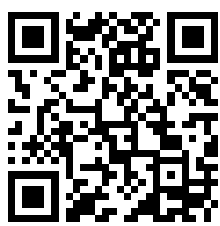

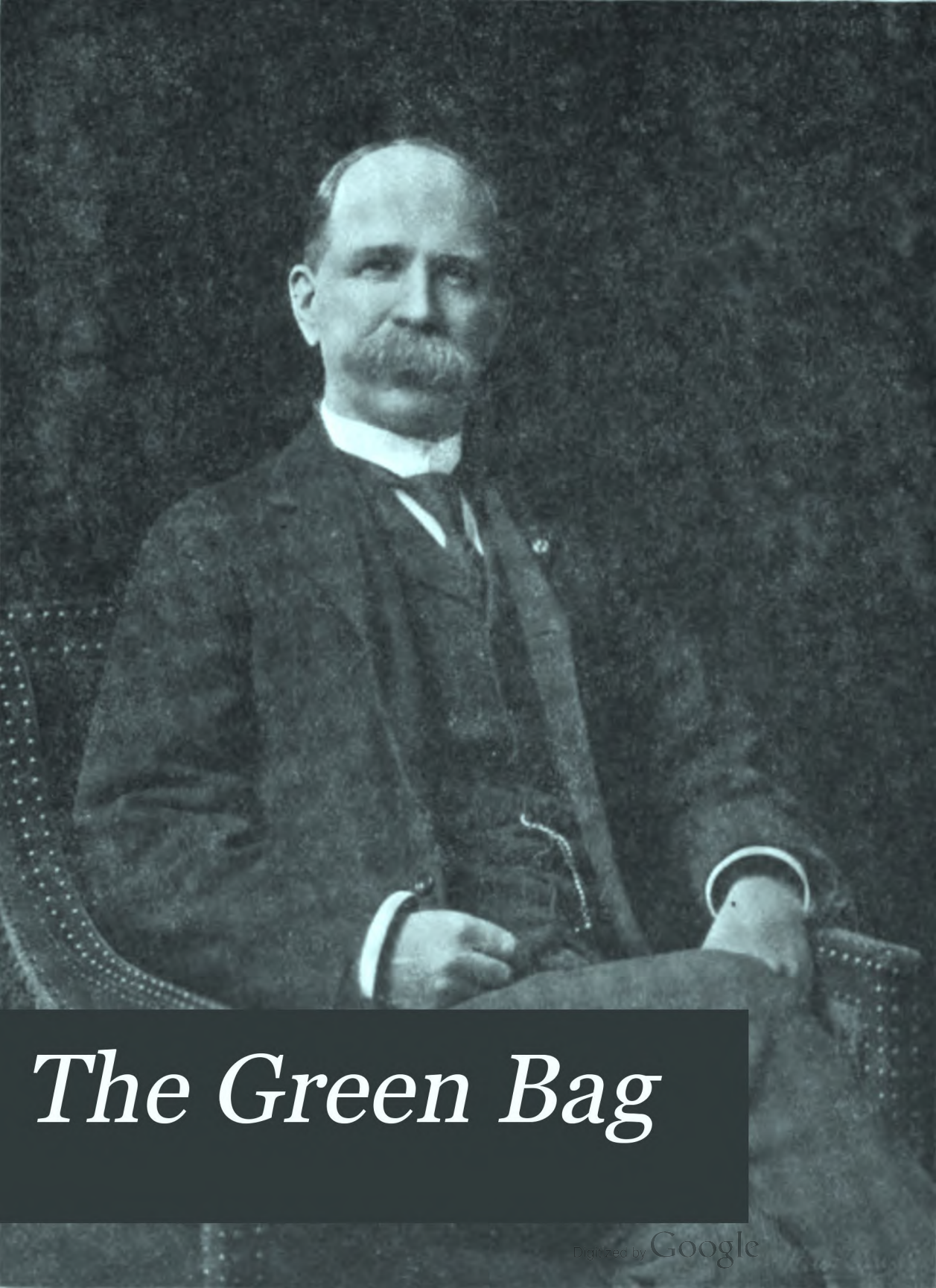

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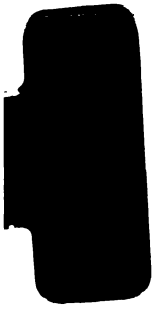

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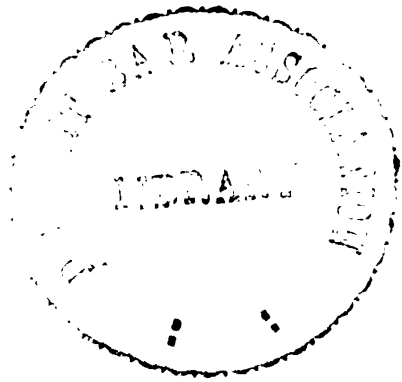

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HON. ITHAMAR C. SLOAN

PROFOUND LAWYER, STATESMAN
OF CONSTRUCTIVE ABILITY

The Green Bag

Volume XXV January, 1913 Number 1

Ithamar Conkey Sloan of Wisconsin

By Duane Mowry, LL.B.

of the Milwaukee Bar

An eminent jurist of Wisconsin[1] once said of a deceased brother attorney on the occasion of memorial services by the bench and bar: "But yet a few years, and we, his contemporaries, shall have passed away too. Then will be little left of Mr. ———'s professional career, except vague traditions and doubtful anecdotes. So passes away the fame of a great lawyer. We see men of inferior parts give to history names, such as they are, while lawyers — their moral and intellectual betters — are forgotten. That is not because the life of a lawyer is less useful or honorable, but because the immediate subjects of a lawyer's labors rarely enter into what we call history. The heroes of history are not always, perhaps not often, the truly great. The faithful discharge of the duties of a profession, often exercising the most sacred measure of human faith and the highest order of human ability, the confidence and admiration of contemporaries for these, are the only glory of a lawyer."

These observations are peculiarly applicable to the subject of this sketch. For the fame of Mr. Sloan as a great lawyer seems to be rapidly "passing away," although less than a score of years have elapsed since he passed into the shades. And there is "little left" but the recollection of the faithful discharge of the arduous duties of an exacting profession and the consciousness of exceedingly able professional work well performed.

But there have been written into the reports of the Supreme Court of Wisconsin and of the United States, opinions which reflect the great legal vision of this master mind of the Wisconsin bar. And it seems fitting that some account be made of the ken of Mr. Sloan's intellectual powers. They were of a high order of merit and were turned to excellent account in the public interest as it will presently appear.

Ithamar Conkey Sloan was born at Morrisville, the county seat of Madison County, New York, May 9, 1822. He had a common school education, read law, and taught school in Georgia during his student days. He was admitted to the bar in 1848, in New York, having previously studied law in the office of Timothy Jenkins, a distinguished lawyer residing at Oneida Castle. Mr. Sloan was associated with him for a time as

[1] Chief Justice Edward G. Ryan of the Supreme Court.

partner and conducted successfully the Oneida Indians litigation. In 1854 he removed to Wisconsin and located in Janesville, then a promising city in the southern part of the state. He at once took rank with the leading members of the local bar, including in the list such names as that of Matthew H. Carpenter, afterwards a United States Senator from Wisconsin, Judge John R. Bennett, of the state circuit court, Charles G. Williams, subsequently a member of Congress from Wisconsin, Judge David Noggle, of the state circuit court, and others. He was elected District Attorney of Rock County in 1858 and was re-elected in 1860. He was elected a Representative to Congress in 1862 and again in 1864. He continued to reside in Janesville until he removed to Madison, the capital of the state, in 1874. While in Madison, he formed a law partnership with Breese J. Stevens and W. A. P. Morris for practice under the firm name of Sloan, Stevens & Morris. His brother, A. Scott Sloan, was elected Attorney-General of the state at the annual elections in 1873 and 1875. During a portion of the term of his brother as Attorney-General, Mr. Sloan was his Assistant Attorney-General. For a number of years during his residence in Madison he was a lecturer in the law department of the University of Wisconsin, and for ten years prior to 1890 he was the Dean of the Law Faculty of the University. He continued the practice of his profession at Madison until 1898. Failing health then compelled him to cease from active labor. He retired to his farm near the city of Janesville, the scene of his early labors and early triumphs, where he died on the 24th day of December, 1898, at the age of seventy-six years.

Thus is summarized, in a few sentences, the long and busy career of this able member of the Wisconsin bar. But no attempt has been made to direct attention to his valuable professional services to his adopted state and to the nation. And it is mainly with Mr. Sloan's career as a lawyer that we are most concerned. For, as a lawyer, his public services were of the herculean quality. Always great in a court of justice, he seemed greatest when engaged in legal argument before a bench of well-trained judges.

It has been already intimated that Mr. Sloan excelled before the court rather than before the jury, in forensic rather than in oratorical ability. This view seems to be quite generally entertained by his brethren of the bench and bar. One of these has said: "He did not carefully prepare or deliver addresses before the public on any topic. . . . He made no effort for oratorical display. His strength was in his great power of analysis and his logical and accurate expression of his conclusions. He was forceful and extremely persuasive in argument. He seized upon the strong point in his case and presented it with great cogency, relying almost wholly on his own reasoning and giving but little attention to the authorities. He did not weaken his arguments on the strong and decisive questions in his case by endeavoring to establish and sustain the doubtful and immaterial ones, but usually passed them with little or no notice."

Another lawyer, who was intimately associated with him for a number of years, says: "He was one of the foremost lawyers of the state and of great natural ability. He was not a laborious man, . . . yet when interested in a legal question his interest would not fail by reason of his inclination to idleness. He worked then with diligence and force and great rapidity. His memory of what he had read, and where to look for

the law that he wanted to find, was unusual. . . . If I had at any time consulted him upon a matter which was for the time being dropped, and I again consulted him upon the same matter months afterwards, he would instantly begin with the matter where we had left it and recall all of the conversation that we had previously had upon the subject. He had little patience with technicalities. His mind was too broad for them and too profound. He was resourceful and faithful to his client, but was above the desire to win for the mere sake of winning."

It is interesting to note some of the observations of the members of the Rock County Bar Association. It is interesting because it is believed to be a fairly just estimate of the lawyer by those who knew him long and intimately. "The more important and difficult the question, the more manifest his great mental strength and self-command. In discussing questions of fact, he was logical, thorough and convincing, but his strength was better manifested in the discussion of legal questions, affording opportunity to deal with principles of law and reasons underlying them and governing their application. His handling of decisions was most masterly, but to his great praise be it said, he was not a case lawyer. His penetrating and analytical mind inclined him to seek for and rely upon foundation principles as the best guide to correct conclusions. The records of the cases in which he has taken part will be an enduring memorial to his ability and virtues as a lawyer."

Mr. Sloan was engaged in much of the far-reaching litigation in the state. One of the cases of commanding importance is that of Whiting against the Sheboygan and Fond du Lac Railroad Company and others, and is reported in the 25 Wis. 167. This was an action brought by a taxpayer to prevent a county from aiding a railroad company to build a railroad through the county from one certain point to another by voting a tax upon the taxable property of the county for that purpose. A private law had passed the Legislature authorizing the assistance. Mr. Sloan's contention was that the proposed tax was for a private purpose and therefore invalid. The Supreme Court of the state held with his view in an exceedingly able and exhaustive opinion. And the case has become one of the leading cases upon the subject in this country. It has settled the doctrine that municipalities, county, city or village, cannot raise money by tax to donate to railroads.

Some of the arguments presented to the Supreme Court are interesting and will bear reproduction. Among them Mr. Sloan said, "that the only solid ground upon which the distinction between a public and a private purpose, in the use of money raised by taxation, can rest is, that in the one case the title to the thing constructed or acquired with the money vests in the public, and in the other it vests in an individual or a private corporation. We admit that money may be raised by taxation by a municipal corporation, if authorized by the legislature, to build a railroad, and we do not see why it might not also be so raised to operate a horse railroad, a line of stages, a bank, a store, a hotel, a mill, or a merchant's shop, to be owned by the municipal corporation. But we deny that money can be so raised to build or operate any of these things for an individual or a private corporation. Yet the incidental benefit to the public would be the same whether any of these enterprises were owned and conducted by the municipal corporation or by a private corporation. The only difference would be, that in the one case

the direct benefits (that is, the profits, if any) would go to the taxpayers whose money is taken; and in the other they would not. No court has gone to the length of holding that money raised by taxation can be donated to a private corporation."

On a rehearing Mr. Sloan took up other questions not before considered. Among these questions is the right of eminent domain. His exposition of the subject is certainly a law classic. He says: "It is said that the power of eminent domain can be exercised only when the property is taken for a public use. And it is assumed that the same public use which will authorize a right of way to be taken under the power of eminent domain, will also authorize money to be raised by taxation and paid over to any individual or private corporation in whose favor the power of eminent domain can be exercised. But these two branches of sovereign power are distinct, and proceed upon different principles. The one takes specific property for public use, but awards full compensation. The other is defined to be a rate or sum of money assessed on the person or property of a citizen by government, for the use of the nation or state. We apprehend that an important distinction between these powers is, that property taken by the power of eminent domain may be taken for the use of the persons who compose the public, in their individual capacity. Such is the case when the right of way is taken for a railroad, or when land is taken to create water power for a mill, or for a turnpike. In none of these cases has the government of the state any connection or concern beyond the act of delegating the power of eminent domain to the individuals or private corporations engaged in these enterprises. On the other hand, money raised by taxation is taken for the use of the state or nation in its organized political capacity as a government. It results from this distinction that property might well be taken under the power of eminent domain, which would remain the subject of a perpetual use by the individuals who compose the public as the people of the state, although the title be transferred to a private corporation. It would in such a case be a matter of comparative insignificance to the owner of the property taken, whether the title went to the government or to a private corporation, as in either case full compensation must be made before it can be taken. And it would be of as little importance to the people generally, as the use for which it would be taken and held would be secured to them equally in either case, for the moment such use ceased it would revert to the original owner. But the use of money raised by taxation consists wholly in its exchangeable value or purchasing power; and it can only be exacted by the state or nation to defray the public charges. In other words, the state takes money from individuals as their share of the public burdens. And it is an inexact use of language to say that money raised by taxation is taken for the public use, without distinguishing between a use by the people in their individual capacity as citizens, and a use by the government in its organized capacity. The legislature can raise money by taxation without limit for the use of the government of the state, or to discharge the burdens resting upon it; but it cannot raise money by taxation for the use of, or to discharge the burdens resting upon, the persons who compose the public, in their individual capacity as citizens. It is this distinction which makes the boundary line between the power of eminent domain and that of taxation."

A summary of Mr. Sloan's most cogent

argument concludes with these terse sentences: "It us true that there is no express constitutional prohibition upon the exercise of the power of taxation here claimed. The reason undoubtedly is, that while history furnishes many examples of the rapacious conduct of governments in taking the property of citizens for their own purposes without compensation, no government of any civilized country, however despotic, had ever claimed, or attempted to exercise, the right to take, without compensation, the property of one class of citizens and give it to another. In these latter days the attempt has sometimes been made, as this case shows; but whenever it has been made, courts have everywhere held that no such power has been granted to the legislative branch of government, and that all acts having such an object in view were wholly void; and the prohibition is as imperative as though found in the express provisions of the Constitution."

It is to be noted that Mr. Sloan's argument was almost entirely independent of reference to authorities. And yet his arguments were so well put and forcible as to be convincing to the majority of the judges of the Supreme Court as to their correctness. The doctrine of this case has been followed in a large number of cases.[2]

It may be said in passing that the case of *Olcott* v. *The Supervisors*, 16 Wall. 678, holds that a railroad is a public highway, a road for public use, and that therefore a state may impose a tax in furtherance of that use, though the road be owned by a private corporation. That view has never been accepted in Wisconsin as the correct one. Nor does it find general support in the courts of last resort in the several states.

The limits of this article will not permit of a too extended reference to the litigation in which Mr. Sloan was interested and of which he was so large a part. But any consideration of his professional career would be both unsatisfactory and incomplete, if it failed to take into account his great public service to the state and to the nation by reason of his intimate connection with the litigation growing out of the Potter Law, so called, the Granger Railroad legislation enacted by the Wisconsin Legislature in the early part of the winter of 1874. This law proposed to fix the maximum rate for the carriage of passengers or freight in Wisconsin by railroad, express and telegraph companies. It was claimed to be drastic in its operation and the railroad companies insisted that it involved an unwarranted exercise of legislative power. On the other hand, it was claimed that the constitution of the state gave to the Legislature the right to exercise this power; that unless it could be made to appear that the exercise of the power in the instant case amounted to confiscation, the parties affected by the law would

[2] *Phillips and others* v. *Town of Albany and others*, 28 Wis. 340, 357; *Judd and another* v. *Town of Fox Lake and others*, 28 Wis. 583, 585-6; *State ex rel. McCurdy* v. *Tappan, Town Clerk*, 29 Wis. 664, 685; *Rogan* v. *City of Watertown*, 30 Wis. 259, 264; *Lawson* v. *Schnellen and others*, 33 Wis. 288, 292; *The State* v. *West Wisconsin Railway Co.*, 34 Wis. 197, 215; *The Attorney-General* v. *Railroad Companies*, 35 Wis. 425, 571; *Bound* v. *Wisconsin Central Railroad Co.*, 45 Wis. 543, 559; *Nevil and another* v. *Clifford et al.*, 55 Wis. 161, 172; *Lynch* v. *Eastern, LaFayette & Miss. R'y Co.*, 57 Wis. 430, 435; S. C. *id.* 470; *Willard and others* v. *Comstock and another*, 58 Wis. 565, 574 and 5; *Sage and others* v. *Town of Fifield and others*, 68 Wis. 546, 550, 1 and 2; *Pedrick and others* v. *City of Ripon and others*, 73 Wis. 622, 625; *Ellis* v. *Northern Pac. R.R. Co.*, 77 Wis. 114, 118, 19 and 20; S. C. 80 Wis. 459, 463; *Fowler* v. *City of Superior*, 85 Wis. 411, 425; *Lund* v. *Chippewa County and others*, 93 Wis. 640, 650 and 1; *Wisconsin Keeley Institute Co.* v. *Milwaukee County*, 95 Wis. 153, 159; *Chi. and N. W. Railway Co.* v. *Morehouse and another*, 112 Wis. 1, 10; *The State ex rel. City of New Richmond* v. *Davidson, St. Tr.*, 114 Wis. 563, 574; *The State ex rel. Garrett* v. *Froehlich, Sec. of State*, 118 Wis. 129, 135; *The Citizens' Savings and Loan Ass'n* v. *City of Topeka*, 20 Wall. 655; *Kennicott* v. *Supervisors*, 16 Wall. 452, 463.

have to submit to its enforcement. The railroad companies refused to submit without a struggle in the courts. The case is found in the 35 Wis. 425, and is there entitled *The Attorney-General* v. *The Chicago & Northwestern Railway Company*. A similar action was pending against the Chicago, Milwaukee and St. Paul Railway Company, and both cases were considered as one action as the identical legal questions were involved in them. Substantially the same questions were raised in the case of *Peik* v. *Chicago & Northwestern Railway Company* and reported in the 94 U. S. Reports, on page 164. It may be said, however, that the opinion of Chief Justice Ryan in the Wisconsin court is far more able and exhaustive than is the opinion of the Supreme Court of the United States. Indeed, it may be said of Justice Ryan's opinion that he left nothing more to be said upon the subject of which it treats. It at once placed its author in the front rank of the great American jurists of the country.

The legal questions considered by the Wisconsin court were numerous, were vital and were vastly important to the material interests of the population of the state. They included the original jurisdiction of the Supreme Court and its exercise in injunctional proceedings; the legislative regulation of railroad tolls and the extent of its power to alter railroad charters and limit charges under the provisions of the Constitution; informations by the Attorney-General involving new questions of practice. All of these matters were brought to the professional attention of Mr. Sloan, who was the Assistant Attorney-General at the time. And how well he acquitted himself in that litigation will appear, in a small way, in what follows. His arguments in that contest are spoken of by those who heard the case before the court as among the ablest ever made by any lawyer in the West.

In this case, Mr. Sloan was very insistent in his claim that the Supreme Court has original jurisdiction in equity to the extent of issuing writs of injunction to restrain the commission of unlawful acts under sec. 3 of Art. VII of the Constitution. He cited a number of cases in our state court which adhere to this view. But the decisions in other state courts were also cited to show the same view. This he follows with the statement that courts of equity can restrain by injunction a corporation from exceeding its corporate powers, and if the exercise of the usurped power causes special injury to the property or rights of an individual, he can maintain a suit in equity to enjoin the exercise of such power. These propositions he fortifies with well-considered authorities. To the suggestion that there is a remedy at law in the instant case he answers as follows: "The information in the nature of *quo warranto* to forfeit the charter of a corporation is in the nature of punishment, and the proceeding was formerly regarded as strictly criminal, and is still *quasi* criminal. But the remedy by injunction is for the prevention of injury, and not for punishment. The ground of the application is not that the act is crime, but that it occasions irreparable injury to several persons. The defendants, in order to succeed, must establish the principle that because the act is crime it is entitled to favor and protestation in a court of equity." See also *Attorney-General* v. *Cleaver*, 18 Ves. 214. Mr. Sloan argues exhaustively and quotes authorities without number to show that the instant case is properly before the right court and that the correct proceeding is now seeking adjudication.

Discussing the validity of the law of

1874 he says: "The power reserved to the Legislature by the constitution of the state, to alter or repeal at any time after their passage, all general laws and special acts under the provisions of the Constitution, particularly, under sec. 1, Art. XI, is, by its terms, an unlimited power. The existence, powers and capacities of a corporation, and its mode of exercising them, must depend upon the law of its creation. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. Corporations have no right to charge toll on freight, except as that right is granted by their charters. There is no limitation on the power of the Legislature to alter the charter of a corporation, where that power is reserved without any words of limitation. The legislative discretion cannot be controlled by the courts. The reserved power of the Legislature is not affected by the fact that its exercise may incidentally impair, or even destroy, the value of the securities held by the creditors of the corporation. Thus, where the state has not granted any exclusive right to one corporation, it impairs no contract by incorporating a second one which injures or destroys the first."

These quotations seem so thoroughly fundamental in the law as to make needless the citation of authorities to support them. But many citations are submitted, leaving no room to doubt their correctness. And the same argument is presented before the Supreme Court at Washington, but the propositions are announced with a little more care. Mr. Dixon was associated with him in the case at Washington, but was unable to attend. And the argument for the state was made by Mr. Sloan only.

Enough has been said to show that as the apostle of constructive law, of the law that tends to the upbuilding of the state, Mr. Sloan stands without a superior in the state, perhaps not in the whole country. He reveled in the presentation of carefully worked out principles of law. But he was not a mere theorist. His view was that of the clear-minded lawyer, of the sound-headed statesman. Yet, withal, he was a truly modest man. The world needs more of such great men. And it is the writer's contention that we all need to know much more about such great men and their valuable work.

He died, ripe in years, with public and professional honors well won. Thus has passed from public view, but let us hope not from the public mind altogether, a truly great lawyer. And "the fame and example of a great lawyer should be cherished, while it may, by his professional survivors, for the imitation of those coming after, that they, too, may be aided in the fullness of time to die full of professional honor."

WE have often been told of the enormous waste of war, and the cost of supporting European armaments. The withdrawal from production of so many men as are required for the standing armies of those militant nations can easily be understood as a factor in the cost of living. But we are not as ready to consider the enormous cost of litigation in this country, and the enormous waste involved in the withdrawal of so many of the most capable men of the world from productive work in order that they may fight our private battles for us. Here is a cost comparable with that of European armaments. — *Professor T. N. Carver.*

Lines Written by a Layman to a Lawyer Friend in Jail

SUGGESTED BY THE SENTENCING OF A FRIEND FOR CONTEMPT

By Douglass Malloch

DEAR John:
I know so little law,
What things to say that are exempt,
I take my pen in hand with awe
Lest I be guilty of contempt.
Undoubtedly I little dreamt
That things I said in other days
Might have me locked away or hemped
Because of some illegal phrase.

I know so little legal ways,
They are so intricate, you see,
They seem to me a mighty maze,
A most gigantic mystery.
And yet I hope no law may be,
When naught improper I intend,
Preventing laymen like to me
From sending comfort to a friend.

And so this little screed I send,
The simple lines I've written here,
The atmosphere of gloom to rend
That hangs about the lower tier —
To rend the gloomy atmosphere
That hangs about your residence,
To bid you keep a heart of cheer
That is a fellow's best defense.

The soul of friendship is immense;
It knoweth neither bolts nor bars;
It riseth over circumstance
And sets its throne among the stars.
The clod's fatigue, the soldier's scars,
The stress of sickness, hurt of pain,
The cut of caustic scimitars,
It heals and maketh well again.

And, though the sheriff may enchain
In consequence of present scrape,

It certainly is very plain
  Some other matters you escape:
  Upon the street the shoppers gape
In windows full of tinsel trash,
  For hats of most atrocious shape
Give up their hubbies' hard-earned cash.

You miss the Christmas shopping crash,
  You miss a lot of other things —
The morning paper's daily hash
  Concerning tariff bickerings.
  No bellboy now around you clings
To help you don your overcoat;
  And safety confinement brings —
No hold-up man will get your goat.

From things political remote,
  You care not what the figures were —
No matter what the final vote,
  Still from your place you need not stir.
  In fact, a lot of things occur
That other people fret about
  That any fellow, my dear sir,
Can very nicely do without.

So really you have cause to shout
  With gladness at your present fate;
You're luckier, without a doubt,
  Than many others I could state.
  And, in the meantime, friends await
To hail you with a merry grin
  When you shall pass the iron gate —
A lawyer purged of all his sin!

Chicago, Ill.

The Banishment of "Dryasdustism" from the Law

DEAN John A. Wigmore's review of Pollock's "Genius of the Common Law," [1] is of more than usual interest, as the tribute of one great legal scholar to another. "It is a wonderful thing," he says, "to be able to write a book like this. A sure stand upon facts, a wide vision of movements, a delicate marking of outlines and high lights — this combination of scientific and artistic skill is rarely united, and even more rarely in a legal author. Sir Frederick has brought to bear these talents, as pre-

[1] 7 *Illinois Law Review* 260 (Nov. 1912).

sumably few other living men could do, upon the dry subject of the history of Anglo-American law. Every page is worth reading; every page gives a stimulus to new thoughts, or confirms or overturns old ones."

Dean Wigmore admits that on a mere perusal of the metaphorical chapter headings he was repelled by a sensation of euphuism, but the reading of the book removed this distaste. "Certainly, if the object of using it was to invoke deep sentiment and high elevation to the nobility of the lawyer's career, that object is attained. Mr. Justice Holmes is the only legal writer in English (of the past century) who hitherto has won his readers or hearers while striking this note."

The timeliness of Pollock's comments on "almost every debatable topic" of our modern law is noted, and a characteristic and highly suggestive reference occurs to Sir Frederick's casual mention of Thackeray's sentence: "Mr. Paley has not been throwing himself away; he has only been bringing a great intellect laboriously down to the comprehension of a mean subject." This deprecatory attitude of Thackeray toward the law, says Dean Wigmore, "was more or less generally the temper of the intellectuals in the stirring days of Kingsley and Newman and Peel. As late as the '60's, Mr. Justice Holmes tells us, in his introduction to the recently appeared General Survey of Continental Legal History, young men of promise were found turning away from the law because it *was* a 'mean subject,' a barren study, unmeet for men of heart and soul. ***And the law deserved this then.***

"There have been other such periods of dryasdustism in the law. There was one, on the Continent, back in the 1400's, when Bartolus and his followers reigned intellectually supreme. Read what the early Humanists said about the law, and then what the later ones did to revive it. There is a revival of today, similar to that of Humanism four centuries ago, which will put such life and interest into the rules of law as they have not seen in Anglo-American annals, since the days of the Commonwealth and Charles II. And the capacity of its magnetism will be so increased that Sir Frederick's closing sentence (which we believe he himself could not have really felt a generation ago) will really come true in the next generation: 'There is no more arduous enterprise for lawful men, and none more noble than the Perpetual Quest of Justice laid upon all of us who are pledged to serve Our Lady the Common Law.'"

The Lawyer[1]

By Hon. C. E. McLaughlin
of the Sacramento (Cal.) Bar
President of the California Bar Association

But for human selfishness there would be no necessity for human law. Passion, pride, avarice, ambition, appetite and other manifestations of man's thirst for pleasure, power, and self-gratification constitute the elements ever waging relentless war against the potency of municipal law.

Government, necessarily, involves limitation of mental and physical power to gratify selfish desire, and through the ages men have resisted surrender of any measure of natural advantage. This never-ceasing struggle between human selfishness and human reason is evidenced by the creation and destruction of many governments, the enactment, nullification, and repeal of many codes. Unselfish men, of great ability, have, in all countries at all times, been engaged in an effort to frame and effectuate a perfect system of law protecting the weak from the strong and promoting the general good. But, ever and anon, these efforts have come to naught through the selfishness of individuals.

Governments organized to protect and secure human rights have been used by tyrants to increase and intensify human wrongs. Laws beneficent in conception and expression have been converted into instruments for increase and perpetuation of power established and sustained by imposition, injustice, and cruel oppression. Earnest men have spent their lives passing laws for weal of humankind, only to suffer torture, exile, and death at the hands of those in whose behalf they labored.

During the existence of the Roman Republic, a struggle between the plebeians and the patricians engrossed the attention of Rome's ablest men. The plebeians fought stubbornly for alleviation of their wrongs and vindication of their rights. None seconded their efforts more ably than Spurius Cassius, author of the first great agrarian law. His great ability was exercised in behalf of the plebeians. Yet he was hurled from the Tarpeian rock, and as he fell he heard the cheers of the plebeians applauding his unjust and terrible punishment, secretly contrived by the patricians, whose power he sought to curb.

Factions successful in forcing enactment of laws, limiting exercise of special privileges have, in turn, exercised special privileges, and ruthless perversion has often characterized the conduct of men entrusted with power to enforce righteous laws. The twelve tables of Rome, attesting in every line the wisdom, humanity, and unselfishness of its framers, was law of republican Rome, invoked as warrant for the arrest and condemnation of Virginia, saved from the lust of Appius Claudius by the dagger of her father, who had pleaded in vain for legal redress. Through maladministration of this law citizens were deprived of life and despoiled of property with impunity, vice laughed at virtue, and privilege exulted in the wrongs which brought wealth and happiness

[1] Annual address of the President of the California Bar Association, delivered at Fresno, Cal., Nov. 21, 1912.

to the few, and poverty and woe to the multitude.

The prostitution of this great code by men selected at the instance of the plebeians, was viewed with equanimity by them when its perversion affected patricians, and the latter class calmly encouraged its misapplication when rights of plebeians were involved. Only the shameful treatment and martyrdom of Virginia aroused the whole people to a full sense of the terrible consequences resulting from misapplication of beneficent laws. History abounds with similar instances. Selfishness has ever been alert to vantage ignorance and indifference. Tyranny has pointed to law as vindication for acts of rapine, cruelty, and spoliation. Persecution has rejoiced while tears and blood were shed, and shrieks and lamentations heard from victims of perverted law. Craft and cunning have oftentimes been successful in having laws intended to restrain construed to further selfish aims. The infinite variety of selfish purposes has ever been the source of perplexity and error in the enactment and enforcement of human law.

The failure of governments and codes during the course of history has been caused by man's ignorance of himself, his needs, his interests. The average man, representative of the vast majority, has never comprehended the basic legal principle that restriction of individual desire is essential to the protection and preservation of individual rights. The fact that law, restraining gratification of *his* desire, likewise restrains the desire of others having greater physical and mental strength, seldom or never occurs to him. He should readily understand that removal of restraint preventing *him* from gratifying *his* passion, greed, or lust would unleash desire of *others* having greater power to compel gratification. But, failing to see what seems so apparent, ignoring the proposition that general security is dependent upon compulsory self-denial, the ordinary man lends willing ear to designing men who promise benefit to him, knowing that by pandering to his desire they may gain his assistance in obtaining undue and unjust advantage for themselves. In this way supreme and arrogant selfishness, whose vantage is usually a detriment to the humble, has enlisted the aid of the latter to secure privileges which made the condition of its dupes intolerable.

