federal Attorney-Generalship: By Whom Should the Interstate Commerce Laws be Administered?" By Edward L. Andrews. 43 *American Law Review* 685 (Sept.–Oct.).

"It is intended to present these propositions: that the office of Attorney-General is not adapted to the function of selecting the business enterprises to be subjected to Governmental proceedings under the anti-trust laws; that Congress should constitute a non-political and quasi-judicial Board, whose initiative should be made a condition precedent for projecting the interstate commerce laws against specific objects of attack. . . .

"In constitutional theory the President is the First Law Officer of the Government, in the sense of the execution of the laws. . . . But laws undertaking to direct the course of commerce have brought us into daily contact with this executive power and all its crudities. The result of this efflux of law-mongering has been to constitute the President into Commander-in-Chief of the business of the country, as well as of the army and navy. . . .

"The Attorney-Generalship has been denatured by the new functions thrown upon it."

See Monopolies.

Justifiable Homicide. "The Right to Shoot an Escaping Criminal." By N. W. Hoyles, K.C. 45 *Canada Law Journal* 577 (Oct. 1.)

"As this subject has been brought somewhat prominently before the notice of the public by recent cases, an examination of the law bearing on it may be timely. The rule, as stated by the press comments on these cases, has been said to be 'that a policeman has absolutely no right to shoot at a man who is simply running away. Let it be clearly understood hereafter, then, that an officer who fires at a fleeing man leaves himself open to the danger of being called upon to face a charge of murder.'

"In the absence of any official report of these cases it may well be assumed that no such wide proposition of law was laid down therein as is above stated."

Juvenile Crime. "The Beast and the Jungle, II." By Judge Ben B. Lindsey. *Everybody's*, v. 21, p. 579 (Nov.).

This notable vital document tells the story of the Children's Court, how Judge Lindsey conceived the idea and what it accomplishes, and expresses his views regarding the fundamental problem of the prevention of crime.

"A meeting was arranged at the outset to give an opportunity to hear the boys of their jail experiences. The boys came and "the things they told would raise your hair. . . . It was enough to make a man weep; and indeed tears of compassionate shame came to the eyes of more than one father there as he listened."

Law Enforcement. "The United States Through Foreign Spectacles." By John T. Morse. *Quarterly Review*, no. 421, p. 367 (Oct.).

"Many American statutes are merely moral manifestos, never intended for practical use. A startling instance is the general tacit understanding that so solemn an enactment as the Fifteenth Amendment is only a political abstraction. Not long since, Mr. Roosevelt angrily proclaimed that some of the ablest lawyers make it a specialty to instruct their clients how to evade the laws; and there is no gainsaying the substantial truth of his assertion. Yet, with all his ardor to enforce laws which served his purpose, he himself angrily assailed decisions of the courts with injurious violence. Early in the crusade against sundry powerful corporations for breaches of statutory law, certain of them complained that it was not fair to prosecute them because they had not been notified of the intent to enforce the laws. This may be comic, but it illustrates the American practice."

Legal Education. Address of the President of the Law Society. Delivered at Newcastle-on-Tyne, Sept. 28, 1909. 44 London *Law Journal* 577 (Oct.2).

Mr. Winterbotham's address at the annual provincial meeting of the Law Society recognized the fact that legal education is more advanced in the United States than in England. He said, in part:—

"The committee of 1846 reported that no legal education of a public nature worthy of the name was then to be had, and it is worthy of note that although we have made some progress since that time, a great deal of that report is by no means ancient history at the present date. The report compares the state of affairs in this respect in England with the position on the European continent and in America, pointing out that we had no scientific teachers of law—'men who, unembarrassed by the small practical interests of the profession, are enabled to apply themselves exclusively to law as a science, and to claim by their writings and decisions the reverence of their profession, not in one country only, but in all where such laws are administered.' . . .

"Lord Russell in his admirable address on legal education delivered in Lincoln's Inn Hall in 1895. He mentions that in 1894 there were in the United States seventy-two law schools, attended by 7,600 law students, taught by some 500 professors. The Harvard Law School is probably the best known of these. . . .

"It is possible that I am addressing some who do not know the nature of the teaching at these American law schools. If so, may I commend to their perusal Professor Dicey's captivating article on 'The Teaching of English Law at Harvard,' which appeared in the *Contemporary Review* of November, 1899, and which has since been reprinted in pamphlet form? No one after reading that article can fail to recognize how far we are behind the United States in this matter. Professor Dicey says: 'The professors of Harvard have through-

out America finally dispelled the inveterate delusion that law is a handicraft to be practised by rule of thumb and learned only by apprenticeship in chambers or offices. They have convinced the leaders of the Bar that the Common Law of England is a science, that it rests on valid grounds of reason, which can be so explained by men who have mastered its principles as to be thoroughly understood by students whose aim is success in the practice of the law.'

"Professor Dicey goes on to point out that the legal education at Harvard Law School is not only scientific, but exceedingly practical. . . . 'It is the Socratic method applied to law, and is infinitely stimulating.' The best evidence of the practical character of the legal education at Harvard is that those who take the best places in the Harvard Law School are recognized as the most desirable men for practical work, and as a rule secure positions in offices from the first."

Legal History. "The Equity of a Statute." By W. H. Loyd. 58 *University of Pennsylvania Law Review* 76 (Nov.).

"If the courts no longer avowedly enlarge or restrain a statute, it is not to be denied that the same result is accomplished by the liberal application of principles in better accord with the modern theory of the judicial functions."

"The Character and Antecedents of the Charter of Liberties of Henry I." By Henry L. Cannon. *American Historical Review*, v. 15, p. 37 (Oct.).

"As Henry's Charter is essentally similar to the Magna Carta, though less highly developed, it may be likewise termed a 'deed of grant'; so that it is extremely likely that the legal model of Henry's Charter, brought down through one or more preceding exemplars, was some borough charter. May it not be that the famous charter granted to London by William I, at some time between 1066 and 1075, is the model which was followed in the days of William Rufus and then of Henry?"

"The Origin of the Attorney-General." By Hugh H. L. Bellot. 25 *Law Quarterly Review* 400 (Oct.).

"He derived his title from a period when the term was used indifferently for every one who represented another in whatever capacity. . . . From one out of many King's counsel, the Attorney-General became the first and only King's counsel, and so head of the English Bar."

"The Judicial History of the Supreme Court of the Indian Territory: Judiciary of the Five Civilized Tribes." By R. L. Williams, of the Supreme Court of Oklahoma. 27 *Medico-Legal Journal* 42 (Sept.).

"The Supreme Court of Oklahoma Territory: Its Judicial History as a Territory of the American Union." By Clark Bell, LL.D. 27 *Medico-Legal Journal* 63 (Sept.).

Legislative Powers. "The Courts as Conservators of Social Justice." By Chief Justice Simeon E. Baldwin. 9 Columbia *Law Review* 567 (Nov.).

This paper discusses the question whether, if legislation be passed "contrary to what seems to be natural right," yet not expressly forbidden by the Constitution of the United States, it may be declared void by the judiciary. So far as American judges have asserted that it may be so declared, in not a few instances, the author believes that so far as these assertions disclaim the need of any assistance from the express provisions of the Constitution they are *obiter dicta*. The constitutional provisions bearing on this supposed right of the judiciary are discussed under three heads: (1) the "due process of law" clause, (2) the clause in most state constitutions granting the legislative power of the state to a legislative body, and (3) the guaranty to each state of a republican form of government.

The historical meaning of the phrase "due process of law" is traced, and the expansion of its meaning from that of a procedural to that of a substantive right is indicated. The author plainly realizes the gravity of the question what construction, in the light of history, may be placed upon the phrase. He seems cautious about accepting the doctrine of substantive right in the broad sense in which it was declared in *Hurtado* v. *California* (110 U. S. 516) and in *Union Transit Co.* v. *Kentucky* (199 U. S. 194), giving some emphasis to the doubt expressed by Mr. Justice Moody in *Twining* v. *New Jersey* (211 U. S. 78) as to whether the rule exempting the accused from compulsory self-incrimination is guaranteed by the "due process of law" provision of the Constitution.

With regard to constitutional grants of legislative power, Chief Justice Baldwin reviews some decisions of the United States Supreme Court, the opinions rendered in which, he observes, "rely solely on the implications from the general nature and objects of free governments as serving to limit that legislative power which a state can exercise and therefore can be deemed to have granted to its legislative department." He seems wholly to approve of the view taken by the Supreme Court in *Loan Association* v. *Topeka* (20 Wall. 655) that constitutional limitations on legislative power enable an American court to treat a statute which seems to it flagrantly unjust as void.

But the meaning of the constitutional grant of legislative power, says Judge Baldwin, can be better appreciated in the light of the interpretation to be placed on the clause guaranteeing to all the states a republican form of government. He refers to Chief Justice Waite's remarks in *United States* v. *Cruikshank* (92 U. S. 542), wherein the latter re-asserted the doctrine of natural rights stated in the Declaration of Independ-

ence. "Well founded or ill founded," comments Judge Baldwin, these rights "exist for us by reason of their recognition in our constitutional documents. Man, in some future state of society, may deny any right of private property, but for Americans it will continue in full force until they alter the Constitution of the United States." To determine the extent of the "natural rights" protected by a republican form of government, courts, suggests Judge Baldwin, have "the right to look to the general principles which are common to our free institutions under republican governments," and thus bounds are set to the legislative power which a state constitution may grant to a state legislature. Judge Baldwin, while quoting with approval the opinion of Justice Story in *Wilkinson* v. *Leland* (2 Peters 627), does not offer any observations of his own on the actual scope of legislative power, if it is to be defined in accordance with such principles as these.

Particular emphasis is put by Judge Baldwin, however, on the limitation placed upon legislative power in view of the tripartite division of the functions of the state, the legislative function being limited by the judicial and administrative functions. The maintenance of a republican form of government, we are told, is to be looked for "to the President in his proper sphere of activity, to the Congress in its proper sphere of activity, to the Judiciary in its proper sphere of activity. . . . The Monroe doctrine applies. The area of freedom must be preserved in its entirety."

Justice Baldwin goes no further than this toward proving that a law can be declared unconstitutional merely because it offends the sense of social justice. That, in fact, was far from being his object. His paper tends to show, however, that some approach to that doctrine has been made by the United States Supreme Court, in the manner already indicated. He would perhaps admit that this tendency has not yet resulted in the formulation of concrete rules of much practical utility to guide the judiciary in working out the above policy.

Liquor Problem. "Local Option and After." By Russell E. Macnaughten. *North American Review*, v. 190, p. 628 (Nov.).

"The true solution of the temperance question lies in local option combined with a licensing system of disinterested management; and in no case should the unit of one licensed house for every thousand of the population be exceeded."

Marriage and Divorce. "The Law and Procedure in Divorce." By Hon. Henry B. Brown, ex-Justice of the United States Supreme Court. 13 Law Notes 128 (Oct.).

"What then is the remedy for this deplorable state of affairs? Resort to the federal courts is impossible without an amendment to the Constitution, which is equally impossible. A concerted action on the part of the states is also impracticable, when it is considered how far New York, the Carolinas, and the District of Columbia are from the other states in determining the causes for which divorces are granted. To secure a uniformity of law with respect to procedure is apparently the only recourse. It may be difficult, but it is not impossible, and it is to the credit of the American Bar Association that a step has already been taken in this direction."

This paper was read last summer before the Maryland State Bar Association.

Monopolies. "How to Control the Trusts with Justice to the People Without Destroying Property." By William L. Royall. 69 *Central Law Journal* 238 (Oct. 1).

"The injury done by the trusts is in giving their goods away or selling them below cost to destroy a weaker rival. . . .

"The first thing to be done is to amend the Sherman law so as to restrict it to all unreasonable restraints on trade and all agreements that aim at doing a rival a wanton injury, and to provide appropriate penalties and appropriate measures for enforcing the law. Then let Congress enact a statute as to interstate trade making it unlawful for any person or combination of persons to give away goods or to sell them at or below cost, or so near thereto as to be in effect a sale at or below cost for the purpose or with the intention of destroying a rival in interstate business or driving him out of interstate business, or inflicting a wanton injury of any sort, and forcing fair and equal competition.

"Let this statute have appropriate provisions for enforcing it. Then let each state pass an act to the same effect relating to intra-state trade."

The author of this article, a lawyer of Richmond, Va., secured the permission of the United States Supreme Court to file a brief setting forth these arguments, as *amicus curiae*, in the so-called tobacco trust cases.

Mutuality. "Mutuality of Obligation and Remedy as a Requisite to Equitable Relief, with Special Reference to Oil and Gas Leases." By H. C. McClintock. 58 *University of Pennsylvania Law Review* 16 (Oct.).

"The Supreme Court of Illinois has recently decided in the case of *Ulrey* v. *Keith* (86 N. E. Rep. 696) that a court of equity will not afford protection to a lessee under a so-called 'oil and gas lease,' where the lessee, by the terms of the instrument, is given the right to terminate the lease at any time. . . . This is refused for 'lack of mutuality in remedy.' . . .

"The Supreme Court of the state where the question has first been presented has, it is submitted, decided the case wrongly, under a misapprehension both of the true purpose of the rule, and the applicability of the precedents by which they considered themselves bound."

Penology. "Beating Men to Make Them

Good; Third Article—The Decline of the Punishing Idea." By Charles Edward Russell. *Hampton's*, v. 23, p. 609 (Nov.).

"Fewer arrests, fewer sentences to prison, better treatment in prison, more of a chance to recover from the once ineradicable curse of the prison sentence, fewer beatings, fewer degradations, gradually a wider recognition of man as man, more decency, more kindness, more respect for the value and possibilities of human life. That is the outlook. It is only a scanty beginning, only a meager promise of what may be, and yet few of us are so constituted that we can regard it unmoved. Most of our prisons are still terrible places."

See Juvenile Crime.

Pleading. "Judge Gilbert and Illinois Pleading Reform." By Clarke B. Whittier. 4 *Illinois Law Review* 174 (Oct.).

This is an article of such value and importance as to deserve more than brief notice. The author says:—

"Almost everywhere else a demurrer to any pleading opens up the record back to the declaration. But not so in Illinois if a prior demurrer to the declaration has been overruled. Almost everywhere else a motion in arrest of judgment takes advantage of a declaration defective in substance. Not so in Illinois if the declaration has already been tested by a demurrer. But a motion for judgment *non obstante veredicto* will accomplish the defendant's object despite the decision on demurrer. Yet a motion in arrest of judgment is the more natural form of motion. And the two motions are really the same except in form. It would seem that when a declaration accuses the defendant of a tortious act the plea of not guilty should raise the question whether the defendant did the act. But it does not always do so in Illinois. If the defendant is alleged to have done the act by means of a railway train, for example, he must specially deny that he was running the train. Yet how could he have done the act if not controlling the agency that immediately accomplished it? More generally one may amend a declaration to make sufficient an incomplete statement of a cause of action. But Illinois cases forbid such a correction. Illinois pleading is not even good common law pleading. . . .

"Illinois being then in need of pleading reform, what shall she do? It is the purpose of this paper to propose that she make a real advance on the best that has yet been done. No originality is claimed for the suggestions that follow. Some of them are general law, but not the law of Illinois. Some of them are derived from our American code pleading. Some of them are taken from English reformed pleading. English reformed pleading, as is commonly known, is much more liberal and flexible than our most advanced code. Some of the following proposals come from the practice act drafted by Judge Hiram T. Gilbert and presented by him to the state legislature this spring. The writer's function has been to consider carefully these various possible pleading reforms and to attempt to pick out the best. . . .

"What seems to the writer to be the chief object of pleading" is "to notify the parties respectively of the claims or defenses which will be advanced by their opponents and attempted to be proved at the trial. Something must do this. The parties cannot go to trial blindfolded as to what they must meet. And it seems that to give this information is the real function of pleading. The following system, then, has been devised with that as the chief end in view."

Mr. Whittier's proposed reform of pleading includes the following as some of its chief features: the abolition of all distinctions between proceedings at law and in equity, the abolition of distinctions between the forms of action, the requirement that the pleadings instead of stating the material facts constituting the cause of action shall merely be notices to the opposing party of the cause of action in as few words as possible, the right to include conclusions of fact or of law, the use of the demurrer solely to throw out pleadings which do not set up a legal cause of action or defense, and the right of the court to control the course of the pleadings of its own motion and compel the filing of pleadings of such a nature as to inform the court of the general nature of the causes of action or defenses intended to be relied upon.

Mr. Whittier's suggestions are presented in lucid form in numbered sections, with clearly reasoned intervening discussion. He disclaims any idea of offering the text of a proposed act, modestly declaring that more care should be exercised in framing his proposals. But he has made an important contribution to the study of needed reforms in procedure, and his draft shows a wide familiarity with the technique of practice and admirable qualifications for the drafting of an appropriate act.

"Simplification in Procedure." Editorial. 15 *Virginia Law Register* 486 (Oct.).

"Our English brethren have solved the question of pleading—that is, of the preliminary steps to get a case before the court for trial upon its merits—by their Practice Act, which practically abolishes all technicalities in pleading and allows such ready and prompt amendment to defective papers that there is no excuse for delay, and no reason for postponement. The combatants—to use the language of the ring—are stripped and ready for the combat under the present *régime* in less time than it took an old-fashioned pleader to get to a rejoinder. We need that act—or a similar one—in our business in this state, and it is coming."

"Pleading Special Contract and *Quantum Meruit*." By G. I. Woolley. 19 *Bench and Bar* 12 (Oct.).

A discussion of the subject examined under New York Code provisions.

"There would seem to be little advantage in suing on a *quantum meruit* where a special contract has been fully performed, except in case of a contract void, but not illegal, as, for example, an oral contract within the Statute of Frauds. . . . In cases where it is doubtful whether plaintiff can prove full or substantial performance of a special contract, but the circumstances are such that recovery may be had on a *quantum meruit* for a partial performance, the complaint should contain two counts, one on the contract and the other on *quantum meruit*."

Police Administration. "Chief Kohler of Cleveland and His Golden Rule Policy." By William J. Norton. *Outlook*, v. 93, p. 537 (Nov. 6).