This selfish attribute of man has ever furnished the opportunity of ignorance and unscrupulousness. The misguided zealot, who promises happiness when chaos shall reign, appeals to the dissatisfied, at war with conditions which have failed to bring individual benefit to them. Self-seeking demagogues enlist support by promising, as palliative for existing wrongs born of special privilege to one class, the transfer of special privilege to another and larger class. The student of history is impressed with the great truth that man's effort to better his condition and bring about his own regeneration, has had, for its most serious obstacle, the aid of vantage-seeking, selfish friends. He finds that a large number of splendid governmental systems have been reared and destroyed, innumerable laws, beneficial and wise, enacted, ignored, and repealed; and critical analysis of cause and effect leaves no room for doubt that demagogues have been responsible for more of such mischievous results than tyrants or ignorant fanatics. The profit-seeking friend of the people has always been their greatest enemy.

Man is not omniscient. Finite limitations encompass him. Compelled to frame laws dealing with human imper-

fections, he has never framed, and never will frame, a perfect code. Each effort to control himself by legal enactment will, to some extent, be thwarted by the very attribute he seeks to curb and control. Groping blindly, through inability to comprehend his greatest permanent good, the best he can do is to avoid the warning light marking hidden rocks of individual selfishness, strewn with legal wreckage accumulated through the centuries, melancholy evidence that man is prone to bless or damn law according to the benefit conferred upon him individually. Compelled to rely on men, having natural impulses and weaknesses, to frame, expound, and execute the law, disappointments many and grievous will attend his efforts, for law deals with the great human problem and the universal sin — human selfishness. Great minds of all times and peoples have labored assiduously to solve this great problem. Repeated failure has not daunted, nor base ingratitude discouraged them. Steadily, surely, the great lawyers of ancient and modern times have continued to plead and plan for the advantage, security, and benefit of men, most of whom have struggled against each advance, repressing or limiting individual desire, appetite, aspiration or passion.

The task of the lawyer has ever been difficult, and never have difficulties been greater than now, especially in our own land. Past experience will aid in the solution of ordinary legal problems, but extraordinary legal problems, arising from new and rapidly changing conditions, challenge the genius, originality, and patriotism of the American lawyer. Changes wrought by advancing civilization, scientific achievement and invention, and general dissemination of knowledge will tax his patience and ability to the utmost. Our fathers were not perplexed by, nor will their methods aid in the solution of, the great problems involved in the control of great public service corporations, furnishing light, heat, power, and transportation to the public. They were not confronted with questions arising from close commercial and social relations existing between men and communities widely separated.

The long struggle between plebeian and patrician presented problems easy of solution compared with questions involving unquestioned conflicting rights of employers and employed, and the important incidental rights of third persons arising out of modern industrial and commercial intercourse and interdependence. New standards of living, with constantly changing ideals and environment; development of newly discovered resources; universal education; and growth of great corporate bodies, controlling immense volumes of wealth, combine to broaden the scope of modern legislation, and increase the responsibility of those charged with the enactment, enforcement, and exposition of the law.

The genius, patriotism, and courage of the lawyer has never failed mankind in any emergency. His liberty, fortune, and blood have frequently and willingly been sacrificed for human weal. Since Solon and Clisthenes, men of noble birth and riches, forced an unwilling aristocracy to submit to democratic constitution and laws in Athens, down to the time when a great French lawyer sacrificed health and fortune in defense of the rights of the condemned, despised, and execrated Dreyfus, lawyers have been true to oath and trust never to forsake the cause of the defenseless or oppressed.

Now, then, will the lawyer meet the great emergencies and perform the great duties confronting him at this time? That he will face this labor with clear vision, lofty courage, unyielding patriot-

ism, and add additional lustre to the glorious record of our profession, I have no doubt. He must not only contend with new questions arising from new conditions, but must face and foil the most dangerous form of opposition ever encountered by law. The struggle of law for many centuries was against physical strength exerted to defy and overthrow it. But now secretly, intelligently, and insidiously, man's mental strength is engaged in astute, resourceful effort to remove, evade, and delay restraints which law seeks to place upon avarice and greed. Special interest shamelessly brings to the struggle all the energy and skill of purchased ability. The seductive allurements which temptation affords are thrown about those entrusted with the enactment, enforcement, and exposition of the law. Paid agents brazenly swarm wherever suggestion or argument finds legislative listener. If an obnoxious law cannot be defeated, it is amended, if possible, so as to render it unconstitutional or otherwise abortive, and courts all too frequently bear the burden of blame properly attributable to secret machinations in committee room or lobby.

Some judges seem unable to comprehend the cardinal truth that the purpose of law is to curb human unselfishness, vindicate right, and redress wrong, and precedent, resting atilt upon other precedent, finally topples, compelling attention to great cardinal principles of law which should never have been overlooked. Ingratiating sycophantic deference mimics obeisance in the temples of justice, and companionship of judges is sought by those who seek to make friendship the forerunner of favor. A false environment and atmosphere, intended to blind and deceive, supplements false logic, and the modern judge must indeed be wary if contamination soils no ermine or makes suspicion attach to no reputation. A false precedent, based on imperfect or erroneous conception of legal principles, is an unreliable guide, especially when adroit ability seeks to make such precedent lean further afield the true foundation upon which judicial decisions should always rest. Some judges have ignorantly, a few designedly, brought just criticism upon our courts, but truth compels the just reflection that, in the main, they have been true to the high responsibility and trust reposed in them.

Unfortunately, this cannot be said of some members of our profession, for it must be admitted that lawyers of great ability have participated in pollution of the source of law, and have given full measure of their ability to bring about initial distortion or ultimate misconstruction of laws inimical to interests employing them. It is a common saying that the modern lawyer is at once adviser and business agent of some clients, under present business conditions. A lawyer cannot be true to his trust and engage in practices tending to prevent enactment or enforcement of wholesale restraints upon selfish desire, and any member of our profession thus dishonoring it should be taught that a man cannot be at once the exponent and opponent of the law. A lawyer may, of course, be adviser and business agent without impropriety; but, if his agency involves skilful pilotage of the business bark along channels forbidden by the letter and spirit of law, his cruise should end in the penitentiary, where such advisers and business agents belong. In such a case his profession should be nemesis rather than shield. No man deserves more severe condemnation than the lawyer who uses his education and talents to undermine, defy, or destroy the system of law he has sworn to uphold and defend.

Recent disclosures convince that men and corporations controlling important special interests have contributed large sums of money to aid candidates for high office in state and nation, and the suspicion is general that such contributions were not prompted by disinterested patriotism.

These and other considerations have caused widespread discontent affording opportunity to *pseudo* friends and open enemies to interpose timeworn obstacles and objections to government and law. The overthrow of our whole system of government is openly advocated, the adherents of this doctrine becoming stronger numerically day by day. Those who believe that unbridled license constitutes liberty, and hence advocate elimination of municipal law altogether, are not idle and are preaching and spreading their infamous propaganda openly. The demagogue, ever the friend of the class having the greatest voting strength, the pretended ally of every faction promising aid to his ambition, rants in denunciation of those vieing with him for place and power, and promises panacea for existing ills in something to gratify individual selfishness, age-old enemy of human law.

Not infrequently we hear clamorous demand for radical departure from our system of government, conceit and ambition combining in advocacy of innovations and changes, seductive when viewed superficially, but extremely dangerous when studied and analyzed. Men and principles long revered, traditions and laws long respected, have suddenly become victims of vehement denunciation. This clamorous cry for sweeping change, unfortunate results of which echo through the ages from Rome, Athens, Carthage, to the latest of sudden revolutions, is almost invariably heard from the lips of those least to be trusted if change in our system is necessary or desirable.

Amid all this din and confusion, the calm voice of law calls the American lawyer to full, unselfish, courageous performance of duty to his country and its institutions, the cornerstone and superstructure of which are cemented and sanctified by sacrificial blood and tears.

Neither seductive blandishment, specious plea, nor arrogant selfishness, on the one hand, nor the rant of the demagogue, the alluring promise of a new propaganda, nor the denunciation of the anarchist on the other, should confuse, beguile, or intimidate him. Keeping steadily in mind the prime purpose of law, his eyes on the beacon light of human experience, his courage intensified by the example of many great lawyers, who either stemmed a dangerous human tide or fell victim to its thoughtless fury, his voice should be heard above all clamor demanding that there be neither subversion, evasion, misapplication, nor destruction of law. Recognizing that changing conditions necessitate changes, he should aid in the just and proper amendment of law, but his highest duty is to resist and foil the efforts of selfish men to make law an instrument promoting and protecting selfish advantage, rather than a shield and sword protecting the conserving human rights and human happiness.

The latter task will require constant vigilance and exercise of all the power and concentration of the best intellects. The opposition will be tireless and aided by the keenest minds, willing to prostitute their talents, and endanger all that sacrifice has wrought for reward, which selfishness is always able and ready to offer. It will require moral courage of no mean order to purge our profession of hypocritical, sycophantic, oath-breaking, treason-baiting men, who stand

ready to serve the highest bidder, no matter how venal or vile his cause, to lay aside truth, honor, self-respect, humanity, and weal of organized society at the bidding of those who desire to frustrate, cloud, and, if possible, defeat the design, purpose, and object of law.

The men who thus throw their manhood at the feet of those requiring prostitution of honor and talents have found it very profitable, although contemptible, to do so, and it is not always the weakest mind that succumbs to great temptation or performs basest service for great reward.

Law is not a combination of quibbles and tricks designed to promote dishonesty and sharp practice, but a system intended to compel honesty, truthfulness, candor, and fair dealing among men. Therefore, as prelude to the full and faithful performance of duties and responsibilities now resting upon members of our profession, we must win back the confidence and respect of men by proving the lawyer worthy of confidence and respect.

We cannot longer permit the few to besmirch the many, nor can we at this juncture be neutral, without being false to cause and country. Imbued with the patriotic fervor of Baker, Henry, Adams, Lincoln, and other great lawyers whose names illuminate the pages of history, whose services and sacrifices furnish an incentive and inspiration, the American lawyer should give to the solution of every governmental problem the best efforts of a broad and well-trained mind, prompted and spurred by a loving and generous heart.

A New Gubernatorial Residence

By Sirius Sinnicus

"To Hell with the Constitution," said Governor Blease of South Carolina at the Governors' Conference." — *News Item.*

NOW, Guv'nor, if you wish to go
Down where the climate's warm,
There's not a man would dare say no,
And doubtless there's a swarm
Of neighbors who would help you start
Although you would be missed.
But then the best of friends must part
And if a fellow will insist,
Why, who can hold him back?

But this is what I can't explain, —
Perhaps you'll make it clear;
I don't see what you have to gain,
And you will lose, I fear.
For you propose to take along
The good old Constitution.

I fear its doctrines are too strong
And they might cause confusion
Among the citizens.

But this is how we'll do the trick
And save the dear old thing;
We'll print it on asbestos thick
To which the flames may cling
And do the document no harm.
Then you can ask old Satan
Who rules within those regions warm,
About the renovation
Of this here Constitution.

The Ettor Trial at Salem

THE strike at Lawrence, Mass., resulting in the trial of Joseph Ettor, Arthur Giovannitti, and Joseph Caruso, I. W. W. leaders, as accessories to the murder of a woman during a street riot, began on Jan. 12, 1912, and the next morning Ettor arrived in the city and assumed the leadership of the operatives. The disturbances became alarming and the militia was ordered out. Dynamite was discovered in three different places Saturday, Jan. 20, and William D. Haywood made his first appearance in Lawrence on Wednesday, Jan. 24. Serious rioting, in which street cars were attacked, took place Monday morning, Jan. 29. The police and strikers clashed that same evening on Union street in front of the Everett Mill and Anna Lopizzo was mortally wounded by a bullet.

The next night Ettor and Giovannitti were arrested, charged with being accessories to the murder. Both defendants were arraigned on the morning of Jan. 31 in the Lawrence Police Court before Associate Justice F. N. Chandler. Both pleaded not guilty and were held for trial without bail.

It was a time of great excitement, and the lower court seems to have made the mistake of holding the two men for a crime that precluded their liberation on bail. That the murder and other crimes of violence would not have occurred but for their incitement may be true, but the detention of the men on the charge of murder, rather than simply on that of inciting a riot, gave the appearance of the employment of extraordinary means to remove them from the scene of trouble. It has been felt all along that the state had insufficient evidence on which to hold the men for murder, and their acquittal was expected in many quarters.

When the two men were first held for trial, their attorney asked for a continuance of ten days and it was granted.

A petition of habeas corpus for the release of the prisoners on bail was heard and dismissed by Judge Braley in Supreme Court at Boston Feb. 6.

The police court hearing opened before Judge J. J. Mahoney, Feb. 9, and on Feb. 21 the defendants were held for the grand jury. A true bill against the defendants was reported by that body

April 18. On April 24, District Attorney Attwill said the cases would be tried at the session then sitting at Salem. The defendants pleaded not guilty to the indictments May 17, before Judge Brown at Salem, and the case was continued until May 20.

This delay in finding an indictment and in setting an early date for trial after indictment is not unusual under our leisurely system of procedure, but the defendants might have had their trial last May had they desired it, instead of making their long detention in jail the basis of socialistic propaganda. On May 20 before Judge McLaughlin, who relieved Judge Brown, Attorney John P. S. Mahoney of Lawrence, for the defendants, argued for a continuance. He said he had not had sufficient time to prepare the case as the indictments were not returned until late in April, and that his associate counsel was in a hospital. As the indictments had been returned a whole month previously, it seems hardly conceivable that he had not had time to familiarize himself with the case.

District Attorney Attwill said that he was constantly in receipt of letters from socialistic organizations asking for a speedy trial, and said he was willing to proceed at once. He requested that, should the cases be continued, they go over to September, as he did not care to try them in hot weather. He said that he was willing to go on at once, but if the defense wanted more time he was willing to grant it. The court then allowed the continuance. The postponement of the cases until the fall was thus the defendants' own doing. They could have had the trial in May.

On Sept. 9, at a conference held by the court, District Attorney Attwill and counsel for the defendants, Sept. 30 was set for the opening of the trial.

A week before the opening of the trial, the defendants asked for a bill of particulars, the motion being vigorously opposed by the District Attorney, who said they had had a transcript of the evidence last April and should not have delayed the demand for the bill. Judge Quinn of the Superior Court ordered the bill of particulars furnished to the defense.

The evils of delay in empaneling a jury are not often seen in a worse light than in this trial. Five days were consumed in the selection of the jury, two venires of 350 talesmen each being found necessary. The state and the three defendants availed themselves of most of their peremptory challanges, 66 on each side, but a larger number of talesmen were excused because of their opinions. Notwithstanding the extent to which public opinion was aroused, the selection of twelve impartial men should have been less difficult. It cost the county $6,000 to secure a jury.

The difficulty of getting a jury resulted in a delay of two weeks after the third day, before the second lot of veniremen were examined, and on Oct. 9 the defendants, complaining that only four jurors had been secured, urged that they be admitted to bail. The releasing of the defendants in capital cases on bail is a matter of discretion with the trial justice. On Oct. 10 the court refused bail. On Oct. 15 the panel was completed.

The taking of evidence in the trial at Salem began on Oct. 16, and lasted until Nov. 19. The state called no fewer than eighty-seven witnesses, resting its case on Nov. 2. Final arguments to the jury began Nov. 19, after Ettor had been given considerable time to present his own evidence on the witness stand. On Saturday, the 23d, Ettor and Giovannitti both delivered impassioned pleas to

the jury, and on Monday the 25th Judge Quinn made his charge.

The jury, after deliberating for five hours, brought in a verdict of acquittal on Tuesday the 26th.

The conduct of the trial by Judge Quinn, whose rulings upon questions of evidence were prompt and impartial and whose charge to the jury was remarkable for clearness, has been commended, but the reason for the introduction of the evidence of so many witnesses and for the needlessly protracted proceedings is yet to be explained. In comparison with the expeditious Becker trial in New York, this case offers a signal example of the slowness and expense of American criminal procedure in one of its worse phases. The trial covered eight weeks, during which the court was in session thirty-six days.

Three Points That Win

By J. W. Donovan

Formerly Circuit Judge in Michigan

LEONARD SWETT placed his leading winning point as the Manner of Opening; whether with clearness, so that a layman could see through it, and so reasonable as to be convincing. A case well opened, civil or criminal, is a start toward victory. He would start like this: "In nearly every case there is room for argument, or what we call two sides to the controversy and the only fair way to find who is right is to hear patiently that you may decide impartially — else how can we judge who has the real right of the matter?" Then he would add:—

"The story of this case is peculiar. While you may think, at first blush, that the defendant has done a great wrong to Mr. Franklin in taking from him $800, a gold watch and chain, and a $20 gold piece and a revolver, still if you become convinced from Franklin's own admissions that the money, watch and chain were won at poker, a game proposed by Franklin, then in all fairness you will say not guilty as charged, for the charge is robbery."

Such a candid start rivets attention to the vital issue, as in poker there is no intent to rob. Now if it should appear that on a rainy day at Franklin's suggestion they played poker and he later admits to the hotel clerk, a witness called by the people, we have a reasonable defence.

Starting with the suggestion of fairness, passing to the friendly game, and closing with the manner of losing the items named, we find more than a reasonable doubt, rather, a reasonable defense. And so the case developes. First defendant says: "I am real rusty on cards and haven't played poker since the War; I did play a little in the Army." Then they start and play, first one dollar, then ten dollars against the revolver, then twenty to twenty, and defendant is a swift winner till the "roll" changes hands and at last the watch and chain goes in and they separate. The defendant goes to Detroit from Essex. Franklin asks, "Where is the big Yankee? He has beaten me at my own game." Each point won of itself. So said the jury.

The Release of Patrick

New York Times, Nov. 29, 1912.

THE Governor is sworn to uphold the law and protect the public interests. If Governor Dix has honestly reached the conclusion, after careful consideration, that Albert T. Patrick did not murder William Marsh Rice or connive in his murder, he has done right to pardon the man. But he is setting aside the verdict of the trial jury, which was upheld by the highest court in this state, and it is clearly his duty to give to the people a clear statement of his reasons for believing Patrick guiltless. It would have been a wiser and a safer plan, if the Governor's examination of the evidence in this case has satisfied him that there is doubt of Patrick's guilt, to appoint a commission to go thoroughly into the matter and abide by its decision. The Governor's pardoning power, of course, is not to be denied. He had a right, if he chose, to release Patrick merely on humane grounds. We doubt if the pardon on that ground would have been approved by thinking men. But he has chosen to declare his belief in Patrick's innocence, and thereby to cast doubt upon the proceedings of the trial court and, at the same time, to withhold from the public the facts on which he bases his conclusions.

Governor Dix has not been alone, by any means, in his conviction of Patrick's innocence, so far as the charge of murder is concerned, but the man had a fair trial and has profited greatly by his legal knowledge. That the lawyer, whose acquaintance with his aged client was slight, who had done nothing to obtain the old man's gratitude, had formed plans to gain possession of all or a large part of the Rice estate, amounting to several millions, is a proved fact. The testimony of Jones, the valet, was contradictory and to some lawyers unconvincing.

Patrick has fought for his life with remarkable bravery and persistence, has practically conducted every stage of his own case, which passed from the trial court to the Court of Appeals, and thence to the United States Supreme Court, before the sentence of death, pronounced April 17, 1902, was commuted to life imprisonment Dec. 20, 1906. In the intervening six years Patrick has managed to keep his name and his cause in the public mind. Presumably the case is now closed. But if the report is true that Patrick intends to renew his demand for the Rice millions, and to seek to secure probate of the will declared a forgery, it may last many more years. We can hardly credit this tale, however; the man who has been under sentence of death, and in durance for twelve years, is likely to value his freedom too highly to risk it again in an attempt to get money.

From whatever aspect the case is viewed it is plain that there has been a serious miscarriage of justice. If we admit, now, that Patrick was indicted and convicted of murder on insufficient or incompetent testimony, that a man guiltless of murder was convicted and sentenced for that crime, and deprived of his freedom for twelve years, we must also admit that the relations of Patrick and the valet Jones and the actual cause of the death of Rice are still mysteries which the law has not penetrated in spite of the money expended and the time wasted. The mystery of the second will, also, has never been explained. Patrick has never been tried for forgery, and will not be if he is content to let well enough alone. The administration of justice in this state, therefore, suffers from the outcome of the Patrick case, which constitutes a bad precedent in criminal law, and is likely to be used too frequently by astute lawyers in the future.

As for Patrick, his courage and persistence have gained for him a large share of public sympathy of a certain sort. Too many people will be glad that he has escaped further punishment. "He has suffered enough," they will say. In that manner the sentimental people of this city came to look upon the prosecution and imprisonment of that arch-rascal, William M. Tweed. Law exists, however, not to punish or revenge, but to protect society. In this view we must regard the influence of the Patrick case as detrimental to the public welfare.

Reviews of Books

TOWNES' ELEMENTARY LAW

Studies in American Elementary Law. By John C. Townes, LL.D., Professor of Law, University of Texas, author of "Townes on Texas Pleading," "Townes on Torts," etc. 2d ed. T. H. Flood & Co., Chicago. Pp. xxvii, 626 + 68 (index and appendix). ($4 *net.*)

A WORK of this kind certainly demonstrates the need of analytical text-books, for there is nothing in it to attract a first-year student of law who may have acquired from his general education a scientific habit of mind, and for whom a lucid statement of philosophic breadth would serve as the easiest mode of preparation for the mysteries of the highly technical discipline upon which he expects to enter. Such a student should not be worried at the outset by a dubious declaration that "there exist absolute principles of right and wrong, which are universal, eternal, immutable, and inexorable, which constitute the standards by which all human conduct is ultimately to be judged." Nor should he be perplexed by a series of introductory definitions of sovereignty, political powers, and legal rights, masquerading as "general principles of law." His curiosity will not find much light thrown on the nature of law by the vapid definition of it as "an authoritative rule of being or conduct." That the author is learned in American law is plain, and along the line of a formal tendency long established in American legal education his treatise may well render the service it aims to perform; but such books do not advance the movement for a more scientific jurisprudence, nor help the coming generation of lawyers to a riper understanding of legal institutions than that possessed by their nineteenth century predecessors.

COLLIER'S BANKRUPTCY (9th ed.)

The Law and Practice in Bankruptcy under the National Bankruptcy Act of 1898. By William Miller Collier. 4th ed., by William H. Hotchkiss. 9th ed. with amendments of 1903, 1906, and 1910, and with decisions to July 1, 1912, by Frank B. Gilbert, of the Albany bar, editor of Street Railway Reports Annotated, joint author of Commercial Papers, etc. Matthew Bender & Co., Albany, N. Y. Pp. lxxvii, 1313 + 107 (appendix) + 93 (index).

THE publishers of the new edition of Collier's Bankruptcy are to be congratulated in giving to the bar this latest edition of a standard law book in so practical and convenient form from a book-making point of view. The flexible leather covers, the thin paper and clear type, and intelligent arrangement of the subject matter must commend the book to every lawyer who appreciates a comfortable working tool.

The previous eight editions of this work have made Collier's Bankruptcy well and favorably known to the Bench and Bar, but the new edition promises an enlarged usefulness for the book. The familiar arrangement of the former editions has been adhered to, of setting forth the Bankruptcy Act by sections in consecutive order with a discussion of the general principles and the decisions thereon.

The citation of cases is very full and accurate and covers the decisions in the 27 volumes of the American Bankruptcy Reports, 194 volumes of the Federal Reporter, and 224 volumes of the U. S. Reports. With this vast amount of material and the changes in the law itself by recent amendments the present editor has done well not to attempt a patchwork by merely bringing the old editions down to date. The entire work has been revised by re-writing the text and the notes. All the merits of the

original book have been preserved and new ones added in the way of condensation and accuracy. Good judgment has been displayed in not attempting to present every decision of every court, but many of the overruled and obviously weak and erroneous decisions are omitted to make the presentation of important cases more adequate.

The volume contains the standing orders, rules of practice, both the statutory forms and many others evolved from practice, a clear index and a workable system of cross references. On the whole, the work is bound to find sure favor with the profession at large.

L. M. F.

WILLIAM ALLEN BUTLER'S AUTOBIOGRAPHY

A Retrospect of Forty Years (1825–1865). By William Allen Butler. Edited by his daughter, Harriet Allen Butler. With portraits and illustrations. Charles Scribner's Sons, New York. Pp. xviii, 388 + 52 (appendix and index).

THIS is a charming autobiography, the interest of which is not centered in the many interesting and prominent personalities with which the author had relations, and the ease of an unpretentious discourse is doubtless due not more to the conversational fluency with which it was dictated than to a bright mind and a good literary sense. It is not so impressive an autobiography as the late John Bigelow left, either in care of composition or in copious historical disclosure, but it has more of the flavor of old New York, a lighter and more humorous manner, and a homelier and more refreshing simplicity on the intimate and domestic side. For these reasons it will be pronounced neither garrulous nor dull.

Mr. Butler was the son of a distinguished lawyer and grew up in a legal atmosphere. He was not so overshadowed by his father's great reputation as not to be an interesting character. Benjamin Franklin Butler was Attorney-General of the United States in two administrations and one of the three authors of the epoch-making revision of the statutes of New York in 1830, which became the groundwork of the statutory systems of many states. William Allen Butler may at least be said to have compared favorably with his father in legal ability if he did not make so great a name for himself. He was a man of ripe legal scholarship and broad general culture, and achieved high rank at the bar, especially as an admiralty lawyer, but not only in that specialty, his arguments before the state courts and the Supreme Court of the United States being models of sound legal learning, and his ability as an advocate exceptional. His high rank at the bar is sufficiently indicated by the fact that he served at different times as president of the American Bar Association and of the Association of the Bar of the City of New York.

Aside from the active professional life which supplies an interesting fund of material for reminiscence, and the breadth of experience which gives value to his account of the events leading up to the Civil War, the reputation of Mr. Butler as a writer of light verse lends an additional interest to his personality. The lines "Nothing to Wear," if strange to the present generation, had a great vogue in their time and were even translated into several foreign languages. Of Mr. Butler's talents in this direction United States Circuit Judge George C. Holt furnished the following interesting estimate in a memorial address printed as an appendix to this volume:

His serious poetry is of a fairly high quality, but his humorous work is that upon which his reputation as a poet will really rest. His light society verse ranks very high in that class of

poetry. "Nothing to Wear" is, I think, as clever as any verses of society written in English except those of Praed. He was not the equal in ludicrous rhymes of Barham, the author of the "Ingoldsby Legends," or of Hood in extraordinary punning verse, nor was he the equal of either Lowell or Holmes in this country in purely humorous poetry, or perhaps of John G. Saxe in rhyming facility. But with these exceptions I think that it would be difficult to name any writer of his time in England or this country that has excelled him in his own special line.

BRANTLY ON CONTRACTS

Law of Contract. By William T. Brantly, Reporter of the Court of Appeals of Maryland; author of the "Law of Personal Property," etc., formerly Professor of Law in the University of Maryland. 2d ed., revised and enlarged. M. Curlander, Baltimore. Pp. 466 + 39 (table of cases: + 55 (index). ($4 *net*.)

IT IS plain from an examination of this book that the author had made a vigorous independent analysis of the principles of contract and that he has been remarkably successful in stating these principles in clear logical order. He has produced an admirable text-book, which should be of incalculable service to the student in helping him to understand this complicated elementary topic of the law. The writer acknowledges his indebtedness to Pollock and Anson, but has drawn on the civil as well the common law for his principles of classification, with results that are not displeasing. In view of the conciseness with which the subject is presented, and the firm grasp of the author on his materials, it is not surprising to learn that he was a university lecturer on contracts for twenty-five years, and this circumstance alone perhaps explains the compression of the treatise, which deals with rules found in a great number of cited cases without any obscuring of main ideas by subordinate details. In its revised and enlarged form, this text-book will surely be allotted a place in the literature of the law of contract which cannot henceforth be disregarded.

STREET RAILWAY LAW

A Treatise on the Law of Street Railways, embracing urban, suburban, and interurban, surface, sub-surface and elevated roads, whether operated by animal power, electricity, cable or steam motor. By Henry J. Booth, of the Columbus bar. 2d ed., revised and enlarged, by Isaac C. Sutton and Paul H. Denniston of the Philadelphia bar. T. & J. W. Johnson Co., Philadelphia, 1911. Pp. cxi (table of cases), 797 + 124 (index). ($6.50 *net*, delivered.)

Street Railway Reports Annotated. Vol. VII, reporting the electric railway and street railway decisions of the federal and state courts in the United States. Edited by Austin B. Griffin of the Albany bar and Arthur F. Curtis, Delhi, N. Y. Matthew Bender & Co., Albany. Pp. 948 + 74 (index). ($5).

THE first edition of Booth on Street Railways appeared in 1892. Its value as a standard authority was immediately recognized, and it was of assistance in settling the law on some doubtful questions, some of its views being adopted by the courts. The editors of the second edition note that in many cases the courts have quoted from the first edition. They say that they have cited in the new edition more than three thousand cases decided since the appearance of the former edition, and that they have undertaken to cite every important reported case decided in the United States and Canada "except negligence cases which were merely cumulative." They have also included a new chapter, dealing with Interurban Railways. The author of the first edition reviewed both the text and notes of the new edition before its appearance, and its maintenance of the high standard already set is a foregone conclusion.

The seventh volume of Street Railway Reports continues the series without any perceptible deviation from the plan of former volumes. There is a useful appendix of "Cases Not Reported in Full," as before, and the index-digest

is a practical feature. Negligence naturally comes in for a large share of attention. The annotations of the series of reports are also made accessible by a combined index to all seven volumes.

A MEDLEY OF LEGAL STORIES

A Chance Medley of Legal Points and Legal Stories. Little, Brown & Co., Boston. Pp. 374 (index). ($1.50 *net.*)

"AMERICAN ingenuity has invented a new cause of action. A shipowner, relying on the weather forecast of the United States Meteorological Office, unloaded his rice on a wharf. It got soaked, and he sued the Government for damages. But he found that though the department might lie the action would not."

The foregoing fails sufficiently to do justice to the legal acumen of the learned and accomplished paragrapher of the *Pall Mall Gazette* to be considered a typical example of his observations on legal matters. The writer, whose identity is hidden behind the veil of journalistic anonymity, clearly possesses the faculty of dealing lightly with the law, yet he has collected pregnant observations on an astonishing variety of legal "points," and the book is not too trivial to deserve the compendious index offered in attestation of a possible utility. But no index is needed for anecdotes like these: —

There is a good story about the Lord Chief Justice. It was before his judicial days and while he was yet a stuff gownsman, that he was asked in court one day by a brother barrister what was the extreme penalty for bigamy. "Two mothers-in-law," instantly replied Russell.

Again: —

"A prisoner was defending himself well to the jury, but the judge, not being able to hear him well, said, 'What was your last sentence?' 'Six months,' was the answer."

The author is very happy in his rare gift for extracting witty stories from books ancient and modern; of Baron Brampton, for example, we read: —

Sir Henry Hawkins, as he will be known to posterity, had once to cross-examine an expert in handwriting. In those days judges and juries regarded these experts with more respect than is the case now. When Sir Henry arose he handed to the expert six slips of paper, each of which was written in a different kind of handwriting. Mr. Netherclift, the expert, took his magnifiers and remarked, "I see, Mr. Hawkins, what you are going to try to do. You want to put me in a hole." "I do, Mr. Netherclift, and, if you are ready for the hole tell me, were those six pieces of paper written by one hand and about the same time?" The expert examined the paper carefully, and after a considerable time answered, "No, they were written at different times by different hands." "By different persons, do you say?" "Yes, certainly." "Now, Mr. Netherclift, you are in the hole. I wrote them myself this morning at this desk." Collapse of the case.

TRAIN'S COURTS, CRIMINALS AND CAMORRA

Courts, Criminals and the Camorra. By Arthur Train. Charles Scribner's Sons, New York.

IN THIS book Mr. Train, in his sprightly style, has written a series of untechnical essays comparing criminal practice in New York with the Italian practice as exemplified in the famous trial of the leaders of the Camorra at Viterbo last year. While the essays are not always closely connected, still this thread runs through them all, and if Mr. Train can succeed in convincing his countrymen that there is much to be commended in the Continental criminal practice in comparison with our own theory and practice, he will have performed a useful service as well as have entertained them pleasantly.