"In substance this Biblical policy applied by a patrolman to an offender is simply to refrain from taking the offender into custody unless absolutely necessary. . . .

"Comes now a wife pleading for work that she may support her children. 'No,' she says, 'I don't want to arrest him. He's a good man except when the drink is in him. It's the drink that does it.' Yes, that's true. And it is the Golden Rule wife and the Golden Rule officer that assist the drink in doing it. . . .

"Mr. Kohler's policy of police repression, which partakes of the theory of full armament, is thoughtful and wise; his policy of Golden Rule, which partakes of disarmament, is inconsistent and unwise."

"The English Conception of Police." *Quarterly Review*, no. 421, p. 503 (Oct.).

"The absence of any inquisitorial examination of defendants by the magistrate, the purely 'accusatory' character of our criminal procedure, and the universal reliance on verbal evidence, relieve the police of an immense amount of labour in preparing reports and documents, besides educating them to appreciate what constitutes proof by subjection to rigorous cross-examination at all stages of the proceedings. Dr. Budding and Dr. Weidlich alike attach much importance to these points; and the latter gives some remarkable figures to demonstrate the superiority of our system to the German, which retains the magisterial inquisition and largely depends upon written police evidence (*Protokolle*). . . . It is due to Sir Robert Peel's reforms that a man may once more 'travel with his bosom full of gold without scath or harm' in any part of the kingdom, while no single liberty worthy of the name has been destroyed or circumscribed."

"The Organized Criminals of New York." By General Theodore A. Bingham. *McClure's*, v. 34, p. 62 (Nov.).

Procedure. "Treadmill Justice." By George W. Alger. *Atlantic Monthly*, v. 104, p. 696 (Nov.).

"One fundamental difference between English and American methods, which should be of interest to us, is the relatively greater importance attached there to what may be called the stopping-point in litigation. By this is meant something more than speed in getting to trial and being heard. It is speed not only in getting into court, but also in getting out of court, which the English have admirably provided for in their judicial system. . . .

"A system of law which has not adequate terminal facilities must be judged by its results, and one of them is the creation of unnecessary temptations to perjury. . . .

"The disregard of the litigants' right to stop is not confined to one state or section, but it is, with few exceptions, a general and characteristic defect in American justice. It exists through the courts, even when the legislatures have provided adequate means for the termination of litigation. In Pennsylvania, for example, there was adopted some fifteen years ago a statute giving its appeal courts power to enter such judgment as would do substantial justice without sending the case back to the original court. One of the leaders of the Philadelphia bar testified, before the Law's Delay Committee in New York, that during twelve years in which the statute had been in effect the Supreme Court had exercised the power given by statute only once. . . .

"The weak spot in the American judicial system is in the so-called lower courts. This is true because the public has an exaggerated opinion of the importance of those tribunals where the judges sit in robes and austere dignity. . . . The undue subordination of the trial judge lies at the basis of the interminableness of litigation.

"The complaint is made often that commercial litigation has largely disappeared from our courts. . . . Commercial litigation will not return to the courts solely by shortening the delay in getting to trial. The business man wants to know when he is likely to get out of court, and lacking any reasonable assurances on that score will settle his grievances or charge them up to profit and loss."

"The Law's Delay." By John F. MacLane, Assistant Attorney-General of Idaho. 2 *Lawyer and Banker* 156 (Oct.).

"The periods of delay to which we western lawyers are peculiarly subject may be classified in the order in which they occur as follows: delay in the office before starting the case, delay in getting to trial, delay during trial and delay on appeal.

"Delay in office, it would seem, is an individual rather than class failing. But I believe that all lawyers are more or less subject to it, and it is most discouraging to the client. . . .

"Delays prior to trial are legion in number, are most difficult for the layman to understand, and are most grievously born and bitterly complained of. . . . The principal causes of delay during this period are the settlement of law issues on motion or demurrer; the taking of depositions; the time which elapses until the next term of court, and the granting of continuances when that

term arrives. For many of these delays, our statutes are responsible; for others, we ourselves must take the blame. . . .

"Delays during trial in general are the results of friction in our system, and of antiquated methods of procedure and rules of evidence and practice. The first which I would mention is the cumbersome and unreasonable method which obtains in impanelling a jury. . . .

"The frequent adjournments during a trial cause much friction, and no little delay. . . . The trial has been had, and it is desired to appeal. How much time shall we allow? First, a sixty-day stipulation for preparing a statement or bill of exceptions, which will of course be extended for a further period of sixty days and probably for thirty more at the end of the second. It will take thirty days to amend and get the statement or bill settled. Thus at the end of six months we have a statement of our case prepared and settled. Acting promptly, the motion for a new trial should be disposed of within the seventh month, at the end of which we would then have sixty days to appeal. The appeal taken at the end of the ninth month, we have sixty days, or to the end of the eleventh month to file our transcript.

"Thus, proceeding with unexceptionable diligence under our present practice, we find ourselves in the Supreme Court just a year from the close of the trial. If the transcript is filed in the spring, after the commencement of the usual spring term of the Supreme Court, it will be the following fall term before the case is placed on the calendar of that court for a hearing. In that event it will doubtless be reached some time during the winter; an opinion will be filed, if the case is not a complicated one, within a month or so after the argument; time is permitted for filing petition for re-hearing, and in the aggregate, the case will have been pending in the Supreme Court from nine months to a year before *remittitur* is finally sent down. Thus when the case is finally determined, it has been in course of litigation for the greater part of three years. But if there should have been an error committed during the trial below, so that the Supreme Court would reverse the judgment, and remand the case for new trial, the time would be correspondingly extended."

See Pleading.

Property and Contract. "Impairment of the Obligation of Contract by State Judicial Decisions." By W. F. Dodd. 4 *Illinois Law Review* 155 (Oct.).

"By the Constitution of the United States the states are forbidden to pass any 'law impairing the obligation of contracts.' It is the purpose of this paper to consider to what extent the federal courts protect contracts from impairment by state judicial decisions, when no act has been passed by a state legislature impairing contract obligations. Contracts may be impaired by state judicial decisions in two manners: (1) by a decision holding unconstitutional a statute under which contract rights have accrued, such decision being one which passes upon the validity of the law for the first time; (2) by a decision reversing a former decision, contract rights having been acquired upon the faith of the decision which is reversed, (*a*) by holding a law to be unconstitutional when similar laws had previously been held valid, (*b*) by altering common law principles, or by changing the interpretation of a statute admittedly valid. Bearing in mind these two methods of contract impairment, it will be well to consider the subject under several headings."

Race Discrimination. "Race Distinctions in American Law, VIII, IX." By Gilbert Thomas Stephenson. 43 *American Law Review* 695 (Sept.–Oct.).

This installment treats, first, of the separation of the races in the schools, three recent incidents standing out, the Berea College affair, the exclusion of the Japanese from the San Francisco Schools, and President Eliot's assertion that the separation of the races in the Berea schools did not necessarily imply abandonment of the principle of equal treatment. The statutes of the various states and the conditions throughout the country are outlined.

The paper deals, secondly, with the separation of the races in public conveyances, reviewing "Jim Crow" legislation from the close of the Civil War to the present time.

See Treaty Power.

Real Property. "The New York Test of Vested Remainders." By S. C. Huntington. 9 *Columbia Law Review* 586 (Nov.).

Riparian Rights. See Waters.

Sherman Anti-Trust Law. See Interstate Commerce, Monopolies.

Socialism. "The Missing Essentials in Economic Science." By W. H. Mallock. *Nineteenth Century and After*, v. 66, p. 716 (Oct.).

"If we start with a given number of laborers, equal in productivity, working for an equal number of hours, and receiving as their reward equal shares of the total product . . . the only way in which the position of any group of equal laborers could be improved, except at the expense of the prosperity of all the rest, would be by the advent of some exceptional man or men, who by taking the labor of this group—say, the coal-producers—under his own control, and thus bringing superior knowledge to bear on it, should enable them to produce more than as much in two days as formerly they produced in six. . . . He, like the laborers under him, would demand his special reward; . . . if the state refused to concede him this, thereby causing the cessation of his special productive efforts, the whole community would relapse into the condition from which it had just emerged. . . .

"Thus the bargain which a socialistic state would have to strike, in the interest of the

majority, with its exceptionally efficient citizens, would be in its essentials a bargain of the same kind as that which such men virtually make to-day with the great mass of the community under a system of free exchange and competition."

"The New Radicalism." *Quarterly Review*, no. 421, p. 617 (Oct.).

"It will be for the people before long to determine whether they will follow the new path which leads ultimately to the bottomless pit of socialism, or the old way by adherence to which we have attained our present eminence and may reach a still more glorious future."

"Poverty an Ultimate Principle." By F. W. Orde Ward. *Westminster Review*, v. 172, p. 456 (Oct.).

"Nature loves poverty, because it presents the line of least resistance for the purpose of propagation, and comes to her hand with materials most plastic and pliable, and in the extremity of its weakness gathers up an impregnable strength—the strength of useful adaptability. . . .

"Poverty, with its collateral incidents and consequences, would appear to be the most congenial ground for the production of all the supreme virtues that enrich and enlarge our human lot. Without perpetual opposition, without the wear and tear of grinding troubles, without resistance to overwhelming odds, we should scarcely rise above the level of the higher animals."

Suretyship. "Surety Companies not Legal Favorites: Modification of an Old Doctrine Necessitated by Modern Conditions." By Isaac Petersberger. 7 *Law and Commerce* 301 (Oct.).

"In the development of the application of the principle that 'the surety is a favorite of the law,' the courts in the construction of contracts of suretyship originally firmly entrenched themselves behind said doctrine, when the surety was a private individual; . . . With the creation of corporate suretyship, . . . the courts in interpreting the same class of contracts made by corporations are taking the position that these contracts are to be strictly construed against the corporate surety and with favors, if any, toward the person for whose benefit the undertaking was executed."

Tariff. "The Revision of the United States Tariff." *Edinburgh Review*, no. 430, p. 269 (Oct.).

"About all that is good that can be said for the Tariff Act of 1909 is that it must constitute a new starting-point for a measure that shall end the corruption of the protective system as this corruption was developed and became increasingly widespread between 1861 and 1909. With the uplift in federal politics that characterized Mr. Roosevelt's terms as President, Aldrichism and all that it means in American political life is obviously coming to an end."

Taxation. "The Relations of State and Federal Finance." By Prof. Edwin R. A. Seligman. *North American Review*, v. 190, p. 615 (Nov.).

Professor Seligman here considers the problem of taxation now confronting the American people. His conclusions are suggested not only by scientific principles, but by tendencies to be observed in public finance in all parts of the world. One of these tendencies, for example, is that limiting local taxation to the field of real estate. There is also a centralizing tendency which places the taxation of incomes and inheritances in the hands of the national government, because it is better able to administer such taxes than are separate states. The inequalities of flagrant under-taxation and of oppressive double taxation, which arise particularly in the case of the taxes on personal property, owing to the ease with which they are evaded, have found their natural corrective in some foreign countries in their administration by the central government. The ideal system in the United States, considering the question solely with reference to the considerations of administrative efficiency and suitability, would be for the corporation, income and inheritance taxes to be collected by the federal government and the real estate taxes by the local governments, leaving no taxes at all for the state governments. But the subject has also to be considered from the point of view of adequacy of revenue. The state governments must be supplied. Moreover, the revenues of the national government from customs, duties and internal indirect taxes can readily be made to prove adequate for all requirements. How, then, are the states to be provided for?

"Why is it not possible to secure all the ends of suitability by having the taxes administered by the federal government under general federal laws, and why is it not possible to secure all the ends of adequacy by having the proceeds apportioned in whole or in part to the various states? This is my solution of the difficulty: let the national government assess the taxes and let the state governments profit by the taxes. This is by no means so new or revolutionary a suggestion as it may appear. It is found in some form or other in many countries and in not a few of the American commonwealths. . . .

"The question of the constitutionality of the scheme that I have suggested may be left to the lawyers. My own opinion, expressed with all diffidence, is that a constitutional method can be devised. But my additional opinion, expressed without any diffidence, is that if constitutional methods cannot be devised, the sooner a constitutional amendment is procured the better it will be. I can see no other avenue of escape from the complications that are looming up on all sides.

"Of the three great taxes about which the controversy has now become so acute, the income tax ought to be levied by the federal

government and its proceeds utilized not only to diminish the burden of the national indirect taxes, but more especially in order to facilitate the reform of the state general property tax; and . . . the corporation tax and the inheritance tax should be levied as national taxes by the federal government but under a clear understanding with the separate states that the proceeds should be distributed in whole or in greater part to them. To determine the exact methods of repartition would be comparatively easy. For that would be a matter of detail, not of principle."

Treaty Power. "The Treaty Power and its Relation to State Laws." By William C. Coleman. 43 *American Law Review* 641 (Sept.–Oct.).

"Conceivably, a treaty could grant to aliens greater rights than are granted to American citizens under the Fourteenth Amendment, and such a treaty would be constitutional. But it is not admitted that those greater rights could be of such a nature as to conflict with the state's exercise of that class of governmental functions which bear a peculiar relation to the welfare of the state as a unit, and the exercise of which, for this very reason, must be peculiarly within the state's discretion. Schools are within that class. . . .

"It is sufficient to say that the Japanese should bear in mind our country's constitutional limitations, and that we, too, should equally bear in mind that we are a nation, and that there underlies every treaty a question of policy—a question of national, as well as of state interests."

Vagrancy. "The American 'Tramp' Question and the Old English Vagrancy Laws." By Bram Stoker. *North American Review* v. 190, p. 605 (Nov.).

"The time is fast coming when something *must* be done regarding the willfully-idle class. Already in Germany if they refuse to work they must starve. . . . In this age we do not, and could not kill, because of mere idleness. But the offender could be given a life sentence. In England a life sentence really means twenty years."

Waters. "Origin and Basis of the Rule that in Determining Riparian Rights the United States Courts Follow the Decisions of the Supreme Court of the State in Which the Controversy Arises." By W. A. Coutts. 69 *Central Law Journal* 262 (Oct. 8).

"The court in *Pollard* v. *Hagen*, 3 How. 212, 11 L. Ed. 565, held that Alabama must be regarded as entering the Union upon an equal footing with the original states; . . . that the shores of navigable waters, and the soils under them, were not granted by the Constitution of the United States, but were reserved to the states respectively, and the new states have the same rights, sovereignty and jurisdiction over this subject as the original states. . . .

"It thus appears that the doctrine of state sovereignty, a doctrine which at the time of its assertion in *Pollard* v. *Hagen* was closely allied with the doctrine of nullification, is the ground work upon which rests the rule that in determining riparian rights the federal Supreme Court is guided by the decisions of the court of the state from which the case in hand comes."

Miscellaneous Articles of Interest to the Legal Profession

Cleveland. "Grover Cleveland: A Group of Letters.—IV—A Record of Friendship." By Richard Watson Gilder. *Century*, v. 79, p. 24 (Nov.).

"It has come to this, that his fellow-countrymen in general, even those that dissent from his political opinions, recognize in Grover Cleveland a man who, being mortal, was not without fault and limitation, yet who stands pre-eminent for unfeigned purity of intention, for singular frankness, for scrupulous and unusual honesty, for faithfulness to duty, for resolution, for courage, and, above all, for absorbing, dominating patriotism. It is not strange that almost the last words that were heard from his lips were these: 'I have tried so hard to do right.'"

Harriman. "Mr. Edward Henry Harriman: The Most Powerful Man in America." By Burton J. Hendrick. *Fortnightly Review*, v. 86, p. 577 (Oct.).

"Harriman's railroad domination means everywhere the elimination of competition, the curbing or the ruthless crushing of rivals, the increased efficiency of management, the general use of the cheapest and most expeditious routes for traffic, and consequent economies in many directions. Up to the present time, however, Harriman had not let the public share in the prosperity with which his system everywhere overflows. In this respect his influence is an unquestioned evil. Evidently Harriman has drawn from his Standard Oil alliance other things than mere financial backing."

Irish Home Rule. "Ireland's Need." By Stephen Gwynn. *Nineteenth Century*, v. 66, p. 618 (Oct.).

"For my own country—apart from the paramount consideration of racial pride, national sentiment—I want a government that can attend rationally to local affairs, big and little, that can do the constructive work of legislation. And, above all, I want law and order. I want a government which, by keeping legislation and administration in harmony with the country's needs, will remove the sanction which at present attaches, and rightly, to breaches of the law."

Isle of Pines. "Cuba's Claims to the Isle of Pines." By Gonzalo de Quesada, Former Minister of Cuba to the United States. *North American Review*, v. 190, p. 594 (Nov.).

"American public opinion and fair play will be Cuba's best champions, and the sacred trust will not be violated. The Isle of Pines has been, is and will be Cuba's."

Journalism. "Sensational Journalism and the Remedy." By Samuel W. Pennypacker, LL.D. *North American Review*, v. 190, p. 587 (Nov.).

"The remedy is very simple and plain. It is to subject the press to the same law and the same authority of the state which governs the other relations of men. . . . If working-men may be prevented by injunction from committing riot, so may newspapers be prevented by injunction from publishing falsehood and scandal. Such material has no part in the liberty of the press any more than sewerage has place in the streams. Both constitute nuisances which may be suppressed and in time will be suppressed."

Legal Reminiscences. "The Lighter Side of My Official Life: Early Days at the Irish Bar and the Home Office." By Sir Robert Anderson, K. C. B. *Blackwood's*, v. 186, p. 461 (Oct.).

"I was sitting in court one day while R. Dowse, Q. C., afterwards a well-known figure in the House of Commons, was arguing a case before a bench of judges, the majority of whom were Catholics. One of their number, Judge Ball, who had already 'outlived his usefulness,' interrupted with the silly question, 'But what is a clerical error?' Sharp as a pistol-shot came back the answer, 'The present position of the Pope in Rome, my Lord!' Dowse was always his own *claque*, and his ringing laugh was joined in by every man in the court, not excepting Ball's colleagues on the bench."

Monopolies. The muck-raking articles on this subject are now making more capital out of the sugar trust and supposed water-power trust than anything else. Here are three examples:—

"The Story of Sugar; Second Article—The Organization of the Sugar Trust." By Judson C. Welliver. *Hampton's*, v. 23, p. 648 (Nov.).

This article tells of the "great defeat" which free sugar under the McKinley tariff administered to the sugar trust. "Instead of being a defeat, it was one of the greatest victories the trust ever won. . . . Havemeyer knew that the way for him to fool the people was to tell them the truth. He knew just how much confidence they had in him."

"The Beet-Sugar Round-Up." By Charles P. Norcross. *Cosmopolitan*, v. 47, p. 713 (Nov.).

"There was only a certain territory in which the beet-sugar men could find a market. The date when they would first offer their sugar was of course known to the trust, and for a period of three months before this date the trust was exceptionally busy stocking up the markets where the beet-sugar people intended to sell their output. Then when it came time to sell the trust undersold them at any price they offered. . . . The way the trust was enabled to make this price was through a series of freight rebates probably unparalleled in the history of the country."

"The Pinchot-Ballinger Controversy:" By John L. Mathews. *Hampton's*, v. 23, p. 659 (Nov.).

"What are Secretary of the Interior Richard A. Ballinger and national Forester Gifford Pinchot fighting over? If you will have the blunt truth, sir, they are fighting over your property and mine, whether it shall or shall not be grabbed by monopolists."

Mexico. "Barbarous Mexico; the Tragic Story of the Yaqui Indians." By John Kenneth Turner. *American Magazine*, v. 69, p. 33 (Nov.).

"I held my breath with the rest, held it for ages, until I thought the rope would never fall. Not until I saw the finger signal of the *administrador* did I know that the blows were delivered by the watch and not until it was all over did I know that, in order to multiply the torture, six seconds are allowed to intervene between each stroke. . . .

"Naturally I made inquiries about Rosanta Bajeca to find out what crime he had committed to merit fifteen lashes of the wet rope. I ascertained that he had been only a month in Yucatan, and but three days before had been put in the field with a harvesting gang to cut and trim the great leaves of the henequin plant. Two thousand a day was the regular stint for each slave, and Bajeca had been given three days in which to acquire the dexterity necessary to harvest the required number of leaves. He had failed. Hence the flogging. There was no other fault."

New Zealand. "New Zealand: The Brighter Britain of the South Pacific." By Willard French. *Putnam's*, v. 7, p. 208 (Nov.).

"New Zealand's death-rate is the lowest in the world. Her wealth, *per capita*, is the greatest in the world. Her wheat yield comes up to sixty bushels to the acre and oats up to ninety bushels. She has exported over $350,000,000 of gold. Her manufactures have reached an annual output above $115,000,000. She has four million horse-power readily available for generating electricity, in natural water power. She has four cities of from sixty to eighty thousand each and a lot of substantial provincial towns."

Reviews of Books

ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY

"Select Essays in Anlgo-American Legal History." By Various Authors. V. 3. Little, Brown & Co., Boston. ($12 *net* for the set of three volumes.)

THE history of the development of the principles of law which are our daily monitors is full of delightful interest to the practitioner who finds relaxation in intellectual exercise. An overwhelming weight of detail, however, so valuable to the student, but so confusing and inconsequential to the general reader, makes difficult the reading of the typical comprehensive history of English law. In this collection of essays the reader will find concise yet careful treatment of certain specific topics, some of which are sure to attract and hold his attention, and each of which, while part of a unified plan, is complete in itself. The editors are to be congratulated upon the success of their labors, which are completed in this volume. It comprises Part V, Commercial Law, Part VI, Contracts, Part VII, Torts, Part VIII, Property, and Part IX, Wills, Descent, Marriage. The last part is notable for the inclusion of a treatise by Professor Robert Caillemer of the University of Grenoble, "The Executor in England and on the Continent,"

It is difficult and perhaps undesirable to make comparisons between the productions of so many learned authors written at different times and for different purposes, all of which have previously appeared in legal periodicals, or as part of a larger publication. Each is important partly as characteristic of its author, and all were selected with a view to rounding out the topics treated in this volume. The arrangement is such, however, that no article had to be included which did not measure up to a high standard, and the editor did not depart from the rule even for the purpose of completing a topic. The reader will probably find most interesting "The History of the Carrier's Liability," by Joseph Henry Beale, and most scholarly "The Mystery of Seisin," by the late Professor Maitland. The scope of the historical work of Professor Ames is shown by the fact that he contributed more articles than any other author. His two essays on the history of contract are in many respects the most notable in this volume.

COMPARATIVE JURISPRUDENCE IN THE BRITISH EMPIRE.

"The Legislation of the Empire; being a Survey of the Legislative Enactments of the British Dominions, from 1898 to 1907. Edited, under the direction of the Society of Comparative Legislation, by C. A. E. Bedwell. 4 v. Butterworth & Co., London. V. 1, pp. xxxv, 545; v. 2, pp. x, 482; v. 3, pp. x, 528; v. 4, Index, pp. 231. (12*s*. 6*d*. per vol.)

THESE four handsomely printed volumes epitomize the statute legislation of the British Empire during ten eventful years which saw the creation of the Commonwealth of Australia, the constitution of the provinces of Alberta and Saskatchewan, the beginning of the reorganization of South Africa, and the introduction of new principles into the common law. About twenty-five thousand statutes are dealt with. Nothing more is attempted than a summary of the principal features of each act, with only such fullness as its importance may demand, and as the mass of minor detail is omitted the information reaches the reader in an easily digestible form.

The Earl of Rosebery in his preface explains that the Society of Comparative Legislation, in striving to perform a useful service to the cause for which it was founded, thought best to restrict its researches, in the review of legislation now before us, to the territory of the British Dominions. Inasmuch as the New York State Library publishes a full digest of the laws of the various states of America, and the *Société de Législation Comparée* presents a complete survey of the laws of European countries, he considers it singular that the work which has been done gratuitously by a large number of contributors "in these days of superabundant legislation . . . should be left to a private society."

Sir John Macdonell, one of the editors of the Society's *Journal*, in his introduction observes:—

> "There may one day be a true science of legislation which will enable a student of it to predict accurately the trend and nature of the legislation of any given society. Such a science may show that the history, constitution, and economic circumstances of a community necessitate a course of legislation which can be foreseen. Sociology may teach us that there is an affinity between democratic forms of government and certain kinds of statutes."

Such a science may some day be able to

predict tendencies in legislation, but it is doubtful whether it will ever furnish a means of ascertaining definitely how important principles of substantive law will be modified. For example, Lord Rosebery and Sir John Macdonell both point out that during this period there are many statutes curtailing liberty, and as Sir John observes, it may be that "the age of contract seems to be ending, that of status returns." Such a generalization, if sound, must have positive scientific value, but it would not be easy to state in even the most general terms its full signification with reference to the future legislation of the United States or any other country. The process of legislation, in fact, like the process by which we reach ethical judgments, is empirical. It is affected not only by main currents of intelligence but by countless cross currents of instinct, and when we say that a system of law is empirical that implies that it is partly instinctive. One of the important instincts to be counted on unfailingly, alike in law and in morals, is the instinct of mimicry. The present work clearly recognizes the extent to which the legislation of the British Parliament has been imitated in all parts of the Empire. In fact, if one wholly eliminates statutes which are but imitations of pre-existing acts one cannot but be surprised at the smallness of the amount of real constructive legislation included in the volumes of the present work. Thus wholly apart from constitutional law, which certainly illustrates the mimetic tendency, the English acts relating to negotiable instruments, criminal law, patents, company law, partnership, employer's liability, married women's property, and judicial procedure, have been adopted in many parts of the Empire, and in some cases throughout the British Dominions. In such a phenomenon is there profound significance? Possibly so, but on the other hand there are such things as fashions in legislation. As Sir John Macdonell says, "In these pages will be found abundant confirmation of M. Tarde's theory as to the great influence of imitation in legislation." It is hard to believe that the prevalence of that influence does not offer serious obstacles to the development of a science of comparative legislation which shall have much practical utility in enabling any particular society to solve the problems of the present or to anticipate the difficulties of the future.

In fact, there seems to be a tendency to overemphasize the results of investigation in this field, which may readily go too far. Some familiarity with the results of such research is desirable in all who have to do with the drafting of bills. Serious defects and omissions can be avoided by utilizing every scrap of assistance which may be obtained from the legislation of other parts of the world. But the invaluable work of those who are engaged in the tasks of true constructive legislation must rely on something more than merely the performances of the legislatures of other countries. The drafting of the British Partnership Act, for example, and of the excellent statutes which are due to the work of our own Commissioners of Uniform State Laws, required something more than a study of the work done in foreign countries. The science of comparative legislation is only one of many sciences on which the legislator must depend. There are the tests of other sciences to be passed, in fact, before it is even necessary to inquire whether a legislative bill compares favorably with the "standard" law possibly to be deduced by application of the comparative method.

These four volumes embody an astonishing wealth of information. They should be in every good law library in the United States. The labor of compilation has been well performed, and the volumes will be found useful working tools by all who are interested in legislative problems. They testify to the current tendency to pass laws aimed at social amelioration, and illustrate many other modern tendencies, such as, for example, that antagonistic to emphasis on technicalities in our judicial procedure. Because of the admirable sense of proportion displayed, and the scholarly outcome of the collaboration of so many learned contributors, the volumes will reward study from every possible point of view.

NICHOLS ON EMINENT DOMAIN

The Power of Eminent Domain. A treatise on the constitutional principles which affect the taking of property for public use. By Philip Nichols. Boston Book Co., Boston. Pp. 422 + table of cases and index 57. ($5 *net*.)

A USEFUL, up-to-date text-book on an important branch of constitutional law is now available in the form of this succinct yet comprehensive treatise on the power of eminent domain, by the former

assistant corporation counsel of the city of Boston. The subject is an important one, overlapping others of paramount importance, and Mr. Nichols has digested the general law with sufficient historical research to explain the origin and development of leading principles.

The writer is logical in his arrangement of his subject-matter, and sure-footed and moderate in discussing points at all doubtful. He does not place himself in the ranks of either the strict or the liberal constructionists of the Constitution, and maintains an attitude of impartiality throughout the course of his lucid exposition of the general principles established by both federal and state courts. As the work is limited in its scope to the substantive law, the complexity and confusion which would be encountered in a treatment concerned with the varying rules prevailing in the different states are avoided. The author observes in his preface that decisions on the fundamental principles, unlike those on questions of procedure, "carry as much weight from one end of the country to the other as they are entitled by the standing of the court which pronounces them and the soundness of its reasoning." Consequently the method adopted has been such as to make possible a minute and orderly exposition based upon a review of a great number of cases. The result has been the production of a standard treatise of solid usefulness.

We do not see that Mr. Nichols' professed willingness to "indulge in some reasoning and . . . even express his own opinion of what the law ought to be" has resulted in consequences at all objectionable. His positions seem to be backed up by sound legal authority. If he makes such an assertion as that "an act of legislature against natural justice would not be due process of law" (p. 5) it must be borne in mind that under the authority of *Hurtado* v. *California* (110 U. S. 516) and other cases this statement was not overdrawn, although its principle might now, perhaps, be considered doubtful in the light of the later decision in *Twining* v. *New Jersey* (211 U. S. 78), which had doubtless not been rendered at the time Mr. Nichols wrote the passage in point.

The treatment is subdivided under eleven main headings, beneath each of which are arranged several chapters covering sub-topics. The main headings are as follows: "The Powers of a Sovereign State," "Jurisdictional Limitations," "Constitutional Limitations," "What Constitutes a Taking," "Additional Servitudes," "The Taking of Waters and Water Rights," "What Constitutes Property," "What Constitutes the Public Use," "What Constitutes Just Compensation," "Due Process of Law and Other Constitutional Requirements," and "Rights of the Condemnor." The book is well printed and compares favorably with Lewis's standard work.

FROST ON GUARANTY INSURANCE

The Law of Guaranty Insurance. By Thomas Gold Frost, Ph.D., LL.D. Little, Brown & Co., Boston. 2d ed. Pp. liv, 770, and index. ($6 *net*.)

THE business of guaranty insurance has had a later development in the United States than in England and on the Continent, the first important company in this country being the Knickerbocker Casualty Company, which was established in New York City in 1880. The carrying of fidelity insurance risks has now increased so that there are a large number of companies in this country doing a business amounting to hundreds of millions of dollars annually, which is steadily increasing. Mr. Frost's work, originally written in 1901, is the "pioneer treatise" on this subject. The writer had had considerable experience in connection with litigation in this field, and embodied its results in a work which immediately received the commendation of leading members of the bench and bar. The original edition was limited in its scope to an exposition of the settled principles which had been laid down by the courts. So favorable an opinion was entertained of the author's abilities that a strong demand was asserted for a freer expression of his own views on points which are not yet settled. Moreover, during the past few years a great number of decisions have been rendered, and revision and enlargement of the treatise became necessary. Mr. Frost therefore undertook a new edition, covering over five hundred new cases, which have been digested and commented upon as their importance seemed to demand, and inserting many of his own views, the result being an addition of two hundred and fifty pages to the size of the original volume. The revision evinces painstaking labor, and the value of the new edition is much greater than that of the original treatise at the time of its appearance, and will undoubtedly evoke the same and possibly even greater praise.

That the subject of fidelity insurance, together with those allied branches of com-

pensated suretyship known as commercial and judiciary insurance, is important is shown by the vast amount of litigation upon it in all parts of the country. It may have been supposed that Mr. Frost would treat the topic from the point of view of New York state laws, but his handling is national rather than local, and decisions from every jurisdiction are brought together without discrimination. Now, as in the original edition, the amount of material included is considerable but is well arranged, and any topic is easily found with reference only to the excellent table of contents without consulting the full index. The work in its new form is an admirable example of a carefully prepared, complete treatise, such as reflects the greater credit upon the author because of pressing demands of legal practice which make such an achievement difficult. The appearance of such works as these in America can scarcely fail to command in foreign countries increased respect for the American bar.

SOME NOTABLE FORENSIC ORATORY

"Classics of the Bar: Stories of the World's Great Jury Trials and a Compilation of Forensic Masterpieces." By Alvin V. Sellers. Classic Publishing Co., Baxley, Ga. Pp. 314, four illustrations. ($2.)

THIS most readable book illustrates the perennial abundance of legal eloquence. Most collections deal with the efforts of the more noted forensic lawyers of history, but the present volume is unlike them in that no Erskine or Mansfield, no Webster or Choate is represented in its pages. The compiler has rather chosen some recent oratory of which we read but yesterday in the newspapers, and some of that of an older generation of American lawyers, whose reputation deserves some measure of permanence. There was, for example, Sergeant S. Prentiss of Mississippi, than whom Mr. Sellers thinks "the world has seen no greater orator," and Senator Daniel W. Voorhees of Indiana, who was one of the foremost criminal lawyers of his day. Of more recent times, the author deems Mr. Darrow and Senator Borah in the Haywood trial, and Mr. Delmas in the Thaw trial, sufficiently eloquent for extended quotations.

The compiler has proved that he is a good judge of what really constitutes forensic eloquence. His selections belong to the more direct and more human species of oratory rather than to that of the more austere and stately kind. He has produced a volume of much interest, so distinctly readable as to be swallowed readily in one or two sittings, and it may be retained on the library shelf with the sense that it is perhaps not an unworthy companion of treasured volumes. As an illustration of its character, we may quote a passage from the remarks of Assistant District Attorney Edgar D. Peixotto, in the Durrant murder case at San Francisco a few years ago:—

The brilliant counsel for the defendant in his opening statement challenged the prosecution to answer the questions, where Blanche Lamont was murdered, by whom she was murdered, and what the motive was? We are now ready to answer these questions. "Where was she murdered?" In the belfry of the Emanuel Baptist Church. "When?" On the afternoon of April 3, 1895, between the hours of 4.20 and 5 p. m. "By whom?" By this defendant, Theodore Durrant. "What was the motive?" Unbridled passion—that same motive that has ruled and governed the world, made nations totter and decay, brought men from the highest pinnacles in life down to brutish beasts; that same motive that has filled our histories with black pages; that gave to the Roman Empire such characters as Nero, Tiberius and Caracalla—whose delight and pleasure it was to see men, women and children slaughtered before their eyes to satisfy their beastly desires; that same motive which inspired Gilles de Rays, who was executed in the year 1440 after confessing to the murder of some eight hundred children in eight years to satisfy his perverted nature: that same motive that actuated Catharine de Medici to have women flayed before her eyes to satisfy her perverted passion; that same motive that brought out in the revolutionary period the monstrous baseness of Marquis de Sade, from which the term sadism is derived, a term meaning passion and lustful murder added to villainies; that same motive that prompted and made into a monster Jack the Ripper, the Whitechapel murderer, who went about week after week and month after month in that quarter of London known as Whitechapel and there killed fallen women by strangling them, and left them murdered and dismembered; that same motive that was the foundation of that wonderful work in fiction of the late Robert Louis Stevenson—the portrayal of Dr. Jekyll and Mr. Hyde; that same motive that made Mr. Hyde satisfy his inhuman feelings, his perverted passion, his uncontrollable desires, by killing simply for the pleasure of killing and then satisfying his lustful desires after the killing had taken place; the motive, insatiable passion, the fire that consumes, the abyss that swallows all honor, fortune, well-being, everything . . .

Blanche Lamont had not learned the character of her companion, and so, unsuspecting, she entered the little gate of the church, which, unknown to her, was then the portals of heaven. She disappeared forever from the gaze of mankind until her corpse was found as you have heard it described. What happened within that church

must forever remain a blank, the details concealed alone in the breast of Theodore Durrant. That is why we asked you if you would convict on circumstantial evidence, and you severally answered 'Yes.' It was a deed which the eye of man could not see. If you ask for further details, we must supply them from our imaginations, and mine has been suggested to me by a bit of verse by Blanche Higginson:—

"The devil he stood at the gates of hell
And yearned for an angel above;
And he sighed, 'Come down, sweet siren, and learn
The lesson of passion and love.'

"The angel she leaned from the gates of gold
(The devil was fair in her eyes),
And she thought it would be very nice if she
Could lift him up to the skies.

. . . . . .

"The angel she leaned from the gates of gold
And she clasped him with arms of snow,
And while she was striving to draw him up
The lower she seemed to go.