Though members of the bar will not need to be told that our constitutional safeguards of life, liberty and property, if they were strictly applied, would give to all the criminal classes too great an

advantage today, and that it is frequently only by the extralegal acts of our police that order is maintained in the large cities, they will be interested in the history of the Camorra which he has written and his comments on the now famous Italian trial. There is also much entertaining reading in the chapters on detectives in which the author demolishes the ideals of the devotees of Dr. Conan Doyle and shows us the modern detective as a business man with unlimited telephone service.

TIFFANY'S HANDBOOK OF BANKING LAW

Handbook of the Law of Banks and Banking. By Francis B. Tiffany, author of "Death by Wrongful Act," and handbooks on "Sales" and "Principal and Agent." Hornbook Series. West Publishing Co., St. Paul, Minn. Pp. 579 + 51 (table of cases) + 37 (index). ($3.75 delivered.)

THIS is a book for practitioners dealing with deposits, checks, clearing houses, collection of negotiable paper by banks, loans and discounts. The general principles relating to these subjects are set forth together with the particular applications to our national banking system. In addition, there are chapters devoted to the interpretation of the National Bank Act, to the issue of bank notes, and a brief discussion of the principles of corporation and insolvency law particularly applicable to national banks. There is also a chapter upon savings banks. No attempt is made to deal with the multitude of statutory provisions in the several states relating to the local banks and trust companies. The National Bank Act and the other federal statutes relating to national banks are printed in an appendix with annotations. There is a voluminous index and the typographical arrangement is of the best. The citation of cases does not purport to be exhaustive, reference being given to the digests of the same publisher for further authorities. The book has successfully realized the author's purpose, namely, to produce a handbook of the law of banking and not a treatise, and will be found useful by those who have to deal with this subject. S. R. W.

DUNN'S PURE FOOD AND DRUG MANUAL

Dunn's Pure Food and Drug Legal Manual. Edited by Charles Wesley Dunn, A.M., of the New York bar. Federal, state, and territorial general and special food, drug, paint, oil, and turpentine laws, rules and regulations, food standards, food inspection decisions, and leading decisions of the courts. Uniformly classified and arranged cyclopedia of information. V. 1, pp. xxvi, 2347. Dunn's Pure Food and Drug Legal Manual Corporation, 32 Liberty street, New York. ($12 for the 2 v.)

AT its last annual meeting, the American Bar Association voted its approval of the recommendation of the Conference on Uniform State Laws that the provisions of the federal Food and Drugs Act of 1906 be copied by the states. The editor of Dunn's Manual in his introduction to a most valuable work refers to the great inconvenience to commerce arising from various and conflicting legislation, and suggests the desirability of the state legislatures yielding to the efforts that have been made to induce them to make the enactments of their respective states harmonize as closely as possible with those of the national government. The present work is needed because of this very diversity in state legislation, and will help the movement toward uniformity. The treatment of the subject is analytical and comparative, and the federal act is taken as the basis of comparison and as the standard food and drugs statute.

The work is in two volumes, of which the first lies before us and the second is to appear shortly. We are impressed by the complete and encyclopedic character of the first volume, and by the clear and convenient arrangement of its volu-

minous materials. Part I is a digest of statute law, and Part II contains the text of the statutes. The treatment is by states arranged in alphabetical order, and the digest follows a uniform scheme of numbered sections, based on the federal law. To ascertain the law relating to the use of colors and bleaches in food, for example, it is only necessary to turn to no. 36 in the digest of the federal law, and to the same number under any of the state heads. The testimonials of many public officials bear witness to the accuracy with which the Manual has been prepared. The quotations from judicial decisions and from administrative orders and bulletins add to the value of the work, which is sufficiently up-to-date to include the session laws of 1912.

BOOKS RECEIVED

American City Government: a survey of newer tendencies. By Charles A. Beard, Associate Professor of Politics in Columbia University. Century Co., New York. Pp. 386 + 27 (appendices) + 7 (index).

The Government of American Cities. By William Bennett Munro, Ph.D., LL.B., Professor of Municipal Government in Harvard University. Macmillan Company, New York. Pp. 385 + 16 (index). ($2.25 *net.*)

The Fourteenth Amendment and the States: a study of the Operation of the Restraint Clauses of Section One of the Fourteenth Amendment to the Constitution of the United States. By Charles Wallace Collins, M.A., sometime Fellow in the University of Chicago, member of the Alabama bar. Little, Brown & Co., Boston. Pp. 174 + 33 (appendices) + 13 (index). ($2 *net.*)

A Journey to Ohio in 1810, as recorded in the journal of Margaret Van Horn Dwight. Yale Historical Manuscripts. Edited with an introduction by Max Farrand. Yale University Press, New Haven. Pp. 64. ($1 *net.*)

The Essentials of International Public Law. By Amos S. Hershey, Ph.D., Professor of Political Science and International Law in Indiana University, author of The International Law and Diplomacy of the Russo-Japanese War. Macmillan Co., New York. Pp. xlviii, 532 + 26 (index). ($3 *net.*)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administration of Justice. "Some Practical Remedies for Existing Defects in the Administration of Justice." By Charles A. Boston. 61 *Univ. of Pa. Law Review* 1 (Nov.).

A valuable paper, dealing in facts rather than in generalizations, and most helpful and practical on this account. For example, Mr. Boston deals with the evils of defective systems of practice, and the civil jury. The jury, he says, "is the one inapt element in our system of administering justice, antiquated, crude and inefficient, causing congestion, leading to waste, and perpetuating technicality, in order that it may even approximate fairness. If judges are for any reason not desirable triers of fact, then at least the public money would be better spent, public business better expedited, and better results reached if we had standing triers of fact skilled in the art, through experience, and therefore better equipped psychologically for their function."

The efficiency of the judicial branch of the government, says Mr. Boston, is to be secured by the establishment and observance of universal principles, rather than by the occasional employment of any one remedy. "The judges," on the whole, "are an unusually conscientious and competent body." But the efficiency of judiciary organization and administration can be greatly increased. A more careful selection of candidates for the judiciary is needed: —

"It is always said in discouragement of such efforts that you cannot legislate morals into people; that you cannot make people good by enacting that they shall be good; that is true, but you can change a style of dress in a single season and for practically a whole sex in a civilized land by letting a few people adopt it, and a few newspapers talk about it; so you can set the reading public all to reading and discussing the same book by judicious advertising; likewise you can make good manners and better ethics fashionable with the bar and the bench by advertising them and calling public attention to them; and one way to do this is for the bar to call attention to proper standards, and to take thought for increasing efficiency on the bench by directing common thought to the essentials of judicial conduct and demeanor."

Biography. "Daniel O'Connell as an Advocate." By J. A. Lovat-Fraser. 38 *Law Magazine and Review* 58 (Nov.).

"His demeanor towards the judges was at times extremely insulting and offensive. 'Good God, my lord' he once said at Cork Assizes to a judge who had employed his evening after his day's work in refreshing his memory upon some

point of law, and on coming into court gave him a favorable decision, 'If your lordship had known as much law yesterday morning as you do this, what an idle sacrifice of time and trouble would you not have saved me, and an injury and injustice to my client.' "

Comparative Jurisprudence. "Classifications of Homicide — A Study in Comparative Law." By D. Oswald Dykes. 24 *Juridical Review* 177 (Oct.).

"The principles of classification of homicidal crimes which appear in the French and German codes run through the codes of almost all the Continental states, with many variations in detail. Thus the heaviest penalty is reserved for premeditated murder and for parricide in the laws of Hungary, Italy, Spain, Belgium, and Denmark. . . . In passing from Europe to the American continent we find at least as great a variety of classifications of homicide. Each state in the American Union has its own criminal law, generally in the form of a code. Some systems bear traces of English influence, but the greater number follow more closely the Continental model."

Contempt. "The 'Third Degree' and Trial by Newspapers." By Edwin R. Keedy. 3 *Journal of Criminal Law and Criminology* 502 (Nov.).

"To prevent the 'third degree' and trial by newspaper, and to remedy two striking defects in our criminal procedure it is suggested that a statute or statutes be enacted providing for the following: —

"1. That it shall be a misdemeanor, punishable by imprisonment, for any police officer to exert any force, mental or physical, against an accused person for the purpose of extorting any admission or confession.

"2. That any admission or confession made by an accused person in response to interrogatories of the police shall be inadmissible in evidence.

"3. That it shall be a misdemeanor, punishable by fine and imprisonment, for the editor of any newspaper to publish regarding an accused person statements or comments which create a belief in the guilt of the accused before his trial, thereby prejudicing him at his trial and interfering with the proper administration of justice. This is an offense at common law (*Rex* v. *Fisher*, 2 Camp. 563, and *Rex* v. *Tibbits*, 1902, 1 K. B. 77), but the courts in this country have hesitated to apply it.

"4. That the trial judge be given power to declare the law (he has this power in most states) and to comment on the evidence.

"5. That no judgment of conviction shall be reversed unless the trial court committed substantial error prejudicial to the defendent, thereby causing a miscarriage of justice."

Criminal Law. "The Fundamental Principles of Criminal Justice." By Hon. Simeon E. Baldwin, LL.D. 22 *Yale Law Journal* 30 (Nov.).

"I venture to formulate as the fundamental principles of criminal justice the following list:

"(1) The person accused should have fair notice of the charge against him, and a fair opportunity to make answer, with the aid of witnesses and counsel.

"(2) The tribunal which hears his case should be so constituted as to be reasonably independent of executive or legislative dictation as to the judgment to be pronounced.

"(3) The sentence, in case of conviction, should be imposed by that tribunal.

"(4) It should be promptly and publicly made known to the convict.

"(5) In framing it regard should be had (*a*) to the nature and gravity of the offense; (*b*) to the intent of the offender, and the fault to be imputed to him; (*c*) to the natural effect of the punishment awarded, in preventing the commission of similar offenses, whether by himself or others, and in satisfying the public conscience; and (*d*) when not capital, to its possible utility in improving his moral character."

"The Need of a Scientific Study of Crime, Criminal Law and Procedure — The American Institute of Criminal Law and Criminology." By Eugene A. Gilmore. 11 *Michigan Law Review* 50 (Nov.).

Describing the organization and aims of the Institute.

"Proceedings of the Fourth Annual Meeting of the Institute." By the Editors. 3 *Journal of Criminal Law and Criminology* 592 (Nov.).

This issue of the *Journal*, besides the committee reports elsewhere noted, also contains the address of the retiring president, Chief Justice John B. Winslow of Wisconsin (p. 506).

See Comparative Jurisprudence, Criminal Procedure, Evidence, Penology.

Criminal Procedure. "Criminal Procedure." (Report of Committee E of the Institute.) By Justice William N. Gemmill (Chairman). 3 *Journal of Criminal Law and Criminology* 566 (Nov.).

Summarizes the results of a questionnaire sent to the chief justices of the several states. Detailed recommendations are offered. A valuable document.

"A Progressive Program for Procedural Reform." By Nathan William MacChesney. 3 *Journal of Criminal Law and Criminology* 528 (Nov.).

"The bar has taken little or no interest in the movements that go to make up the modern criminological reform. Much of the criticism against the bar for its unprogressive attitude is justified, but the explanation is at hand. However much the philosophy underlying penal administration may have changed during the last century, such change is known only to the scientific student of the subject, and while it has affected the practices of the administration of

the criminal law, it has to a very limited extent affected only the actual enactments concerning it with which in the first instance the bar is more largely, if not exclusively, concerned."

See Criminal Law, Penology.

Due Process of Law. See Fourteenth Amendment.

Equal Protection of the Laws. See Race Distinctions.

Evidence. "Confessions." By Nicholas J. Hoban. 75 *Central Law Journal* 347 (Nov. 8.)

"It is generally considered that a confession voluntarily made is entitled to the greatest weight. '*Habemus optimum testimonium rei.*' A prisoner's confession involving no question of law is sufficient grounds to warrant a conviction, although there is no corroborating proof of his having committed the offense charged. This view, however, is very seriously doubted by text writers as not being what the English courts would hold, if the question was directly presented to them, but it clearly is not the American rule. It is well settled in this country, that there must be some corroborating evidence to the confession in order to establish the prisoner's guilt; but if the commission of the offense be established, it is unnecessary to have any corroborating evidence of the prisoner's criminal agency."

Extradition. "A Report of a Recent Extradition Case: *Re Macaluso.*" By Prof. Charles Cheney Hyde. 7 *Illinois Law Review* 237 (Nov.).

A brief account of proceedings before United States Commissioner Foote in Chicago a year ago, resulting in the prompt surrender of the culprit to the Italian government.

Federal Jurisdiction. "Limitations on Federal Courts in Administering State Law." By Needham C. Collier. 75 *Central Law Journal* 330 (Nov. 1).

Fifteenth Amendment. See Race Distinctions.

Fourteenth Amendment. "Judicial Construction of the Fourteenth Amendment." By Francis J. Swayze. 26 *Harvard Law Review* 1 (Nov.).

A full and valuable discussion of the entire subject. As for the outlook for the future:—

"Questions as varied as the multitude of human affairs will arise. We must continue to define, as we have for forty years, by a process of inclusion and exclusion. Whether that process shall be conducted by the slower and more considerate process of the courts where both sides are heard and the court feels obliged to vindicate its conclusions by reason, or by the sometimes hastier but not always in the end more expeditious processes of an electorate or a legislative body which may substitute its will for reason, is a question of political expediency. A lawyer naturally prefers the existing method, hitherto the boast of our American system, but must recognize that under a different system the vague provision of the Great Charter has frequently served a useful purpose in protecting personal liberty and private property. Whatever system is followed, language must continue to be defined when it becomes necessary to apply it to concrete cases.

"The practical result depends not so much upon the language of the written instrument or the statutory enactment, as upon the spirit in which the language is defined and the law administered."

See Government.

General Jurisprudence. "What is the Law? I." By Joseph W. Bingham. 11 *Michigan Law Review* 1 (Nov.).

"I have stated that the field of law is part of the field of the science of government. I delimit it further by saying that it includes only the organization of the institutions and agencies of authoritative government, their concrete operations and effects, and the causal facts which bring about those operations. These things constitute external sequences of phenomena which correspond to the working field of the scientist. Knowledge of such concrete governmental phenomena obtained by observation, report, inductive and deductive reasoning, and the other implements of scientific investigation, may be generalized into rules and principles. A technical vocabulary and sterotyped methods of phrasing may be developed with accompanying definitions. When thorough knowledge so obtained has been fully organized we shall have that which may with propriety be called a science of law."

The treatment here followed offers a striking example of close analytical examination and will repay careful reading.

Government. "Constitutional Law in 1910–11: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1910." By Eugene Wambaugh. *American Political Science Review*, v. 6, p. 513 (Nov.).

Professor Wambaugh points out that the year 1910–11 was much more important, from the standpoint of federal constitutional law, than the previous year; the noteworthy constitutional decisions of the Supreme Court were much more numerous. He here notices the Oklahoma, Kansas, and Nebraska Bank deposit guaranty cases (*Noble State Bank* v. *Haskell*, etc.,), the Standard Oil case, the federal corporation tax case (*Flint* v. *Stone Tracy Co.*), and the Gompers contempt case (*Gompers* v. *Bucks Stove and Range Co.*). Other cases were: *German Alliance Insurance Co.*, v. *Hale*, in which an Alabama statute, prohibiting combinations of insurance underwriters, was upheld; *West* v. *Kansas Natural Gas Co.*, holding that an Oklahoma statute designed to keep natural gas from being piped out of the state was an interference with interstate commerce; *Coyle* v. *Smith*, involving the

removal of the state capital of Oklahoma and the equality of states; *Bailey* v. *Alabama*, in which a statute was construed as establishing peonage; and *Muskrat* v. *U. S.*, turning on the distinctions between governmental powers, the Supreme Court refusing jurisdiction in the Cherokee land claims.

The Gompers and Standard Oil cases are treated as of more importance from the point of view of political science than from that of constitutional law.

"Statesmanship and the Universities." By Clayton Colman Hall. *Forum*, v. 48, p. 701 (Dec.).

"The solution of social and political problems can only be worked out by the scientific study of humanity and of human political, social and industrial institutions. It cannot be discovered either in the laboratory or the hospital. But it lies with those who have learned in political science to look beneath the surface for the cause, and to recognize that, as in medicine, a cure can be wrought, not by treating the symptoms with palliatives, but only by attacking the disease."

Great Britain. "The Legal Status of Sovereignty." By W. W. Lucas. 24 *Juridical Review*, 185 (Oct.).

"The sovereignty under the British Constitution, looked at from a legal point of view, is a graded authority. It embraces, firstly, an activity which possesses unqualified authority to create rights and duties. This function enjoys in law plenary authority, and therefore in performing its office it is free from all legal liability. . . . The second function of sovereignty is represented by a discretionary activity to which the laws of the creative are committed. It supplements them with further legislation of a subordinate nature and with administrative rules, and it organizes the whole down to the point of overt action. . . . The third function is simple performance. It possesses no discretion as to what the duty shall be, but a minor discretion only as to how it shall be performed."

Ireland. "The Present Status of the Home Rule Question." By William T. Laprade. *American Political Science Review*, v. 6, p. 524 (Nov.).

It is considered not unlikely that the present bill will meet the fate of its predecessors of 1886 and 1893, but that the majority of the British electorate will not seriously oppose the bill, and that the adoption of home rule in some form is only a matter of time.

See Fourteenth Amendment, Judicial Review of Statute Legislation, Judiciary Organization.

History. "The Impeachment of Andrew Johnson." I, "The Causes of Impeachment," by Gen. Harrison Gray Otis. II, "Emancipation and Impeachment," by Gen. John B. Henderson. *Century*, v. 85, p. 186 (Dec.).

Two articles which lay bare the political background and personal motives behind the attempted impeachment of Johnson. Gen. Henderson, one of the survivors of the Senate which witnessed the proceedings, says: "It would be well if those who are urging the 'recall' as a general panacea for mistakes and dissatisfaction in the working of elections would study the personal motives and partisan manoeuvrings which were the soul and body of this enormity of injustice in American history."

"The Monroe Doctrine Abroad in 1823–24." By William Spence Robertson. *American Political Science Review*, v. 6, p. 546 (Nov.).

"Luther Martin and the Trials of Chase and Burr — The Impeachment of Justice Chase." By Hon. Ashley M. Gould. 1 *Georgetown Law Journal* 17 (Nov.).

Homicide. See Comparative Jurisprudence.

Indeterminate Sentence. See Penology.

Insurance. "Purchasers and Mortgagees as Assignees of Fire Insurance Policies." By James Edward Hogg. 24 *Juridical Review* 228 (Oct.).

International Law. "The Law of Nations." By Alpheus Henry Snow. 6 *American Journal of International Law* 890 (Oct.).

"It seems, therefore, that the time has come when supernational law must supplant that which is called "international law." . . . As a true supernational law must protect and preserve the nations as well as regulate them in the common interests, it is consistent with such a law that the nations should decline to submit to judicial settlement any questions, which if decided adversely to them, would result in their destruction."

See History, International Prize Court, Monroe Doctrine, Panama Canal Tolls, Spitzbergen.

International Prize Court. "The *Protocole Additionel* to the International Prize Court Convention." By George C. Butte. 6 *American Journal of International Law* 799 (Oct.).

"That a uniform body of substantive prize law will be applied by the units in this system in all parts of the world follows rationally. . . . The courts of prize of the various nations regarded as courts of first instance sustain, in effect, the same relation to the International Court of Prize as inferior municipal courts to their court of last resort."

See International Law.

International Relations. "North America and France," II. By Gabriel Hanotaux. *North American Review*, v. 196, p. 792 (Dec.).

"The French civil law is the fruit of the experience of a very old nation, itself the inheritor of the two great civilizations of antiquity. Such is the fact. It expresses the course of living which had been preferred by hundreds of generations and, like the French language itself, is the result of long and well-considered usage.

"With regard to the relations of husband and

wife in the marriage tie, of father and children, of social beings and social wealth, of capital and labor, it speaks with a voice of incomparable authority.

"In most Anglo-Saxon countries, notwithstanding the numbers and the standing of the legal profession, and perhaps for that reason, jurisprudence has remained in a state of astonishing medievalism, and the countries would find advantage in a closer acquaintance with the principles of French law. The clear language which characterizes the civil code would bring an unlooked-for light to such who would read it with open minds and serious intent."

Judicial Recall. "The Independence of the Judiciary, the Safeguard of Free Institutions." By William B. Hornblower. 22 *Yale Law Journal* 1 (Nov.).

Address delivered at Yale Law School last June.

"The advocates of recall overlook the fact that the successors of these incompetent, inefficient or corrupt judges are to be selected by the voters of the very same constituency which is responsible for the election of the incompetent or inefficient or corrupt men who are to be recalled, and the identical political bosses, or conventions, or primaries, which selected the recalled judges are to select their successors. We are thus traveling in a vicious circle."

"Social Justice and the Courts." By Theodore Schroeder. 22 *Yale Law Journal* 19 (Nov.).

"The recall will do neither the harm nor the good that is prophesied, but it is coming. It is coming because it is in line with the slowly progressing democratization of human institutions and therefore right. What good it will do will not be of the kind prophesied, but will come by indirection. It will tend to make judges more thoughtful and give voters an interest and opportunity for more enlightenment as to their relations to their fellow men. As an educational force, slowly, and in the long run, it will do good, and in my judgment aside from this it will do little of either good or harm."

Judicial Review of Statute Legislation. "Judicial Criticism of Legislation by Courts." By Charles G. Haines. 11 *Michigan Law Review* 28 (Nov.).

"If judicial review of legislative acts is to remain a part of our system of government is it not likely that the dissenting justices have pointed the way toward a solution which without recourse to the recall of judges or without a limitation of jurisdiction will make judicial practice accord with the wishes of a people demanding a more democratic government? Since constitutions may be interpreted so as to favor a wider range of discretion in legislatures without doing violence to the English language or to the honor and integrity of Courts of Justice, may we not expect that courts will more frequently defer to the judgment of legislatures when laws are attacked which involve social or economic policies?"

Judiciary Organization. "Reorganization of the Circuit and Superior Courts of Cook County." By Albert Martin Kales. 7 *Illinois Law Review* 218 (Nov.).

"The system of rotation among the different classes of judicial work by the judges of the Superior and Circuit Courts absolutely prohibits the judges from becoming expert in the handling of judicial business. The existence of such a system is preferred by the judges themselves and does them incalculable harm not only as judges, but when they are obliged to return to practice."

Legal Education. "A Morning at the Paris Law School." By Layton B. Register. 61 *Univ. of Pa. Law Review* 33 (Nov.).

An animated account in lighter vein.

"The first year includes the history of law and constitutional law. The study of the Civil Code runs through all three years while political economy fills an important role during the first two years. Criminal and administrative law are taught during the second year and a choice may then be made between public international law and the Roman law of contracts. In the third year, commercial law is covered in two courses. This includes such important subjects as the jurisdiction of the commercial courts, partnerships and corporations, carriers, sales, negotiable instruments, insurance, brokerage, admiralty, patents, trademarks, etc. Practice, private international law and a choice between industrial law and colonial legislation are offered during the third year. The program is practically the same in all the law schools of France, since the degrees of each are equivalent, theoretically at least."

Legal History. "The 125th Anniversary of the Drafting of the Constitution of the United States, 1787–1912." By Hon. Hannis Taylor. 1 *Georgetown Law Journal* 1 (Nov.).

Restating the views of the author as to the part played by Pelatiah Webster in the history of the Constitution.

Monopolies. "The Reason for the Continued Uncertainty of the Sherman Act." By Herbert Pope. 7 *Illinois Law Review* 201 (Nov.).

"The 'standard of reason which had been *applied* at the common law and in this country' must be rejected. The Supreme Court has in fact rejected many of its applications. We have seen already that in specific instances it has, in deciding cases, disagreed with the standard of reason as it has been applied in England and in some of the states in this country. What the Sherman act really means must therefore depend, not upon how the standard of reason *has been applied* 'at the common law and in this country,' but upon how the Supreme Court thinks it *ought to have been applied.* The meaning of the common law itself must first be settled by the Supreme Court before it can become a

certain guide for the interpretation of the Sherman act."

See Patent Monopoly.

Monroe Doctrine. "The Monroe Doctrine — Its Precept and Practice." By Percy F. Martin. *Fortnightly Review*, v. 92, p. 869 (Nov.).

A British view, from the standpoint of a writer on international law. The alleged injustices of the policy of the United States, particularly in dealing with South American republics, its "aggressions, becoming ever more daring and ever more successful," are dwelt upon. The treatment of recent history may not be entirely judicial, but does bring a few unpleasant truths to light. Sir Edward Grey is severely criticized anent the Panama Canal dispute.

See History.

Panama Canal Tolls. "The International Status of the Panama Canal." By Edward S. Cox-Sinclair. 38 *Law Magazine and Review* 1 (Nov.).

We find it difficult to accept the conclusions of this article, but it makes an able presentation of the case for the United States in the controversy regarding the construction of the Hay–Pauncefote treaty. The writer argues that the courts of Great Britain and of the United States are qualified, according to the "acknowledged doctrine of international usage," to pass upon any issue involving international law, that the United States Supreme Court is competent to pass upon any question connected with the basic law of the canal, and that there is no international obligation on the part of the United States to submit the construction of its legislative act to an international tribunal. Any aggrieved party thus has an impartial tribunal in the Supreme Court. As for the merits of the controversy, on grounds of "general justice" the position of our Government is upheld. Quoting Hall's rules of construction according to the plain and reasonable sense of words, Mr. Cox-Sinclair takes this view of what a natural, literal construction of the treaty necessarily entails: —

"It is necessary for the opponents of the United States to contend that the expression 'free and open to the vessels . . . of all nations observing these rules' implies 'including the nation owning and administering the canal,' and that the expression 'no discrimination against any such nation,' *i.e.*, 'observing these rules,' implies 'or in favor of the nation which enforces these rules.' It seems that this would be a strained, though perfectly possible, construction. But it is scarcely a construction of 'literal meaning.'

"The Panama Canal Act." By C. A. Hereshoff Bartlett. 38 *Law Magazine and Review* 15 (Nov.).

"It appears that the United States has expressly excepted its coastwise trade in thirty-one treaties with other commercial countries, while Great Britain on her part has also solemnly and diplomatically made the same reservation in thirty-one treaties with foreign nations, so that no fewer than forty-seven commercial countries among the international federation of friendly powers of the world have by treaty pronounced themselves in favor of the inviolability of home or coastwise trade from foreign intrusion; and those countries that have not so formally expressed themselves have by their local laws or immemorial custom tenaciously declined to place their coasting vessels on an equality with or in the same category as foreign vessels. This right of a nation to dominate over its own domestic maritime trade has been of such constant and unquestioned recognition that it has become practically a principle of the law of nations."

The writer goes on to argue that the treaty of 1815, relating to port tonnage duties, has been construed favorably to Great Britain's desire to discriminate in favor of its own coasting trade. Mr. Bartlett, however, fails to point out the fact that the coasting trade of England is not closed to other nations, and that there is the same equality among vessels of different nations in the coasting trade as in overseas commerce. The argument based on the accepted construction of the treaty of 1815 is therefore impertinent to the issue.

As Dr. Baty observes (p. 93 of the same issue), an exemption of vessels engaged in coastwise trade from payment of canal tolls, not limited in terms to vessels of the United States, would not be a violation of the Hay–Pauncefote treaty; the violation consists in an express discrimination in favor of the coasting trade of the United States.

Patent Monopoly. "The Patent Monopoly: When does the Patentee's Right to Dictate the Resale Price of his Patented Article Terminate?" By Frank J. Hogan. 1 *Georgetown Law Journal* 23 (Nov.).

"The question propounded in the title of this article involves great and grave problems of economic public policy, affecting in its solution our ever important friend, the ultimate consumer. If unpatented articles can be brought under the protection of lawful monopoly, if prices can be maintained to an arbitrary standard by a legalized system that prevents competition after the patentee has enjoyed all the rights which the patent statutes intended should be his, then indeed has the time come for the overhauling by Congress of patent legislation."

Penology. "Indeterminate Sentence and Release on Parole." (Report of Committee F of the Institute.) By Edwin M. Abbott (chairman). 3 *Journal of Criminal Law and Criminology* 543 (Nov.).

"Altogether, a general review of the subject must fill those interested with encouragement. Not only in this country but throughout the world the treatment of convicts as persons who are still worthy of reclamation is growing. The extension of the parole system to life-termers after serving a long term in prison, is another evidence of the trend of mind which the public is assuming. Of course, in many states, pardons have been procured for life-termers, but the

growing substitution of a system of parole after 15 or 20 years in prison, or in some instances even less, with a close scrutiny upon the actions of the paroled convict, add a humanitarian zest in the expansion of the parole system. In Germany, in England, in Austria, in Norway, in Switzerland, in Finland and in other European nations has this system of parole been established and expanded."

The discussion is supplemented by an extended appendix epitomizing the existing laws, both national and state, including brief comment on the general merits of the system of each state. The report is a valuable document.

"Proceedings Following Conviction." By Frank L. Randall. 3 *Journal of Criminal Law and Criminology* 517 (Nov.).

"To be properly equipped for service the state should provide a receiving station, to which would be taken all convicted felons, who are not placed on probation (and many misdemeanants also), in the care of officers appointed by the commission. Many persons thus received could be assigned, without much doubt or delay, to the prison, the reformatory, the school for feeble-minded, the industrial or training school, the state farm for inebriates, the colony for epileptics, the hospital for the acute insane, or to the state custodial asylum; an institution which every state should have, and which should, in time, have a larger population than both the prison and the reformatory.

"Recidivists in misdemeanors should be decreed to be felons, and should be saved, as far as possible, from the consequences which follow their weaknesses. No more would we then read, in the report of a county workhouse, that over three hundred persons had each served more than fifty terms therein. As no sane or competent person will serve repeated terms in a workhouse or jail, repeated convictions should be accepted as strong evidence of helplessness, and conclusive evidence that the person needs attention and aid."

"The Report of the Commissioners of Prisons." By "Lex." 38 *Law Magazine and Review* 68 (Nov.).

"The Commissioners lay great stress on the classification of prisoners, and urge that all courts, in passing sentence, should specify in what class the prisoner was to be placed. But the person who passes sentence often knows little about prison-classes and not much about the antecedents of the prisoner. Might it not be better to give a free hand to the Prisons Commissioners and the prison authorities in this matter? The Act of 1898 has not proved a success, as this report suffices to show."

See Criminal Laws.

Perpetuities. "General Powers and the Rule Against Perpetuities." By Albert M. Kales. 26 *Harvard Law Review* 64 (Nov.).

"In short, the fact that a power is a general power to appoint by deed or will or a general power to appoint by will only has an entirely different significance, depending upon whether you are considering the validity of the power in its inception or the validity of the exercise of a power admittedly valid in its inception."

Public Service Corporations. "Rights and Duties of Public Service Corporations." By Hon. J. B. Whitfield, Chief Justice of Florida. 22 *Yale Law Journal* 39 (Nov.).

"The guiding star and controlling purpose should ever be to secure to the public the primary right to a reasonably adequate service for a fair compensation and without unjust discrimination as to patrons or service, and to preserve to the corporations their absolute right to reasonable compensation for service rendered and to security against being deprived of their property or of its use in violation of law."

Race Distinctions. "The Latest Phase of Negro Disfranchisement." By Julien C. Monnet. 26 *Harvard Law Review* 42 (Nov.).

The "latest phase" is supplied by an article of the Oklahoma constitution containing the grandfather clause in a new form. The writer believes that if the case reaches the United States Supreme Court, which is doubtful, it will be held invalid. There is an illuminating discussion of possible remedies.

"The Constitutionality of Segregation Ordinances." By James F. Minor. 18 *Virginia Law Register* 561 (Dec.).

"It is the conclusion of the writer that such legislation will not be overthrown on the ground that it denies equal protection of the laws, where it does not arbitrarily set apart certain portions of a city for the residence of each race, but merely requires the residential districts to be allotted to each to be automatically determined by principles which apply without discrimination to each race. But if such an ordinance undertakes to arbitrarily set apart residential districts for each race, it would seem that, however good its intention to be fair to each, such an assignment could not even theoretically be considered a law operating equally upon each race. Practically, of course, it would assign an inferior section to the colored race, although this would be the only possible assignment which would not require wholesale removals and a complete upheaval and disturbance of actual conditions as they now exist, and would be the practical result of any assignment, however determined. Such an ordinance, requiring the removal of all Chinese residents in a city to a delimited district, has been held clearly invalid as an unconstitutional discrimination and deprivation of property. *Re Lee Sing*, 43 Fed. Rep. 359."

Spitzbergen. "Spitzbergen. "By "Theta." 38 *Law Magazine and Review* 78 (Nov.).

"The deliberations of a joint conference of Swedish, Norse, and Russian diplomatists have led this year to the signature of a Protocol, establishing — so far as these nations can accomplish it — a régime under which the island is entrusted to the administration of a special commission calculated to safeguard the interests of the other powers. It is tolerably certain that the Protocol

will be transformed into a binding treaty in due course, to which the accession of other nations will be invited."

Wills. "The Menace of Testamentary Law." By John H. Wigmore. (Communication.) 7 *Illinois Law Review* 249 (Nov.).

Dean Wigmore is shocked by the judgment of the Illinois Supreme Court in *Wilce* v. *Van Anden*, 248 Ill. 358, where a testator devised a residue to trustees with the direction that it be distributed among the testator's brothers and sisters in such manner as they should deem advisable and the court held the bequest void for indefiniteness. He does not say that the Supreme Court did not declare correct law, but he does assert that if that is sound law, it is "a poor sort of law for this day and generation." The various technical distinctions learnedly enumerated by Mr. Kales, which make some gifts void and others not void, he deems unsuited to modern practical needs and an outworn survival of the antique. He suggests "a careful reconstruction of the whole edifice":

"I respectfully propose that the Governor of this state appoint Mr. Kales and two other skilled persons as a commission, to report within five years a comprehensive statute on estates of property and devises and bequests thereof, to the end that a testator's intentions, as ascertained from his will, may hereafter be faithfully effectuated, so far as practically feasible, in the administration of his estate, and that thus the whimsicality of the law of estates may cease to be an unjustifiable menace to the safety of wills lawfully executed."

Latest Important Cases

Defamation. *Words Imputing Death not Libelous per se — Mental Pain does not Indicate Actual Injury to Reputation.* N. Y.

To publish a notice in a newspaper of the death of a person, when as a mater of fact he is alive, is not actionable *per se* as libelous, according to the decision of the Appellate Division of the New York Supreme Court in *Cohen* v. *New York Times Co.* (New York Law Jour., Nov. 22).

Jenks, P.J., in upholding the demurrer of the defendant, stated the authorities with great fullness, and said:—

"The question, then, whether this publication could be a libel *per se* involves the inquiry whether it could have injured the reputation of the plaintiff. Here is a bare item of news in a newspaper. The item states that an event has come to pass which is looked for in the history of every man, is regarded as beyond his control, and therefore does not permit the inference that the man has done any act or suffered any act which he could not have done or which he need not have suffered. Prematurity is the sole peculiarity. How can the publication of such an event merely as a matter of news hold up the subject to scorn, to hatred, to contempt or to ridicule so that his reputation is impaired? Such publication may be unpleasant, it may annoy or irk the subject thereof, it may subject him to joke or to jest or to banter from those who knew him or knew of him, even to the extent of affecting his feelings, but this in itself is not enough (*Samuels* v. *Evening Mail Ass'n*, 6 *Hun* 5; *Lombard* v. *Lennox*, 155 Mass. 70; *Du Vivier* v. *French*, 104 Fed. 278). The question is, as we have seen, whether the publication "tends to lower him in the opinion of men whose standard of opinion the court can properly recognise, or to induce them to entertain an ill opinion of him" (Lord Halsbury's Laws of England, supra; *Mawe* v. *Pigott*, Ir. Rep., 4 C. L., 54, cited both by Lord Halsbury and in Folkard's Starkie on Slander and Libel, p. 234). Newell on Slander and Libel (sec. 36) quotes Lord Wensleydale: 'Mental pain or anxiety the law cannot value and does not pretend to redress when the unlawful act complained of causes that alone, though where a material damage occurs and is connected with it, it is impossible a jury in estimating it should altogether overlook the feelings of the party interested.'

"With more than formal respect for the learned court at Special Term, due to the learning and ability of the justice who presided there, I think that this case is not analogous to the cited cases of the reduced gentlewoman in *Moffatt* v. *Cauldwell* (3 Hun 26), of the over-educated scholar (*Martin* v. *Press Publishing Co.*, 93 App. Div. 531), of the deserted woman (*Kirman* v. *Sun Printing & Pub. Ass'n*, 99 App. Div. 367), of the man dubbed Jack Ketch (*Cook* v. *Ward*, 4 M. &. P., 99), or of the alleged suicide (*Cady* v. *B'klyn Union Publishing Co.*, 23 Misc. 409), for in each of them there was not publication of a mere matter of news, but the incident was used not alone to point a moral, but to adorn a tale narrated in a sensational vein."

Monopolies. *Restraint of Trade under Sherman Act — Combination of Manufacturers and Jobbers for Sale of Patented Articles — Rights of Patentees — "Bath Tub" Trust.* U. S.

In *Standard Sanitary Mfg. Co.* v. *U. S.*, de-

cided Nov. 18, the United States Supreme Court sustained the decree of the United States District Court of Maryland, Mr. Justice McKenna delivering the opinion of the Court. The decision abrogated the so-called "license agreements" by which manufacturers of 85 per cent of the sanitary enameled ironware in the United States were bound together in a combination to control output and restrict prices. The Court said:—

"Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed, not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent. of the manufacturers, and their fidelity to it was secured, not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument 'cash bail.' . . .

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law. . . .

"The added element of the patent in the case at bar connot confer immunity from a like condemnation for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights, for which the Government contends, between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

Merger of Partly Competing Railways through Stock Control — Sherman Act — Competing Traffic, if of Substantial Volume, Though Relatively Small, Involves More than Incidental Restraint of Trade. U. S.

In a sweeping decision which went much further than the *Northern Securities* decision, the Supreme Court of the United States unanimously held, Dec. 2, that the Harriman merger of the Union Pacific and Southern Pacific Railroad companies constituted a combination in restraint of trade within the meaning of the Sherman Anti-Trust law, and should be dissolved. *U. S.* v. *Union Pacific Ry. et al.*, Oct. term, no. 446.

Answering the contention that at no time did the Union Pacific acquire a majority of Southern Pacific stock, the court said:—

"It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is ample to show that, distributed as the stock is among many stockholders, a compact united ownership of 46 per cent is ample to control the operations of the corporation. This is frankly admitted by Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific company.

"The consolidation of two great competing systems of railroad engaged in inter-state commerce by a transfer to one of a dominating stock interest in the other creates a combination, which restrains inter-state commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. (*United States* v. *Joint Traffic Association, supra*, 577.)

"It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts inter-state commerce under restraint.

"Nor does it make any difference that rates for the time being may not be raised and much money spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly, which determines the applicability of the act. (*Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, 676; *United States* v. *Joint Traffic Association, supra.*)

"It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads,

and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law. But we think the testimony amply shows that while these roads did a great deal of business for which they did not compete, and the competitive business was a comparatively small part of the sum total of all traffic, state and inter-state, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars.

"Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer, it has since been placed under a common control. It was by no means a negligible part of a large and valuable part of inter-state commerce which was thus directly affected."

Mr. Justice Day delivered the opinion of the Court.

Patents. See Monopolies.

Street Railways — *Electric Trolley Car a "Vehicle."* Mass.

In a majority opinion handed down Nov. 26, the Massachusetts Supreme Judicial Court, in the case of *Foster* v. *Curtis*, 99 N. E. 961, held that an electric car is a vehicle in the meaning "of the law of the road" and the driver of an automobile or other vehicle going in the same direction as a car must turn to the left. Chief Justice Rugg and Justices Loring and Hammond dissented, holding that the electric car is not a vehicle. In this case the plaintiff was struck by the defendant's automobile as he alighted from the rear of a car.

Trade Unions. *Defamation — Immunity from Actions for Tort — English Trade Disputes Act.* England.

An interesting decision has been rendered in the House of Lords, to the effect that trade-unions in England are absolutely immune from actions for tort under the Trade Distputes Act of 1906.

In *Vacher* v. *London Society of Compositors*, the tort complained of lay in the circulation by the defendant society of an alleged libel upon the plaintiffs. The House of Lords declined to follow several cases which held that a union may be liable for defamation, construing the statute as clearly absolving the unions from civil process. A certain qualification embodied in the statute was held not to affect the express rule of absolute immunity, protecting the trade union against an action in respect of any tortious act, instead of restricting its immunity to tortious acts committed in contemplation or furtherance of a trade dispute. The decision of a majority of the Court of Appeal was thus affirmed.

Unfair Competition. *Trade Names.* U. S.

That an injunction will not lie against a corporation which employs as a trade name a personal name which is the same as that used by another business, and the business of which does not come into competition with the other business, was the decision of the United States Circuit Court of Appeals for the seventh circuit, in *Borden Ice Cream Co.* v. *Borden's Condensed Milk Co. of New Jersey*, decided at Chicago recently (Chicago Legal News, Nov. 23). The Court (Carpenter, D.J.,) said:—

"A personal name, such as 'Borden,' is not susceptible of exclusive appropriation, and even its registration in the Patent Office cannot make it a valid trade mark. *Howe Scale Co.* v. *Wycoff*, 198 U. S. 134; *Elgin Natl. Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

"There is no charge made in the bill that the appellants are infringing, or propose to infringe upon any technical trade mark of the appellee, so we may dismiss any claim for relief upon that score.

"The only theory upon which the injunction in this case can be sustained is upon that known as unfair competition. Relief against unfair competition is granted solely upon the ground that one who has built up a good will and reputation for his goods or business is entitled to all of the resultant benefits. Good will or business popularity is property, and like other property will be protected against fraudulent invasion.

"The question to be determined in every case of unfair competition is whether or not, as a matter of fact, the name used by the defendant had come previously to indicate and designate the complainant's goods. Or, to put it in another way, whether the defendant, as a matter of fact, is, by his conduct, passing off his goods as the complainant's goods, or his business as the complainant's business. . . .

"The name 'Borden,' until appellants came into the field, never had been associated with commercial ice cream. By making commercial ice cream the appellants do not come into competition with the appellee. In the absence of competition the old company cannot assert the rights accruing from what has been designated as the secondary meaning of the word 'Borden.' The phrase 'unfair competition' presupposes competition of some sort. In the absence of competition the doctrine cannot be invoked."

The Editor's Bag

THE BATH TUB CASE

BY the decision in the *Bath Tub* case (*Standard Sanitary Mfg. Co.* v. *U. S.*, decided Nov. 18) the Supreme Court has now formulated the doctrine that the patent law does not afford legal protection to an agreement into which manufacturers and dealers enter with the manifest purpose of suppressing competition and controlling prices. In considering such an agreement in future, the Court will look at the actual facts leading up to it and to the intention of the parties, and where it finds simply an attempt to restrain trade in violation of the purpose of the Sherman act, under cover of the supposed rights of patentees, it will deal with the combination as merely an unlawful monopoly subject to the remedies provided by the anti-trust law. In this way the chief objections to the present state of the patent laws, as shown by the fears expressed by Chief Justice White in his dissenting opinion in the *Mimeograph* case, have been met, and the principal argument for the passage of the Oldfield bill pending in Congress has fallen to the ground.

No other recent decision goes further in restricting the rights of patentees. It marks the latest stage of judicial limitation of freedom of contract in the sale of goods. In some respects, the sale of all goods, whether patented or not, may be regarded as subject to the same general considerations. In *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373, the Court limited the right of the manufacturer of unpatented goods to control the price paid by the consumer. In *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, it established that no restriction could be placed upon the vendee's right to sell a copyrighted book. In *Henry* v. *Dick Co.*, 224 U. S. 1, the Court seemed to take a liberal view of the right of a patentee to impose restrictions upon the purchaser's use of the patented article, but this latest decision in the *Bath Tub* case dissipates the notion that the patentee is the recipient of any extraordinary privilege in the enjoyment of his monopoly of sale.

All the limitations in the foregoing cases are subtractions from the common law right of the owner or vendee of goods to sell them on what terms he chooses. Such a right is not properly a patent right, for letters-patent do not confer any privilege with regard to the sale of goods which the owner of unpatented goods did not have at common law. A merchant has always had the right to sell his goods on whatever terms he deems advisable, consonant with public policy. He may insert into a contract of sale any covenants he may desire, and the contract is valid if not void for lack of consideration. A paper manufacturer, for example, may stipulate with purchasers that his paper is to be used only as a writing paper, and such an agreement is supported by sound consideration if it serves to assist him to establish the reputation of a certain writing paper bearing a particular trade name. Such at least was once the law.

The facts in *Dr. Miles Medical Co.* v. *Park* were essentially similar. There the manufacturer sought to enjoin a Cincinnati firm from selling proprietary medicines at cut rates, and Mr. Justice Holmes, dissenting, said: "There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the court has come."

In the *Bobbs-Merrill* case adherence to this principle of a vendor's freedom of contract would have enabled the owner of the copyright to regulate the terms of all successive sales of the copyrighted book, and the question does not seem really to have turned on the law of copyright, but on rights of property in general. In the *Mimeograph* case it was properly held that restrictions on the use of the article sold might be imposed in the form of a so-called "license restriction," but there again the extent of the vendor's right, rather than the patent law, really furnished the point in controversy, and the attitude of the Court, in treating the problem as one of patent law and in dealing with the violation of the agreement of sale as an infringement of patent, was somewhat strained. In the *Bath Tub* case, why should not the owners of the patent, and their assignees or licensees, by virtue of their control of their own property, have been permitted to sell it on such terms as they saw fit, and to enter into such arrangement for the marketing of their product as they chose?

The situation may perhaps be more clearly grasped if we treat the *Bath Tub* case as no more involving than the *Mimeograph* case any question peculiar to patent law, but the rights of vendors of goods in general. The common law freedom of contract has been limited, as we have seen, by various decisions which are in effect an exercise of the police power holding certain methods of sale to be contrary to public policy. Suppose the vendors of a certain proprietary medicine, or other unpatented article, had combined in the same manner as the defendants in the *Bath Tub* case for the purpose of controlling prices, would the case then have presented circumstances essentially dissimilar? On the authority of *Dr. Miles Medical Co.* v. *Park* no right of monopoly of sale would have been sustained, but in the absence of that decision the question would be whether the proprietary rights of the vendors in question could be exercised by them in combination, obviously not for the purpose of stifling competition, as they operate in an open market, but for the purpose of maintaining as high a uniform price as the market would stand. The law of conspiracy is applicable to such a case, and it is not necessary to hold that the conduct of the defendants would have been lawful if the same acts committed by only one of them separately would have been lawful. In these days of large corporations an individual may be more dangerous to the public welfare than a combination of individuals, but that is beside the point. The common law of conspiracy, and the statutory phase of it presented by the Sherman act, would have furnished a convenient peg on which to hang a judicial finding of the guilt of any defendant entering into an unlawful combination, whether a patentee or an ordinary owner of chattels.

Obviously it is time to call a halt to those who speak of a patentee's unrestricted monopoly of sale. His patent confers the right of exclusive manufacture o his product, and perhaps also the exclusive right to its use, but in selling it he is subject to the exercise of the police power, like the vendor of any unpatented article, and even such protec-

tion as may have been afforded by the *Mimeograph* and other cases is likely to be taken away, so that the patentee will occupy no more favored position than the holder of a copyright or ordinary trade-mark. It may be that these limitations in the interest of public policy are sound, at all events they are likely to come by legislative action if not anticipated by judicial construction. The time, however, has arrived to distinguish between the law of trade in general and the law of patents. In the *Mimeograph* case the legal fiction of an infringement of patent by violation of a license restriction served only to confuse, and in the *Bath Tub* case it is puzzling to learn that conduct serving to promote enjoyment of the fruits of a patent "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it." The rights of the patentee may be limited by new law of trade, but they are not limited by anything inherent in the privilege of a patentee, whose profits are not restricted by anything in the terms of his letters-patent.

LAW ON THE LINKS

IN England Justice Scrutton is said to enjoy the distinction of being the first judge to perform a judicial act on the golf links. Justice Scrutton has been called the vacation judge, since he sits in court on Wednesdays to hear urgent applications that cannot wait until the law courts sit in the ordinary course.

One day not long ago he was met on the links by a lawyer who asked him to order notice to be given to a party that an injunction would be applied for against him. In court the Judge described the incident.

"I remember it," he said. "The application was made to me just before I made a very excellent shot from the tee and I granted it before I took my put."

The only novelty, some one has pointed out, is the *locus in quo*.

THE ENGLISH DIVORCE REPORT

IT TOOK the English Royal Divorce Commission a long time to make its report, and on account of the composite character of the commission, which was large and made up from many different professions, we did not expect the close approach to unanimity on leading principles revealed in what seems to be regarded an excellent document.

From the American standpoint the recommendations present no radical features. The commission would put the two sexes on an equal footing in the divorce court, as in our own country, and the proposed increase in the grounds of divorce does not admit any new causes not found in our own proposed Uniform Divorce Act or in typical statutes of states not classed in this respect as ultra-conservative, such as New York and South Carolina. The proposed grounds of divorce are adultery, desertion, cruelty, incurable insanity, habitual drunkenness found incurable after a certain period, and imprisonment under commuted death sentence. The recommendations, however, go further than our own Uniform Act in enlarging two of the grounds of divorce, as it is proposed that the incurable insanity of either party, after five years' confinement, rather than the "hopeless" insanity of the husband alone, shall justify a severing of the knot, and as cruelty is loosely defined, and is dangerously vague in comparison with the extreme cruelty of our own proposed act, endangering the life or health of the opposite party or rendering cohabitation unsafe. It is to be hoped, therefore, that cruelty will be carefully defined in

any legislation that England may choose to adopt. The attitude of the three dissenting commissioners, Sir William Anson, the Archbishop of York, and Sir Lewis Dibdin, who oppose any extension of the present grounds of divorce, is remarkable and probably will have little effect upon the action of Parliament.

The proposal that permanent separation be abolished and divorce substituted in its place will be commended as in the interest of morality. Courts are still to be allowed to issue temporary separation and maintenance orders, in cases of drunkenness and cruelty, but the securing of what is *de facto* a divorce but by legal fiction not a divorce is to be made impossible.

One of the chief evils which the Commission was formed to redress was that of the inaccessibility of the divorce court to poor people. The majority report accordingly recommends, in addition to local sittings of the High Court, making the journey to London unnecessary in the case of the poor, and in addition to the cheapened procedure in the local sessions, a thorough system of legal aid to the poor which grants every facility for proceedings *in forma pauperis* where the applicant can show a proper *prima facie* case.

The *Law Times* is opposed, we think with good ground, to the recommendations regarding the local administration of the divorce law. It finds fault with the proposed exclusion of all but the poor from the local sittings of the court, and favors one uniform system for the whole realm, making it possible for any one, rich or poor, to sue for divorce either in London or at selected centres. It would also have the local sessions of the High Court presided over not by commissioners, but by High Court judges, who are better fitted by training and experience to discharge the functions of a divorce tribunal. Lest such a system be more expensive to the litigant than one involving proceedings before commissioners only, the *Law Times* urges that the fees, costs, and procedure of the Probate, Divorce and Admiralty division be so revised as to be available to all who desire to avail themselves of the opportunities of the new system.

We have previously expressed our disapproval of secret divorce proceedings (22 *G. B.* 45) and our commendation of that section of the Uniform Divorce Act which directs that all divorce proceedings shall be public. The majority report would allow a judge, at his discretion, to hold proceedings *in camera* when he considers that the evidence is unsuitable for publication in the interests of decency or morality. The minority report concurs in the recommendation. No member of the Commission would abolish the "inherent jurisdiction" of hearing cases *in camera*. Mr. J. A. Spender, however, would restrict the privilege to prevent its abuse merely in the interest of parties who desire secrecy, and suggests legislation regulating newspaper reports. He would forbid reports in the public press till a case is concluded, in order to overcome the evil of long and detailed accounts running from day to day with sensational incidents. He believes that by such precautions the community would reap the moral advantage of a wholesome publicity. We cannot see how regulation of press publications would not answer every objection which might be based on considerations of decency, and how this would not completely remove every justification for proceedings *in camera*. The somewhat analogous case of the law of newspaper contempt, which is so much more effectively enforced in England than in our own country, affords some ground for the feeling that the success of this

expedient as an all-sufficient remedy would be a foregone conclusion.

A NEW LAW SCHOOL REVIEW

THE *Georgetown Law Journal*, the first issue of which appeared in November, will be welcomed to the ranks of law school journals. As the editors rightly say, Georgetown is not newly arrived among the leading law schools of the country, and the publication of a review should perhaps earlier have been attempted. The first number contains articles of timeliness and importance. Frank J. Hogan's discussion of "The Patent Monopoly" is extended and useful. The standard set is high, and we doubt not that the *Green Bag* will often have occasion to direct the attention of its readers to noteworthy matters in the pages of the *Georgetown Law Journal*.

MR. DOOLEY'S OPINION OF OUR CRIMINAL PROCEDURE

MR. Dooley's reflections, "On Trial by Jury," make it apparent that the discussion of defects in criminal procedure has by no means escaped him. He is struck by that contrast between England and America which so often serves as a text for elucidation. "Th' laws an' th' language ar-re th' same in th' two counthries but they're pronounced diff'rent." In England, he says, a man is presumed to be innocent until he is proved guilty, and they take it for granted that he is guilty; in this country he is presumed to be guilty until he is proved guilty, and after that, is presumed to be innocent. This seems to imply that the legal burden of proof and the actual burden of proof do not coincide. Whatever presumption of innocence a prisoner may be entitled to at law, it may be disregarded in the actual conduct of a trial; this is what Mr. Dooley would say, and he is undoubtedly voicing a common opinion of laymen that the criminal law is administered with other purposes than the single-minded aim of detecting the guilty and protecting the innocent. He plainly considers the English system to bear too heavily on the innocent, and the American system to be too lenient to the guilty; and each system seems to him as bad as the other. But it is not of the traditions of the criminal law that he makes mockery, but rather of their supposed neglect and abuse, and thus he joins the ranks of those who would like to see the ideal of the common law perpetuated and justice impartially administered in accordance with time-honored principles.

Mr. Dooley's estimate of English criminal procedure is warped by a too evident anti-British prejudice, which serves as a means of averting unpopular comparisons to the disadvantage of our own courts of law. His picture of the method of trial is extravagant and whimsical in both cases, but it is the American system which really has most to fear from his satire. No truthfulness in the description of the English judge will be recognized. We all know that he refrains from anything which might influence the jury regarding the merits, in his analysis of the evidence, and his charge does not deserve to be burlesqued in this fashion: "Pris'ner at th' bar, it is now me awful jooty to lave ye'er fate to a British jury. I will not attimpt to infloonce thim in anny way. I will not take th' time to brush away th' foolish ividence put in in ye'er definse. Ye'er lawyers have done as well as they cud with nawthin' to go on." Outside comic opera, an English judge whose instruction to the jury could be paraphrased in this strain is inconceivable. But the description of the American

judge is much closer to fact. He may not, in terms, instruct the jury that "he's all up in th' air about th' case an' doesn't know what he ought to say to thim," but the absurd rule prevailing in many of our jurisdictions which prevents a judge from commenting on any portion of the evidence practically relieves him of the duty to make any effort to secure an intelligent verdict. The uselessness of such a judge as a part of the machinery of justice is dramatically exhibited by Mr. Dooley in words vividly portraying his impotence:

"Th' pris'ner is brought into coort, smilin' an' cheerful, th' flashlights boom, th' cameras click, th' ladies swoon, an' th' judge says with a pleasant smile: 'It is me dhread jooty to sintince ye to th' Coort iv Appeals. Long life to ye.' "

The *Crippen* case is doubtless fresh in Mr. Dooley's mind, yet in that case the rights of the accused were scrupulously cared for, and the speed of the proceedings does not justify the conclusion that he did not have a fair opportunity to clear himself. If Mr. Dooley would let us look upon the English system to relieve our eyes of the strain of beholding the caricature of justice offered by our own procedure at its worst, his satire would make a more telling impression. He sees the absurdities of protracted postponement of the trial, of the laborious method of impanelling a jury, of that too indulgent demeanor of judges and other officials toward the prisoner which panders to newspaper sensationalism, of toleration of frivolous defenses, of over-attention to technicalities with regard to admission or exclusion of evidence, and of improper reversals on purely technical grounds. The evils are of course overstated, and some of our courts are conspicuously free from many if not from all of them, but the sombre truth underlying much of Mr. Dooley's buffonery will be recognized, and it will be long before our procedure will be so purged of these defects as no longer to offer humorists an inviting field for sarcasm. One does not make mockery of justice, of liberty, or of any other sacred possession of the American people, and so soon as our courts come to be administered with due regard to their higher function any mockery of them will provoke resentment rather than mirth. Many successors to Mr. Dooley can doubtless continue, before that Utopian event, to employ his methods of entertainment to the delight of a sympathetic audience.

THE ETHICS OF ADVOCACY IN AN UNJUST CAUSE

REFERRING to Brougham's famous speech before the judges of the Queen's Bench in defense of Queen Caroline, the *Law Journal* has this to say:

> The real truth is that Brougham intended to address a threat to George IV and his advisers rather than to frame a considered statement of the duties of an advocate. . . . The allegation [of Disraeli] that advocates are permitted to say anything "provided they be paid for it" is entirely contrary to the traditions and practice of the profession. Within the last few days the Lord Chief Justice, as president of the Court of Criminal Appeal, has reproved a member of the bar who, knowing that his client had already been convicted, sought to secure his acquittal by appealing to the jury in impassioned language not to attach the stigma of criminality to his name. It has always been recognized that an advocate is bound, in doing his utmost for his client, to have regard, in the words of Sir Alexander Cockburn, to "the eternal and immutable interests of truth and justice."[1]

The duty of an advocate in an unjust cause has received interminable discussion, and if the high-sounding words of Cockburn smack somewhat more strongly of the ideal than of the reality,

[1] Law Journal, London, Nov. 30, 1912, p. 717.

hardly any one will deny that the ethics of the profession are undergoing an improvement and that a rule more satisfactory than the American Bar Association canon may be looked for in the near future. As a tentative expression of the highest ideals and traditions of the bar, we have the hardihood to propose the following rules which may perhaps not be so utterly Utopian as to merit the unqualified disapproval of our readers:

In General. — An advocate has a two-fold function to perform, as an officer of the court and as the representative of his client in the conduct. of a lawsuit. He thus owes duties alike to the court and to his client. When these two kinds of duties come into conflict his duty to the court takes precedence. But in view of the fact that his client has no right to demand of the court anything but impartial justice, the fulfillment of the advocate's duty as an officer of the court involves no breach of his duty to his client, and *vice versa.*

The Duty of the Advocate to the Court. — As an officer of the court, the function of the advocate is not judicial, as he is in close personal contact with one of the parties to the controversy, and is more conversant with the circumstances of his client's side of the case than of those of the opposite side. Nor is his function that of a party to the dispute, as the ethics of his profession prohibit the prostitution of his talents for fees. His function is rather that of an intermediary between court and client, and his relation to the court is advisory or intercessory.

An advocate is not bound to advise the court of anything which may aid the cause of the opposite party, that being the allotted duty of opposing counsel, but he is precluded from suppressing anything which may destroy or weaken his client's cause, and he is obliged to present the case with complete regard for the interests of truth and justice. He is bound to urge a fair, impartial view of his client's case upon the attention of the court, and to seek to the best of his ability to state the whole truth, rather than to present a distorted or fragmentary statement of the law and facts. If the law and facts do not favor his client's success in the controversy, his sole effort must be expended in preventing the imposition of unjust and excessive remedies.

The Duty of the Advocate to his Client. — An advocate is bound by his duty to his client to urge every point in his favor which he can consistently with truth and justice, without inviting the tribunal to pronounce a partial or one-sided judgment, and he should give his client the benefit of any reasonable, legitimate doubt which he may entertain of the merits of his client's case, and present the case with as much liberality of view as he conscientiously can, that the decision of the tribunal may not be forestalled or prejudiced when it cannot be clearly foreseen.

An advocate is also bound to expose the weaknesses of his adversary's case, if he deems them of material importance, and to avail himself of every proper presumption which he honestly believes may operate to his opponent's disadvantage. He should first endeavor to master his client's side of the controversy completely and to present the case with all the sympathy to which the client may be entitled, and he should then work for as liberal a judgment in his behalf or as considerable a mitigation of remedy as the ends of justice may require.

PETITION TO HAVE GOVERNOR HANGED

MANY instances have been cited wherein executive clemency exercised on the strength of petitions from the people has been misplaced; but this was never more clearly shown than in a case that occured in Baltimore in the days of the "Know-Nothing Party," when lawlessness was rife.

A youth, a member of a prominent family, had shot and killed a neighbor, through a window in his house. The youth was tried, convicted, and sentenced to hang. As the day approached for his execution, a petition with many signatures was sent to the Governor; but one of the influential citizens of Baltimore, resolved that a pardon should not be granted if he had power to prevent it, protested to the Governor.

"But," replied the Governor, "see how strongly the petition reads, and how numerously it is signed."

"Governor," said the visitor, "if you will give me twenty-four hours I will bring here a petition signed by the same men who signed this one, and they will petition the Legislature to hang you. Allow me but twenty-four hours."

The stay of sentence was granted, and in twenty-four hours the visitor returned. He handed the Governor a petition with this remark:

"Observe the names, and then read the petition."

The Governor found that the names were identical with those in the first petition. The body of the petition read as follows:

"Whereas the Governor of Maryland is notoriously open and defiant in the violation of law, and whereas he has been found to be guilty of treason, we, the undersigned, pray the Legislature of the State of Maryland to condemn the said Governor to be hanged."

This was too much for the Governor; and the result was that the murderer was hanged.

WORKMEN'S COMPENSATION

(From the *London Chronicle*)

MARY ANN, while cutting bread,
Cut her finger. With elation
Mary Ann went off to bed,
Claiming compensation.

William Jones, while carting coke,
Bruised his shin. With jubilation
William cried: "A happy stroke!
One year's compensation."

Charles, the waiter, dropped the cheese
Hurt his toe; retired from waiting.
Six months' claim. At Brighton he's
Now recuperating.

Jane, while cooking, trod and slid
On some fat, and fell obliquely;
Interesting invalid,
Drawing two pounds weekly.

Jack, the hodman, scratched his wrist,
Scratched it with a scaffold splinter;
On the compensation list,
Resting for the winter.

On a job at Maida Vale
With his hammer, Green, the plumber,
Hit the wrong nail (finger nail),
Resting till next summer.

Bless the goodness and the grace,
And the thoughtful legislation
That conferred upon our race,
Workmen's Compensation.

AN ANECDOTE OF HAMILTON

ONE of the qualities necessary to a great advocate is the dramatic sense, which so groups and marshals facts and arguments that they stir the imagination and carry conviction into the minds of a jury. There are occasions when only by the use of this sense can a lawyer stem the strong popular feeling that runs against his client.

About a hundred years ago, in the city of New York, the body of a girl was found in a well. Her lover, a young mechanic of good character, was put on trial for the murder, and Alexander Hamilton was retained for the defense.

Popular sentiment against the accused ran so strongly as to give undue force to the circumstantial evidence that was put in by the state. Hamilton, while endeavoring to allay the excitement and to impair the effect of the damaging facts, reserved himself until the prosecution had concluded the examination of the principal witness, on whose direct testimony the state chiefly relied.

This witness, a man named Croucher, bore a bad reputation, and Hamilton had become convinced that he was the murderer. The night being well advanced when the examination in chief was concluded, Hamilton took lighted candles and placed one on each side of the witness, so as to throw his face into strong relief.

The prosecution objected to this procedure.