" 'Don't struggle, sweet angel,' the devil he cried,
As he bore her on passion's swell;
'When an angel's arms have embraced me but once
She belongs to the devil and hell.' "

The book is not in any sense a historical compilation of *causes célèbres*, but the speeches are prefaced by notes giving the general facts and also are followed by a comment on the manner in which the jury disposed of the case. The reader can thus review the Tilton-Beecher trial, the trial of Dr. E. M. Brown of New York for the murder of Miss Anderson, the Haywood trial, the trial of Durrant for the murder of Miss Lamont, and the trial of Dunbar for the murder of two children in Westerlo, New York. Among other features are a selection of short, eloquent perorations, and an abstract of the interesting colloquy between Susan B. Anthony and Judge Hunt, at the time of her conviction for voting "without having a lawful right to vote."

THE ROMANCE OF BURGLARY

"Mr. Justice Raffles." By E. W. Hornung. Charles Scribner's Sons, New York. ($1.50.)

THE latest "Raffles" story furnishes a good evening's entertainment, and is not easily set aside, because of the dramatic interest of Raffles's latest burglarizing exploits in circumventing the scoundrelly moneylender, Levy. The title suggests Raffles as an impostor elevated to the bench and practising his roguery in that extraordinary capacity. In this respect, however, the book disappoints. The only basis for the soubriquet "Mr. Justice" lies in the fact that when he has secured his prisoner, manacled and caged in the lonely tower, he burlesques the instrument of the law in sentencing him to condign punishment.

If the two cardinal points of literary technique are to portray clearly or to suggest vividly every smallest detail upon which a work of art depends for completeness, such a book as this falls far short of the mark. Raffles is not an unattractive person. His characteristics are by no means indistinct, but his personality is suggested rather than portrayed, not designedly but because the author can do no better. Mr. Hornung is unable to present his roguish hero solely in the light of his own natural words and deeds. The task requires high literary talent. He must rather overlay the idea of Raffles with an arabesque of self-conscious posing and dull joking, which leads one to think that Raffles might easily be more attractive as a real than as a fictitious being. Moreover, it is a matter of common observation that one can hardly write sympathetically of vulgarity and wholly avoid it. But it is possible to lend to it a greater fascination than Mr. Hornung has done.

Possibly if a book like this was intensely realistic, it might do some harm, but written as it is it can only furnish harmless pleasure of no high order.

NOTES

Addison C. Harris has issued in pamphlet form the address on "Modern Views of Compensation for Personal Injuries" which he delivered recently before the Indiana State Bar Association. It contains not only an extended discussion of legal principles, but much information with regard to the workmen's compensation laws of European countries. Those interested in the subject of employer's liability legislation should secure a copy and will find it worthy of preservation.

"The Bench and Bar of Litchfield County, Connecticut, 1709–1909," is the title of an interesting volume prepared with great research by Dwight C. Kilbourn, clerk of the Superior Court, and a member of leading historical societies. Mr. Kilbourn has included in this volume a large amount of interesting information, biographical sketches of members of the Litchfield County Bar, a catalogue and history of the famous law school at Litchfield, and many historical notes.

The nineteenth annual Index of Legislation compiled at the New York State Library lists or briefly digests 2254 general and permanent laws passed at fourteen regular and fifteen special sessions held in the various states during the year ending October 1, 1908. The Index also contains references to statutes declared unconstitutional by state courts

and records the popular vote on constitutional amendments The classification extends to many subordinate topics, and renders a mass of useful information readily accessible. The Yearbook of Legislation for 1907 contains the similar Index for the previous year, covering 7672 acts, making a much greater number of pages. This volume also contains the useful Digest of Governors' Messages. A consolidated Review of Legislation, with contributions from specialists, reviewing the messages and statute laws of the years 1907 and 1908 is to be issued later.

NEW BOOKS RECEIVED

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

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).

International Law. By T. Baty, D.C.L., LL.D., of the Inner Temple, Barrister-at-Law. Longmans, Green & Co., New York. Pp. 346 + index 18.

The 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 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*.)

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.

Latest Important Cases

Banking and Currency. *Bank Guaranty Law of Nebraska in Violation of Fourteenth Amendment.* U. S.

The United States Circuit Court at Lincoln, Neb., held the bank guaranty act of Nebraska unconstitutional, in a decision recently rendered. The chief objection of the court to the act was that it attempts to exclude individuals from engaging in the banking business, unless they do so through the agency of a corporation. It is also pointed out that—

"The act not only attempts to exclude individuals from engaging in the banking business, unless they do so through the agency of a corporation, but also attempts to impose upon them as a condition to their engaging in that business even in that form, a duty to make good the obligations of all other bankers in the state to their depositors. We are of opinion that this cannot be done consistently with the Fourteenth Amendment to the national Constitution or with the state constitution, and that the act is therefore void."

"Those who favor a genuine bank currency," says the *Springfield Republican*, "are as mortally hit by this strange Nebraska decision as those who favor mutual deposit guaranty."

Contempt. *Violation of Preliminary Injunction by Published Declarations—Defiance of Authority of the Courts.* D. C.

In the important case of *Gompers, Morrison and Mitchell* v. *Bucks Stove & Range Co.*, decided November 2, the Court of Appeals of the district of Columbia affirmed the decree of the Supreme Court of the District of Columbia adjudging President Samuel Gompers, Secretary Frank Morrison and Vice-President John Mitchell of the American Federation of Labor guilty of contempt of court.

Mr. Justice Van Orsdel, delivering the opinion of the court, after discussing several technical points of procedure, and noting the distinction between criminal and civil contempts, said:—

"Individual interests dwindle into insignificance when compared with the higher principle involved in this cause. The fundamental issue is whether the constitutional agencies of government shall be obeyed or defied. . . . If an organization of citizens, however large, may disobey the mandates of the courts, the same reasoning would render them subject to individual defiance. The one has no greater rights in the eyes of the law than the other. Both are subject to the law, and neither are above it. . . .

"If a citizen, though he may honestly believe

that his rights have been invaded, may elect when, and to what extent, he will obey the mandates of the court and the requirements of the law as interpreted by the court, instead of pursuing the orderly course of appeal, not only the courts, but government itself, would become powerless, and society would soon be reduced to a state of anarchy."

Chief Justice Sheppard, dissenting, said:—

"The specific acts charged against them relate wholly to declarations and publications which violated the preliminary injunction as issued. I have heretofore expressed the opinion that so much of the injunction order was null and void, because opposed to the constitutional prohibition of any abridgment of the freedom of speech or of the press. 33 App. D. C., p. 129. Subsequent reflection has confirmed the views then expressed. I concede that the court had jurisdiction of the subject-matter of the controversy and of the parties, but I cannot agree that a decree rendered in excess of the power of the court—a power limited by express provision of the Constitution—is merely erroneous and not absolutely void. That proposition is met and conclusively disposed of by Mr. Justice Miller in *Ex parte Lange*, 18 Wall., 163–175." (*Washington Law Reporter*, v. 37, p. 706, Nov. 5, 1909.)

Corporations. *Prohibited by New York Statute from Practising Law.* N. Y.

The Appellate Division of the Supreme Court of New York denied, on Oct. 22, the application of "The Associated Lawyers Company" for the court's approval of its incorporation. The court said:—

"While it has never been legal for a corporation to practise law, a system has grown up by which corporations undertake to procure attorneys for the transaction of the law business of its clients, and while the legality of such corporate action has been doubted, the impropriety of allowing corporations to enter into such a business has been universally recognized, and by this legislation it has been prohibited."

See Public Service Corporations.

Defamation. *So-Called "Panama Libel"—Immunity of Newspapers Printing Fair Comment—Such Cases can be Tried Only in Jurisdiction where Publication Occurred.* U. S.

In the proceedings brought against Delavan Smith and Charles R. Williams, proprietors of the *Indianapolis News*, at Indianapolis, Oct. 13, Judge Anderson of the United States Circuit Court discharged the defendants, who had been indicted for alleged criminal libel in publishing articles alleging that there was a corrupt profit of $28,000,000 in the sale of the Panama Canal to the United States, and who were resisting the removal of the case to the District of Columbia.

"I am of the opinion," said Judge Anderson, "that the fact that certain persons were called 'thieves' and 'swindlers' does not constitute libel *per se*. A newspaper has a certain duty to perform.

"Here is a matter of great public concern. I was interested, you were interested, we were all interested. Here was a newspaper printing the news—or trying to. Here was this matter up for discussion, and I am not willing to say that the inferences were too strongly drawn. I am not approving them—I am simply saying that I am not able to say they were too strongly drawn. Now, if that is the situation, the question is, did these defendants under the circumstances act honestly in the discharge of this duty which I have spoken of, which the law recognizes, and were they actuated by a desire to injure the persons who are affected by their act? If it were necessary to decide this case upon the question of privilege or lack of malice, I would hesitate quite a while before I would conclude it was my duty to send these people to Washington for trial. But that is not it.

"This indictment charges these defendants with commission of a crime in the District of Columbia. Now the Constitution of the United States in one of the amendments provides that the accused shall be tried in the state or district where the offense is committed.

"Everything that the evidence shows that the defendants do or did, they do and did in the state of Indiana, city of Indianapolis. I am not here to say that if those defendants had an agent in Washington to whom they sent for circulation copies of this paper, that they might not be amenable to prosecution in Washington, if they could be arrested in Washington. I am compelled to take one of two views, and there is nothing between them. When newspaper owners or proprietors do what the evidence in this case shows these defendants did, composed, printed and deposited in the mails for circulation these papers containing the, for the purposes of this statement, libelous articles, either they are guilty here and in

every county, district or jurisdiction into which these papers go, or they are only guilty here. There is no middle ground to take.

"Where people print a newspaper here and deposit it in the post-office here for circulation throughout the counties and districts, there is but one publication and that one is here. If that is true, then there is no publication, according to the evidence. in Washington."

Equity. *Court will Enjoin a Directory Publisher from Omitting Plaintiff's Name from List of Reputable Express Companies—Such Omission not a Libel.* Mass.

The Supreme Judicial Court of Massachusetts has overruled the defendants' demurrer in the suit in equity brought by William L. Davis against the New England Railway Publishing Company *et al.*, seeking to prevent the defendant company from excluding reference to the plaintiff's business in its publication, entitled "A. B. C. Pathfinder and Dial Express List."

The court says: "The ground on which the plaintiff seeks relief is not that he has a right to compel the defendants, or either of them, to do anything for his benefit, but that he has a right to have them refrain from intentionally doing anything, without legal justification, to his injury. The defendant corporation professes to give to the public a full list of all the reputable express companies doing business in Boston. While it does not say in express words that the list is complete, that is the meaning which the publication is intended to convey and does convey. Its list is false and misleading, to the plaintiff's injury. . . .

"It is peculiarly a case for equitable relief. The wrong is continuing, and in a sense an irreparable one. The extent of the injury cannot be measured accurately in an attempt to assess damages. The injury is to property, and it is not technically a libel upon the plaintiff. The rule that a court of equity will not enjoin the mere commission of a crime does not apply."

Franchises. See Public Service Corporations.

Interstate Commerce. See Legislative Powers.

Legislative Powers. *Interstate Commerce Clause Violated by Statute Regulating Business of Itinerant Vendors.* Colo.

The Itinerant Vendors' Act, of Colorado (Sess. Laws 1905, p. 274, *et seq.*; Rev. St. 1908, c. 114, section 3563 *et seq.*) in *Smith* v. *Farr*, 104 Pac. Rep. 401, has been held to violate the interstate commerce clause of the Constitution. The petitioner for *habeas corpus* was a salesman representing a factory located in the state of Iowa, and at the time he was arrested was engaged in the sale of vehicles to farmers in Colorado. The court held that none of the conditions which would authorize the state to impose a license fee were present in the case at bar. Its police power was not involved and the vehicle which the petitioner sold was not dangerous nor injurious to health or morals. Neither did the law purport to be one providing for inspection of manufactured articles brought into the state for the purpose of sales to consumers or the levy of taxes thereon as a part of the mass of property therein. Such a law was a clear violation of the Constitution.

Monopolies. *Prosecution for Conspiracy under Sherman Act Barred by Statute of Limitations—"Conspiracy" Synonymous with "Contract" in Restraint of Trade.* U. S.

An important decision was rendered by Judge Holt of the United States Circuit Court Oct. 26, in the cases of Gustave E. Kissel and Thomas B. Harned, indicted under the Sherman act for conspiracy in restraint of trade, with others of the American Sugar Refining Company. The defendants pleaded the statute of limitations. The court dismissed the indictments, declaring that the operation of the statute invalidated any action against the defendants, inasmuch as the offense for which they were indicted was committed more than three years ago (reported in N. Y. Law Jour., Nov. 1, 1909). The court said in part:—

"Statutes of limitations are beneficial statutes. The interests of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitation should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning. The Government has waited, before bringing this prosecution, for five years and a half after the alleged offence was complete, and in my opinion the statute of limitations is a bar to this indictment.

"The law of conspiracy has been the subject of a great deal of over-refined discussion

and the authorities upon the subject are quite conflicting. Some hold a conspiracy to be an offense complete when entered into, upon which the statute of limitations immediately begins to run. Others hold it to be a continuing offense, from which it is argued that the statute of limitations never begins to run against a conspiracy until it has been abandoned and whatever result has been accomplished by it annulled. . . .

"But a conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade. If this indictment had charged 'that the defendants made a contract in restraint of trade,' I suppose no one would claim that the statute of limitations did not begin to run as soon as the contract was executed. How can the Government impose a different liability by calling the thing by another name?"

In the course of his opinion Justice Holt administered a few words of censure to public prosecutors for seeking indictments for "conspiracy to commit a crime" rather than for the crime itself:—

"There seems to be a mysterious potency in the word 'conspiracy.' Prosecutors seem to think that by this practice all statutes of limitation and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But if a conspiracy to commit a crime has been carried out and the crime committed it cannot be made something else by calling it a conspiracy."

Monopolies. *Agreements between Telephone Companies for Exclusive Rights of Connection Invalid.* U. S.

The case of *United States Telephone Co.* v. *Central Union Telephone Co.*, 171 Fed. Rep. 130, is a notable and interesting contribution to the law governing the rights of telephone companies as public service corporations. The complainant company made contracts with several local companies by which they agreed to permit no connection with any other company for a period of ninety-nine years. Several of the companies broke this agreement. The court discussed the character of the telephone business as being public in its nature, but drew a distinction between it and the sleeping car business, in which it was held, in *Chicago, St. L. & N. O. R. Co* v. *Pullman Co.* (139 U. S. 79, 11 Sup. Ct. 490, 35 L. ed. 97), that a contract for exclusive rights for the term of fifteen years to furnish sleeping cars to a railroad company was not invalid. It is possible for all travelers to obtain like accommodations on sleeping cars, but where there are different telephone companies, it would be impossible to give them like service unless each company were allowed the right of connection with the local exchanges. This being the case, the contract in question would necessarily prevent local companies from carrying out to the full extent their duties as public service corporations. The agreements were held invalid.

Philippine Land Titles. *Occupancy by a Native for Long Number of Years as Basis of Claim.* U. S.

In deciding the case of *Reavis* v. *Fiansa* Nov. 1, favorably to the latter, the United States Supreme Court, in effect, held that the occupancy of land by a native of the Philippine islands for a long number of years, is a superior basis for a claim to the land to that of settlement by an American.

"Whatever may be the construction of Revised Statutes, section 2332," said Mr. Justice Holmes, "the corresponding section of the Philippine act cannot be taken to adopt from the local law any other requirement as to the possession than the length of time for which it must be obtained. Otherwise, in view of the Spanish and American law before 1902, no rights could be acquired and the section would be empty words."

Procedure. *Technical Defect in an Information Nullified by the Record.* Okla.

The Court of Criminal Appeals of Oklahoma signifies its intention to be governed by reason and common sense rather than to be bound by precedent or technicality, in the case of *Caples* v. *State*, 104 Pac. Rep. 493. Defendant attempted to secure a reversal of a criminal conviction on the ground of defects in the information. The caption read: "State of Oklahoma, Plaintiff," etc., instead of "The State of Oklahoma, etc.," and there was no allegation that the prosecution was by the state as it is required to be by constitutional provision. The court held that even if the caption were a necessary part of the information, the constitutional provision would be met if applicable at all, and there was no necessity of alleging that the prosecution was by the state, where it appeared from the record that it was actually being so conducted. "The

supreme purpose of this court is to give the people of this state a just and harmonious system of criminal jurisprudence, founded on justice and supported by reason freed from the mysticism of arbitrary technicalities. . . . Now that our criminal jurisprudence is in its formative period we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice. . . . We will give full consideration to all authorities which are supported by living principles and will follow them when in harmony with our laws and the conditions existing in Oklahoma, but we must confess to want of respect for precedents which were found in the rubbish of Noah's Ark and which have outlived their usefulness, if they ever had any."

Public Service Corporations. *Assessment of Special Franchises—"Net Earnings Rule" in New York State—Equalization of Assessments.* N. Y.

Long litigation in the New York state courts reached a termination Oct. 19, when the Court of Appeals reached, in the case of *People ex rel. Jamaica Water Supply Co.* v. *Tax Commissioners*, a decision rendering the special franchise taxes levied under the law of 1900 collectible. Two principal issues had been raised. The first was whether the court could properly set aside the assessment made by the State Board of Tax Commissioners because it did not correspond to the result reached by applying what is known as the "net earnings rule." On this point the court held that the board, in fixing the value of a special franchise for purposes of taxation, may avail itself of any rule or method reasonably adapted to ascertaining its true value. When the method known as the "net earnings rule" is adopted taxes other than the special franchise tax should be deducted from the gross earnings in order to determine the net earnings. There should also be deducted a reasonable amount to meet depreciation. Under this rule the court below might take judicial notice that six per cent should be allowed as a fair return upon the capital invested by the company in real estate and other tangible property. In the present case, seven per cent was a proper rate to adopt in capitalizing the surplus earnings, to provide a sinking fund for unforeseen contingencies.

The second point was whether assessments upon special franchises were to be equalized with the local assessments made by assessing officers of the localities in which the corporations involved might be located. The Court of Appeals upheld the ruling of the court below, holding that the assessments should be made at the same ratio of actual or true value as other property in the county appearing on the assessment roll. The question of unequal assessment may be reviewed by the courts on certiorari.