"I have," said Hamilton, "special reasons, deep reasons, reasons that I dare not express, reasons that, when the real culprit is detected and placed before the court, will then be understood."

The court overruled the objections, and the candles remained. Hamilton then fixed a piercing gaze on the witness, and amid breathless silence said, without turning: —

"The jury will mark every muscle of his face, every motion of his eye. I conjure you to look through that man's countenance to his conscience."

Then began a cross-examination, which caused the witness to stumble, to contradict himself, and finally to break down. The jury acquitted the prisoner without leaving their seats.

The subsequent career of Croucher justified Hamilton's dramatic device. After committing several crimes, he fled to England, where he was hanged for a heinous offence.

COURT-ROOM DEVICES

MANY devices have been employed in the court room productive of an effect far more telling upon the jury than mere words.

A suit was brought some years ago by the people of a certain quarter of Montreal against a manufactuing company. The vile odors of the chemicals used in the works, they alleged, had made the neighborhood untenantable, and seriously lessened the value of their property.

The judge and the jury were disposed to turn a deaf ear to the complaint. The company was rich and powerful, and "an alleged smell," as their counsel declared, "was too intangible a grievance to grasp."

One of the opposing counsel was seen to go out and not long after returned with two glass retorts.

"Here," he said, in the course of his plea for his clients, "are the offending subjects of our contention." He passed them to the judge and then to the jury, who smelled them and smilingly declared them pure and odorless.

"But," said the counsel, "the company mixes them!" He suddenly poured the contents of one of the retorts into the other, and the nauseous fumes of hydro-sulphuric acid or sulphuretted hydrogen filled the air. Judge, jury and spectators choked for breath. It was necessary to adjourn court until the next day, when heavy damages were at once awarded to the plaintiffs.

In a murder trial before a western court, the prisoner was able to account for the whole of his time except five minutes on the evening when the crime was committed. His counsel argued that it was impossible for him to have killed the man under the circumstances in so brief a period, and on that plea largely based his defense, the other testimony being strongly against his client.

When the prosecuting attorney replied, he said, "How long a time really is five minutes? Let us see. Will his honor command an absolute silence, in the court room, for that space?"

The judge granted this request. There was a clock on the wall. Every eye in the court-room was fixed upon it as the pendulum ticked off the seconds. There was breathless silence. We all know how time which is waited for creeps and halts and at last does not seem to move at all. The keen-witted counsel waited until the tired audience gave a sigh of relief at the close of the period, and then quietly asked: —

"Could he not have struck one fatal blow in all of that time?"

Dramatic effects, however, are hazardous agencies to use, as it is not impossible to spoil them as an anticlimax — as a member of the English Parliament found when at the close of a fiery adjuration to the government to declare war, he cried out, 'Unsheath the sword!" and drawing a dagger threw it on the floor.

"Ah!" coolly said an opponent. "There is the knife, but where is the fork?"

A shout of laughter was the result.

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 sensational murder case was being tried in one of the rural districts of West Virginia, and finally, after a long drawn out fight, had reached the exciting stage of a verdict. As the husky band of countrymen filed slowly in from the jury-room, the prosecuting attorney smiled confidently to himself, because he felt sure of a verdict of involuntary manslaughter. And in this he was not wholly disappointed. The clerk took the paper handed him by the foreman, and, to the surprise of all, read in a sonorous voice:

"We, the jury, find the defendant guilty of involuntary slaughterman."

"This poem was written by a prominent lawyer of this city. Has it any value?"

"About as much value," said the editor, "as a legal opinion written by a poet."

— *Washington Herald.*

Jack — I tell you courting a girl is mighty expensive.

Tom — Yes, but thank heaven one doesn't need a lawyer to sue for a girl's hand.

— *Boston Transcript.*

First Financier — Aren't you afraid this deal may land us in jail?

Second Financier — Nonsense. You seem to forget that millions are involved. — *Exchange.*

"It's all right to fine me, Judge," laughed Barrowdale, after the proceedings were over, "but just the same you were ahead of me in your car, and if I was guilty you were, too."

"Ya-as, I know," said the judge, with a chuckle. "I found myself guilty and hev jest paid my fine into the treasury same ez you."

"Bully for you!" said Barrowdale. "By the way, do you put these fines back into the roads?"

"No," said the judge. "They go to the trial jestice in loo o' sal'ry." — *Harper's Weekly.*

The late Judge Gary of Baltimore, who in his younger days was a member of the State Legislature, was noted for his quickness at repartee. On one occasion he had introduced a bill that proved very obnoxious to several members of the opposing faction. After adjournment one of the discontented came rushing up to him in a great state of excitement.

"Look here, Gary," he exclaimed. "I'd rather blow my brains out than advocate such a measure."

"My dear sir," replied Gary, with a twinkle in his eye, "you flatter yourself on your marksmanship." — *Newark Star.*

The Legal World

Monthly Analysis of Leading Legal Events

Two important decisions have been rendered by the United States Supreme Court construing the Sherman act. In one of them the Court refused to sanction a combination of dealers in enameled iron bath tubs made under cover of the supposed protection of the patent protecting the enameling process used, and

in the other it found a railway to have unlawfully stifled competition by acquiring 46 per cent of the stock of another great railway, a substantial amount of whose business, though a relatively small proportion, competed with that of the former road. The Court thus seems to have been borne onward by the momentum of the doctrine which it itself laid down in the *Standard Oil* and *Tobacco* cases, and also to reflect a considerable part of the popular judgment on the question to what extent it may be advisable to maintain actual competition in the public interest. The *Northern Securities* decision, in which the Court was closely divided, had come to be accepted as settled law, and the Court so far acquiesced in the attitude of that decision as to hand down with absolute unanimity a railway decision slightly amplifying the doctrine of the earlier case.

Under the inspiration of the example set by the Supreme Court in the reform of equity procedure, the project of the American Bar Association for the reform of common law procedure is being pressed earnestly by one of its committees upon the attention of Congress. Another committee is interesting itself in the success of another beneficial measure for which the Association stands sponsor, a statute increasing the salaries of federal judges.

Evidence that American criminal procedure is equal to the demands of prompt and even justice has not been lacking in New York state, where the efficient conduct of the cases against Becker's four accomplices and of the case against Hyde won Justice Goff well merited praise. The protracted Ettor trial in Massachusetts, however, is a discouraging episode, showing that our progress must needs be extremely slow. New York state, moreover, has little to boast of in view of the miscarriage of justice involved in the Patrick case, for whether Patrick was rightly or wrongly convicted of murder by the courts of his state, his pardon by Governor Dix showed that in either event justice had been defeated.

The country as a whole exhibits no great interest in the reform of criminal law and procedure and in scientific methods of dealing with offenders, but the California Bar Association has just gone on record as in favor of indeterminate sentence and parole for first offenders.

Retrogressive action has been taken in Arizona and Idaho, both of which have adopted the recall of judges, and the evil effects of the system of elective judges were shown in many of the state elections. In Chicago the failure of the Municipal Court ticket of the Chicago Bar Association led to an agitation for the election of judges on a separate ballot, without party designation, and there is some hope that the evils of the system may be mitigated by this expedient. The courts of the country may soon find themselves forced to face new problems connected with the uprising of popular democracy, of which the latest important symptoms are the adoption of woman suffrage constitutional amendments by four states, while the direct initiative has been adopted in Idaho.

Interest has been shown in the subject of professional ethics, the Nevada Bar Association having adopted the canons of the American Bar Association, while the Rhode Island Bar Association has referred the drafting of a code to a committee.

Personal

Chief Justice Olson of the Chicago Municipal Court has received a salary increase of $2,500 a year by an ordi-

nance passed by the City Council, making his annual salary $10,000 a year instead of $7,500.

Hon. Frank B. Kellogg, president of the American Bar Association, has announced the appointment of the following committee on increase of salaries of federal judges: Edward A. Sumner, chairman, New York, N. Y.; Hon. J. M. Dickinson, Nashville, Tenn.; Hon. Chapin Brown, Washington, D. C.; Hon. Charles E. Shepard, Seattle, Wash.; Hon. John W. Griggs, Paterson, N. J.

Robert Franklin Walker, who has been elected Justice of the Missouri Supreme Court for ten years, assisted in the revision of the Missouri statutes of 1899 and was elected Attorney-General in 1892. He was chairman of the commission, selected by the General Assembly, and approved by the Governor, which compiled, revised and annotated the statutes of 1909. Judge Walker has been president of the Missouri Bar Association and was one of the editors of "The Cyclopedia of Law and Procedure." His plurality in the November election was greater than any other candidate for Supreme Judge.

Procedure and Courts

Boston will have a new court, to be known as the Domestic Session of the Municipal Court, which will care for all troubles arising from wife beating, non-support and other cases of the kind. The idea of a special session of the court for handling cases of this kind is that of Chief Justice Wilfred Bolster. The hearings in the new Domestic Session room will be public, but it is believed that they will not attract any spectators other than those interested in the cases that are being tried.

Governor Gilchrist of Florida has sought ever since his induction into office the securing of the adoption of some system of pleading and practice in the courts simpler, more direct and inexpensive than at present. With this end in view he called a conference of circuit judges in Tallahassee some weeks ago. That body framed certain recommendations which if enacted into law will go far toward attaining the Governor's object. Acts embodying these recommendations will be introduced in the legislature at the session next spring.

The Law Association of Philadelphia has adopted a series of resolutions on the subject of judicial reform which express a compromise. The special committee had decided that the only practicable way to secure immediate relief was the addition of one judge to each of the five Common Pleas Courts, by legislative action. The association adopted this view, but at the same time instructed the special committee to take appropriate steps to secure the adoption of a constitutional amendment "permitting the establishment of a municipal court." Five years must elapse before a municipal court can be provided for by this method of constitutional amendment.

A committee of the American Bar Association has been appointed to secure the simplification of legal procedure in the federal courts. The committee is making a vigilant campaign to have Congress authorize the Supreme Court of the United States to do away with the unsatisfactory features of the present system of procedure at law. A uniform system in equity throughout the United States is now covered by new and simplified rules issued by the Supreme Court, and the American Bar Association, through its committee, will urge Congress to provide for the similar

simplification and uniformity of the practice at law in the Federal Courts. It is expected that Congress will give the Supreme Court the necessary power, which it now lacks, to make such a system available. It is hoped that upon the adoption of such a uniform system of simplified practice in the federal courts, many of the states will follow the example.

In giving the gist of the new rules of equity practice and pleading promulgated by the United States Supreme Court, the *Legal Intelligencer* (Philadelphia) says: "A careful reading of these rules suggests that their purpose is to relieve causes in equity of unnecessary technicality, speed the cause to an issue and push it to trial and final decision at the earliest opportunity. Thus, Rule 18 provides that, unless otherwise prescribed by statute or these rules, the technical forms of pleading in equity are abolished; Rule 19, *inter alia*, that the court in every stage of the proceeding must disregard any error or defect which does not affect the substantial rights of the parties; Rule 46, that if the appellate court shall be of the opinion that evidence which has been excluded should have been admitted, it shall not reverse the decree unless it be clearly of the opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require; Rule 22, that if at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be transferred to the law side and be there proceeded with, with only such alterations in the pleading as shall be essential. . . . Taken as a whole, the rules show a distinct advance in methods of procedure in equity cases in the direction of simplicity, expedition and economy."

Criminal Law and Procedure

The trial of Mrs. Elsie Hobbs Raymond, charged with the murder of Mattie Hackett, opened at Augusta, Me., Nov. 19, before Chief Justice Whitehouse. From thirty-six veniremen examined a panel was made up in an hour and twenty-four minutes. The jury brought in a verdict of acquittal Nov. 27, after less than two hours' deliberation.

The trial of Burton W. Gibson, the New York lawyer charged with the murder of his client, Mrs. Rosa Menschik Szabo, opened at Goshen, N. Y., Nov. 18, one hundred and ninety talesmen being summoned, from which a panel was made up before the close of the first day's session of court. The evidence was all in on the fifth day, Friday, the jurors being allowed by Justice Tompkins to go home till Monday. The arguments of counsel were made on Monday, the case going to the jury in the afternoon. After over fifteen hours' deliberation, the jury reported that they could not agree and were discharged. The final vote stood nine for acquittal and three for conviction.

"Gyp the Blood," "Whitey Lewis," "Lefty Louis" and "Dago Frank," the gunmen convicted of the murder of Herman Rosenthal in New York, were sentenced by Justice Goff Nov. 26 to die in the electric chair at Sing Sing during the week of Jan. 6. The verdict was rendered by the jury after only an hour and ten minutes' deliberation, seven hours having been required for the Becker verdict. The prisoners were ably defended, and the fairness and celerity of Justice Goff's conduct of both this and the Becker trial have been widely commended. The trial of the four accomplices of Becker opened on Monday, the 11th, a jury being selected in two days, and sentence being pro-

nounced two weeks later, on Tuesday the 26th.

John Schrank, who shot Colonel Roosevelt, was taken to the Northern Hospital for the Insane, near Oshkosh, Wis., Nov. 25, Judge Backus having committed him to that institution on Friday after a commission of alienists adjudged him insane. Schrank had not changed his demeanor since sentence was pronounced. His disease, pronounced paranoia, and probably incurable, may result in his spending the rest of his life in the asylum. However, should he ever be pronounced sane, he will be returned to Milwaukee and tried for the attempt on Mr. Roosevelt's life.

Capital Punishment

Judge James E. Withrow sentenced a young man twenty years old to life imprisonment rather than to death in the Circuit Court at St. Louis two months ago, for the murder of a policeman. The court exercised its discretion in this manner in view of the prisoner's youth, his willingness to plead guilty, and the refusal of juries to inflict the death sentence in many similar instances. Judge Withrow after sentencing Wiggins expressed his views regarding capital punishment as follows: —

"Prior to 1907 the laws of Missouri required the infliction of the death penalty in all cases of conviction of murder in the first degree. Under the old statute, where the jury found the defendant guilty they had nothing to do with the punishment; it was fixed by law. Five years ago the Legislature amended the statute, which now requires the jury to assess the punishment at death or imprisonment in the Penitentiary for life.

"While capital punishment has been abolished in several of our states, and in some foreign countries, there are two sides to every important question. The terrible tragedy which was recently enacted in Cooper County, Va., would seem to furnish a strong argument in favor of the retention of the death penalty on ou rstatute books for application in extreme cases.

"In nearly all densely settled communities are found lawless men and women, who neither fear God nor regard man. No punishment seems to have any terror for them, except the fear of expiating their crimes on the gallows. Incarceration in a comfortable, modern penal institution for life, with the possibility of a pardon, commutation of sentence or parole in a few years by some considerate Governor or Pardoning Board, does not seem to afford the necessary protection to human society.

"In recent cases in Missouri and Illinois where juries have assessed the death penalty, the Governors have declined to interfere. These incidents and some others that could be mentioned tend to show some change in public sentiment."

In this connection, it is of interest to note that a proposed change in the law is proposed in the District of Columbia, to the end that juries may have the option of bringing in a verdict of "guilty, but without the death penalty" where the charge is murder in the first degree.

The tendency of the day, however, does not seem to be in the direction of giving juries discretion in prescribing the mode of punishment. The determination of the terms of sentence is being recognized to belong properly to the judge or his expert advisers.

Bar Associations

California. — At its annual meeting in Fresno, Cal., late in November, the

California Bar Association declared in favor of an indeterminate sentence law for the cases of persons convicted of a first offense, and of the parole of such persons within the time for which they are sentenced to imprisonment. The annual address was delivered by President C. E. McLaughlin of Sacramento (see p. 11 *supra*). Hon. Peter J. Shields of Sacramento read a thoughtful paper on "The Judicial Office."

Nevada. — The annual sessions of the Nevada Bar Association were held in Reno, Nev., November 15th and 16th.

The first day's session was devoted to formal addresses as follows: the President's annual address by Hugh H. Brown of Tonopah, Nev., on "Unfair Criticism of the Courts"; Curtis H. Lindley, author of Lindley on Mines, the first President of the California Bar Association, and the incumbent President of the San Francisco Bar Association, delivered a notable address on "The Legal Profession in the Social Crisis"; L. G. Campbell of Winnemucca, Nev., one of the prominent mining lawyers of the state, presented a paper on the question "Should the Extra-Lateral Vein Right be Abolished." He recommended that Congress repeal the apex law. The paper will attract wide attention throughout the mining states. Samuel Platt of Carson City, Nevada, United States District Attorney, delivered an address on "The Lawyer after Election."

At the second day's sessions the Association adopted the American Bar Association's "Canons of Legal Ethics." The Constitution and By-Laws were amended so as to make it the duty of the Association to investigate charges of misconduct, not only against practitioners at the bar, but also judges on the bench. In the debate which preceded the adoption of this radical and perhaps pioneer measure, it was pointed out that while there was no present need for such a provision in the state of Nevada, the state being well satisfied with the present high character of its judiciary, both state and federal, yet it was felt that such a provision might afford a measure of protection in the future. Furthermore, it was pointed out that the provision would serve a useful purpose in those instances where the conduct of a judge is misunderstood and misconstrued, with a consequent ferment of public opinion. In such a case a judge can call upon the Bar Association to pass upon the record and rectify public opinion.

The Association instructed its proper committees to make a study of the several "Uniform Acts," heretofore drafted under the general supervision of the American Bar Association, and to recommend to the incoming Nevada Legislature such acts as might be suitable in this state. A resolution was also adopted in connection with the question of proposed amendment to the divorce laws of this state, contemplating a change from the statutory residential period of six months to twelve months.

The new officers of the Association are: president, A. E. Cheney, Reno; vice-presidents, L. G. Campbell, Winnemucca; H. R. Cooke, Tonopah; secretary, James D. Finch, Reno; treasurer, George S. Brown, Reno.

Oregon. — Martin O. Pipes, retiring president, called the annual meeting of the Oregon State Bar Association to order at Portland Nov. 19, and in his opening address spoke particularly of the judiciary recall and pointed out many reasons why it was not fair to the judiciary. Judge O'Day and A. E. Clark, members of the committee ap-

pointed by the Governor to revise the procedure and practice of the state, each made extended addresses as to what should be done, but the committee made no definite recommendations. George N. Davis, Circuit Judge-elect of Multnomah County, delivered an address, taking as his subject, "A Dual Obligation of the Lawyer." The following officers were elected: president, Charles H. Carey; secretary, W. L. Brewster; treasurer, C. J. Schnabel.

Rhode Island.—Former Associate Justice Charles C. Mumford of the Superior Court was elected President of the Rhode Island Bar Association at the annual meeting in Providence Dec. 2.

It was voted that the President appoint committees on new members and prepare a code of ethics.

A proposed act prepared by former Chief Justice Charles Matteson, giving to creditors a remedy supplementary to execution, was presented and referred to committee with full powers. At the banquet, Walter George Smith of Philadelphia spoke on "The Lawyer as a Citizen."

The officers were elected as follows: President, Charles C. Mumford; vice-presidents, Nathan W. Littlefield, Nathan B. Lewis; secretary, Howard B. Gorham; treasurer, James A. Pirce; executive committee, Albert A. Baker, Frederick Rueckert, Amasa M. Eaton, John E. Canning, Archibald C. Matteson.

Vermont.—The annual meeting of the Vermont Bar Association was held at Montpelier, Vt., Nov. 12–13. In the absence of R. E. Brown, the president, Clarke C. Fitts of Brattleboro, vice-president, presided. The president's address on "Law and its Enforcement," was read by the secretary. A recommendation was adopted for a constitutional amendment placing commutation of the death sentence in the hands of the Governor instead of the legislature. The following officers were elected: president, Clarke C. Fitts of Brattleboro; vice-presidents, John G. Sargent of Ludlow, George B. Young of Newport, E. C. Mower of Burlington; secretary and librarian, John H. Mimms of Burlington; treasurer, Edwin M. Harvey; board of managers, L. C. Moody, Frank W. Williams, Charles D. Watson and Guy W. Bailey.

Miscellaneous

Arizona adopted the judicial recall into its constitution in November. President Taft, it will be remembered, vetoed the act for the admission of Arizona as a state because it contained the recall provision.

All of the Idaho constitutional amendments voted on at the recent election were adopted. The vote in favor of the initiative was 38,921, against 19,377; in favor of the recall 36,827, against 14,094. Less than half the voters expressed themselves.

Woman suffrage amendments to state constitutions were adopted in November in Michigan, Kansas, Oregon, and Arizona. In Wisconsin figures the amendment was defeated by about 75,000 majority, the Teutonic and Scandinavian sections of the state standing out most strongly against it.

The new public insurance law of Germany, which goes into effect Jan. 1, requires that every one in private employment whose annual earnings do not exceed 5,000 marks ($1,000) must be insured by the state. The premiums vary with the wages; to illustrate, they amount to about $64 on an income of $800, and are payable half by em-

ployee and half by employer. The insurance becomes effective only after ten years' premiums have been paid. At the age of sixty-five, or sooner in case of disability, the pension becomes operative, and two-fifths of the pension go to the widow in case of death.

At the November election in Chicago only three of the thirteen judicial candidates for the city courts endorsed by the Chicago Bar Association were elected, including Chief Justice Olson of the Municipal Court and Judge William N. Gemmill of the Court of Domestic Relations. The movement for separate ballots for judicial officers, to take the judges out of partisan politics, has received strong support in Illinois, a resolution in favor of this reform having been adopted by the Chicago Bar Association a few days after the election. In an address on the subject, President John T. Richards told the Association that personally he favored a system of judicial appointments, rather than an elective judiciary.

Obituary

Atlay, James Beresford, who died in England on Nov. 22, was known in this country as the author of "The Trial of Lord Cochrane," "Famous Trials of the 19th Century," and "The Victorian Chancellors." He also edited the works of Hall and of Wheaton on international law, besides publishing various historical and biographical studies. He was a son of the late Bishop of Hereford, and was called to the bar at Lincoln's Inn in 1887.

Bartlett, John P., who had served in both houses of the New Hampshire legislature, died of apoplexy at his home in Manchester, N. H., Nov. 18. He was appointed United States Commissioner for Dakota Territory in 1868, and was the first attorney to be admitted to the Nebraska bar.

Bent, S. Arthur, who died in Boston Nov. 22, was well known as a student of early New England history, and was the author of "Familiar Short Sayings of Great Men," published in 1882, and "Hints on Language" and "Notes to the Golden Legend."

Rayner, Isidor, United States Senator from Maryland, in some respects perhaps the most brilliant and soundest lawyer in the Senate, died in Washington, Nov. 25, of neuritis, at the age of sixty-two. A Hebrew, the son of well-to-do parents, he was educated at the University of Virginia and admitted to the bar in his native city of Baltimore. After service in the state legislature he was elected to Congress in 1886, being looked upon as one of the leaders of the house during his three terms of office. In 1889 he was elected Attorney-General of Maryland, adding to his reputation for eloquence and sound argument, and in 1904 he was elected to the Senate. He was always prominent in debate in that body, and was a master of satire and strong in caustic speech; a strong party man and an ardent advocate of state rights. He rose to an exalted position in the estimation of the nation and of the Senate in a few months of active service, delivering many important and scholarly speeches in that body on constitutional questions.

Wakeley, Eleazer, the Nestor of the Nebraska bar, died Nov. 21 at his home in Omaha, aged ninety. He was appointed Associate Justice of the Territorial Supreme Court in 1857. He was counsel for the Union Pacific for a number of years.

Willis, Henry B., Justice of the Appellate Court of the Second Illinois district, died Nov. 7, aged 63.

THE LATE CHARLES ALLEN

FORMER ASSOCIATE JUSTICE OF THE MASSACHUSETTS SUPREME COURT

AUTHOR OF "ALLEN'S REPORTS"

By courtesy of the Boston Herald

The Green Bag

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Charles Allen

AN EXCELLENT example of the type of men who have helped to make the standard of the Massachusetts judiciary what it is was the late Charles Allen, former Associate Justice of the Supreme Judicial Court, Reporter of Decisions, and Attorney-General, who died Dec. 13 at his apartments in Hotel Charlesgate, Boston. He lacked three months of reaching the age of eighty-six years. Since suffering a paralytic stroke in June, 1907, he had been a confirmed invalid, but had retained his mental vigor to a marked degree.

Judge Allen, who was deeply learned in the law and much admired and esteemed by the bar, was born in Greenfield on April 17, 1827, and was the son of Sylvester and Harriet (Ripley) Allen. and a nephew of George Ripley the author. Charles Allen was graduated from Harvard with the class of 1847, of which he was, with perhaps a single exception, the only surviving member. Judge Allen received from Harvard his honorary L.L.D. degree in 1892.

After his graduation he studied law in the office of George T. Davis and Charles Devens, Jr., of Greenfield, and later at Harvard Law School, and was admitted to the bar in 1850. He then began active practice in his native town, Greenfield, where he remained until 1862. In his practice he was associated at different times as law partner with George T. Davis, David Aiken and James C. Davis. In 1861 he was appointed Reporter of Decisions of the Supreme Judicial Court. He continued as Reporter until 1867, when he was elected Attorney-General of Massachusetts, continuing as such until 1872, when he was succeeded by Charles R. Train. He then resumed his private legal practice, earning a good income at the bar.

In 1880, Hon. John D. Long, then Governor of the state, appointed Mr. Allen chairman of the commission to revise the General Statutes of Massachusetts. In this work he had charge of the law limiting the hours in which hotels and saloons should sell liquors to customers. He copied from a reprint, and thus arose the "comma and semicolon" controversy twenty years later.

He was appointed Associate Justice of the Supreme Judicial Court on Jan. 23, 1882, by Governor Long. He continued in office for sixteen years, though eligible for retirement under the law when in 1897 he had reached the age of seventy years. At that time Judge Allen was in excellent health and active and so decided to continue in his official duties on the bench. In August, 1898, however, when Governor Wolcott was chief executive of the Commonwealth, Judge Allen sent in his resignation, choosing to resign at the age of 71 while in the full vigor of his powers.

Judge Allen was the author of Allen's Reports, comprising fourteen volumes embodying his work as Reporter of Decisions, and other works, including "Telegraph Cases" and "Notes of the Bacon-Shakspere Question." His culture was more than merely professional. The beauties of nature and the best in literature and art appealed to him.

His soul was sensitive to the serious questions that concern man in his spiritual relations. He was an extensive and appreciative traveler, a fisherman with the knowledge of Izaak Walton himself, and a scholar whose critical judgments commanded respect so far as his modesty permitted them to become known. He was extremely modest and retiring, and rarely appeared on social or festal occasions, but when he was called on to give a public address, such productions were always felicitous, indeed beautiful in their fine thought and lucid, graceful expression. His countenance bore the light of a singularly refined spirit, and his voice was silver music, like a clarinet in quality, that having heard one desired to hear again, and would not have it cease. His conversation was the fruit of a pure soul combined with a keen intellect and retentive memory. It was marked by a gentle humor and enriched by literary quotation and historical knowledge.

Since his retirement from the bench, Judge Allen had devoted his time to literary work and to travel. He was a Republican and took an active interest in the work of his party. In religious faith he was a Unitarian of liberal ideas. He was a man who made friends easily, and retained their confidence. He never married.

Ye Fallen Pirate

By Dan C. Rule, Jr.

ONE time there dwelt in Boston town —
'Twas during bluff King George's reign —
An Advocate of wide renowne
Ycleped Ezekiel Reuben Kayne.

Who on ye Lidde so firmly sat
Of his past life & historie,
That folk referred to him as "That
Strange, silent Man of mysterie."

He hearkened not unto ye Chimes
That call to prayer on Sabbath Day,
But sought ye Tavern; & for Dimes,
At Seven-Uppe with Cardes would play.

But our good Parson, Matthew Birch,
One night sought out ye Lawyer Kayne:
"Why comes our brother not to Church?
Speak up, my erring son — explain!"

Then Lawyer Kayne he bowed his Hedde,
& wept right bitterlie and sore.

" 'Tis little use," he sobbing said,
For I be lost forever more!"

"A Lawyer *now*; but in my youth
(At last I speak out bold & plain)
I was (good Parson, hear the truth!)
A Pirate on ye Spanish Main!"

Our Parson sighed. "Why not retrace
Ye path by which ye fell so low?
By far ye swiftest road to grace
Is that on which we travel slow.

"One upward step is plain to see,
For what ye lost ye must regain;
Go back, O Lawyer Kayne, & be
A Pirate on ye Spanish Main!"

Clyde, O.

On the Judgment of One's Peers

MY dear *Man:* —

As a remembrancer of your twenty-first birthday I send, along with my affectionate congratulations, Chesterfield's "Letters" and Machiavelli's "Prince," prompted by the spirit of an anecdote related in a third literary classic, albeit a minor one, which delighted my boyhood as well as yours. I mean dear, goody-goody "Sandford and Merton." You will remember the story of a wealthy gentleman who, bloated and almost helpless from indulgence of appetite, was recommended to a celebrated physician for treatment. Going to the latter's house the patient was shown into a waiting room whose door, connecting with the dining-room, was ajar. The doctor was entertaining a company of poor people at a sumptuous meal and urged them to eat and drink heartily. The sybarite was delighted at the prospect for himself, only to be disillusioned when placed upon the diet of an anchorite and forced to perform physical exercise which in his gouty condition was torture.

I would not recommend the writings of these arch-worldlings to your cousin, Horace. I have often told you he is not at all like my brother but takes after his mother's family. He crooks the pregnant hinges of the knee so naturally that I am sure he was born morally bow-legged. Your case and his demand different didactics and for you I venture to prescribe even the writings of one who reminds a conquering prince as a matter of course to extirpate the family of the conquered prince, and of the noble Lord who counsels his son to flatter people behind their backs in the

hearing of tale-bearers. Discarding much that nowadays must inspire horror or contempt, you may find in the more moderate precepts of both authors as to winning people, holding people and using people, a corrective of your own aggravated individualism. You must not feel hurt. I say *individualism*; I do not mean ordinary egoism. The distinction is the wide one between over-conscientiousness and vanity. You do not lack worldliness, through other-worldliness, or idealism in the visionary sense. I am speaking of the defects of your qualities which themselves I admire. (Would that your cousin Horace had defects of his defects! I fear he is a sycophant without a flaw of honesty.) You make a fetich of self-reliance; you cherish the dream of running this world on pure intellect without emotional alloy; you have a puritanical dread of appearing to seek popularity from mercenary motives; you are too "offish" to ask a favor from one to whom it would be only a pleasure to comply; you are congenitally a dissenter, — a prevailing sentiment among your own class, or any strong expression of opinion tending to drive you into opposition. You cannot afford to let the eremitical mental and moral spirit deepen and possess you.

The merely prudential motive is one not to be ignored by anybody. I know it is irritating to a man of self-respect and dignity of character to see a rival of slender intellectual equipment but abundant *ad hominem* facility make his career a continuous *succès d'estime* without ever achieving solid success. But, on the other hand, pleasing manners and address, the patience of a good listener and a spirit of tactful helpfulness are legitimate adjuncts of positive ability. Nothing is more forlorn than the spectacle of a man of sterling parts handicapped at every point and restricted to half results because he cannot "get along" with people.

But I warn you against aggravated individualism for a still deeper reason. You can never know yourself except through realizing others' opinion of you. You can never find yourself save by finding an audience. It would be the height of folly to retire still deeper into your study and prepare for success by reading the biographies of men who have succeeded. I had a friend once who started out to achieve fame on strictly *a priori* principles. He had a more than ordinarily large head, containing, alas, not its fair proportion of gray matter, and reasoned that cranial bulk was necessarily potential of greatness and all that was required of him to come into his own was to familiarize himself with the lives of former great men and do as they had done in similar circumstances. He never has arrived and when last I heard of him he was still encincturing his skull not with a laurel but a tape-measure and still devouring biography. In a broad and vague sense history repeats itself but never so identically as to make the actors of past scenes anything more than approximate guides for those now on the stage.

While contemporary reputations, speedily achieved, are usually ephemeral it would be impracticable to write, or paint, or compose directly for posterity. Lowell has somewhere remarked that he had long ago satisfied himself by a good deal of dogged reading that every generation is sure of its own share of bores. Antiquarian research never unearths new minds of magnitude; the commanding figures of each age were men who received some appreciation from their contemporaries and, if they lived long enough, died famous. The apothegm that the judgment of a foreign nation is equivalent to that of

contemporaneous posterity has been taken more seriously than any half truth deserves to be. Foreigners are quick to recognize something akin to their own national genius, as Frenchmen did in the works of Poe, but a writer whose inspiration is indigenous must first arrive in his own country.

Now, whether one be laying out his life on a five-talent plan, or be more humbly striving to make one talent go as far as it can, he must begin with an appeal to the appreciation of the man next door. Recalling the look of polite resignation you have often worn in my presence I can fancy your expression of patronizing indulgence as you read. I have a practical corollary, however, which may not be altogether trite. Most people realize the judgment of their peers only through the bitter experience of tangible failure. Some, indeed, ask advice as to definite projects in view. Next to nobody seeks generally to sensitize himself to the influence of outside criticism. Cousin Horace and his numerous ilk "cultivate people" in order to "break into society," or to gain clients or customers. Very few deliberate how far they may attain to seeing themselves as others see them as the basis of self-criticism. That old rat, Polonius — he *was* baned for a rat by the way — touched upon the point when he admonished *his* son: —

"Take each man's censure but reserve thy judgment."

If you ever decide to follow in my professional footsteps it should be from a spontaneous call to the law much stronger and more unmistakable than my present call to preach. You must not impute a motive of indirectly interesting you in professional affairs when I say that the benefit of something akin to forensic advocacy is desirable for the good of one's general intellectual life. Forensic ethics indeed limit an advocate to presentation of the evidence and making the facts themselves speak; the expression of his personal opinion is precluded. Nevertheless, the underlying theory is that truth is mighty and will prevail and that the best method of reaching truth is through hearing the strongest utterances from diverse points of view. This policy has survived centuries of misconception of its ethics by laymen because of its real utility. Even if you do not become a member of the bar I trust you will cultivate the attitude of judicial receptivity without which advocacy itself misses its major convincingness.

My secretary is away and I copy this passage out of Bryce's "American Commonwealth" in my own hand — fortunately you are one of the few persons in the world who could read it: —

"Any one who has made it his business to feel the pulse of English opinion must be sensible that when he has been away from England for a few weeks, he is sure, no matter how diligently he peruses the leading English papers of all shades, to 'lose touch' of the current sentiment of England in its actuality. The journals seem to convey to him what their writers wish to be believed, and not necessarily what the people are really thinking; and he feels more and more as weeks pass, the need of an hour's talk with four or five discerning friends of different types of thought, from whom he will gather how current facts strike and move the minds of his countrymen. *Every prudent man keeps a circle of such friends, by whom he can test and correct his own impressions* better than by the almost official utterances of the party journals."

A politician is necessarily an opportunist and with him, sensing public opinion is of primary concern and not

merely a matter of incidental importance. But the circle of discerning friends would be a feature of universal utility, provided it were large enough and sufficiently varied in point of view.

There is grave peril in restricted mentorship. Partnerships of two persons in literary production have not been infrequent and of some of them it may be said, as it was of the Brothers Goncourt, that they wrought as one composite mind, there being no discernible individual strands. Mental partnerships, without literary production, are very common indeed, and by this is meant not unions of the oak and the ivy but of two equally strong natures. They read and discuss the same books, compare notes and modify one another's extremes. After a time either may be relied on to express the same opinion without consultation, which will be different from the view either would have held had he not assimilated the other's personality. Up to a certain point the mutual corrective influence is advantageous. Beyond it lies the tendency to rest content with the approving judgment of a single fellow-mortal and an opinionativeness all the more inveterate because of the concurrence of another mind which in reality acts like another lobe of the same brain.

Were I writing an essay I might descant upon the similar advantages and risks of identification with a group of fellow-craftsmen. Such a circle, however informal in character and even though it do not degenerate into a gross mutual admiration society, inevitably evolves a mutual sensitiveness for *amour propre* and corporate sentiment, ideals and limitations — the very essence of provincialism. This narrowing tendency has been perceptible even in important cliques of men of genius, in protest against conventionality or for accentuation of something that was sorely needed but, after all, was not the one thing needful.

Young men of your temperament have a goodly assortment of lofty aspirations and eternal verities which in time prove not only "frail as frost landscapes on a window pane" but laughable as schoolboy rhetoric. The seriousness with which youth takes itself is deepened by the sentiment, frequently uttered in varying form and context, that it is personality alone that gives value to a work of art or, indeed, to work, not merely routine, of any sort. Personality *is* indispensable in so far as it brings originality and sincerity, and the earmark of style, which the writer or artist could not have suppressed had he tried, is merely the guinea's stamp. Conscious personality is another name for mannerism.

The gospel of self-reliance and courage of conviction has been fanatically preached. I particularly admire the courage frankly to change one's mind. It betokens neither indolent conformity nor servile conventionality to render one's self *en rapport* not only with the opinions, but with the sentiments and impressions of those whose suffrage would be the beginning of the judgment of posterity if one's work were to live. This is a matter of self-education and Alma Mater, in whose lap you still sit, has nothing in her curriculum so educationally crucial. You asked me to suggest a motto for your new bookplate. I suppose *Try your life on a dog* would lack dignity even if it were put into Latin. How will this do?

Eyes to the stars, ears to the ground.

Affectionately if saturninely,

FATHER.

Law and Philology: the Meaning of SS.

By Joseph Osmun Skinner
of the New York City Bar

IN these days of the "modern law" of real property, in these modern days when an attorney is chary of quoting a Latin phrase in court lest it cause knowing glances among his colleagues, one is inclined to apologize to the busy practitioner before taking him into a purely historical field. For philology is considered an historical field today. As Vice-Chancellor Kindersley said in an English case,[1] "It is not necessary to go into the derivation of the word, for that sort of reasoning would not assist in the administration of justice." Though we have apparently graduated from the philological stage of legal interpretation we have not yet reached the Looking-Glass world of Lewis Carroll's fairy story.[2] There Humpty Dumpty says to Alice, in a rather scornful tone, "When I use a word it means just what I choose it to mean — neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master — that's all."

In this nebulous interval between the derivation and the Humpty Dumpty stage there is nothing for us to do but to hold fast to the precedents we have. But sometimes, in these days of "modern" precedents, our reports lack fruition and we are compelled to go back — back even to Coke on Littleton where Lord Coke says:

> "'Discontinuance' is a word compounded of *de* and *continuo*, for *continuare* is to continue without intermission. Now by addition of *de* (*euphoniae gratia dis*) to it which is a privative, it signifieth an intermission. *Discontinuare nihil aliud significat quam intermittere, desuescere, interrumpere.* And as our author saith, it is a very ancient word in law."[3]
>
> . . . . . .
>
> "Here *Littleton* explaineth a man of no sound memorie to be *non compos mentis.* Many times (as here it appeareth) the Latin word explaineth the true sense, and calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus,* or the like, for *non compos mentis* is most sure and legal."[4]

If, then, in our examination of the meaning of the two little letters *ss* we are compelled to pass by modern precedents we take it that the reader, who, we assume, is a busy lawyer, will approve. All the cases in the books, both ancient and modern, dealing with the said appendage of the venue as written today could be counted on one hand. The New York reports contain two of them, *Jones* v. *Hoyt*[5] and *Babcock* v. *Kuntzsch*[6]; Utah reports contain one, *McCord Mercantile Company* v. *Glenn*,[7] all of which are very modern. And likewise, all of which merely state that the omission of the letters *ss* from the venue is immaterial. In 1736 Chief Justice Hardwicke, in *Jodderell* versus *Cowell*,[8] commenting on the apparent contradiction by the venue in the margin of the venue in the body of the declaration, said: "for the word *ss*, I verily believe, was not

[1] *Barrett* v. *White*, 24 L. J. Ch. 726.
[2] "*Through the Looking Glass.*"
[3] 325*a*.
[4] 246*b*.
[5] 85 Hun (N. Y.) 35 (1895).
[6] 32 N. Y. Supp. 587 (1895).
[7] 6 Utah 139, 21 Pac. Rep. 500.
[8] Michaelmas Term, 10 Geo. II, Lee's Cases, *temp.* Hardwicke.

originally meant to the county, but only a denotation of each section or paragraph in the record, etc." Whether Lord Hardwicke's decision (legal or philological) is to be accepted we will leave to the reader to decide after he has finished reading this article.

As we have received little or no enlightenment from the cases, we are justified in an examination of the opinions of the eminent writers of legal dictionaries and glossaries to learn their opinions on the derivation and history of the two letters. After a rather exhaustive examination of the works of such writers we are led to believe that they did not deem the letters worthy a very exhaustive study. Out of a long list we find *ss* given a place in only six. One of these informs the reader as follows:

"SS. A mark in a pleading or process indicating the venue." [9]

Another amplifies and illustrates to a brief extent the same idea and refers to Lord Hardwicke's opinion which we have quoted above. To the philological opinion of the great judge he adds his words of encouragement and belief as follows: [10]

"And this opinion is countenanced by the more ancient form of the contraction ff or ff, the latter closely approximating the modern section mark, §. Bracton, indeed, expressly uses ff to denote the sections of the civil law. Bract. fol. 114."

The one really important fact found under the letters *ss* in four of the six writers referred to is the statement that the letters are supposed to be a contraction of *scilicet*.

Assuming then for the present that *ss* is an abbreviation of the word *scilicet* our investigation leads us to a study of that word, not forgetting, however, that it will be necessary to substantiate the bare statement of the writers of the dictionaries.

Scilicet is a Latin word formed from the two words *scire*, meaning *to know*, and *licet*, meaning *it is permitted*.[11] Put into modern English: *namely, that is to say* or *to wit*.[12] *Scilicet* is found in some of the very earliest English reports, those which have come down to us from a time when the Latin language was still the language of the court reports. For example: *scilicet* is found in the Plea Rolls; Pleas of Michaelmas Term for 1207; the abbreviation *scil.* in the Plea Rolls, Manor King's Ripton, 1288; the abbreviation *sclt*[12a] in the Plea Rolls, Civil Pleas, Michaelmas Term for 1201; the abbreviation *s* in the Plea Rolls, Civil Pleas for Lincolnshire Eyre for 1202; *scilicet* in the Coroner's Rolls of Bedfordshire for 1271; *scilicet* in the Leet Rolls of 1312–1313 [13]; *scilicet* in the Coroner's Rolls, Hundred of Redbornestoke, 1270 or 1271 [14]; the abbreviation S^{c} in the report of cases in a Term after the Vigil of the Apostles, 1200; *scilicet* in the Wapentake of Calceworth, Lincolnshire Eyre, 1202; in fact the word or one of its many abbreviations runs all through the reports of that period.[15] It may not be too much of a diversion to give here in full a translation of one of these very interesting early cases. The translation is that published by the Selden Society of a case which was tried in the Cornish Eyre in 1201 for the Hundred of Powdershire: [16]

[9] Stimson's Law Glossary, tit. "ss."
[10] Burrill's Law Dict. tit. "ss."

[11] The Stanford Dict. of Anglicised Words and Phrases (Fennell's Ed.), tit. "scilicet."
Webster's New International Dictionary, tit. "scilicet." An Etymological Dict. of the Eng. Language by Rev. Walter W. Skeat, tit. "videlicet."
[12] A Dictionary of the English Language by Joseph E. Worcester, tit. "scilicet." Bouvier's Institute, Vol. 1, p. liv.
[12a] The *l* intersected by a circumflex.—*Ed.*
[13] Selden Society Publications, Vol. 5, p. 60.
[14] Sel. Soc. Pub., Vol. 9, p. 27.
[15] Sel. Soc. Pub., Vols. 1–9.
[16] Sel. Soc. Pub., Vol. 1, p. 2.

"William de Ros appeals Ailward Bere, Roger Bald, Robert Merchant, and Nicholas Parmenter, for that they came to his house and wickedly in the King's peace took away from him a certain villein of his whom he kept in chains because he wished to run away, and led him off, and in robbery carried away his wife's coffer with one mark of silver and other chattels; and this he offers to prove by his son, Robert de Ros, who saw it. And Ailward and the others have come and defended the felony, robbery and breach of the King's peace, and say that (as the custom is in Cornwall) Roger of Prideaux, by the sheriff's orders, caused twelve men to come together and make oath about the said villein, whether he was the King's villein, or William's and it was found that he was the King's villein, so the said Roger the serjeant demanded that (William) should surrender him, and he refused, so (Roger) sent to the sheriff, who then sent to deliver (the villein), who, however, had escaped and was not to be found, and William makes this appeal because he wishes to keep the chattels of Thomas (the villein), to wit (*scil.*), two oxen, one cow, one mare, two pigs, nine sheep, eleven goats; and that this is so the jurors testify. Judgment: William and Robert in mercy for the false claim. William's amercement, a half-mark. Robert's amercement, a half-mark. Pledge for the mark, Warin, Robert's son. Let the King have his chattel from William. Pledge for the chattels, Richard, Hervey's son."

During the period of the Norman French which followed the Latin period above referred to, the writers held fast to the legal phraseology but put it into the French. In the reports of that period, from 1350 on, we find numerous cases of *cestassauoir*,[17] *cest assavoir*,[18] *ceste assaver*,[19] and variations and abbreviations of them. When the French period passed and the King ordered the legal reports to be recorded in English, then it was that the law clerks, who wrote the reports in those days, must have adopted, to a certain extent at least, the old Latin word *scilicet* the form of which later contracted to *ss*.

[17] Sel. Soc. Pub., Vol. 10, p. 11. Bill in Chancery in 1396.

[18] Mirror for Justices, Sel. Soc. Pub., Vol. 7, p. 133.

[19] Mirror for Justices, Sel. Soc. Pub., Vol. 7, p. 3.

Just how the final *s* became attached to the initial letter is the one difficult point to explain. Although we have no proof of the theory, it is very likely that it came through the fact that the final *et* of many words was abbreviated in old manuscripts and books[20] into a letter which resembles our *z*. Many examples of this *z* are found in the Pipe Rolls. Those were the days of abbreviations as can be seen by an examination of the reports of the old cases decided before the year 1200 as reproduced by the Pipe Roll Society. After getting *scilicet* reduced to *sz* one can easily imagine that the law of least resistance caused the tired scriveners to drop off the bottom loop of the *z*.

As an argument in favor of the theory just propounded, a study of the word *videlicet*, which seems to have been a twin sister of *scilicet*, would be very interesting and instructive were there space for it. It seems that in the early days *scilicet* and *videlicet* were used interchangeably.[21] In modern times, however, *scilicet* has dropped out of use except in the form *ss*, while *videlicet* (*viet*), in our modern abbreviated form *viz.*, has grown in favor.

Though we do not know the history in detail of the change of *scilicet* to *ss* there is no question but that the *ss*, so universally used in writing a venue, is an abbreviation of *scilicet*. In at least one modern case[22] we find *sct* instead of *ss*, and a venue with the words *to wit* in place of *ss* is of common occurrence.[23]

[20] Introd. to the Study of the Pipe Rolls, Vol. 3, p. 3.

Antient Kalendars and Inventories of the Treasury of His Majesty's Exchequer, Vol. 3, p. 239, Year 32 Edw. III.

An Etymological Dict. of the English Language by Rev. Walter W. Skeat, tit. "videlicet." The Stanford Dict. of Anglicised Words and Phrases. (Fennell's Ed.), tit. "videlicet."

[21] Sel. Soc. Pub., Vol. 9, pp. 27, 58.

[22] *Barry* v. *Crowley* (1846), 4 Gill. (Md.) 194.

[23] Chitty on Pleading, p. 279 *et seq.*

Jodderell v. *Cowell*, Lee's Cases, *temp.* Hardwicke.

It is in connection with a *venue* that the letters *ss* are brought to the special attention of the lawyer. But when he recalls that our modern *venue* is the direct descendant of *Middlesex, to wit,*[24] or *London, to wit,* of Blackstone's day and Chitty's day, he wonders what the meaning of the words *to wit* is after the word London. To explain that they carry no meaning in that form, it being merely a transitional form, which, taken by itself, has no meaning, it is necessary for us to go into the history of *venue.*

When we speak today of the *venue* of an action all we have in mind in a general way is the place of trial. As a very recent writer puts it in his scholarly treatise:[25] "As a term of modern law its prevailing signification is that of the geographical division in which an action or special proceeding is brought for trial." In the early days of English law the *venue* meant much more than this; it meant many things, the books are "full of cases upon the subject of venues, and the doctrine very nice and curious." [26]

The word *venue* came from the Latin word *vicinetum*, the neighborhood where the facts to be tried arose.[27] In the early days the jurors were not judges of the facts presented to them by the witnesses as they are today, but were the witnesses themselves. In those days the jurors were called from the *hundred* or other political subdivision so that they would be the persons cognizant of the matter in dispute.[28] In order to know into what neighborhood the *venire facias*, or writ which commanded the sheriff to summon the jurors, should be directed, and to enable the sheriff to execute the writ, it was required that the neighborhood should be particularly set forth. For in seeking out the "free and lawful men of the *visnetum*" he would make "diligent enquiry concerning those who were sufficiently acquainted with the facts by personal knowledge or by reliable report." [29]

During the early period when the jurors were the witnesses, there was only one venue; but later on, when the jurors became judges of the facts, a second venue was introduced. The first is known as the venue of fact — the place of the dispute; the second, the venue of action — the place where the dispute would be tried.[30] If our ancestors could have adopted their new theory *in toto* — that the jurors are judges and not witnesses — there would have been no reason for stating a second *venue.* But the change came very slowly through a period of four hundred years and we find it was during that period that the venue in the margin, to which the letters *ss* are now so commonly attached, was first used.[31] One of the early examples of the venue of the action stated in the "margent," as Lord Hardwicke said in *Jodderell* v. *Cowell*, is that in a precept to summon jurors to attend an admiralty court at South Benfleet in the County of Essex in 1543: [32]

Sowthe Benfleete }
in comitatu Essexie }

At first it was thought very important that both venues be stated; but later

[24] Chitty on Pleading, p. 279 *et seq.*

[25] Charles M. Hepburn, Professor of Law at the Indiana University. Author of the subject, "Venue" in 40 Cyclopedia of Law and Procedure.

[26] *Ilderton* v. *Ilderton*, 2 H. Bl. 145.

[27] Bacon's Abridgment, tit. "Visne or Venue." *Dowdale's Case*, Coke's Reports *48*a*. *Ware* against *Boydell*, 3 Maule and Selwyn's Rep. 148.

[28] Bouvier's Institute, Bk. 4, tit. 8, chap. 4, sec. 2, § 2.
Coke on Littleton, 125*a*.
Ilderton v. *Ilderton*, 2 H. Bl. 145.

[29] Bigelow, Hist. Proc., p. 335.

[30] 40 Cyclopedia of Law and Procedure, tit "Venue."

[31] 40 Cyclopedia of Law and Procedure, p. 14.

[32] Placita in Curia Admirallitatis, *temp.* Hen. VIII. (1543).

the venue of each allegation of an affirmative fact upon which issue might be taken gradually fell into disuse and by the rules of Hilary Term, 4 William IV, it was ordered that to abolish all unnecessary statements, the venue should be stated only in the margin, except in certain special cases.[33] But before the change, as above mentioned, had become a settled fact, after the reason for two venues had ceased to operate, but before the writers of pleadings had ceased to state the two venues, "the courts began to distinguish between cases in which the truth of the venue was material and those in which it was not so." [34] The use of *scilicet* and *videlicet* then became very common, especially when the pleader did not wish to be compelled to prove as true that which it was customary to allege in his pleadings.[35] As Lord Mansfield said in his *Mostyn* v. *Fabrigas:* [36]

"It is necessary in such actions to state in the declaration, that the ship was taken, or seized on the high seas, viz. in Cheapside. But it cannot be seriously contended that the judge and jury who try the cause, fancy the ship is sailing in Cheapside; no, the plain sense of it is, that as an action lies in England for the ship which was taken on the high seas, Cheapside is named as a venue; which is saying no more, than that the party prays the action may be tried in London."

Although this use of the words *scilicet* and *videlicet* to show that the pleader does not promise to prove true the facts following the said words was extremely common, the old reports containing scores of cases setting forth the law on their meaning, it was not, we take it, from that meaning of the word *scilicet* that the *ss* of modern days came. It was rather from the word *scilicet* used when the writer desired to particularize a general statement.[37] And just here we cannot do better than to give to the reader the full opinion of Lord Hobart, handed down when he was Chief Justice of his Majesty's Court of Common Pleas in the twelfth year of the reign of James I, in the case of *Stukeley* v. *Butler:* [38]

"Now I come to the use of a (viz) or (sc) or in English (that is to say) and the nature and force of it. It is neither a direct several clause, nor a direct entire clause, but it is *intermedia*.

"First it is clear, that it is not a substantive clause of it self, and therefore you can neither begin a sentence with it, nor make a sentence of it by it self; but it is (as I may say) *clausula ancillaris*, a kind of hand maid to another clause, and to deliver her mind, not her own. And therefore, it is a kind of interpreter; her natural and proper use is to particularize that that is before general, or distribute that that is in gross, or to explain that that is doubtful and obscure."

After the venue in the margin became a fixture it would be found in the following form:

In comitatu Middlesex, *viz.*,
In parochia Sanctae Margaretae } [39]

London, ss.,
At the Parish of St. Mary-le-Bow,
In the Ward of Cheap. } [40]

which would mean, "In the County of Middlesex but more particularly in the Parish of Saint Margaret" and, "At London but more particularly at the Parish of St. Mary-le-Bow in the Ward

[33] Chitty on Pleading, 16th Am. Ed., p. *276. Stephen on Pleading, p. 316. Rules of Hilary Term (1834), Rule 8. *Reed* v. *Wilson*, 41 N. J. L. 29.

[34] *Bishop of Lincoln* v. *Wolfreston*, 1 Black. Rep. 495. Blackstone was one of the advocates in this case. Bouvier's Institute, Bk. 4, tit. 8, chap. 4, sec. 2, § 2.

[35] *Dakin's Case*, 2 Saunders 290*a*. Hilary Term, 22 and 23 Car. II. Regis. *Dowdale's Case*, 6 Coke's Reports, *47*b*.

[36] *Cowp.* 176, 2 H. Bl. 161.

[37] A new English Dict. edited by Sir James A. H. Murray.

[38] Hobart 171.

[39] *Arundel's Case*, Trin. 36 Eliz. In the King's Bench (1594).

[40] *Ware* against *Boydell*, 3 Maule and Selwyn's Rep., King's Bench, p. 148, year 1814.

of Cheap." During those early days it was essential that the venue be laid in the parish, town or hamlet, as well as in the County, for although the venue to the action had come into use, the fact venue had not fallen into complete disuse; it was still thought necessary to summon the jurors, or at least part of them, from the immediate neighborhood of the fact in issue.[41]

In 1706, in the fourth year of the reign of Queen Anne, a statute was enacted which directed that the jury were no longer to be summoned *de vicineto* but that they should come *de corpore comitatus*.[42] Then it was that the parish and ward were dropped from the venue. The pleaders, however, still held fast to the *viz.*, *to-wit*, or *ss.*, and *London*, *ss.*, and *Middlesex* (*to wit*) became the usual forms, notwithstanding the fact that the *to wit* and *ss* carried no meaning with them. And it was from these meaningless forms we inherited our present *ss*.

The political divisions of the states, however, wherein the great body of courts are county courts as to their jurisdiction, in adopting the pleadings and rules of the mother country, in a way, brought back into real use the *ss* of early English days. Now we have

State of New York }
County of Albany } ss.

in which the printer, in his desire to make the venue of neat appearance, has helped us to hide the significance of the *ss* by placing it after the bracket. But if we should write it

State of New York, ss. }
County of Albany }

it would still mean, having the same force and effect it had in the days before 4 Anne, "In the State of New York but more particularly in the County of Albany."

[41] Bouvier's Institute, Bk. 4, tit. 8, chap. 4, sec. 2, § 2.

[42] *Ware* against *Boydell*, 3 Maule and Selwyn's Rep. 148.
4 Ann. C. 16, s. 6.
Note to *Arundel's Case*, Coke's Reports, Part vi, 14*a*.

Jim

By Edwin Thomson

HE came from up in I-o-way,
O somewhere in the dim
And distant past, we've heard folk say,
This man whom we call Jim.
His greatness lies in just one thing:
With care does he select
The words that make the court room ring,
"Your Honor, I object!"

E'en Stenor in his heraldry
Had not a voice so loud
As this when with garrulity,
And with mien that is proud,
He states excuses that would tire
Astrae, who'd protect
Herself and bid him to retire,
But he'd say, "I object!"

When court adjourns down here and we
  Must go Beyond to try
The cause up there, he'll not agree,
  This is the reason why:
He's always had his way down here,
  And he will stand erect,
Declare that he will not appear,
  "Your Honor, I object!"

Kansas City, Mo.

The Popular Dissatisfaction with the Administration of Justice in the United States

By Charles W. Eliot, LL.D.
President Emeritus of Harvard University

[In view of its obvious importance, we prefer to exclude other matter from our pages this month to make room for Dr. Eliot's timely and valuable paper read before the Massachusetts Bar Association. Readers will find in these views new confirmation of the trite characterization that this distinguished layman never touched any subject which he did not illumine: *nihil quod tetigit non ornavit.* Few lawyers have written with so broad a comprehension of actual conditions or with a clearer notion of the practical remedies available. The paper is printed in the form in which it appeared in the *Springfield Republican.*— *Ed.*]

MR. PRESIDENT and Members of the Massachusetts Bar: —

I feel it absolutely necessary to explain my appearance before you with a paper on the causes of the popular dissatisfaction with the administration of justice in this country. When your committee invited me to read a paper on that subject before this association of lawyers, I said at once that I was wholly incompetent to do so, that it was a subject with which only a judge or a practising lawyer could adequately deal, and that a layman could have no standing before a professional body like this. Your committee urged that the precise thing wanted was a paper by an observant layman who was accustomed to studying the trend and force of public opinion, that no judge or practitioner was in position to understand and describe from the people's point of view the causes of the popular discontent, that professional learning and experience were a bar in the minds of the public not only to making an influential statement of the causes of the evil, but also to making a convincing proposal of remedies. Your committee further urged that they had consulted both judges and practitioners on the question of employing a layman, and had been advised to do so. Under these circumstances I reluctantly accepted the invitation — and have been sorry ever since that I did so, although I appreciate highly the honor of so peculiar a choice.

I was brought up as a student of science, and was therefore trained in the careful study of ascertained facts as the only legitimate basis for some strictly limited inference. This paper, on the contrary, is based on general impressions received through inaccurate reports of trials, both civil and criminal, of legislative proceedings, and of police

administration of various sorts in our different states, and on the reading of newspapers, magazines, and books in great variety, but rarely characterized by the scientific spirit of accuracy and thoroughness. I must beg you, therefore, to regard the following paper as the production of a well-meaning representative of the general public who is quite aware that he has rashly invaded your professional province.

JURIES ONE CAUSE FOR DISSATISFACTION

A frequent cause of dissatisfaction with the conduct of criminal trials is the extreme difficulty in some states — Massachusetts is not one of them — of procuring a competent jury of twelve men. The public does not believe in the exclusion from a jury of all persons who say that they have formed an opinion on the case to be tried. In these days of newspapers and periodicals which not only print the news, but discuss all questions suggested by the news, every fairly intelligent man may be expected to have formed some opinion on any interesting case, a crude and imperfect opinion to be sure, but still an opinion. The only possible result of requiring exclusion for that reason is the formation of a dull and ignorant jury. From the exaggerated application of this principle great delays result, many days, weeks, and even months being consumed in the operation of procuring a jury. It would be far better if the judge, and not the counsel, should put the questions to the proposed juror; and the better view is that the judge should decide whether the impressions about the case which the juror has already received are such as to preclude a fair verdict on his part, when the whole evidence in the case shall have been put before him, and that the judge's decision should be final and not open to appeal. Under such conditions, the intelligent men on the panel would not necessarily be shut out.

Among the evils attending the selection of jurors are excessive challenging and excessive excusing from service. The practice of different states differs in these regards, but experience has shown that peremptory challenges without giving of reasons should be few except in major criminal cases, where the defendant's counsel may reasonably have many challenges. There is a tendency in judges to excuse competent persons from service on juries because they have business to attend to. The public believes that the general acceptance of this excuse may easily result in the impaneling of juries consisting mainly of incompetent men who have no private business of any consequence to do. The public also fears that in the long-drawn process of impaneling a jury there may be opportunity of getting into the jury, by design of counsel, men who later could be bribed, or men who could be intimidated, and these suspicions impair the public faith in the traditional value of a jury trial. It would help to restore faith in that value if juries could be promptly impaneled from a large panel by the action of the judge.

Many failures of justice have resulted from the dismissal of suits because of flaws in the indictments, and these failures are peculiarly exasperating to the intelligent public. To its thinking, an insignificant error in spelling or grammar or in describing a place or a person, should never be allowed to block the course of justice. An indictment need only have that degree of accuracy which will enable a sensible man to understand what is charged against the accused. Persons need to be described with that degree of accuracy necessary to unquestionable

identification; and the crime needs to be described with only that degree of accuracy necessary to prevent a verdict of "not guilty" from leaving the defendant liable to a second trial on a somewhat different description of his offense. When a trial has aborted because of some flaw in the indictment, the law declares that the accused can be reindicted and put on trial; but there will always be delays, and as a matter of fact reindictment is extremely rare. When the English criminal law in former centuries would hang a boy for poaching or stealing a handkerchief, English judges were glad to use flaws in the indictment as means of saving life, but no such excuse can be given today for the conspicuous defeats of justice caused by dismissing cases because of trivial flaws in the indictments. Motions for new trials on unsubstantial errors which could not have affected the just results have a similar effect on the average American mind, an effect much increased if the new trial granted is long postponed. It is of great importance in regard to the effect of new trials on the public mind that such trials, for whatever reason granted, should come off quickly, instead of being postponed, as they often are in this country, for a year or two; for the American public has come to regard a new trial as an advantage which the rich can often procure, and the poor cannot. Such postponed trials seem to the public peculiarly discreditable examples of the law's delay.

CONTENTIOUS ATTITUDE OF COUNSEL

The common contentious attitude of counsel in a lawsuit, and the common attitude of the judge as the umpire in a game, have done much to discredit the administration of justice in the United States. Counsel do not seem to the American public to be officers of a court seeking for truth and justice, but players of an unethical, intellectual game. The judge seems to regard himself — often perforce — as a mere umpire between contending parties, and not as an agent of the commonwealth to settle controversies on their merits. The American public has lost some of its old faith in the judge as a protecting agent for carrying out the substantial requirements of law and justice. Some considerable portion of the public from time to time gets much interested, through the newspapers, in this game of counsels umpired by the judge. They admire and applaud the ingenuity and spirit with which counsel take technical points for their clients, and the public press often sympathizes with and encourages this misdirected admiration. Of course, the best men in the practice of the law do not insist on technical points in favor of their clients, but rather waive them, and the best judges try to control counsel and direct the course of justice, so far as state statutes permit. Unwise legislation is largely responsible for the particular evil now under consideration, and in recent years there has been much legislation intended to reduce the power of the judge over the procedure in his court. Lawyers dissatisfied with the control exercised over themselves by individual judges have originated some of this pernicious legislation.

Much of the injurious prolongation of testimony, cross-examination and argument in American courts is due to the fact that the judges have been deprived of effective control over counsel. It is an important function of a good judge to abbreviate testimony by excluding the irrelevant and to limit cross-examination and argument. To this end judges should be independent and well paid, appointed to serve during good behavior

and efficiency, and entitled to a pension after reasonably long service, or on disability. The judge should always be the principal person in the court-room. He is in England; often he is not in this country. The American practice of electing judges for short terms has seriously impaired in many states the quality of judges and their position in the community. The very voters that elect the judges easily acquire a habit of distrusting them.

This serious change in the position and function of the judge has been accompanied by a change in the habits of eminent legal practitioners which also tends to the lowering of courts and judicial procedure in the public estimation. It has been noticeable of late years that leading lawyers are not much in court-rooms. They work in private chambers for rich men and rich corporations, drawing legal papers for promoters, industrial adventurers and bankers. In this service higher fees can be charged than in service before the courts. It is commonly the junior members of large legal firms who argue cases in court. The passing of the judge, the disappearance of great court-room advocates, the popular distrust of courts, and the disposition of rich business men and corporations to avoid litigation and "beat the law" so far as they safely can, and even farther, have constituted a vicious circle of evil tendencies in both theory and practice, the effects of which on public opinion in the United States have been plain, widespread and deeply to be deplored.