The extended opinion in the case was written by Willard Bartlett, J. (Reported in N. Y. Law Jour., Oct. 25, 1909.)

Public Service Corporations. *Dissolution of Corporation Revokes its Franchise—Status of the Franchise, if Continuing, to be Determined only in Suit to which State is a Party.* N. Y.

The New York Court of Appeals on Oct. 19 reversed the judgment of the Appellate Division and dismissed the proceedings in the case of the City of New York against the former Directors, now Trustees, of the corporation which built the Belmont tunnel under the East River between the Grand Central Station and Long Island City. The question before the court was whether, on the dissolution of a corporation which is in default in performance of the conditions under which it holds its corporate power, the franchise can pass to the trustees. Chief Justice Cullen pointed out that the legal status of the franchise could be determined only in litigation to which the state was itself a party, and said:—

"When the legislature enacted that the powers of the corporation should cease it intended thereby that in the same contingency the franchises conferred on the corporation should cease. What possible benefit would accrue from the dissolution of a corporation for failure to exercise its franchises in time, if the franchise itself is to continue for the benefit of the stockholders, who might form a new corporation and to it transfer the franchises?"

Sherman Anti-Trust Act. See Monopolies.

Wagers. *Oral Betting at a Horse Race not Bookmaking—New York Anti-Race-Track Gambling Law.* N. Y.

"While the statute makes all bets and wagers illegal and void, and money lost thereon recoverable," said the New York Court of Appeals in *People ex rel. Lichtenstein* v. *Langan*, decided Nov. 9, "it has made

gambling a crime only where it is accompanied by record, registry or the use of some part of the paraphernalia of professional gamblers, except in the case of poolselling, where probably no writing or record is necessary to constitute the crime." Consequently oral betting does not constitute book making inviolation of the anti-race-track gambling laws in New York State. To hold otherwise would be "a departure from the rule which gives to the terms of the statute their ordinary and accepted meaning, and would be a construction which was not within the contemplation of the legislature." (Reported in N. Y. Law Jour., Nov. 15, 1909.)

Correspondence

The Dartmouth College Case

To the Editor of The Green Bag:—

ALLOW me to point out certain inaccuracies in your review (in *Green Bag* for October) of my article on "Confusion of Property with Privilege: the Dartmouth College Case," published in *The Independent* for August 26. You state that the *Charles River Bridge* case "holds that an act contrary to the Constitution is not a legislative act." The page (644) and statement to which you refer, are found in Story's dissenting opinion; and the statement is only incidental to his main contention. The effect of the decision is that grants made by the state must be construed strongly in favor of the grantor. while private grants are construed strongly in favor of the grantee. This certainly trimmed the wings of the College case decision as Story vigorously argued in sixty-six pages of dissent.

You say that in *State Bank of Ohio* v. *Knoop* and *Washington University* v. *Rouse*, "the Supreme Court held, in effect, that a state cannot by charter deprive itself forever of the power of taxation." The court expressly held just the opposite doctrine. In the former case the period of exemption was limited by the charter; but in the latter case there was no time limit, and the court held that there was "permanent exemption from taxation."

You say: "The repeal of obnoxious charters must be effected by judicial decision rather than by legislative enactment." Can you point out a court which has claimed or exercised the power to repeal charter contracts while the grantees of the charter keep their part of the contract? This would be judicial law-making with a vengeance.

You state that in America "the power to repeal and amend corporate charters would be exercised only with the most confusing and harmful consequences." You must be aware that for many years a considerable number of our states have had and exercised this power. Will you point out the "confusing and harmful consequences?" New York has this power through constitutional reservation of the right of repeal and amendment. Its Court of Appeals does not agree with you as to the results. See 194 N. Y. 221-222.

I commend your frankness in admitting that the contract clause of the Constitution was not designed to include grants by the state, and that this decision was one of "the innovations of Marshall on the Constitution." Opinions will differ as to this and other innovations being "the expression of the central spirit of the Constitution," and also as to the propriety of following a supposed "central spirit" in opposition to the "design" of specific provisions.

You apparently admit that Marshall was mistaken in stating that Dartmouth College was a private foundation. Indeed, Mr. Shirley has made this too plain for argument. But you conclude that this is irrelevant because "a corporation of a public character may be to some extent and for certain purposes a private body." You fail to see that Marshall's entire decision is based on a supposed contract between private donors and the crown. If the donors were not private and if the founder was the crown itself, the basis of the decision falls. Marshall said: "It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within

the letter of the Constitution and within its spirit also, unless . . ." 4 Wheaton, 643–644.

With reference to "the second error" imputed to Marshall, you mistake the question. It is a matter of New Hampshire inheriting obligations or liabilities, not powers. The state, on achieving its independence, acquired all the *powers* of sovereignty. But if we grant that New Hampshire inherited also certain *obligations*, the state certainly did not inherit the obligation of any contract which King George had not attempted to make by the Dartmouth College charter—which indeed he had no power to make. See opinion of Chief Justice Doe in 67 N. H. 27–53.

You admit that later decisions have established that there are certain classes of contracts into which it is not "competent for the legislature to enter." But you claim that these later cases have not "materially modified" or refuted the doctrine of the college case. But if these contracts as to which the legislature is not "competent" are not distinguishable in principle from the contracts still held to be governed by the doctrine of the college case, you must admit that the doctrine has been both modified and refuted. Contracts exempting property from taxation are held to be governed by the rule of the college case; contracts exempting property from exercise of the police power are not. But, as Justice Strong said, "the police power of the state is no more sacred than its taxing power." See 97 U. S. 678–679.

The real "point" is whether a charter is a "contract" in the constitutional sense, or is mere legislation. You do not notice the *Chicago Lake Front* case. Can you explain on what principle it is incompetent for the state to contract away the public rights in Chicago's harbor, while it is competent for the state to contract away the public rights in the streets of Chicago or any other city? See 146 U. S. 387. In these later cases the Supreme Court has overruled the *Dartmouth College* case in principle—has furnished the reasoning on which it may finally be overruled in fact.

I am surprised that you did not notice the preceding article on this same subject (in *Independent* for August 19), dealing with the improper influences which were used to bring about the decision in the *Dartmouth College* case, influences whose character and effectiveness are recognized by such eminent authority as Henry Cabot Lodge, Joseph Cotton, Jr., and John M. Shirley, from whom I quote.

JESSE F. ORTON.

73 *Sixth street, Elmhurst, N. Y.,*
October 15, 1909.

A REPLY

1. The *Dartmouth College* case asserted the doctrine that where the state is bound by contractual obligations protected by the Constitution not to disturb a grant previously made by charter, an act of the legislature which seeks to disturb the grant is null and void. We understood that Mr. Orton's purpose, in referring to the *Charles River Bridge* case (11 Peters 420), was to convey the notion that the legislature can substitute a narrower construction for that contemplated at the time of the original grant, thus modifying the rule that the original intention of the parties to the contract is binding on the legislature. We do not understand, however, this to have been the doctrine of the *Bridge* case. And in our opinion the *Charles River Bridge* case does not overrule the doctrine that a legislative act violating constitutional safeguards of contract is null and void. Perhaps a little more precision of statement was desirable, but in aiming at condensation we were not guilty of misinterpretation.

2. It seems doubtful whether the *Charles River Bridge* case can accurately be said to have "trimmed the wings of the College decision" till it is conclusively shown that the Supreme Court, in that decision, impliedly rejected the view that a royal grant like that in the Dartmouth College patent would be construed in favor of the grantor.

3. *State Bank of Ohio* v. *Knoop* (16 How. 369) seems to us to have held, *in effect*, that a state cannot forever deprive itself of the power of taxation. Justice McLean, who wrote the opinion, said that an exemption from taxation made for the purpose "of advancing any policy connected with the public interest" is not an alienation, but an exercise of sovereignty (p. 389). This would imply that an exemption is virtually an ex-

ercise of the taxing power, and also, apparently, that the state might repudiate such an exemption under a valid exercise of the police power, should it be found detrimental to public policy. Chief Justice Taney, concurring on other grounds (see *Ohio Life Insurance Co.* v. *Debolt*, 16 How. 431), said that a state cannot alienate the power of taxation unless it is allowed to do it by the state constitution.

With regard, however, to *Washington University* v. *Rouse*, we must confess to a serious oversight. Both that case (8 Wall. 439) and *Home of the Friendless* v. *Rouse* (8 Wall. 430) hold that a state may bargain away the taxing power in perpetuity, and the judgments of Justice Davis in these two cases are open to criticism.

4. The courts, not the legislature, are the final tribunal which shall say whether or not the Constitution has been violated. There are certain conditions under which the legislature may possess a valid right to repeal corporate charters and the courts cannot review such action. But to make legislatures themselves the sole judges as to whether constitutional safeguards are preserved inviolate, when they repeal charters where no right of repeal was reserved, and to deny the right of the courts to interfere, would not tend to make property secure in America. It therefore happens that as a matter *of fact*, though not *of law*, the courts in such instances do virtually exercise a power of repeal, and that this state of affairs is for the public good. Our remark that "the repeal of obnoxious charters must be effected by judicial decision rather than by legislative enactment" was meant to be interpreted only in the foregoing sense, that the constitutional rights of property might be sure of being protected.

5. A considerable number of our states have had the power of repealing and amending corporate charters, and all that the New York Court of Appeals said in *Lord* v. *Equitable Life Assurance Society* (194 N. Y. 212), about the exercise of this constitutionally reserved power in New York State is doubtless true. Instances of repeal, however, are far less frequent than those of amendment, and we find in this decision no specific observations upon the consequences of the exercise of this unfettered right of repeal. Mr. Orton's proposition is not to be sustained without the presentation of facts bearing on this particular point. If, however, results have been favorable, that may have come about in spite of this reservation of the right of repeal. The *Dartmouth College* case undoubtedly infused into all legislatures a greater respect for the property rights of corporations than they would otherwise have come to experience. There is no doubt that it still exerts a *morally* deterrent influence, even though its doctrine may not be *legally* binding on the New York legislature with respect to the repeal of charters. In the exercise, however, of the power of amendment, which in New York State has been resorted to with far greater frequency, the legislature has by no means been free from the salutary *legal* as well as the *moral* inhibitions of the doctrine of the *Dartmouth College* case. This point can best be illustrated by quoting from a recently published work of much value, Frost on New York Corporations (p. 361):—

"When it comes to the right of the legislature to exercise its reserved power to alter and amend a corporate charter or act, . . . in order to justify the exercise of this power by the legislature it must be done (except in the exercise of the police power) in such a manner as not to defeat or substantially impair the object of the grant or any rights vested under it, which the legislature may deem necessary to secure either that object or some public right. It cannot be used to take away the property already acquired by the corporation or to deprive the corporation of the 'fruits actually reduced to possession of contracts lawfully made. The alterations must be reasonable. They must be made in good faith and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of alteration or amendment. But in all cases where the rights of the general public are in a manner seriously affected the legislature will be granted a great latitude in such matters.' (*Buffalo, etc., Ry. Co.* v. *Dudley*, 14 N. Y. 336.)"

6. We "apparently admit" Marshall's error in stating that Dartmouth College was a private foundation. If our words were ambiguous we now disclaim any intention to admit anything of this sort. What controlling legal authority is there for the imputed erroneousness of Marshall's view? Do not the terms of the grant alone show its private character, whatever public function might subsequently come to be discharged by the corporation thus created? "The rights of the Dartmouth College students," said Chief Justice Doe in *Dow* v. *Railroad*, 67 N. H., at p. 36, "are public in a certain

sense . . . but they do not make the college property public in the sense in which the state-house, state-library and state-prison are public. . . . On the college land the legislature cannot build a road, against the owner's objection, without paying the owner for a right of way."

7. The learned and able opinion of Chief Justice Doe in *Dow* v. *Railroad* (67 N. H. 1) throws so much light on the *Dartmouth College* case that it commands the greatest respect. One of the links in his logical chain, however, does not seem perfectly flawless. "Since the enactment," says the Court (at p. 41) "of the Bill [of Rights] in 1689, the sovereign has had no authority to exempt from legislative repeal a college charter granted either by the King or by Parliament." The law, however, of the English Constitution would give perpetual life to a royal grant not in derogation of the common or statute law (see Halsbury's Laws of England, v. 6, pp. 485–7; v. 8, pp. 315–6), and a grant in itself perpetual by operation of law at the moment it was made would obviously be within the power of the crown. The crown would then be bound to insure the perpetuity of the grant, so it would be easy to see in the circumstances a contractual transaction like that which Marshall professed to see in the college charter. Whatever the obligations of the royal grantor, they would descend to the state of New Hampshire after the Revolution so far as not clearly unsuited to American society. Thus in *Pawlet* v. *Clark*, it was held by the Supreme Court in 1815, in the opinion of Justice Story, that a state succeeding to the rights of the crown cannot by legislative act rescind a royal grant. 9 Cranch 292.

8. While the police power is no more sacred than the taxing power, a temporary alienation of the former would clearly be more in conflict with public policy than one of the latter, for in the latter case the state may gain a recompense in some other form. There is a logical reason for subjecting the inviolability of charters at all times to the limitation involved in the police power, and it is not easy to infer, from the opinion of Marshall in the *Dartmouth College* case, that he intended to deny the right of the state to exercise its police power. On the other hand it is logical to allow temporary exemptions from taxation when justified by public policy, under circumstances like those of *State Bank of Ohio* v. *Knoop*, and charters, while always subjected to the police power and the power of eminent domain, are properly relieved of taxation when the state does not thereby abdicate one of its sovereign powers. Furthermore, it may reasonably be contended that before the Revolutionary War the Dartmouth College charter would under the British Constitution have been subject to the police power and other prerogatives of Parliamentary sovereignty, and that these limitations were inherent in the contract which Marshall construed.

9. In *Illinois* v. *Central R. Co.* (146 U. S. 387), it was held that the state cannot, by granting to private persons property held in trust for the people, abdicate a public trust. The principle of the case is analogous to that in the cases which sustain the propriety of the legislature's exercising the police power or the right of eminent domain, it being immaterial whether a public trust, a public need, or the public health and safety, are to prevail over private prerogative. On the contrary, when rights in public ways are granted by charter, such a grant does not involve the use of such ways for a private as distinguished from a public use, and when those rights are exercised in a manner not calling for the exercise of the police power they should not be in danger of being nullified merely on the ground that the legislature cannot alienate public property.

The principle that a charter is a vested property right, not simply a legislative act, does not need to be overruled by the Supreme Court, as Mr. Orton has contended. For the law already prevents that principle from being made use of to harass or injure the public, without weakening its vitality as an important fundamental institution of American society. THE EDITOR.

The Editor's Bag

MR. JUSTICE PECKHAM

BEFORE his elevation to the bench of the Supreme Court of the United States the late Mr. Justice Peckham had already distinguished himself as counsel in many important cases and as Associate Justice of the New York Court of Appeals. When President Cleveland saw fit to select for the highest court a Democratic jurist from New York State, the appointment was in no sense made for political reasons. President Cleveland clearly perceived his ability, and lived to see Justice Peckham demonstrate his usefulness in the highest tribunal of the nation and earn the universal respect of the bench and bar. The high opinion entertained of him by his colleagues is sufficiently attested solely by the opinions he was selected to right in a large number of important decisions. He dedicated his entire energy to the work of the court, and the care and ability with which he performed his duties, and the lucidity and directness of his written opinions, not to speak of his personal graces and merits, certainly contributed to the dignity of that court.

Apart from the decisions arising under the Sherman act, Justice Peckham wrote the opinions in the oleomargerine case, holding that the sale of an article in original packages made by the importer from another state could not be restrained by state law, in the decision, during the war with Spain, that a stamp tax on transactions at an exchange or board of trade is not a direct tax within the meaning of the Constitution, and in the New York gas case, holding that a public service corporation is not entitled to a fair return on an increased valuation of its franchises without positive proof of such increase in their value. These decisions called for the highest form of juridical ability, and in them all he fully rose to the demand of the occasion.

In learning and acumen the late Justice was perhaps excelled by some of his colleagues, but in his intense desire to do justice he was unsurpassed. One may disapprove of certain of his doctrines, but one cannot disapprove of him as a judge, or accuse him of any grave defect of judgment. If he was not a great constitutional jurist, there can be no doubt that he was the superior in this respect of many who have at various times occupied seats on the bench of the Supreme Court. To the collective wisdom of the court the strong yet gentle Justice Peckham doubtless contributed more than his share of one-ninth.

A GEORGIA CORONER'S VERDICT

One of our readers in Moultrie, Ga., is good enough to send us this anecdote:—

Down in the piney woods section of wire-grass Georgia, where the proverbial "Razor Back Hog" strops himself upon any con-

venient tree, there lives a unique character by the name of "Jene Dykes." Mr. Dykes has been a continual office holder in his home county, "since the memory of man runneth not to the contrary," and has held all offices from County Judge to *Judex de Pace*.

Finally arriving at that Alexandrian state of unrest, he mounted the pinnacle of judicial glory, when his fellow-citizens elected him to the office of Coroner.

Our friend Dykes was recently called upon to investigate a murder, and after a careful sifting of the evidence, charged the jury empaneled in these words:—

"Gentlemen of the jury, this crime cannot be classed homicide, because the deceased was killed on a public road and not at his home. Neither can it be called manslaughter, for the deceased was a boy and not a man. So I charge you, gentlemen, you will have to return a verdict of Boyrodeicide. This latter classification of a crime, however, is not in the Georgia Code."

LOMBROSO

THE dependence of law upon science is nowhere more strikingly manifest than in the case of the criminal law. It is indisputable that a sound system of criminal law can be developed only through careful study of the science to which the late Cesare Lombroso gave impetus. All public law and in a minor degree all private law are largely dependent upon science for their improvement, but it would doubtless be easier to convince the majority of lawyers of the ready applicability of criminological knowledge to the solution of legal problems than of the utility of the results of other sciences by which the wholesome growth of the law should be influenced in no less a degree.