ELECTION OF JUDGES FOR SHORT TERMS

The election of judges for short terms accounts for many of these evils. Several states, notably the state of Michigan, have had for a time good elective judiciaries; but the electors do not consistently maintain the highest standards of selection, and not infrequently fail to re-elect the most admirable judges. Indeed, such a tenure of judicial office disregards some of the most obvious of human qualities. A judge who desires re-election cannot help considering what effect his conduct in the court-room and his published decisions will have on his re-election. As an elected judge grows older and therefore less able to resume practice, he inevitably becomes more timorous and less independent, particularly as he cannot look forward to any pension when he fails to be re-elected. It is perfectly plain that in the long run an elective judiciary cannot command the popular respect which an appointive judiciary commands; and the fact that the great majority of American judges are elective accounts in good measure for the dissatisfaction of the public with American judicial procedure.

With the enormous extension of applied science into commerce, trade, manufacturing and transportation, a new kind of advocate has found a place in the courts, namely, the expert witness; and from the frequent employment of such experts in both civil and criminal cases a new source of popular distrust and disaffection has appeared in the courts. Many suits involving large amounts of money turn on expert testimony; and the experts summoned on either side turn out to be not witnesses but advocates. In patent cases the experts are practically additional counsel; and their statements are apt to be thoroughly contentious and as one-sided as those of counsel. Their action is apt to cause confusion, long delays and heavy costs, and in the end much public exasperation at the advantages given rich litigants over poor, and the not infrequent defeat of justice. The public has received the impression

from other realms of scientific activity that scientists have in some measure knowledge of the actual truth, and also intimate acquaintance with the limits of knowledge, beyond which truth has not been ascertained; but in the courts they see scientists hotly contending as to what the truth is in a given region of supposed fact which lies quite within the limits of knowledge.

EXPERT TESTIMONY

In two classes of cases these hot disputes between men of science, enlisted on opposing sides of the same case, have brought great discredit on judicial procedure, and on men of science as candid students of the truth. These two classes of cases are patent cases and criminal cases involving testimony about insanity. Remedies have been suggested, but not adopted. The employment by the court of official experts is the most promising of these remedies. Another proposal is a limitation of the number of experts that shall be called in a given case. A better remedy might perhaps be found in a reformed public sentiment concerning expert testimony within the professions of the engineer, chemist, physicist, and physician or surgeon. It ought to be a disgrace to members of any of these professions to appear in court, for money, to set forth so much of the truth as tells in favor of one side of the case, while suppressing all parts of the truth which support the contention of the other side. In other words, it ought to be made clear in all those professions that honor requires their members to appear in court only as impartial expositors of scientific truth so far as it is ascertained.

The responsibility of the medical profession in regard to the plea of insanity in criminal cases is heavy. Members of the profession are largely responsible for giving so-called expert testimony which goes quite beyond the limits of present knowledge concerning mental disease, and for inverting exculpatory terms, such as "brain storm," for instance, which are more verbal insinuations drawn from obscure regions where facts are few and theories vague. In these shadowy regions it is easy to procure opposing or, indeed, contradictory medical opinions in great abundance: and unscrupulous lawyers are all too ready to avail themselves of such facilities. It is some comfort that the diagnosis of mental disease has within ten years become somewhat surer, chiefly because much new knowledge has been acquired concerning the relations of general paresis and syphilis to insanity. The medical profession shares with legislative bodies the responsibility for the frequent absence of proper laws for the confinement of the homicidal insane, and with police departments the responsibility of the non-enforcement of the existing laws on that subject. It should be said, however, in defense of the alienists — the class of medical experts whose testimony oftenest excites the public's criticism — that the amount of expert testimony on insanity is very small compared with the great mass of medical testimony in cases arising from personal injury, and that the proportion of defective or rash testimony is smaller among the alienists who are specialists, than among the general practitioners who appear in the personal injury cases. Furthermore, the alienists seem to have proved from the records of hospitals, asylums and prisons that at least ten insane persons are made convicts for one criminal who escapes punishment on the plea of insanity.

THE "THIRD DEGREE"

The police processes for extorting testimony from supposed criminals immediately after their arrest, by incessant

questioning and deprivation of sleep and food while they are under great mental strain, have brought much discredit on legal administration in criminal cases. The public has lost confidence in legal procedure in general, because it is sometimes vitiated at the start by this extortion of testimony. The police examination excites the greater distrust, because it is, as a rule, conducted in secret by police agents only, the accused having neither counsel nor friend present. The American public believes that the process of interrogation, called "the third degree," is a shocking abuse, and that testimony thus procured, in the absence of a judge or of counsel for the accused, should not be admissible in court. It is quite true that a confession procured by threats is now inadmissible; but the question whether or not threats were used is a question of fact which can be tried.

The right view is that all "third-degree" confessions should be thrown out, irrespective of the precise method of procurement. It is notorious that confessions extorted by either mental or bodily torture are apt to be false. The law in Japan permits such police examinations in the absence of judge or counsel; and although physical torture is prohibited by law, it is doubtful whether the preliminary examinations by the police are free from it. In a recent case which occurred while I was in Japan more than one hundred persons made confessions at the preliminary police examinations, under torture of one sort or another, as they alleged, all of which were utterly denied when the cases came to trial in open court. The case is still on trial on appeal. The Japanese procedure was originally copied from the French; but the Japanese government has not yet copied the later alterations in French police procedure. The remedy for this evil is simple and is urgently needed.

No admission or confession made by an accused person in reply to interrogatories of the police should be received as evidence. It is sometimes alleged on behalf of the police that the only practicable way to secure convictions is by extracting confessions; but the experience of England, Scotland and France, where secret examinations of accused persons by the police are no longer allowed, seems to prove that there is no real ground for this allegation. It is very doubtful whether "third-degree" methods really contribute in this country to the conviction of criminals. Counsel for the defense can often win a jury by describing the police methods of procuring confession. A much surer method of preventing the escape of guilty persons would be to increase the power of the trial judge, who in many states of the Union is so hampered by legislative restrictions that he cannot give the public the benefit of his knowledge, experience and character. It is generally admitted that justice in criminal matters is more effectively administered in the federal than in the state courts, the reason being that the appointed judge in the federal courts has effective powers and an independent position.

APPEALS AND RETRIALS

Two other causes of public dissatisfaction with judicial procedure are the multiplication of appeals and the frequency with which new trials are granted. These evils have often been described by members of the bar and teachers of law; but the public is still without accurate knowledge of them, being ignorant concerning the unnecessary multiplication of courts, the waste of time of judges on points of practice, and the confusion of judicial action

through superfluous appeals and retrials. What the public sees is the long delays before the final decision is reached, and the frequency of the reversals of decisions. The public does not in the least understand why so many decisions are based on points of practice rather than on the substantial merits of a controversy, but it objects with great energy to the long delays and to what it considers the frequent defeats of public justice.

The public is not competent to prescribe remedies for these evils, but nevertheless confidently believes that there are too many appeals and too many retrials. It sees clearly that multiplied appeals and new trials diminish the good effects of well administered law in deterring men from crimes of violence and from frauds. The public firmly believes that there should be no retrial without substantial cause. It cannot understand why there should be any appeal on small civil cases or cases of minor crime. The state of the public mind on these matters should be promptly recognized and dealt with by legislation suggested by members of the bar or bar associations.

It is clearly the work of the bar associations in this country to guide and encourage legislatures to effective reforms in American legal procedure. With the exception of the Connecticut Practice Act of 1878, there has been no significant reform of American procedure for more than 60 years, a period during which profound changes have taken place in American manufactures, trade, industrial organization and social theories. The United States Supreme Court has very recently announced some new rules of procedure in equity cases which are doubtless a contribution to the desirable reforms. As effective agencies for bringing about legislative reform in American procedure, the bar associations have, however, one serious defect. Most of them hold annual, or at least infrequent meetings. For effective action on this urgent matter the bar associations might wisely appoint committees with power to act, instead of committees to report. Such committees, composed of the strongest men at the bar, should address themselves to the public as well as to legislatures; for the interest of the public in the administration of justice needs to be renewed since the traditional respect for the bench and the bar has of late been greatly impaired. This change of public sentiment has real grounds in our antiquated judicial organization and procedure; and it is for the bar associations to see to to it that these grounds are removed and that the public is fully apprised of the removal, and of the active agencies which secured the removal. The bar need not fear that judicious efforts in this direction will not prove successful. The public mind and will are sure to be found in sympathy with the needed reforms in the organization of American courts and in legal procedure. As a matter of fact, the various suggestions made by members of the legal profession for the remedy of existing evils in regard to appeals and retrials, — such as no appeal on facts, only one appeal on law, and no appeal when a trial judge sets aside a verdict as against evidence, — have not encountered serious objections from the lay public. Indeed, the public sees in such suggestions possible means of escape from present conditions, which it imperfectly apprehends, and yet cordially dislikes.

By the same multiplicity of appeals and retrials public confidence in the certainty of legal punishment for crime has been much impaired, and confidence in the promptness of punishment almost

destroyed. Much of the lawlessness which prevails in the United States is in part the result of this lack of confidence in the sure and prompt punishment of crimes by legal process. Lynching is sometimes justified on the ground that the slow and devious processes of the law are not to be trusted to punish promptly and adequately crimes of violence. The recent "night riding" in Kentucky and Tennessee, which had only a pecuniary or commercial object, was frequently justified on the ground that the processes of the law, full of loop-holes and means of delay and evasion, were not to be trusted to prevent the iniquitous effects of the tobacco monopoly.

DELAY OF DECISIONS

The long delay of decisions in some American courts is another cause of public complaint, because the full effects of justice, though declared and practically agreed upon, are thus long postponed. Of course the public does not know whether or not there are judges enough for the work of the American community. It does not even know that in the United States we have many more judges in proportion to the population than are found necessary in England, where legal procedure is much more rapid and effective than it is with us. It does not even know that some American legislatures have prescribed conditions of work for judges which inevitably delay their action, as, for example, the requirement that charges and decisions on law shall be written, a requirement which in all probability is unnecessary and unwise, since English judges give off-hand oral charges and decisions in many cases, without objection from either the legal profession or the public at large.

Here, again, is an important field of action for bar associations through committees with power. They should advocate greater power and freedom for the bench in the interests of prompt and effective judicial procedure. It is for the bar associations, also, to suggest the best number and the best structure of courts in the reorganization so conspicuously necessary. Thus, it has been suggested that a bench of three judges, sitting as a law court, is better than a bench of seven or nine, being quicker in operation and offering fewer chances for divided opinions. The two principal courts of appeal in England, one in law and one in chancery, are composed of three judges each. Very few cases go up on appeal to the final tribunal the House of Lords. The best professional opinion on all such points as this should be promptly brought to bear upon American legislatures.

ABUSE OF THE PARDONING POWER

The responsibility of the legal profession for the abuse by executives of the pardoning power is only indirect, and yet it is substantial. The profession has failed to insist that no executive should have in practice the power to retry a case on facts and law. It has failed to insist that no executive should have the the power to pardon on the ground that the court has made a mistake. If in any criminal case new evidence be discovered, or if some of the evidence relied on for conviction subsequently turns out to be false, it is for a court to exercise the power to grant a new trial or to set aside the sentence. It is for courts, not for executives, to apply the correction when a mistake has been committed. If there can be any doubt as to the power of a court to act after sentence has once been pronounced, such power should be explicitly conferred on the court by the legislature. The pardoning power is to be used for mercy and for mitigations of justice in special cases. Applications

to executives for pardons are almost always one-sided, and they frequently afford opportunity for medical practitioners to give expert testimony of dubious quality. Against this abuse individual lawyers cannot effectively protest; so that bar associations must be relied on to expound, and to prevent by new legislation the abuse of the pardoning power.

The public has lately seen with much anxiety the involvement of courts with two very contentious subjects — industrial disputes and politics. Industrial disputes inevitably come before courts in connection with the use of the injunction and the definition of conspiracy; and here the better public opinion holds that the courts can properly act in industrial disputes as a conservative force on the side of order and fair play. The public unquestionably looks for the aid of both bench and bar in keeping all legal procedures fair and humane in cases involving controversy between capital and labor. Lawyers and courts can do much to mitigate the bitterness of the industrial warfare, while maintaining all just liberties and the rights of property. A recent Massachusetts statute gives to the defendant in proceedings for violation of an injunction the right to trial by jury on the issue of fact only, if the violation is an act which would also be a crime. This act removes the main cause of complaint by labor leaders against the use of injunctions; but it also cripples the injunction as a prompt defense against threatened violence. Professional opinion is divided as to the merits of the act, the weight of opinion being apparently adverse. The act is, at least, an intelligent and important experiment. The cases in which politicians have been suspected of packing courts and judges have been known to take active part in political management are fortunately few; political campaigns in which the conduct of the judiciary, and the means of reversing judicial decisions have been made primary issues have been fewer still; but the uneasiness of the public about the connection between politics on the one hand, and legal procedure and judicial decisions on the other, has been considerable. In view of this uneasiness one cannot doubt that the abandonment of the policy of electing judges for short terms would contribute greatly to the re-establishment of the bench in the loyal regard of the American people.

LEGAL EDUCATION

When one who has had the privilege of devoting the greater part of his life to educational administration is forced to consider the problem dealt with in this paper, he inevitably asks himself whether legal education could be so improved that both bench and bar would gradually come to occupy in the minds of the American people a higher position than they now hold. For my own part, I incline to the belief that if examinations for admission to the bar always covered some cultural subjects, like history, economics, government and ethics, as well as legal subjects, some improvement in the standing of the legal profession would gradually result. Such a policy would take effect not by improving the higher levels of the profession, but by excluding the lower.

Every evil or problem mentioned in this paper has often been described and discussed by members of the legal profession, bar associations and teachers of law, and all the remedies I have mentioned may be found in comparatively recent legal literature. You and I are fully aware of this fact. This paper might easily have been made up exclusively of quotations from published

essays and reports by legal authorities — practitioners, committees of bar associations, and professors of law; but I was requested to report the observations and reflections of the unprofessional public on this difficult and very serious subject, and to give as clear an account as possible of the anxieties, apprehensions and discontent of the ordinary person, intelligent and patriotic, but ignorant about law and courts in view of the widening gap between the moral and material results of present legal practice and procedure and the public conscience. This ordinary person is not always wise, or always in a good mood; but in a democracy his state of mind needs to be carefully considered. I hope that I have correctly interpreted his opinions, his alarms, and his assurance of deliverance through the slow but sure working of free institutions.

The immediate duty of the American bar is to lead the way to a great legal reform.

Jurisprudence Not an Objective Science

BY THE EDITOR

AS Mr. Joseph W. Bingham says in the current issue of the *Michigan Law Review*, blurring of the notion of the nature of law is a hindrance to the betterment of our jurisprudence as well as to clear thinking on legal subjects. His examination of the question, "What is the Law?" [1] is an interesting attempt to clarify the subject, and is a striking recent contribution to the higher jurisprudence in this country. Believing as we do that the object of philosophical investigation is to purge our thinking of visionary speculative conceptions, rather than to indulge the dogmatizing tendency to which every human mind is predisposed, we feel that Mr. Bingham's views may well receive some discussion.

Mr. Bingham contends that "the law" consists of actual and potential governmental sequences, of concrete phenomena which may be generalized into rules and principles. Law is thus the concrete operations and effects of government, and these are to be studied "by observation, report, inductive and deductive reasoning, and the other implements of scientific investigation." Law is thus conceived of as something objective, as a certain aspect of human society in action, and the jurist's attitude toward his special field would not be unlike that of the biologist or the naturalist.

There is a want of precision in such a definition, but it is not to be accepted as a complete statement of its author's views. For he includes in his definition of law not only the foregoing objective material, but also past judicial generalizations concerning the phenomena. He conceives of laws as mental processes in this sense, inasmuch, it would appear, as they are merely the reflection of the concrete sequences described. Other generalizations than these actual ones of the past he excludes. It is apparent, on examination, that in treating past judicial generalizations as

[1] 11 *Michigan Law Review*, 1 (Nov.), 109 (Dec.), see 25 *Green Bag* 28.

the law, he refers not to the generalizations themselves but to their content. He says that we may by abbreviation speak of the science of law as "the law," but that when we use "the law" in this sense we mean not the law itself, but our knowledge concerning it, and he is on his guard against what he conceives to be pitfalls of such a catachresis. Essentially, therefore, he conceives of the law as external sequences of phenomena which not only afford material for legal rules but are to be identified with such rules.

This interpretation does violence to the plain and natural meaning of words. By law we clearly mean, in our everyday language, not a real or imaginary state of fact, but a rule or principle. The most that can be said in favor of Mr. Bingham's view is that it may help to place the science of law on a sociological footing, but in doing this we should use words to express accurately what we mean, and the law must not be confused with social phenomena.

Nor is it accurate to regard the material with which the science of law deals as objective, however we define law. Governmental sequences may mean either of two things. They may mean the activity of society supplying an external basis for legal ideas, the actual human relationships with which we connect our ideas of right and obligation; or they may mean on the other hand the intentional striving of society for the realization of ideals of law, namely the human relationships which the sense of law itself creates. In the former case the dynamic basis of law is readily distinguishable from the law itself, and in the latter we are likewise driven to conceive of the law as idea rather than as external object. Legal science is concerned with something more than social phenomena, and its subject-matter is too broad to be comprehended in any purely objective science.

Legal science is concerned not with the delineation of external reality, but with an ideal material which offers a valuation rather than a description of human activity. The law of contract, for example, does not merely generalize the course of action usually pursued by the parties to a contract; it rather sets up a rule of justice which the party to a contract will normally observe. This norm is to be ascertained not by generalization from particular instances of contracts actually negotiated, but by definition of that which constitutes proper performance of a contract. A legal norm is something apart from a generalization, though it may make use of generalization when cast in a general form.

The law is to be defined as idea, rather than as object; moreover, it is not to be considered as simply an abstract quality, but as a principle. We say that a certain situation, for example, is just, linking with it the abstract attribute of justice, but that quality is not synonymous with law. When we say that a certain situation is legal, we are saying that certain external conditions modified by the presence of governmental force conform to a norm or standard of justice, which means more than merely to say that they are just, for law is not like justice, a quality, but a principle predicating that quality of certain ideal conditions.

Loosely we might perhaps define law as the concept of a normal governmental sequence, profiting to this extent by Mr. Bingham's discussion but avoiding its misconceptions. Such a definition would be incomplete in so far as it fails to recognize the indispensable element of social acceptance. In other respects it might challenge fuller discussion.

Needed Joke Legislation—from the Consumer's Standpoint

To the Editor of the Green Bag:

This mature jest will be found in John Timbs, N. A., "Century of Anecdote," and its dates back many many years ago in England:

A justice of the peace was holding court in a little *Missouri town*. One of the attending counsel held against him an old grudge. While the justice was delivering an opinion he was interrupted by the braying of a jackass without.

"What noise is that?" shouted the justice, full of suspicion that the unfriendly attorney was putting up a job on him.

"It is only the echo of the court, your honor," said the attorney, smiling.

Not in the least disconcerted, the justice resumed his delivery. Soon, however, the attorney interposed with technical objections, just as the jack brayed again.

"Hold on!" retorted the retaliating justice: "one at a time, if you please." —*The Green Bag.*

This also is a jest of many varieties, almost infinite:

"Did youse git anything?" whispered the burglar on guard as his pal emerged from the window.

"Naw, de bloke wot lives here is a lawyer," replied the other in disgust.

"Dat's hard luck," said the first, "did youse lose anything?" —*Ohio State Journal.*

I love a classic be it like ale, either new or old.
W. M. R.

NO ARTICLE of trade suffers more keenly from the evils of unchecked, lawless competition than the joke. As a staple article, necessarily manufactured in great quantities to meet the enormous demand of the American people for the cheapest form of æsthetic enjoyment, it is produced under conditions which afford an extreme example of *laisser-faire*, and in no other field of modern industry is the consumer more exposed to the dangers of adulteration and fraud. Under the common law, the rule of *caveat emptor* has hitherto governed this traffic, and there is no implied warranty on the part of the joker to protect purchasers. If every joke-manufacturer could be compelled by statute to guarantee the soundness of his product, and could be sued for attempting to pass off worthless wares on overcredulous purchasers, the benefit to the national digestion could hardly be overstated. The analogy of the federal Pure Food and Drugs Act suggests similar legislation with respect to this industry. By virtue of the same authority under which it regulates the interstate traffic in food, Congress might also regulate that in jokes, compelling jesters to label each joke plainly with a statement of its ingredients and providing severe penalties for misbranding. Such legislation would enable the public to tell just what it is getting, but as a considerable proportion of the public is content with an adulterated product and would willingly continue to devour decayed jokes to gratify its appetite and to save its purse, a Pure Jokes Act would have to be cast in drastic form to banish deleterious commodities from the market.

Personally we are in sympathy with the idea of an oppressive Pure Jokes Act, as such pampering would not injure the editorial stomach, but we do not presume to speak as the mouthpiece of the less sophisticated digestions of the mass of our countrymen. As this drastic reform could hardly be accomplished *in toto* at a stroke, perhaps there is some hope of the feasibility of making a beginning along the lines of cold storage acts. We would not prohibit jokes being kept in cold storage, to protect them from the decay to which everything human is rightfully heir, for stale jokes may share good staying qualities with eggs, and may help to tide over lean seasons. But every joke has in it the seeds of mortality, and a joke of

1813 must certainly look seedy, in this not inelegant sense, if held up beside one of 1913 for comparison. We would therefore limit the period of refrigeration, and require every joker to label his wares with the date when they left the mill. But in the absence of legislation our advice to our higher minded humorous contemporaries is, "Date your jokes, if it is your desire that the mirth of your readers be flavored with the zest of a love of history."

Great harm has undoubtedly arisen from the mistake committed by the American people in treating jokes as a form of literary property rather than as a mechanical invention. The only profession which is accused of sacrificing the plain literal sense of words to an inordinate passion for technicality has put a strained interpretation upon the phrase of the federal statute which describes as patentable "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof." By these words Congress intended to create a classification of productions of higher rank than ordinary intellectual productions, for they must possess novelty, usefulness and originality. All these qualities may be lacking in a literary production, yet it may be copyrighted, and the copyright law does not presume to say whether a production is valuable or worthless. But to be patentable an article must have positive worth, and must contain some element not found in a pre-existent article. If the patent law were construed in this intelligent spirit, it would offer the same protection to artistic production which the copyright law does to inartistic production. The artistic future of the American people is inseparably bound up with the patent law. Let all lovers of progress work unceasingly for a wiser administration of that law!

Our copyright system illustrates the common triumph of matter over mind, for an author copyrights not his ideas, but the form in which they are expressed. An inventor, on the contrary, patents the contrivance embodied in his invention, the principle underlying it, rather than the materials of which it is constructed. He is an idealist. If the more materialistic author were compelled to patent his ideas, he would find himself forced to become a creator, rather than an imitator, and he would have either to become an artist or to cease to be an artisan. Compel the humorist, likewise, to patent the substance rather than the form of his invention, or else go out of business, and you will make him not an author, but an artist.

Before us lies a comparatively modern version of the venerable jackass, "one at a time if you please" story, the risibility of which is excited by ridicule expressed in an abrupt simile turning on an animal emblem of folly. If the original invention could have been filed in the archives of the patent office, ticketed "Division Ridicule, Alcove Animal Simile, Shelf Jackass," the patentee would have been protected by the prompt discovery of this subsequent infringement. That the patentee would not have means or inclination to sue is not to be assumed, for powerful corporations would be formed to deal in the trade thus protected by the patent laws. Consequently, no magazine contributor would dare to dress up this ancient pleasantry in new garb and offer it to an editor. Thus the editor would be able to protect his readers, to protect the public, and to protect civilization itself. For the test, alike for the race and for the individual, is to be able to grow wittier with advancing years without growing more foolish. A. W. S.

Fourth Annual Meeting of the Massachusetts Bar Association

THE Massachusetts Bar Association held its fourth annual meeting at Springfield, Mass., on December 19–20, with President Charles W. Clifford of New Bedford in the chair. The session opened with the presentation of a portrait of former Chief Justice Marcus Perrin Knowlton, painted by Irene E. Parmelee of Springfield, to Hampden County to hang in the Springfield court house. The speech of presentation was made by Attorney-General James M. Swift of Fall River. Glowing tributes to the former Chief Justice were offered by William H. Brooks, District Attorney Christopher T. Callahan, Henry W. Ely, and A. L. Green, all of the county bar.

The session in the court house ended with an address delivered by Dr. Charles W. Eliot, President Emeritus of Harvard University, on "The Popular Dissatisfaction with the Administration of Justice in the United States." This paper contained many suggestions of value. The recommendation, for example, that bar associations should appoint strong standing committees with plenary powers to act in matters of legislation is most timely. (The paper is reprinted on pages 65–74 *supra*.)

In the evening the speakers at the banquet at Hotel Kimball were former Chief Justice Knowlton, Henry M. Rogers of Boston, Stephen S. Taft of Springfield, C. S. Anderson of Worcester, and John C. Hammond of Northampton.

The second day's session opened with President Clifford's annual address, the first part of which was a review of the year's work of the association, the second part dealing with rare and luminous discernment with the problems of industrial competition and the attacks of pure democracy upon representative government.

President Clifford said in part:

"In order that you may have at a glance the general work which the association has performed during the year I refer, in respect to the executive committee, to the careful investigation and discussion running through several meetings which it has undertaken under the authority of your vote authorizing it to adopt a code of ethics for the association. The issue before the committee upon this centered largely in the question whether the association should adopt for the sake of uniformity the code adopted by the American Bar Association as very slightly modified by the Boston Law Association, or whether it should adopt the code prepared by its own committee, which varied very greatly in phraseology from that of the American Bar Association and in some matters in substance.

"The committee were divided upon this question, but finally informally adopted the code prepared by the committee of this association. I cannot speak too highly of the care, attention and ability with which this subject was considered by the members of the committee. The executive committee has also acted as provided in the constitution on many questions submitted to it by the committee on legislation, by the committee on grievances and by the American Bar Association and other organizations and individuals, and at the request of Judge Waite at its last

meeting appointed a committee to confer with the judges of the Superior Court upon a revision of the rules of court, and at the request of the committee on uniform procedure of the American Bar Association a committee to assist in its work.

"The committee on legislation did very valuable work last winter in examining before the time for hearing all laws proposed. Special attention was given to the proposed amendments to the workmen's compensation act.

"The very important and unpleasant duties of the committee on grievances have been discharged with fidelity."

President Clifford's address was followed by presentation of the reports of the committees on legislation, judicial appointments, legal education and membership and grievances. The report of the committee on grievances included all charges of misconduct and such matters which were not made public. A general discussion followed on the best means to prevent any lessening of the general integrity of the bar.

The report of the committee on legislation dealt with efforts to defeat legislation or constitutional amendments proposing to establish an elective judiciary or the recall of the judiciary, or any change in the method of procedure against a lawyer for misconduct. All bills contemplating such innovations opposed by the association were reported to have failed.

The following officers were elected: President, John C. Hammond; vice-presidents, William H. Brooks, James F. Cotter, Samuel K. Hamilton, William H. Niles, Herbert Parker, Joseph B. Warner; secretary, James A. Lowell; treasurer, Charles E. Ware; executive committee, Hollis R. Bailey, Henry H. Baker, Charles Neal Barney, Paul R. Blackmur, Charles E. Burke, James B. Carroll, William A. Davenport, David A. Ellis, Lee M. Friedman, Robert O. Harris, Gardner K. Hudson, Henry F. Hurlburt, James F. Jackson, Melvin M. Johnson, Thomas J. Kenny, Charles S. Lilley, John W. Mason, Oliver Prescott, George S. Taft, Ezra R. Thayer and John J. Winn.

English Divorce Reform

By E. DeForest Leach

WHILE the recommendations of the English Royal Divorce Commission are little short of revolutionary in their nature, the most important feature of the report does not consist in the fact that it favors increasing the grounds from one to six and in other ways facilitating the granting of divorces.

It is really of very little importance, in considering the divorce question as a whole, whether this or that condition or act shall be recognized as a ground for divorce. The important thing for us as Americans to realize, if we will, is that England, after an experience of more than half a century with the strictest divorce law in existence, carefully administered, finds the same to be wholly unsuited to modern social conditions.

Divorce reform in England means just the opposite to what it does in this country. Here it means more difficult

divorce and stricter laws; over there it means easier and cheaper divorce.

Then too, this report answers conclusively all the contentions of the American reformers in seeking more stringent legislation here. True, England has not had the question of uniform divorce legislation to contend with, but the agitation for uniformity has become so discredited in this country that it is no longer a question in itself. It has been shown time and again to be nothing but a subterfuge used wholly for the purpose of deception, in hopes that under the pretense of securing uniformity some states having lenient laws might be induced to enact stricter measures.

The practice of granting separations without the right of re-marriage, which is so much desired by some, has proven most disastrous in England where it has brought into existence a considerable class in society capable of doing everything but of entering into lawful marriage. The conditions resulting cannot be said to be as moral as divorce and re-marriage, even accepting what some please to call the Christian conception of morality as a criterion.

The attitude of the commission is thoroughly in accord with the tendency of modern thought to look upon marriage as a fact rather than a legal or theological fiction. The development of this idea will bring all moralists in accord. The most extreme schools are each working for a higher type of morality, but they are spending most of their energies fighting each other. When we realize that marriage is a fact, we will realize that divorce is also a fact. It is not divorce that we need to oppose, but the social and marital conditions which often make divorce more desirable than marriage. These conditions should be equally repugnant to all classes.

One thing seems to be settled, however, and that is that stringent divorce legislation has proven itself very undesirable in England, as it has wherever tried, and it would seem as though the American reformer must look to other means for a solution of the problem in this country.

414 *Citizens Building, Cleveland, O.*

Reviews of Books

SCOTTISH CIVIL JURISDICTION

The principles of Civil Jurisdiction, as Applied in the Law of Scotland. By George Duncan, M.A., Lecturer on International Law in the University of Aberdeen, and D. Oswald Dykes, M.A., Advocate. William Green & Sons, Edinburgh. Pp. xvi, 358 + 18 (table of cases) + 18 (index).

THIS scholarly work is an outline of the principles of jurisdiction recognized in Scots law, but is marked by such unusual orderliness of arrangement and clearness of logic as seemingly to entitle it to high rank as a masterpiece of philosophical exposition. Jurisdiction is defined as that "according to which a judge determines whether he has the right to pronounce decree against a defender on the assumption that the suit in question is otherwise appropriately and regularly brought before him." Jurisdiction is entirely conditioned by the *lex fori*, and the question in what *forum* must the pursuer bring his action is answered by the maxim *actor sequit forum rei;* that is, he brings

it in the court to which the defender is subject at the time of the suit. A *reus* may have more than one *forum;* there may be the *forum* of residence, or the *forum* of domicile, or the *forum rei sitae*, — and in many cases, of course, the *fora* coincide. As Lord Selborne said, "all jurisdiction is properly territorial," and for it to be effective either the subject-matter in dispute or the defender must have some connection with the territory in which the judge exercises his power of compulsion. The authors are thus led to arrange their whole exposition according to the nature of the remedy sought, and to this end the convenient classification of actions as (1) personal or petitory, (2) real or possessory, (3) declaratory, and (4) rescissory is adopted, with additional consideration of classes of proceedings which do not fall under any of these heads. The attempt is made to show how far each ground of jurisdiction complies with the criterion of the effectiveness of the judge's decrees within his territory. The principle of submission, as a test co-extensive with that of effectiveness, is then considered in separate chapters on prorogation and reconvention, and a discussion of fundamental problems in the conflict of laws is thus included, this portion of the work being deserving of careful study in connection with the writings of Professor Dicey and Sir Francis Piggott on private international law.