The old idea was that the criminal was a free agency, and the old science of criminology, in the hands of such eighteenth-century writers as Beccaria, proceeded upon the theory that as the criminal was an entirely responsible being "the treatment of the criminal is to be determined by the crime committed and not by the nature of the criminal." This is not from a modern point of view a scientific proposition. The modern science of criminology had its origin in the great biological awakening of the nineteenth century, and discarding the free-will dogma reversed the above hypothesis, maintaining that the treatment was to be determined by the nature of the criminal.

The beginning was made by Lombroso's epoch-making theory of the *deliquente nato*, the born criminal. Lombroso went so far as to hold that the criminal was a distinct type of the human species, which can be recognized by peculiar physical and psychical characteristics. The criminal was conceived practically as a sub-species of the human race, bearing so-called marks of degeneration, among them prognathy and receding forehead, structural peculiarities of the brain, and other anatomical differences attesting to a close relationship of the type to the anthropoid apes, and indicating the prevalence of atavism. Insanity and crime were considered so closely allied as to be both results of the same process of degeneration. Lombroso also sought to show that genius could be traced to epilepsy, and that epilepsy, instead of being the product of a pathological condition, was not much else than a highly strung normal function of the nerves.

It may be said that contemporary science does not look upon these theories with approval. They are for the most part either plainly disproved or clearly not proved. But after all the deductions necessary to eliminate their enormities and to reduce them to an orderly sense of proportion have been made, there still remains a slight residue of truth, for while crime is not necessarily either atavism or disease, it is properly subject to anthropological investigation which will throw light on the proper attitude for society to assume for its own protection.

The chief merit of Lombroso is that he collected a great number of observations which will supply a basis for the more cautiously formed conclusions of future criminologists. His hypotheses are of value chiefly because of their stimulating quality and suggestiveness. He was certainly not fitted by temperament or equipped with the necessary laboratory facilities for the ambitious labor he so confidently undertook, for criminology is not merely a branch of anthropology but overlaps the science of heredity and a number of other sciences. His neglect of approved scientific method led to his being classed in some quarters as a "yellow scientist." The genial, benevolent nature of the man, however, robs the term of a contemptuous signification. He unquestionably showed other men of science that they still had much to learn, and he truly founded a new modern science.

That Lombroso's fondness for anthropo-

metric investigations will exert an abiding influence is shown, for example, by the discussion which Professor Ross's prediction that the world would soon see a comprehensive anthropological survey of crime by a laboratory method received at the National Conference of Criminal Law and Criminology held in Chicago last June. Others following in the footsteps of Lombroso will doubtless in the near future put the science of criminology on a firm basis, so that it will furnish criteria for determining what policies should dominate the substantive, the procedural, and the penal law of crime. Of the unscientific *régime*, undue severity combined with harmful indulgence was the inevitable outcome. The new science should put the world in possession of a system of criminal law adequately serving all the ends of social justice, and the inspiration will have come from the Italian enthusiast whose zeal in collecting facts excelled his mastery of principles. Science, while it values truth above men, will not slight his share in an important movement.

HOW MR. ROOT EARNED A BIG FEE

A STORY presumably authentic, but the accuracy of which we do not vouch for, is told of the way Senator Elihu Root secured a fee of $250,000 for two days' services to the Sage estate:—

After the death of Russell Sage a legal snarl presented itself as to the distribution of the estate, variously estimated at from $140,000,000 to $200,000,000. Mrs. Sage, kindly, generous and just, wanted the legal question settled quickly and by authority.

"I want you to see Mr. Elihu Root," she said to her advisor, "and say to him that I will consider it a distinct favor if he will pass upon this question and give to me his decision."

Communication was opened up at once with the then Secretary of War. A special messenger called upon him. He was too much engrossed with his official duties to give the request attention.

"Please say to Mrs. Sage," said he, "that it will be impossible for me to act. I am not practising law now."

"But it is not a question of fee, Mr. Root," said the intermediary. "Mrs. Sage insists that you, and you only, shall advise in this matter."

"I repeat," replied the War Secretary, "that I do not wish to be retained, and you may say that nothing further need be suggested. My fee would be practically prohibitive and I want it to be so regarded."

"And that fee would be—"

"Well, say $250,000," was the reply, in a tone intended to cut off further discussion.

That same day telegraphic communication with Mrs. Sage was opened. "Pay it," she said. Mr. Root was astounded when informed that his "prohibitive" fee was regarded as settled. He accomplished what he had to do in less than forty-eight hours, without appearing in court and without engaging additional aid, and Mrs. Sage was very well satisfied.

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.)

COOK *vs.* PEARY

Supreme Court of Joke-idioture

December Term, 1909.

The facts of this case are sufficiently stated in the opinion of the court.

TUSH, C. J.—The plaintiff, who is by profession a lecturer on Cook's tours, and is the author of "Personally Conducted to the Top of Mt. McKinley" and other standard guidebooks, brings this action to determine the question of the ownership of the North Pole. The plaintiff recently lectured before the Royal Society of Autograph Collectors at Copenhagen, Denmark, and then and there informed his audience that by an instrument executed April 21, 1908, and delivered to one Harry Whitney to be by him held in escrow till the conclusion of Mr. Whitney's extended shooting expedition, he had deeded the North Pole to the aforesaid Society. There is no question of the plaintiff having held a clear title, if he had had any title whatever, nor of the validity of consideration, as the proofs of both these matters are in Mr. Whitney's possession and will be presented by him in 1920 if they have not got lost in the

meantime. The only question is that of the validity of the title thus acquired by the Society. The defendant, who is the proprietor of the Arctic Exploration and Publishing Company, declares that on April 6, 1909, he formally took possession of the North Pole in the name of the United States, and therefore the title immediately vested in the *New York Times*.

The parties to this action having both by advice of this court through their counsel waived inquiry into all questions of fact on account of the non-existence of any credible witnesses, the question of law need only be considered.

[The court at this point asked if any lady in the court-room could lend him a hatpin. He then took a large apple from his pocket, stuck the hatpin vertically through the middle and carefully sliced off a piece at the top with his jack-knife.]

The earth is not a true sphere, but an oblate spheroid. The polar region is flattened as in the case of this apple. The geometrical pole is at a point elevated many miles above the earth's surface, while the geographical pole, which Messrs. Cook and Peary claim to have discovered [the court here grimaced rather indecorously] is at the point where this hatpin intersects the top surface of the apple,—not directly under the geometrical pole, but directly between it and the centre of the earth.

If the particular land, or water, on which Mr. Peary or Mr. Cook stood happened not to lie in a plane parallel to the equator, but dipped ever so little like the top surface of this apple, all their calculations would have been upset, and they would have been unable to find the pole, or prove that they had found it, except by accident. Were Mr. Cook standing directly underneath the geometrical pole, like this [the court stuck a small piece of match into the apple to indicate the explorer] he would revolve round the earth's axis, and were he to arrive actually at the geographical pole his observations would show him to be far south (or north) of it. Unless this part of the earth's surface, therefore, is so shaped that the horizon line gives a correct basis for calculation, neither Cook nor Peary could have discovered the North Pole and have known where, when or how the discovery occurred.

If we suppose, however, that the polar regions are such that useful sextant observations are practicable, the conclusion nevertheless follows that the North Pole cannot possibly be located. For it is not a fixed point. To quote a writer on international natural law:—

> The North Pole is not a fixed point, but a point which is perpetually moving round to overcome the motion of the earth and remain in the same place. If one considers the earth as a great wheel and the Pole as an axle fitting it loosely, we see how the axle will be jarred this way and that when the wheel revolves. And the North Pole, because it is an infinitesimal geometrical entity, is separated by an even greater interval from the terrestrial substances.—Sir Isaac Newton Puffendorff, Textbook of International Physics, p. 7777; cf. G. Grandidier, *Les conséquences scientifiques de la découverte du Pole*, *Journal des Débats*, Sept. 14, 1909.

It follows, therefore, as a matter of natural law, that no one has discovered the North Pole, and the court need not go into the *hinterland* question brought up by Sir Gilbert Parker of counsel for the plaintiff, to weaken the defendant's claim of a title vesting in the *New York Times*. If Canada and Siberia are connected by means of a natural causeway intersecting the North Pole, as may be the case, this court does not wish to take the responsibility for a judgment which might annex Asia to the Dominion of Canada.

Complaint Dismissed.

MAUD MULLER

Maud Muller, on a summer's day, was raking the customary meadow filled with hay, when the Judge came along.

"Good morning, Maud."

"How are you, Judge. Fine morning."

"Yes. Um. You are probably aware that President Roosevelt has forbidden all this."

"Really."

"Really. He claims that the farmer's wife, and, of course, the farmer's daughter, ought not to be raking up hay. Now, if you will give me a glass of water I shall be glad to take you away from all this. I am a rising young corporation lawyer, and think I can make you fairly comfortable."

Maud, looking carefully at his chestnut mare, accepted his invitation.

About thirteen years later, when the Judge was investigated and put into jail, she looked wistfully back over the usual vista of years, thought of the golden-haired yap who lived two farms beyond, that she might have had, and she muttered softly to herself:—

"Of all sad words of tongue or pen,
The saddest are these: I might have had Ben."
—*Life*.

USELESS BUT ENTERTAINING

Lawyer—I think it was prudent to compromise the case. I never encourage litigation when it can be avoided.

Client—Well, any time you want to discourage litigation you can do it by presenting your bill.—*Scraps.*

Judge (to prisoner).—"We are now going to read you a list of your former convictions."

Prisoner.—"In that case, perhaps your lordship will allow me to sit down."

An impecunious young lawyer recently received the following letter from a tailor to whom he was indebted:—

"Dear Sir: Kindly advise me by return mail when I may expect a remittance from you in settlement of my account.

"Yours truly, J. Snippen."

The follower of Blackstone immediately replied:—

"Dear Sir: I have your request for advice of a recent date, and beg leave to say that not having received any retainer from you I cannot act in the premises. Upon receipt of your check for $250 I shall be very glad to look the matter up for you and to acquaint you with the results of my investigations. I am, sir, with great respect, your most obedient servant,

"Barclay B. Coke."

—*National Corporation Register.*

A colored woman was on trial before a magistrate charged with inhuman treatment of her offspring.

Evidence was clear that the woman had severely beaten the youngster, aged some nine years, who was in court to exhibit his battered condition.

Before imposing sentence His Honor asked the woman whether she had anything to say.

"Kin I ask Yo' Honah a question?" inquired the prisoner.

"Go ahead," said the Judge, and the court room listened.

"Well, then, Yo' Honah, I'd like to ask yo' whether yo' was ever the parient of a puffectly wuthless cullud chile?"

—*Law Student's Helper.*

Some years ago, a man in Nantucket was tried for a petty offense, and sentenced to four months in jail. A few days after the trial the judge who had imposed sentence, in company with the sheriff, was on his way to the Boston boat, when they passed a man busily engaged in sawing wood.

The man stopped his work, touched his hat politely, and said: "Good morning, your honor."

The judge, after a careful survey of the man's face, asked: "Isn't that the man I sentenced to jail a few days ago?"

"Yes," replied the sheriff, with some hesitation, "that's the man. The fact is, Judge, we—er—we don't happen to have anybody else in jail just now, so we thought it would be a sort of useless expense to hire some one to keep the jail four months just for this one man. So I gave him the jail key and told him it would be all right if he'd sleep there o' nights."—*Harper's Weekly.*

A persistent lawyer who had been trying to establish a witness's suspicious connection with an offending railroad was at last elated by the witness's admission that he "had worked on the railroad."

"Ah!" said the attorney, with a satisfied smile. "You say you have worked on the P. T. & X?"

"Yes."

"For how long a period?"

"Off and on for seven years, or since I have lived at Peacedale on their line."

"Ah! You say you were in the employ of the P. T. & X. for seven years, off and on?"

"No. I did not say that I was employed by the P. T. & X. I said that I had worked on the road, off and on, for that length of time."

"Do you wish to convey the impression that you have worked for the P. T. & X. for seven years without reward?" asked the attorney.

"Absolutely without reward," the witness answered, calmly. "For seven years, off and on, I've tried to open the windows in the P. T. & X. cars, and never once have I succeeded."—*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.

The Legal World

Important Litigation

The merger said to be contemplated by the Adams, United States, American and Wells-Fargo express companies has been attracting the close attention of the Department of Justice. Steps are being taken so that when the merger is completed the department will be in a position to know the facts and act upon them if necessary.

In the United States District Court for the northern district of New York, the Delaware & Hudson Railroad and the Central Vermont Railway Company were fined $100 each and costs October 5, by Judge George W. Ray, for failing properly to equip certain of their cars with brakes and other safety appliances. The railroads stipulated that the judgments be taken.

An example of one method of checking the law's delays was illustrated in the Appellate Court of Indiana recently, when Judge C. C. Hadley dealt vigorously with the appeal of a railroad corporation. The case was a companion one to several others previously decided, and the court ruled that the appeal was obviously dilatory, seeking to utilize technical objections for the purpose of defeating the recovery to which the plaintiff was entitled in law and equity. Judge Hadley, in affirming the judgment of the lower court, inflicted a ten per cent penalty on the corporation.

The fact that the Supreme Court of Nebraska had declared the guarantee bank statute unconstitutional in that state may have given the bankers of Oklahoma an intimation of what they may expect from the Supreme Court of the United States, where the suit to test the constitutionality of the Oklahoma statute is pending. The Farmers' State Bank of Oklahoma City, at all events, has thought it well to convert itself into a national banking institution. The bank guaranty law of Oklahoma is said to have given occasion for some dissatisfaction on the part of the Oklahoma banks.

The American Book Publishers' Association, organized to prevent booksellers from cutting the prices of books, has been sued by R. H. Macy & Co., the New York department store firm, in the United States Circuit Court under the Sherman act to recover $375,000 damages on allegations that the association is a combination in restraint of trade. The fight has been going on since 1902. After Macy & Co. undertook to sell books at their own prices the Publishers' Association sought relief in the state courts with the result that the Court of Appeals decided that on a copyrighted book the interest controlling the copyright could dictate the retail price. The case was taken to the United States Supreme Court, and the department store was sucessful in obtaining a reversal of this decision.

The Supreme Court of the United States began its sittings October 11, after a recess of more than four months. Associate Justices Peckham and Moody were not in attendance. The term opened with six hundred and thirty cases on the docket, a considerably larger number than for several years past. A large number of petitions for writs of certiorari were presented the first few day or two, seven out of twenty-four being granted and the rest denied. The first cases to be argued were those of *Interstate Commerce Commission* v. *Chicago & Great Western R. R. Co.* and *Southern Pacific Co.* v. *Interstate Commerce Commission.* When the case against the American Tobacco Company under the Sherman act was called, the government asked for delay, and against the protest of the defendants the case was set for December 13.

The Vermont Supreme Court, basing its decision on secs. 3716, 3717 and 3871 of the laws of Vermont, held defective the statute providing that two doctors by signing a commitment stating that a person is insane can send the patient to an asylum. The decision was rendered October 5, on a writ of *habeas corpus* brought on behalf of Mrs. Lydia Anna Allen of Johnson, Vt. The Court held that all persons are entitled to be notified, and have a right to a hearing if desired, doctors' certificates being simply *prima facie* evidence. While the law is defective it is effective in certain directions. This question of illegal commitments had been agitating Vermont for some time. All persons will be considered legally committed at Waterbury, it is believed, until *habeas corpus* proceedings are brought and their release demanded. It is thought that very few applications will be made.

Argument in the Spokane rate case was begun October 4 at Spokane, Wash., before Interstate Commerce Commissioners Prouty, Lane, Cockerell and Clark. The principal contention of counsel for Spokane was that freight rates to Seattle represented reasonable compensation for carriers, and that the higher Spokane rates based on water competition were excessive and unjust. The New York Chamber of Commerce took a hand in the case, feeling that the proposed readjustment of rates would tend to deprive the Atlantic seaports of their natural advantages, draw from the Atlantic seaboard the origin of manufacturing and distributing merchandise and concentrate such business in cities of the Mississippi Valley, and amount

to a discrimination against the East in favor of the West. Commissioner Prouty stated that the Commission, in all probability, would not issue an order in less than five months, because of the similar cases of Salt Lake, Reno and Phœnix, which have a direct bearing on this case.

Important Legislation

The executive committee of the Illinois Bar Association has approached Governor Deneen with the request that in his call for the proposed extra session of the legislature he include a recommendation for the creation of a commission to outline amendments to the existing laws, which will result in a simplification of legal procedure and lessen delays and expenses of litigation.

The King has appointed a royal commission to inquire into the condition of the divorce laws, especially as they affect the poorer classes. In July Lord Gorell, formerly President of the Divorce Court, moved in the House of Lords that county courts should have the power to grant divorces. The Archbishop of Canterbury and others opposed the motion, and the House decided to institute an inquiry into the whole question.

President Taft was the guest at dinner on board the St. Paul, on October 27, of the Governors of more than one half of the states of the Union. In his speech he referred to the advantages of the states co-operating still more closely with the national government. "The lack of uniformity," he said, "in some of our laws is distressing, and yet we cannot amend the legislation of the United States in order to correct the evil that grows out of it. We must by team play, by team action, through the legislatures of the states, accomplish that reform and while we, by inviting governors, do not invite the legislative power of the state, we do invite those men who have much to do with directing what the legislation shall be and whose constitutional function generally is to recommend legislation to the legislature with very considerable influence in that regard."

In the opinion of the office of the secretary of the United States Senate, it is not true, as was recently stated by Governor Haskell of Oklahoma, that thirty-one states, the two thirds required by law, have memorialized Congress to call a constitutional convention to provide for the popular election of United States Senators. Such resolutions must be in proper form and specifically request that a constitutional convention be called. They must also, in the opinion of eminent lawyers in Washington, provide in terms that both branches of Congress shall be notified of the fact of their passage. As far as investigation has gone, the records of the Senate disclose that only twenty-four such communications have been received from state legislatures, although this number may be increased by further research. Of the twenty-four, several states apparently have adopted resolutions which upon their face fail to meet the constitutional requirement that application shall be made (to Congress) for the call of a constitutional convention. Consequently, several legislatures must do their work over again before the list of thirty-one states, or the constitutional two-thirds, can be regarded as complete.

Personal—The Bench

Colonel Joseph T. Lawless of Norfolk City, Va., will become Judge of the Circuit Court of Norfolk County to succeed Judge William N. Portlock, resigned.

On account of ill health, Judge J. H. Gilpatrick of the District Court, Leavenworth, Kans., has tendered his resignation, which took effect October 9. He has been on the bench ten years.

Krishnaswami Aiyar, the noted Moderate Congress leader, who used his influence and authority on the side of law and order during the recent unrest, has been appointed a puisne judge of the high court of Madras.

Captain E. H. Campbell, Judge-Advocate-General of the Navy department, was detached from duty October 28, and it is believed that Commodore R. L. Russell will be designated as his successor. Secretary Meyer explained the change by stating that he was anxious to have the position filled by a graduate in law.

The Allegheny County (Pa.) Bar Association tendered a farewell banquet October 28 to the retiring Chief Justice of the Supreme Court of Pennsylvania, Hon. James Tindale Mitchell, who, next January 1, will have served Pennsylvania on the Supreme bench for twenty-one years. The members of the Supreme and Superior Courts were specially invited guests.

Judge Joseph E. Jones has been re-elected judge of the fourteenth judicial circuit of Tennessee by an overwhelming majority. Immediately after Captain Rankin's death, he called a special term of circuit court, impaneled the grand jury, which brought in indictments against many alleged night-riders, and finally carried the trials through in spite of repeated threats against his life.

Judge Peter S. Grosscup told a women's club at Chicago, October 29, that women were not fitted to become lawyers, because they were devoid of the reasoning faculty. "The only woman lawyer I know who is a success in her profession," he said, "began her career by being put in jail for contemp

of court, for throwing a pitcher of water at a judge who overruled her motion." But he told his audience a lot of the things which women can do and escaped their vengeance.

Personal—The Bar

Neville H. Castle, an attorney at Nome, Alaska, formerly practising in California, has been appointed assistant United States Attorney for the second judicial district of Alaska. He was graduated from Yale in 1894.

There are perhaps more lawyers in Boston who have been in active practice fifty years or more than in any other city of the United States. Robert M. Morse, the leader of the Boston bar, heads the list.

Edgar Allan Poe, City Solicitor of Baltimore, says it is impossible for him to attend to his public duties and at the same time bear his share of the work with the law firm of John P. Poe & Sons, and so he has decided to practice alone.

William R. Begg, who for the past six years has been the general solicitor of the Great Northern Railway Company, with headquarters at St. Paul, Minn., has resigned and will open an office in St. Paul for the general practice of law, about January 1.

The interest of the late Ernest B. Kruttschnitt in the prominent New Orleans legal firm of Farrar, Jonas, Kruttschnitt and Goldberg having been liquidated, the firm has taken in Mr. Richard F. Goldsborough and Mr. Edgar H. Farrar, Jr., and will hereafter be styled Farrar, Jonas, Goldsborough and Goldberg.

Eli F. Cunningham, a St. Louis attorney, arose at a revival tent meeting at Clayton, the first of October, and declared his intention to quit his profession and become a farmer and religious worker. He said attorneys had to lie when following their profession, and they often knew oaths to be violated and witnesses to be perjuring themselves.

Louis D. Brandeis of Boston, who defended the Oregon ten-hour day law for women before the Supreme Court of the United States, has been invited by State's Attorney Wayman of Chicago to defend a similar measure before the Supreme Court of Illinois. Mr. Brandeis's brief in the *Oregon Laundry* case won him a place among the ablest attorneys in the country.

E. S. Mansfield of Boston, a Harvard graduate, and Belgian consul to New England for the past fifteen years, has been decorated by King Leopold of Belgium. He acted as counsel to the Belgian government before his service as Belgian consul, and won a case for King Leopold at that time. He has now the right to be addressed as "chevalier," an honor which has been received by only one other American.

John B. McClymon, said to be the oldest lawyer in the country, celebrated his one hundred and first birthday on October 7 at Pleasant Ridge, Ohio. When he was forty odd years old he married a girl of eighteen and did all he could to conceal his exact age, and it is possible that he is even older. He was born in Cherry Valley, N. Y., and as a young man lived in Poughkeepsie, where he taught school. He went to Cincinnati in 1840.

Among the qualities required of those who choose the law as a career were the following, as defined by Charles N. Barney of Lynn, Mass., speaking at Tufts College October 25: "Absolute trustworthiness, the ability to reason logically and to write and speak accurate and forceful English, and a sufficient initiative to overcome the natural professional tendency to procrastinate." Mr. Barney also recommended that the college man who is to follow the law should take up the study of the sciences by the laboratory method and of advanced subjects in mathematics.

Charles R. Crane of Chicago, who had been offered the portfolio of minister to China, was forced by the Department of State to resign that post in consequence of some indiscreet widely published remarks to the effect that the United States was preparing to protest against some features of the Chinese-Japanese agreements in relation to Manchuria. President Taft upheld Secretary Knox's request for his resignation. Mr. Crane discounted the statement that his friends in Congress would make a fight for his vindication. Mr. Crane has defended himself by saying that he confined himself carefully to the lines laid down by Mr. Taft in his vigorous speech at Shanghai, and that he had been told by the President to "let them have it hot" in his public speeches.

A fountain has just been erected in Indianapolis in memory of the late Nathan Morris, the Indianapolis lawyer who lost his life on Easter Sunday, 1903, in attempting to save his nephew and others from death in a burning house. The fountain is the gift of several donors in various parts of the United States, and is notable as one of the few in the country commemorating men not distinguished for military or political service. The presentation was made at exercises held October 16 at which the speakers testified to the rare uprightness, charity and self-sacrifice which had marked Mr. Morris's whole life. Mr. Henry Wollman, of the New York City bar, had charge of the erection of the monument and made the presentation address, in which he said: "Nathan Morris was a lawyer whose greatest victories were in quieting the din and roar of the angry strife of quarrel. He was the best type of

the modern lawyer, who believes that 'peace hath her victories no less renowned than war.' All great contests, whether on battlefield or in the forum of the courts, must inevitably result in peace. The man who can bring peace with honor the quickest is a real benefactor. Wherever it was possible, he brought peace where passion reigned before. And that is the lesson of his career as a lawyer. At the time of his death he occupied the highest position that a lawyer who is not a member of the judiciary can fill; he was president of the Bar Association of his own city, which means that his colleagues at the bar, the men who knew him best, recognized in the most fitting way that he had lived up to the highest ideals of his profession and had been true and faithful to every trust that had been reposed in him."

Banquet to the Illinois Supreme Court Justices

Probably the most notable function ever given by the legal fraternity of the state occurred in Chicago on the evening of Oct. 30, when the Illinois State Bar Association gave a banquet at Hotel La Salle in honor of the Justices of the Supreme Court of Ilinois. The affair was a brilliant success in every particular, there being about seven hundred representative attorneys from different parts of the state present to do honor to the highest court in the commonwealth, as guests of the Bar Association of the state.

Hon. Edgar A. Bancroft, president of the Association, was the toast-master, and with the other officers of the Association, the vice-presidents, William R. Curran, Samuel Alschuler and Nathan William MacChesney, and the secretary-treasurer, John F. Voigt, conducted the event to a successful conclusion. Messages to the Association were received and read from Mr. Justice Fuller, Chief Justice of the Supreme Court of the United States, Judge Carrol C. Boggs, former member of the Supreme Court of Illinois and United States Senator Shelby M. Cullom.

Mr. Chief Justice Farmer, responding to the toast "the health of the Justices of the Supreme Court of Illinois," in a few words gave such an insight into the inner workings of the Supreme Court of the state as was a revelation to the representatives of the bar.

Judge Baker, formerly of the Supreme Court of Indiana and now of the United States Circuit Court of Appeals, responded to the toast "Co-ordinate Jurisdiction" in a happy vein.

Mr. Justice Cartwright, characterized by the toast-master as "for fourteen years a tower of strength in the Supreme Court of Illinois, upright and downright and outright," Mr. Justice Cooke and Hon. William J. Calhoun, the last representing the bar, also spoke.

The whole affair was pre-eminently successful in accomplishing its purpose of expressing, in the words of former Justice Boggs, "A sincere expression of the regard and confidence reposed in the Court and its members by the bar of the state."

The guests of the Association present were: Mr. Justice Frank K. Dunn, Mr. Justice Alonzo K. Vickers, Mr. Justice James H. Cartwright, Mr. Justice William M. Farmer, Mr. Justice George A. Cooke, Mr. Justice Orrin N. Carter, Mr. Justice John P. Hand, Judge Francis E. Baker of the United States Circuit Court of Appeals and Hon. William J. Calhoun.

Bar Associations

The annual meeting of the Louisville (Ky.) Bar Association will be held on December 28.

The Washington County (Miss.) Bar Association met October 26 and elected officers as follows: president, J. H. Wynn; vice-president, Walton Shields; secretary and treasurer, William Ray Toombs.

The Norfolk Bar Association of Norfolk, Va., passed resolutions October 5, opposing poll tax liens on real estate, and also discountenancing the circulation of petitions among the profession requesting endorsements for judicial nominations.

The Ohio County Bar Association elected the following officers at its annual meeting, held October 2 at Wheeling, W. Va.: president Frank C. Cox; first vice-president, Benjamin S. Allison; second vice-president, Lawrence A. Reymann; secretary, J. William Cummins; treasurer, William B. Casey.

At the annual meeting of the Kennebec (Me.) Bar Association, which was held October 19 at Augusta, the following officers were elected for the ensuing year: president, Charles F. Johnson of Waterville; vice-president, George W. Haselton of Gardiner, and secretary and treasurer, Charles L. Andrews of Augusta.

The annual meeting of the Hampden County (Mass.) Bar Association was held October 9. The old officers and committeemen were all re-elected, including: president, Edward H. Lathrop; vice-presidents, William H. Brooks and James B. Carroll; secretary, Robert O. Morris; treasurer, Charles M. Calhoun.

Preliminary steps in the formation of the Union County (Ore.) Bar Association were taken October 26, when the lawyers of Portland met and effected a temporary organization, with Circuit Judge J. W. Knowles as chairman and Attorney C. E. Cochran secretary. One of the objects is the building of a county law library.

The Kansas City Bar Association held its meeting October 2, with Governor Herbert S. Hadley as the principal speaker. "The

writ of injunction is the most effective measure we lawyers have," said the Governor. "The ordinary forms of legal procedure are blank cartridges." The new officers: president, Thomas H. Reynolds; first vice-president, Joseph A. Guthrie; second vice-president, Jay M. Lee; secretary, John G. Schaich; treasurer, C. C. Maddison.

The Bar Association of Baltimore City, Md., will make an effort to effect the passage by the next Legislature of the expert testimony bill which was approved at the annual meeting of the Association last summer at Old Point Comfort, Va. The bill gives the court the right to appoint an expert witness when necessary at the public expense when it is found that the parties are unable to meet the expense. It will be the right of the court, under the bill, to fix a charge for the expert's services and be responsible for it.

The Vermont Bar Association held its thirty-second annual meeting November 2-3 at Montpelier, Vt. The retiring president, J. K. Batchelder of Arlington, presided, and those present included all the judges of the higher courts and Mr. Archambault, representing the Montreal bar. With the exception of the contingent fee clause, referred for investigation, the American Bar Association code of ethics was adopted. A resolution that a message of welcome be sent to J. M. Tyler, then on his way home from Europe, was passed. John H. Senter, in seconding the resolution, called Judge Tyler the greatest jurist Vermont has ever known. At the banquet Chief Judge John W. Rowell of the Vermont Supreme Court, referring to a letter in which Judge Tyler had described the robes worn by English judges and court officials, observed that the judges of Vermont might at some future time don robes if the judges themselves could overcome the difference of opinion in regard to the style, some being in favor of richly ornamented garments, he smilingly added, while others were for the plain variety. This elicited broad grins from the members of the bar. Other speakers were Judge F. M. Butler, T. Archambault, Warren R. Austin, United States Attorney Alexander Dunnett, Clark C. Fitts, F. G. Fleetwood and Col. J. H. Mimms. C. G. Austin is the new president, J. H. Mimms, St. Albans, being secretary.

Necrology—The Bench

Charles L. Adams, surrogate of Jefferson County, N. Y., died October 14 at his home in Watertown, N. Y.

Judge Ira D. Marston, at one time a district judge in Nebraska, died October 3 at Kearney, Neb.

Judge William A. Brown died in New Castle, Ind., October 4, after a long illness. He was well known in legal circles throughout the state.

Judge Jesse Talbot Bernard of Tallahassee, Fla., died October 29, at the age of eighty years. At one time he was one of Florida's most influential citizens.

Judge Louis C. Payson, at one time one of the most prominent attorneys in Illinois, died October 4 at Washington, D. C. He was a representative in Congress from 1886 to 1892.

Judge George Gary, an authority on probate law and one of the better known of the old school lawyers of Wisconsin, died October 22 in Milwaukee. He had held many public offices including that of State Senator.

Former Congressman H. F. Finley, for many years a leader in the Republican party in Kentucky, died at his home in Williamsburg, Ky., October 16. He was seventy-seven years of age. He had served two terms as circuit judge.

Sir Henri T. Taschereau, Chief Justice of the Court of King's Bench, of the province of Quebec, died October 11 at the home of his daughter in Montmorency, France. He came of a noted French-Canadian family, both his father and grandfather having been judges. He was knighted two years ago.

One of the most widely known lawyers in the state of New York, Samuel D. Morris of Brooklyn, formerly judge, District Attorney and assemblyman, died October 31 at Lakewood, N. J., in his eighty-ninth year. He was one of the counsel for Tilton in the Beecher trial, and was the second oldest practising lawyer in Brooklyn.

Judge D. A. J. Baker died in Minneapolis, October 2, at the age of eighty-seven. He came to Minnesota in 1849 from Maine, where he was born and received his education. He was the second school teacher in St. Paul. The land boom in Old Superior, Wis., drew him there in the early fifties, where he was appointed judge by the Governor of Wisconsin.

Judge Drury A. Hinton died at his residence near Petersburg, Va., October 19. He was for twelve years commonwealth's attorney of Petersburg, and later was elected a judge of the Supreme Court of Appeals, and served there with distinction, his dissenting opinion in the *Cluverius* case being considered one of the strongest opinions on circumstantial evidence ever delivered by a Virginia judge.

The Supreme Judicial Court and Superior Court of Massachusetts paid affectionate tribute October 30 to the late Justice Francis A. Gaskill. Chief Justice Aiken of the Superior Court said:—"Judge Gaskill . . . possessed a charm of manner which no one could be in his presence and not feel. It was more than

the florescence of acquaintance with culture, refinement and social usages; it was the fruitage of a life rooted in rectitude, sincerity, loyalty, generousness and broad humanity." Samuel J. Elder and Herbert Parker also spoke.

Judge J. A. Dupuy, a prominent jurist, died October 3 in Roanoke, Va. He was fifty-five years old. At the time of his death he was president of the Roanoke Bar Association. He was engaged in the practice of law for many years in Parkersburg, W. Va. The Parkersburg *Dispatch-News* thus referred to him: "Gentle as a woman, but strong as a lion in the defense of what he believed to be right, Judge Dupuy was a type of the chivalrous old Virginian school, which is too rapidly passing."

Judge James Cameron MacRae, for ten years dean of the State University Law School of North Carolina and former Supreme Court justice, died recently at Chapel Hill, twelve miles from Durham, N. C. Judge MacRae was seventy-one years old. Until his death he had been one of the state's most active citizens. Speaking of Judge MacRae, Chief Justice Clarke of North Carolina said: "His death is a great loss to the state, to the profession and to the splendid law school of which he was the head. He was a painstaking, able and conscientious judge and a most agreeable and pleasant associate on the bench."

Judge Robert Roberts Bishop of the Superior Court of Massachusetts died at his home in Newton Centre, October 7, after an illness of about three months. He was born in Medfield, Mass., in 1834, and was fitted for college at Phillips Academy, Andover, from which he was graduated in 1854. He was graduated from the Harvard Law School in 1857. He spent a year in the office of Peleg W. Chandler before starting to practise for himself. In 1861 he formed a law partnership with Thornton K. Lothrop. In the spring of 1888 Mr. Bishop was appointed a member of the Superior Court. For many years he served as president of the board of trustees of Phillips Academy, Andover.

Rt. Hon. Gerald FitzGibbon, Lord Justice of Appeal in Ireland, died October 14 in London. He was born in Dublin in 1837. He was educated at Trinity College, Dublin, where as a scholar he won several medals. He was admitted to the Irish bar in 1860, and to the English bar, Lincoln's Inn, in the following year. He received his appointment as Queen's Counsel in 1872, was appointed law adviser to Dublin Castle in 1876, and was Solicitor-General of Ireland from 1877 to 1878. He was made a bencher of King's Inns in 1877, and in 1879 received his appointment as Privy Councillor for Ireland. From 1884 to 1896 he was Commissioner of National Education for Ireland, and from 1885 to 1897 was judicial commissioner of educational endowments for Ireland. He was made a bencher of Lincoln's Inn in 1901. In 1896 he served as Chancellor of the united dioceses of Dublin, Glendalough and Kildare.

Former United States Senator William Lindsay died at his home in Frankfort, Ky., October 15. Senator Lindsay, who was a leading Southern Democrat and lawyer, was born in Rockbridge County, Va., September 4, 1835. He moved to Kentucky in 1854. He served as Captain in the Confederate Army until 1865. He was elected to the state senate in 1867. In 1870 he was made Judge of the Kentucky Court of Appeals, and in 1876 he was appointed Chief Justice, serving for two years. He then became a resident of Frankfort, Ky. In 1893 he was elected to the United States Senate to succeed John G. Carlisle. In the following year he was re-elected for a full term of six years, which expired in 1901. His opposition to "free silver" brought him into national prominence. On his retirement from the Senate he built up a lucrative law practice in New York City. He has lately been called by the *Washington Post* "a lawyer the equal of any jurist who ever sat on any bench or ever pleaded at any bar. He made more decisions that became 'leading cases' than any other man in the history of the Anglo-Saxon race who was on the bench no longer than he." In physique Senator Lindsay was of almost massive size, standing six feet two in height and weighing nearly two hundred and fifty pounds.

Hon. Rufus Wheeler Peckham, Associate Justice of the Supreme Court of the United States, died at his summer home at Altamont, near Albany N. Y., Oct. 24. Justice Peckham was born in Albany, Nov. 8, 1838. His father was one of the best known lawyers in the state of New York. Being graduated at the Albany Academy when eighteen years of age, the boy displayed exceptional gifts as a public speaker. After graduation he entered the law office of Colt & Peckham, and three years later was admitted to the bar. Although not a college graduate, Justice Peckham was a cultivated and scholarly gentleman. In 1857 he was admitted to the firm of Peckham & Tremain, which subsequently became Peckham & Rosendale, and in that office his great legal victories were won. He was engaged in many of the most remarkable criminal trials of central New York state, notably the Johnstown and Grannett murder trials and the Sessions bribery case. In civil or criminal law he was almost uniformly successful. In 1881 he was appointed corporation counsel to the city of Albany, and discharged the duties of the position to the satisfaction of taxpayers. In 1883 he was elected Justice of the Supreme Court in the third judicial district, and while serving as such was, in

1886, elected an associate judge of the Court of Appeals of New York. He was the last of President Cleveland's Democratic appointees to the bench of the United States Supreme Court, Chief Justice Fuller and Justice White being the other two. He took his seat in January, 1896.

Necrology—The Bar

Archibald Foote Clark, of the firm of Gillette & Clark, 99 Nassau street, New York City, died suddenly October 15. He was thirty-five years old.

Hon. W. P. Pipes, Attorney-General of Nova Scotia, and representative of Cumberland County in the provincial Parliament, died suddenly in Cambridge, Mass., October 7.

William R. Donihee died at his home in New York City October 4, after an illness of several months. He was long recognized as one of the most effective Tammany Hall orators, and served in the Assembly.

Milton Sater, a member of the bar of Hamilton county, Ohio, and brother of United States District Judge John E. Sater of Columbus, died October 13 at his residence in Cincinnati.

H. D. Tate, aged fifty-nine, died suddenly at Pittsburgh, Pa., October 22. He was the attorney and one of the moving figures in the proposed Bedford & Chambersburg Electric Railway.

Capt. Leland Hathaway, the oldest member of the Winchester (Ky.) bar, died October 23 aged seventy-four. At the time of his death he was Master Commissioner of the Circuit Court.

Isaac Franklin Jones, one of the most prominent and wealthiest lawyers in West Virginia, died October 10, in Wheeling, W. Va., aged seventy-three. He practised law here for forty years.

Judge James Calvin Sawyer died in Terre Haute, Ind., October 12. He was sixty-one years old and for more than twelve years had been one of the leading attorneys of the Vigo county Bar.

John S. Reynolds died October 25 at Columbia, S. C. He was Supreme Court librarian, a prominent lawyer and newspaper man, and author of "Reconstruction in South Carolina."

J. Q. A. Sullivan, formerly well known in Pittsburgh, where he practised for many years, died at Butler, Pa., October 29. He was born in Prospect, Pa., and was admitted to the bar in 1861

Joseph A. Stetson, a New York patent lawyer, died October 29 in Brookline, Mass. He was graduated from Harvard College in 1891, and from the Harvard Law School in 1894. He was one of the board of overseers of Harvard University.

Robert B. Murray, aged sixty-six, one of the oldest and best known members of the Mahoning county (Ohio) bar, died October 22, at Youngstown, O. Two years ago he was stricken in the United States Court at Cleveland with paralysis.

C. C. Brock of Cottage Grove, Oregon, died October 31, aged sixty-one years. Mr. Brock was a retired lawyer of prominence, having practised at the bar of many of the eastern states. He was born in Pennsylvania, and had practised for thirty years.

Benjamin Franklin Etter, the oldest of the Dauphin county bar and former Deputy Attorney-General of Pennsylvania, died at Harrisburg, Pa., October 16, at the age of eighty-five years. Mr. Etter retired from practice several years ago.

Frederick T. Johnson, at one time city attorney and later comptroller of Newark, N. J., died October 14, in that city. He was born in Newark on September 18, 1858, and was admitted to the New Jersey bar in 1876. Appropriate resolutions were adopted by the Essex County Bar Association.

Hugh K. McJunkin, aged sixty-five, a leading attorney of the Pacific coast, died early in October in his home at Sawtelle, Cal. He served in the Civil War and when he had reached middle age he studied law and served one term as district attorney for the thirteenth jurisdiction district of Iowa.

Hon. Francis Rives Lassiter, for many terms the member of Congress from the fourth Virginia district, died in Petersburg, Va., October 31. He was city attorney of Petersburg for five years, and was appointed United States Attorney for the eastern district of Virginia by President Cleveland.

Charles Russell Sturgis, a Boston lawyer, died October 2, at the age of thirty-eight years. He was graduated from Harvard in the class of 1893, and three years later, from Harvard Law School. He was admitted to the bar and was for a short time in the office of Storey & Thorndike. Later, he took an office with the late Robert Codman. Mr. Sturgis gave most of his attention to trusteeships for estates.

Patrick Henry McCarren, New York state senator and Democratic leader of Brooklyn, died October 23. He was born in East Cambridge, Mass., fifty-eight years ago. In 1881 he was sent to the Assembly, where he served three terms. During his last term he took up the study of law and was admitted to the bar. In 1888 he was elected to the state senate and had been re-elected every term since with one exception.

Samuel Blair Griffith of Pittsburgh, Pa., aged fifty-seven, one of the best known members of the Allegheny county bar, the first president of Pittsburgh's Civil Service Commission, and formerly Assistant United States District Attorney, died October 19 in that city. He was born in Mercer, March 12, 1852. He was appointed Assistant United States District Attorney for the Western district of Pennsylvania by President Cleveland in 1893.

John Stewart Kennedy, a New York lawyer, financier and philanthropist, died October 31. He was nearly eighty years old. He was a director of many large corporations, including the Northern Pacific Railway Company, and held office in many charitable and public institutions, being chairman of the Presbyterian Hospital of New York and second vice-president of the Metropolitan Museum of Art and of the New York Public Library. His will made enormous bequests to charity.

George T. Sewall of Old Town, Me., died October 31, at the age of sixty-five. Mr. Sewall spent practically all his life in Old Town. He was graduated from Bowdoin College in 1867. He was once a member of the Maine legislature and held other public offices. An honored citizen of his town, he was also a profound student of the law and in his more active years had a large practice. The Penobscot Bar Association was represented at his funeral and appointed a committee to draw up resolutions.

Joseph Tanner Richards, of the law firm of Richards, Richards & Ferry, Salt Lake City, died October 9 following an operation for appendicitis. For twenty-six years he had lived in Salt Lake and for the last seventeen years had ranked among the leading lawyers of the city. When twenty-one years old he graduated from the Cornell law department and took up practice in Michigan. After a short career there he returned to Salt Lake, where a year later he was made Assistant United States Attorney for the territory.

Frank W. Lewis, a Boston lawyer and student of social and economic problems, died at Concord, Mass., October 8. He had made a careful study of the various forms of life insurance and their relations to the laboring man, and had recently published a discussion of "State Insurance," in which he urged a revision of the German scheme of insurance. Mr. Lewis was born in Claremont, N. H., in 1840, and graduated from Dartmouth in 1866. For ten years he resided in Lincoln, Neb., where he was active in politics, twice conducting a successful campaign against the saloon element.

United States Senator Martin Nelson Johnson of North Dakota died October 20 at Fargo, N. D. He was born in Wisconsin about fifty-nine years ago. He removed to Iowa when he was a boy, where he received his education at the State University. He was elected to the lower branch of the legislature and was admitted to the bar. In 1882 he moved to North Dakota, where he took up government lands. He was elected District Attorney. From 1891 to 1899 he was a member of Congress, retiring to resume his law practice. Last year he was elected by the legislature to succeed Senator Hansbrough.

W. Mosby Williams died October 1, at Washington, D. C., on the very day when the District Supreme Court put into operation the new rules of practice, for the adoption of which he labored earnestly and untiringly for more than two years as chairman of the committee of the local bar. Mr. Williams was born in Front Royal, Va., about forty years ago, and came to Washington as a poor boy. He was graduated from the Law School of Georgetown University in the class of 1890 and received his master's degree in 1891. He was admitted to the bar of the Supreme Court of the District of Columbia in 1890, and entered actively upon the practice of his profession about three years later.

John Prentiss Poe, leader of the Maryland bar, died October 14 in Baltimore, Md., aged seventy-three. He had been dean of the law school of Maryland University since 1871. He was a native of Baltimore and was graduated from Princeton University in 1854 and was admitted to the bar in 1857. He served as city solicitor for two years in Baltimore, and in various public offices, and was elected state senator in 1899 and in 1891 was elected Attorney-General of the state on the Democratic ticket. In 1869 he was elected a regent of the University of Maryland and later became dean of the faculty. As a practitioner at the Baltimore bar he had a long and successful career. In 1886 Mr. Poe was appointed by the General Assembly to prepare the Maryland Code of Public General and Local Laws, and his codification was adopted by the act of 1888 and re-adopted in 1890. He was well known as an author and authority on legal subjects. Memorial exercises in his honor were held in the Superior Court room in Baltimore October 22, addresses being made by Judge Harlan, Attorney-General Straus, Edgar H. Gans, Joseph C. France, and State's Attorney Albert S. J. Owens. "No one in this generation," said Judge

Harlan, "has touched as deeply the life of the bar or exerted as strong an influence on the profession of the law in this state as he whom we mourn. More than half of its present membership, including eight of the judges of this court, have been numbered among his pupils, have profited by his instruction and have been stimulated to a higher appreciation of the importance and dignity of their calling."

Election Results

The New York election is notable on account of the election of former Supreme Court Justice William J. Gaynor as Mayor. Justice Gaynor, who resigned his seat in the Appellate Division Oct. 14, had accepted the nomination from Tammany with the statement that he did not see why he should not accept a nomination from any source from which it might be offered. He was fought bitterly by the earnest opponents of Tammany, but succeeded in polling a plurality of 73,000 votes in New York. The Fusion forces, however, secured a complete victory over Tammany Hall in other respects, electing an anti-Tammany Board of Estimate. William T. Jerome had retired from the District Attorney contest early in the campaign, and Charles S. Whitman, the Fusion candidate, was elected by a plurality of 10,000.

Justice Charles H. Truax, after losing the indorsement of the Republican organization and being earnestly supported by the New York City Bar Association, failed of re-election to the Supreme Court on the Democratic ticket.

In the fifth judicial district, Supreme Court Justice William E. Scripture, Republican, was defeated by Edgar S. K. Merrill, Democrat, after the State Bar Association, through its Judiciary Committee, had gone on record against his re-election. This defeat vindicated the principle that the bench must keep out of politics.

In Philadelphia the reform candidate for District Attorney, D. Clarence Gibboney, was beaten by Samuel P. Rotan, Republican, who was re-elected by a plurality of 43,000. The Democratic party had refrained from indorsing Gibboney, although he headed its ticket.

In San Francisco municipal reform may have received a setback by the defeat of Francis J. Heney for District Attorney. "Business interests" are represented to have been tired out by the graft prosecutions, and Heney was beginning to reach the men higher up. Charles Fickert, Republican and Union Labor nominee, was elected in his place, together with a Union Labor mayor.

Negro disfranchisement in Maryland was defeated by a majority of between twelve and fourteen thousand votes. The proposed Straus amendment to the constitution had been drafted with care to avoid a clear violation of the Fifteenth Amendment. Lawyers organized both an Amendment League to work for it and an Anti-Amendment League to oppose. If adopted it would have given power into the hands of the Gorman machine. Some of the opposition vote was due to the fears of foreign-born citizens ignorant of the English language that they, as well as negroes, would lose the franchise. The Lawyers' Anti-Amendment League, with George Whitelock as president, conducted a most vigorous campaign on nonpartisan lines.

In Boston District Attorney Arthur D. Hill, whose term of office had been marked by striking efficiency in clearing up the formidable arrears bequeathed him by his predecessors, was defeated by Frank N. Pelletier, the Democratic candidate.

The Democrats of Rhode Island made a stubborn fight for the election of James A. Williams, as Attorney-General, and he had conducted a sensational campaign on the issue of proper enforcement of the laws. The Republican state ticket, however, was elected.

Miscellaneous

For the first time in California a woman was sworn in to serve as a juror, October 19, in the Superior Court of Los Angeles county.

The law department of Tulane University was honored by admission to membership in the Association of American Law Schools at the ninth annual meeting of the body, held in early September at Detroit.

Professor George P. Costigan, Jr., has succeeded Professor Roscoe Pound as editor of the *Illinois Law Review*, published at Northwestern University, Professor Pound having joined the faculty of Chicago University Law School. Professor Costigan has recently come to Northwestern University from the University of Nebraska College of Law.

"When you visit a lawyer to ask about a certain point of law," said Professor Samuel Williston before the American Institute of Banking, October 12, "and upon learning your business he tells you how busy he is, and asks you to call next day, be sure that he will spend those intervening twenty-four hours in diligent study to prepare for your second reception."

President Benjamin Ide Wheeler of the University of California, speaking at the University of Berlin October 30 in the presence of the Kaiser, said that he was convinced from personal acquaintance with William J. Bryan, that Mr. Bryan would have been conservative if he had been elected President, but if he had not proved conservative he would have been bound hand and foot and gagged. Ex-President Roosevelt he described as conservative in his innermost impulses.

At the fall meeting of the Patent Law Association of Washington, held October 12 at the New Willard Hotel, the following officers were elected for the ensuing year: William H. Finckel, president; W. W. Dodge, first vice-president; Walter F. Rodgers, second vice-president; E. G. Mason, secretary, and Charles E. Davis, treasurer.

In the hatters' trial at Hartford, Conn., October 28, the counsel for the plaintiffs, referring to President Eliot's characterization in 1901 of the scab as "a good type of modern hero," moved to strike out the words "foremost university," referring to Harvard, and to substitute "prominent." Thereupon a second amendment was made to characterize it as "degenerate," but this was lost. While these records were being read the attorneys for the defendants smiled. They were all Yale men.

The Massachusetts bar examination board has passed a new rule that after the first of August, 1910, no candidate shall be examined for the bar who has not studied three full years or its equivalent. The board interprets this rule to signify "three years' study in any law school having a three years' course and holding regular day sessions; or four years' study in any evening law school having a four years' course; or three years' study in the office of an attorney-at-law or elsewhere under proper direction, with not more than eight weeks' vacation in each year."

Harvard Law School will sustain a great loss in consequence of the resignation of one of the most valued members of its faculty, Professor Jeremiah Smith, to take effect September 1, 1910. Professor Smith was graduated from Harvard College in 1856 and received his master's degree in 1859. In 1883 he was given the honorary degree of LL.D. by Dartmouth College. He was Associate Justice of the Supreme Court of New Hampshire from 1867 to 1874 and has been Story Professor in the Harvard Law School since 1890. At the last meeting of the corporation he was appointed Story Professor of Law *emeritus*.

The method of treating juvenile criminals in England has been greatly changed recently, the so-called Borstal system of management having been introduced. This resembles in a good many respects the system employed in the Elmira Reformatory and other American institutions. The principle of the Borstal system is to remove the individual at the critical time from evil environment and to place him under wholesome influences. The system teaches him to use his brains in regular and interesting work; it provides him with a suitable diet, and it steadies his unstable nervous system by physical exercise. It is claimed for these methods that instead of really manufacturing criminals, as under a system of indiscriminate deterrent punishment, they at least tend to reform youths predisposed to bad habits and to help them to become respectable members of the community.

It was announced at Washington Nov. 19 that Judge Horace H. Lurton of Nashville, Tennessee, had been selected by President Taft to take the place in the Supreme Court made vacant by the death of Associate Justice Peckham. Judge Lurton, of the United States Circuit Court for the sixth circuit, has held office in his present capacity for sixteen years, having previously been chief justice of the Supreme Court of Tennessee. He is sixty-five years of age, having been born in Kentucky in 1844. He is a Democrat in politics. Judge Lurton formerly had President Taft for an associate on the federal bench, and when Mr. Taft was Secretary of War he recommended to President Roosevelt the appointment of Judge Lurton to the seat since filled by the choice of Mr. Justice Moody. It was thought by many observers that the President, while not particularly seeking a Democrat, might be disposed to give preference to one, and several Democrats from the South had been mentioned, including General Luke E. Wright and Secretary of War Jacob B. Dickinson. Others said that the appointment would probably go to a citizen of New York State, Justice Peckham's state and mentioned Governor Hughes, Judge Alton B. Parker, Senator Elihu Root, United States District Judge Holt of New York City, and Attorney-General Wickersham. The last named, because he is much in President Taft's good graces personally, was said to be a not unlikely candidate. In the South, the bar of St. Louis was strongly in favor of Judge Elmer B. Adams, Frederick W. Lehmann or F. N. Judson of St. Louis. Judge Adams is a member of the Circuit Court of Appeals for the eighth circuit. The Richmond (Va.) Bar Association indorsed Judge Erskine Mayo Ross of Los Angeles, Cal., of the United States Circuit Court of Appeals for the ninth circuit, for the honor. Judge Ross, before he went West in 1869 and rose to the Supreme bench of California, was a young attorney in Richmond. In West Virginia there was popular support of Judge Alston Gordon Dayton of the United States District Court in that state. Secretary of State Knox, having already once declined appointment to the bench of the Supreme Court, was not seriously mentioned. Solicitor-General Lloyd W. Bowers was prominently mentioned. Others proposed were: Chief Justice Simeon E. Baldwin of Connecticut, Governor Fort of New Jersey, Henry M. Hoyt, counselor for the State Department, Interstate Commerce Commissioners James S. Harlan and Charles A. Prouty, and Justice S. L. Mestrezat of Pittsburgh, Pa.

INDEX TO VOLUME XXI

INDEX TO VOLUME XXI

Portraits

Subjects and Titles

[References in heavy figures are to contributed articles. The alphabetically arranged departments *Review of Periodicals* and *Latest Important Cases* are not here indexed.]

Authors

[References in heavy figures are to contributions.]

Table of Cases

[References in heavy figures indicate cases reported; in ordinary figures, cases discussed]

Books Reviewed