ANOMALIES OF ENGLISH LAW

Anomalies of the English Law. By Samuel Beach Chester, of the Middle Temple, Esq., Barrister-at-Law; Fellow of The Royal Geographical Society; Companion of the Military Order of the Loyal Legion of the United States, Commandery of Pennsylvania; Member of the (U. S.) Military Service Institution, Governor's Island, New York Harbor. Little, Brown & Co., Boston. Pp. 287. ($1.50 *net.*)

WHILE the English lawyer no more than the American looks upon his system of law as ideal it is unusual to find the defects of English legal institutions so frankly pointed out and so freely discussed as in this sane, stimulating criticism of a barrister of the Middle Temple. Numerous subjects are taken up, the most interesting perhaps being divorce, the formalities of wills, imprisonment for debt, and defamation. The writer frequently indulges in a felicitous vein of anecdote, and American lawyers will derive profit from his observations. While Mr. Chester believes the division of the profession into barristers and solicitors a good thing, he favors the abolition of the rule of etiquette which prevents a barrister from having relations with his clients otherwise than through the solicitor as an intermediary.

HINDUISM

An Essay on Hinduism: Its Formation and Future — illustrating the laws of social evolution as reflected in the history of the formation of the Hindu community. By Shridhar V. Ketkar, M.A., Doctor of Philosophy, in Sociology, Politics, and Political Economy, ex-president of the Society of Comparative Theology and Philosophy, Cornell University. V. 2 of History of Caste in India. Luzac & Co., London. Pp. xxxix, 162 + 15 (appendix).

IN this second volume the chief element of interest is the sociological discussion of Hindu institutions, more light being thrown on the religious life of India and the caste system than in the previous book (see 22 *Green Bag* 534). The writer's surer command of the tools of scientific investigation is evident. The commentary on Western institutions, particularly the Christian religion, from an Eastern standpoint, strikes an unfamiliar note, but the reader will find something stimulating as well as curious in this new perspective. The treatment is marked by notable vigor and acuteness of thought, notwithstanding the author's by no means perfect command of the English language.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Admiralty. See Maritime Law.

Banking. "Banks Deposits and Collections, I." By Ralph J. Baker. 11 *Michigan Law Review* 122 (Dec.)

"The particular problem to be here considered is that which arises where, after a bank deposit of money, or paper, either the bank of deposit or some other bank or individual into whose hands the money or paper subsequently passes, has become insolvent. . . . The problems litigated in this connection may be separated into two main divisions. The one deals with the relation created when the deposit is made. This is a part of the law of contract. The other deals with the consequential rights and obligations of the parties, flowing from the possible relations which may be assumed on the deposit."

Biography. "Jacques Cujas." (The Great Jurists of the World.) By Coleman Phillipson, LL.D., Litt.D. *Journal of Comparative Legislation*, N. S., v. 13, part 1, no. 27, p. 87 (Oct.).

Students of mediæval history will rejoice in the full learning of this article. Cujas was born in Toulouse in 1522. France occupied the foremost place in the world in the jurisprudence of the sixteenth century, and Cujas stands out supreme in the list of the jurists of that age. He was one of the leaders of that humanist movement which, part and parcel of the Renaissance, sought to rehabilitate society by a return to Roman Law models. He was the foremost investigator and expositor of Roman Law in his time. His work has inspired successive ages, and has been "in a large measure finally embodied in the French Civil Code, which has still more assured its perennial vitality."

"Jean-Baptiste Colbert and the Codifying Ordinances of Louis XIV." (The Great Jurists of the World.) By H. A. de Colyar, K.C. *Journal of Comparative Legislation*, N.S., v. 13, part 1, no. 27, p. 56 (Oct.)

Much attention is here given to the great codification of the diversified customary and written laws of France which Colbert promoted, and which was the forerunner of the Napoleonic Code, and the ordinances are described. Of Colbert himself as a jurist there is apparently not much to be said, his part in the undertaking being primarily that of a statesman and minister of state. The many accomplishments of one who has been pronounced the greatest minister in the annals of mankind, however, are indicated.

See Johnson's Impeachment.

Contempt. "Review of Contempt Proceedings by Habeas Corpus." By R. E. Talbert. 46 *American Law Review* 838 (Nov.-Dec.).

Courts. "Reorganization of the Circuit and Superior Courts of Cook County, Ill." By Albert M. Kales. 7 *Illinois Law Review* 291 (Dec.).

Criminology. "The Foundations of Criminal Law." By Sir John Macdonell. *Journal of Comparative Legislation*, N.S., v. 13, part 1, no. 27, p. 108 (Oct.).

The foundations are ethical, those existing in convention and opinion, in the prevailing philosophy of the time, and the world-wide change that has come over modern ways of thinking of crime and punishment is sketched by the hand of a master. We are, he says, in a dilemma, the prevention of crime and the reform of the criminal being in a measure incompatible. Deterrent punishment and humane measures being incompatible, we must endeavor to restore a lost harmony, resting it on the foundation of the growing sense of justice. "Punishment should be that which the community, or the best part of it, would approve." "Each criminal is a separate problem."

Death by Wrongful Act. "Thanatopsis." By William H. Field. 46 *American Law Review* 801 (Nov.-Dec.).

A somewhat rambling dissertation, enriched by curious lore of mythology and literature, upon the doctrine *actio personalis moritur cum persona*, which Lord Campbell uprooted by his act passed in 1846.

Defamation. See Privacy.

Direct Government. "Forestalling the Direct Primary in Oregon." By J. D. Barnett. *Political Science Quarterly*, v. 27, p. 648 (Dec.).

A narrative of the "assembly" movement since 1904. The author takes the position that the holding of party assemblies to draft platforms and suggest candidates is not illegal under the direct primary law, but extralegal. Clearly, however, it is a method of defeating the law by indirection.

Evidence. "An Exception to the Hearsay Rule." By Eustace Seligman. 26 *Harvard Law Review* 146 (Dec.).

"This then, is the recognized exception: declarations of mental condition are admissible whenever a mental state is in issue. But in the case of *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, the Supreme Court took a further step and allowed in evidence declarations of intention when the fact in issue was not a mental condition, but the act intended. And it is the validity of that step that it is here sought to question."

General Jurisprudence. "Theories of Law." By Professor Roscoe Pound. 22 *Yale Law Journal* 114 (Dec.).

This paper is of not less importance than those on "Sociological Jurisprudence," recently published in the *Harvard Law Review*, and is a noteworthy contribution to the science of jurisprudence. The distinction between the two root ideas of law, *jus* and *lex*, is pointed out, and Professor Pound shows how one or the other has reigned supreme at different times, according to the then prevailing attitude of the state toward the legal relationships of its citizens. A broad and luminous historical survey of the evolution in the notion of the nature of law is given, and the great movements of juristic thought down to the present are skilfully characterized.

"It appears that the growth of legislation as the chief agency in formulating the law has led to an emphasizing of the imperative element in all recent definitions. In England, as the Analytical School arose while the legislative energy of the reform movement was at its height and the Historical School came later, jurists have been tempering ultra-imperative analytical formulas to bring them into accord with the results of historical research. In America, we have been tempering them so as to bring them into better accord with the obvious role of the courts in the making of our law. In Germany, where the Historical School came earlier and waged its war with philosophical rather than with analytical antagonists, metaphysical formulas have had to be made over to accord with the everyday experience of those who live under the jurisdiction of active legislatures. For the moment, the conception of the Analytical School is almost as thoroughly established as was once the idea of a law of nature and later the theory of the Historical School. As the 'capital fact in the mechanism of modern law is the energy of legislatures,' [Maine] we may expect that jurists will insist more and more upon the imperative side of law. Even writers on ethics have been influenced by this modern predominance of enacted law. In Italy alone did the theory of natural law continue to flourish despite a code. But as we have seen, in the history of jurisprudence periods of legislation and codification, in which the imperative theory of law has been current, have always been periods of stagnation. The law has lived and grown through juristic activity under the influence of ideas of natural right and justice or of reasonableness, not force and not sovereign will, as the ultimate source of authority. Hence, if there were no counter movement visible, we might well regard the well-marked swing of the pendulum toward the imperative side of the law in juristic theory as an ill omen."

"What is the Law? II." By Joseph W. Bingham. 11 *Michigan Law Review* 109 (Dec.).

See p. 74 *supra*.

Government. "The Elemental Functions of Government. By W. W. Lucas. *Journal of Comparative Legislation*, N.S., v. 13, part 1, no. 27, p. 145 (Oct.).

While he writes primarily with reference to the powers and functions of the Crown, Mr. Lucas has aided political science by suggesting a concise terminology of political functions in general. He distinguishes the three following fundamental functions:

1. Creative — the power to create or originate law, by establishing custom and enacting statutes.

2. Administrative or discretionary — the power to administer law within the limits conceded or prescribed by the creative power.

3. Ministerial — the obligation to carry out law, whether the command be creative or administrative.

"Cabinet Officers in Congress." By Perry Belmont. *North American Review*, v. 197, p. 22 (Jan.).

"There are those who seem to believe that to enable members of the Cabinet to appear before either House would not be the complete parliamentary system of other governments, because it would not give to the Cabinet the power to direct and control legislative action. It is much to be preferred that it should not. The parliamentary systems of Europe lead to much more instability than does ours. There the cabinet is in effect the executive; also, in that respect, a little more than a committee of the Legislature to carry into execution its general policy, and an adverse vote is usually taken to mean a change of government. It may be well to keep in mind that the idea of bringing officers of the executive departments before the House of Congress is not suggested by the parliamentary system of Great Britain. That system is, in its fundamental principles, so different from ours as to be hardly a safe guide for us."

"The Parliament Act and the British Constitution." By Sir William Anson. 12 *Columbia Law Review* 673 (Dec.).

The author disputes the comparison made by Mr. Jenks in 12 *Columbia Law Journal* 32 between the Parliament Act and the Petition of Rights of 1628 and Bill of Rights of 1689.

See Direct Government, Judicial Power to Annul Statutes, Legal Evolution.

Habeas Corpus. See Contempt.

Insolvency. See Banking.

International Law. "The Twenty-seventh Conference of the International Law Association." By Layton B. Register. 61 *Univ. of Pa. Law Review* 91 (Dec.).

A report of the proceedings, no single topic engaging the extended notice of the writer.

See Maritime Law, Panama Canal, Private Property at Sea.

Johnson's Impeachment. "The Impeachment of Andrew Johnson: The President's Defense." By Gaillard Hunt. *Century*, v. 85, p. 422 (Jan.).

Johnson's counsel, Evarts, Curtis, Stanbery, Nelson, and Groesbeck, advised with him at every stage of the trial, and Johnson managed his own case. A result of the trial was that the counsel gained a great respect for their client, Evarts becoming his Attorney-General.

"Anecdotes of Andrew Johnson." By Benjamin C. Truman, secretary to the President. *Century*, v. 85, p. 435 (Jan.).

Judicial Power to Annul Statutes. "The New Constitution of Ohio — Power of Courts to Review Acts of the Legislatures." By Everett P. Wheeler. 75 *Central Law Journal* 437 (Dec. 13).

"This brief story of legislative corruption and usurpation might be greatly extended. No one who studied it can seriously urge that the power of the courts to deal with unconstitutional legislation should be limited. The fundamental fallacy of the prophets of this new dispensation lies in the assumption that the legislature is the people and that a temporary majority is infallible. The legislature is but one agency which may or may not correctly represent the will the people."

See Legal Evolution.

Judiciary Organization. See Courts.

Labor. "The American Federation of Labor." By Jay Newton Baker. 22 *Yale Law Journal* 73 (Dec.).

"There is nothing better settled than the fact that a combination between individuals to do something which any of them or all of them, acting separately, can innocently do, introduces a new element which makes it a grave danger to the public and the law and has been conducted repeatedly. The organization believes fully and argues that 'An individual has the right to trade with another or not, as he sees fit, and what is true of one individual is true of another and true of any number; they can individually withdraw their patronage or refuse to trade with another and refuse to work with another, and what one may do any number of men may do and any number of men may agree to do without coming in conflict with any legal principle.' "

See Minimum wage.

Legal Evolution. "Social Justice and Legal Justice." By Professor Roscoe Pound. 75 *Central Law Journal* 455 (Dec. 20).

"Professor Commons said recently, 'justice is not merely fair play between individuals, as our legal philosophy would have it — it is fair play between social classes.' I presume you would assent to the proposition that fair play among social classes belongs to the idea of justice. Is it true, then, that our juristic thought, our legal philosophy, holds otherwise? Unhappily, one must admit that it does; or, at least that up to the present time it has, and that there are but the beginnings of a change. Many examples might be adduced. But one, the course of decision of our courts until the last few years upon the subject of liberty of contract, will suffice for our purpose. Two of our state courts in passing adversely upon labor legislation because it infringed upon a theoretical freedom of contract have noted the frequency of such legislation in recent times, but have said that it was not necessary to consider the reasons for it. Another court has asked what right the legislature has to '*assume* that one class has need of protection against another.' Another court has said gravely, that the remedy for the company store evil 'is in the hands of the employee,' since he is not compelled to buy from the employer, forgetting that there may be a compulsion in fact, where there is none in law. Another says that 'theoretically there is among our citizens no inferior class' — and, of course, no facts can avail against that theory. Legislation designed to give laborers some measure of practical independence which, if allowed to operate, would put them in a position of reasonable equality with their masters, has been said by state courts, because it infringed upon a theoretical individual equality, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles. Only the other day the highest court of New York told us that a workmen's compensation act 'does nothing to conserve the health, safety or morals of the employees.' I do not know that this artificial type of reasoning needs to be refuted outside of our courtrooms. The Supreme Court of the United States has completely abandoned it. Certainly when it is repeated today in our state courts, economists and sociologists are justified in the angry retorts with which they meet it."

"An Eighteenth Century Constitution." By Frederic Bruce Johnstone. 7 *Illinois Law Review* 265 (Dec.).

"Let the amending clause of the Constitution be changed. Let amendments be *proposed* on the vote of a simple majority in two successive sessions of Congress. The intervening election will submit the issue to the people and allow two years for consideration. Then let the amendments be *adopted* by the vote of a majority of the people *plus* a majority of the states.

"The plan is not original, it has been urged by many writers, and has been adopted by at least two governments (Australia and Switzerland) whose present plan was modelled after ours. . . .

"The Constitution of 1787, under which we are governed today, is worthy of the highest praise; but the conditions prevailing at its birth have ceased to exist. It was framed by men of the highest ability but was adopted by a people jealous of federal power. It controls the laws of a country which have experienced phenomenal change; for over a century it has been subjected to strenuous analysis and racking interpretation, and it is now required to furnish a national basis for the solution of tremendous social and economic problems — why should it not be amended? Ancestor worship is no longer

the mode — even in our sister republic across the Pacific, it is losing ground."

"An Eighteenth Century Constitution — A Comment." By Dean James Parker Hall. 7 *Illinois Law Review* 285 (Dec.).

Discussing Mr. Johnstone's suggestion in the foregoing paper, the Dean of Chicago University Law School says: —

"I should not disagree with his ultimate proposal to amend the amending clause of the federal Constitution so as to permit a constitutional amendment to be *proposed* by a majority of each house of Congress at two consecutive sessions, and to be *adopted* by the concurrent vote of a majority of the people and a majority of the states. I think, however, that the paper somewhat exaggerates the difficulty of amending the present Constitution, as witness the sixteenth and seventeenth amendments now well on their way toward ratification; and I am quite sure that it underestimates the power the federal Government now has to deal with our important national problems."

See Government, Labor.

Legal History. "The Political Causes which Shaped the Statute of Uses." By Professor W. S. Holdsworth. 26 *Harvard Law Review* 108 (Dec.)

"Professor Maitland has truly said that the Statute of Uses 'was forced upon an extremely unwilling Parliament by an extremely strong-willed king.' But I think that the evidence shows that this strong-willed king was obliged first to frighten and then to conciliate the common-lawyers in order to get the statute through the House of Commons; and that probably their opposition caused the failure of his well-considered scheme for the registration of conveyances. If this be so the action of the common-lawyers has had a large effect upon the form which the Statute of Uses and the Statute of Enrolments finally assumed, and consequently, upon the whole of the future history of the law of real property."

"The Genius of the Common Law; VI, Alliance and Conquest." By Sir Frederick Pollock. 12 *Columbia Law Review* 659 (Dec.)

See 24 *Green Bag* 225.

See Biography.

Literature. "Tales Out of Court — A Serial of the Law; I, The Resurrectionist." By Frederick Trevor Hill. Outlook, v. 102, p. 889 (Dec. 28).

"The Resurrectionist" is so nicknamed because of his rare talent for bringing cases back to life when they have been given up by other lawyers as hopelessly dead. Mr. Hill's story will be enjoyed by lawyers, and his finer strokes of satire on the law's delays can be appreciated by no one else so well. A previous exploit of "The Resurrectionist," in which he achieved heroic success in freeing his client after he had been convicted of murder by four different juries, is here recounted, and we are left expectant with regard to the outcome of the trial that is to come off on the morrow in the little rural county seat selected for the setting of the story.

See Death by Wrongful Act.

Maritime Law. "Maritime Dominion." By M. Sanford D. Cole. 46 *American Law Review* 855 (Nov.–Dec.).

"Has not the time come when an international conference, constituted on the widest possible basis, should be convened to consider the subject of fishery regulation, along with the settlement of general principles to govern the international aspect of the whole question of maritime dominion?"

Marriage and Divorce. "Remedies for Fraudulently Inducing Marriage." 3 *Bench and Bar* (N. S.) 61 (Dec.).

A discussion of the remedies available aside from annulment of marriage on the ground of fraud, English and Canadian as well as United States authorities being considered.

Minimum Wage. "The Economic Theory of a Legal Minimum Wage." By Sidney Webb. *Journal of Political Economy*, v. 20, p. 973 (Dec.).

The article will be valued because of the information given with regard to the successful sixteen years' trial of the minimum wage in Victoria, Australia. The argument is developed that the minimum wage conduces to higher efficiency and productivity by protecting the employer from undercutting by competitors and inciting him to select the most capable workmen. "It has been pointed out by many economists, from J. R. M'Culloch to Alfred Marshall, that at any rate so far as the weakest and most necessitous workers are concerned, improved conditions of employment bring with them a positive increase of production. Arguments for the minimum wage are ably presented at considerable length.

"Minimum Wage Laws." By Florence Kelley. *Journal of Political Economy*, v. 20, p. 999 (Dec.).

Facts are given with regard to legislation and actual conditions in various industries, with special attention to Massachusetts.

Monopolies. "Trust Regulation, I." By Albert Fink. *North American Review*, v. 197, p. 62 (Jan.).

"The proponents of federal legislation, looking to the regulation of the prices of trust-controlled or quasi-controlled commodities, seem to rest their belief in such constitutional power of Congress upon a presumed analogy between the fixing of the prices of commodities and the adjustment of transportation rate. . . . It by no means follows that because Congress has the right to prohibit unreasonable rates it has the power to prescribe or fix rates above or below which the carrier may not charge. . . . Nor has the Supreme Court ever yet sustained the constitutionality of any law attempting to confer an absolute rate-making power upon the Commission."

See Patents.

Panama Canal. "The Canal Diplomacy: Justification for the British Protest." By Leopold Grahame. *North American Review*, v. 197, p. 31 (Jan.).

"The argument that as the United States subsequently acquired ownership of the territory embracing the canal zone and built the canal at her own expense in no way weakens the case established by the facts here recited, for the simple reason that the canal could never have been constructed by the United States with the remotest degree of safety unless the Clayton-Bulwer treaty had been abrogated. Had it been otherwise, there would have been no necessity for the Hay-Pauncefote treaty, which embodies the principle of the most absolute equality in every respect for all the maritime nations of the world."

Patents. "The Proposed Patent Law Revision." By Gilbert H. Montague. 26 *Harvard Law Review* 128 (Dec.).

"The patent owner, like the owner of any other property, 'cannot be compelled to part with his own, excepting on inducements to his liking.' *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424. . . . The patent owner's rights are neither greater nor more unusual than the familiar rights of landowners. When, therefore, the patent owner requires that his property be used only under certain specified conditions and for certain specified purposes, and with certain specified accessories, he asserts no novel property rights. Indeed, the patent owner's rights are much curtailed, as contrasted with the rights of other property owners, in that the owners of every other form of property may exercise their rights for so long a period as they and their successors may desire, while the patent owner may exercise none of his rights beyond the duration of his patent, and at the expiration of the statutory period of seventeen years must relinquish to the public all of his rights."

"Patents and the Sherman Act." By Edwin H. Abbot, Jr., 12 *Columbia Law Review* 709 (Dec.).

"There remains then a debatable land in which the right of the patentee is as yet uncertain. On the one hand he may to some extent extend his monopoly by acquiring additional patents and by reserving to himself the right to furnish supplies for use with the patented article. On the other hand, by the weight of authority, he may not stifle competition between different patents either by contract or by concentrating the patents in the hands of a holding company. Somewhere between these two points the boundary of his right appears to lie."

The article was written before the decision in the *Bath Tub* case, which has cleared up some uncertainties.

See Monopolies.

Penology. See Criminology.

Principal and Agent. "The Liability of a Principal for the Penal or Criminal Acts of His Agent." By Floyd R. Mechem. 11 *Michigan Law Review* 93 (Dec.).

"In a previous article the question of the liability of a principal or master for the wilful or malicious acts of his servant or agent, was considered. (9 *Mich. L. Rev.* 87, 181.) It is proposed here to consider the liability of a principal or master for the penal or criminal acts of his agent or servant. This will involve two aspects: (*a*) The *civil* liability of the principal or master, and (*b*) His *penal* or *criminal* liability."

Privacy. "The Law of Privacy." By Wilbur Larremore. 12 *Columbia Law Review* 693 (Dec.).

"The American people are indulgent even toward positive libel, therein differing widely from the English people. It is probable that no edition of a great American daily newspaper is ever issued that does not contain several pieces of suable defamation, but for only a very small proportion of them are suits brought. With regard to mere publicity the attitude is even more liberal. The average person likes to see his picture in a newspaper upon any pretext. Even if occasionally actions were commenced by persons supersensitive to publicity the ordinary American jury would be unable to perceive any damage. It is not conceivable that litigations over infractions of mere privacy would grow into anything like the abuse that 'trumpery libel suits' are in England. It would be a safeguard, however, to have a right of action for damages for invasion of privacy so established as to be available in meritorious cases, just as it is always a deterrent against excesses that actionability for defamation exists, although resorted to with comparative infrequency."

Private Property at Sea. "On the Position of Private Property at Sea in Time of War." By Lord Avebury. *Nineteenth Century*, v. 72, p. 1131 (Dec.).

Endorsing the American proposal of the exemption from capture of private property at sea, advanced by Mr. Choate at the Hague Conference of 1907. That this measure would work to the advantage of Great Britain is shown, the empire having much to gain in a merely material sense.

Procedure. "Progress in Reform of Legal Procedure." By Everett P. Wheeler. 12 *Columbia Law Review* 685 (Dec.)

An act passed by the New York Legislature only recently is described as effecting a radical change in procedure. Mr. Wheeler points out that this amendment to section 1317 of the Code will do away with the multiplicity of new trials by directing the appellate court to render final judgment upon the rights of the parties; "in short, this act gives to the Appellate Division or Appellate term of the Supreme Court the full power of the trial term. Another great reform secured by the act is the requirement that judgment be delivered without regard to insubstantial error, in the same way as has been required by the Code of Criminal Procedure.

"Other states either by judicial action, as in Maine, Washington and New Hampshire,

especially the latter; or by legislation, as in New Jersey, Ohio, Wisconsin, Kansas and California, have substantially adopted these reforms [preventing repeated new trials and technical reversals]. In the latter state it was done by constitutional amendment in 1911. Unfortunately this applies only to criminal cases. Equity rules 19 and 22, just promulgated by the United States Supreme Court, apply to the federal equity practice the rule thus embodied in the New York Code. Let us hope that the federal courts in common law cases, and the state courts in all the states, will soon fall into line, and restore the United States to the position of a country in which justice is administered without delay, and causes are decided upon the merits."

"The Operation of the Reformed Equity Procedure in England." [By Lord Loreburn.] 26 *Harvard Law Review* 99 (Dec.).

Consisting of answers furnished by the late Lord Chancellor to questions asked by Mr. Justice Lurton, when the latter was gathering information for use by the Supreme Court in revising the rules of equity procedure. The answers cover such points as the practical benefit of a single form of action at law and in equity, how actions are begun and pleaded, how dilatory tactics of counsel are prevented, the taking of evidence whether orally in court or by deposition, methods of obtaining discovery and the manner of making up the transcript of a case for appeal.

"The Procedure in our American Judicial System." By Frederick N. Judson. 46 *American Law Review* 865 (Nov.–Dec.).

"We now recognize that the demand for simplicity in procedure does not spring from ignorant reformers and radical iconoclasts, but is a progressive step in the rational advance of a progressive jurisprudence. Forms were regarded with superstitious reverence in the early stages of society, but we now recognize that the simpler the procedure the better it serves its purposes. It does not mean that accuracy and precision of statement in judicial procedure shall be any less important than they are now, or that a clear and concise statement of the facts in issue will not always be effective. Substance and not form, however, must be of the first importance."

"The Bar and Legal Reform." By Frederick Payler. *National Review*, v. 60, p. 649 (Dec.).

The diminution of litigation in England is attributed by the writer to the delays of procedure, the remoteness of the final determination of the controversy, and the expensiveness of lawsuits. Some interesting figures are given on the subject of costs. The writer has much to say about the monopoly exercised by the bar, and he thinks that solicitors should sometimes have the power to try cases with the details of which they are minutely familiar, to obviate the payment of fees to counsel simply acting under the solicitor's instructions. The etiquette of the bar which compels the client to meet the expense of two fees, both to "silks" and junior counsel, is also assailed.

"More than once the late Lord Chancellor [Loreburn] stated that the ideal condition was to have a judge available to try an action the day after it was set down. . . . At the present moment a gulf of something like six months separates setting down a case and coming to trial."

Professional Ethics. "Work of the Committee on Professional Ethics of the New York County Lawyers' Association." By Charles A. Boston, chairman. 3 *Bench and Bar* (N. S.) 66 (Dec.).

"After the adoption of the American Bar Association's canons the County Association's Committee did not view its labors as at an end, nor its functions as purely nominal. . . . It felt that something more concise and more comprehensive than the American Bar canons might be compiled and promulgated, so as to put before members of the New York Bar, in shorter form, the general principles of the essentials of a lawyer's professional duties. This was not designed to supersede, but to supplement, the work of the American Bar Association; it approached the subject from a slightly different angle, and emphasized a lawyer's duties in the logical categories of his duty toward the state, the court, clients, adversaries and fellow lawyers; and as a public officer, a public prosecutor and a judge. . . . Finally this product of the Committee's labors, after about eighteen months of consideration, was submitted to the Board of Directors, who, in turn, submitted it at a stated meeting for the action of the Association. The Association, however, was not satisfied with the work as a whole and recommitted it to the Board, though declaring in favor of some form of such statement to be adopted by the Association. The Board still has it under consideration, having meanwhile invited additional suggestions from the Committee."

Public Ownership. "Some Problems of Public Ownership." By Walter S. Allen. *North American Review*, v. 197, p. 8 (Jan.).

"A most important feature to be considered by any public body before embarking in a plan for public ownership is the risk of obsolescence and the possible need of entire replacement in a short time. This is a risk which private companies always bear in mind and one which public bodies usually ignore."

Questioned Documents. "Identification of Pencil and Stylographic Marks." By Webster A. Melcher. 46 *American Law Review* 877 (Nov.–Dec.).

Uniformity of Laws. "Unifying Tendencies in American Legislation." By Professor Ernst Freund. 22 *Yale Law Journal*, 96 (Dec.).

This is a translation of an article originally published in German in the *Jahrbuch für Oeffentliches Recht*, 1911.

"The federal Constitution forbids the states to enter into agreements with each other without the consent of Congress; it follows from this that such agreements are possible provided the consent of Congress be obtained. It may be asked why states should not avail themselves of this power to follow the example of the Berne Conventions and agree upon identical legislation regarding certain matters. In the past this course has not been adopted and it is to be feared that it would prove impracticable. For the constitutions of the several states do not recognize such agreements as having statutory force; the agreement in order to have such force would have to be authorized by the state as well as by the federal Constitution."

Workmen's Compensation. "Can the German Workmen's Insurance Law be Adapted to American Conditions?" By P. Tecumseh Sherman. 61 *Univ. of Pa. Law Review* 67 (Dec.).

This is too meaty and important a paper to be briefly summarized, the objections to the German system being presented minutely and concretely under numerous headings, and many objections to the English system being discussed and repelled with even impartiality.

"While the German Workmen's Insurance Law has undoubtedly exerted a material influence in improving the contentment and well-being of the working classes and thereby in promoting workmen's efficiency, it does not follow that this result is due to the distinctive features of the *Industrial Accident* Insurance Law, so that the effect of the German system as a whole would have been any less beneficial had the direct liability for accidents been adopted instead of compulsory mutual insurance. And it is a tremendous exaggeration to attribute the growth in German efficiency so exclusively to the Workmen's Insurance Law alone, since widespread vocational training, compulsory military service, an iron discipline and early and wise child labor regulation are considered by many to have been the principal factors in bringing about that result. Moreover it is a vital mistake to attribute German industrial efficiency too much to the workmen. German managerial and technical efficiency were famous before the workmen's insurance laws, and are undoubtedly the ultimate cause of Germany's general efficiency and prosperity. And the more one studies the subject, the less becomes one's admiration for the German Workmen's Insurance Law in comparison with one's admiration for the administrative efficiency that has made those cumbrous statutes operate successfully."

Latest Important Cases

Defamation. *Sickness of Wife Resulting from Mental Distress Caused by Publication Actionable* per se — *Recovery for Loss of Wife's Services.* N. Y.

In *Garrison* v. *Sun Printing & Publishing Association*, decided by the New York Court of Appeals Dec. 17, it was held that a husband may recover for loss of services of his wife, caused by her sickness resulting from mental distress, which in turn was caused by the defendant's willful and malicious publication concerning her of defamatory words actionable *per se*. (*N. Y. Law Jour.*, Jan. 8.) The Court (Hiscock, J.) said: —

"It was early established in this state by decisions which do not appear to have been overruled or limited that an action to recover for the utterance of defamatory words, not actionable in themselves, could not be sustained by proof of mental distress and physical pain suffered by the complainant as a result thereof (*Terwilliger* v. *Wands*, 17 N. Y. 54; *Wilson* v. *Goit*, 17 N. Y. 442). And the same doctrine seems to have prevailed in England (*Alsop* v. *Alsop*, 5 H. & N. 534, 539; *Lynch* v. *Knight*, 9 H. of L. cases 577, 592). . . .

"Both the *Terwilliger* and the *Wilson* cases took pains to limit their effect to case of defamatory words not actionable in themselves. Their plain intent was to declare that an action of libel or slander involves as its very foundation an injury to character; that where the language complained of is not of such a character that the law presumes an injury, but requires proof of special damages, this requirement cannot be satisfied by simply proving that the plaintiff had been made sick, there being no proof whatever of injury to the character, which involves the effect of the defamatory words on third persons rather than on himself (*Hamilton* v. *Eno*, 16 Hun 599, 601).

"It will be seen that this reasoning does not apply to a case where the words are actionable in themselves, because there the law presumes an injury to character which of itself will sustain an action, and proof of mental or physical suffering is presented as an element of additional or special damages accompanying or resulting from the injury to character thus presumed."

Landlord and Tenant. *Liability of Landlord*

for Nuisance — Rights of Tenant's Servant. Kas.

Where a nuisance dangerous to life is created by the owner on his premises, or through his gross negligence is suffered to remain there, it is held in *Bailey* v. *Kelly* (Kas.) 39 L. R. A. (N. S.) 378, that he cannot, by leasing the property to another, avoid his own liability to any person who is rightfully upon the premises, and who, without any fault, is injured by reason of such nuisance.

This liability is also held to extend to a servant of the tenant, notwithstanding the tenant, by reason of his own fault or neglect or knowledge of the danger, could not have maintained an action against the owner for any injury suffered by himself.

Monopolies. *Alleged General Combination of Coal-Carrying Railways — No Hard Coal Trust — Specific Contracts Illegal — Abnormal and Unusual Methods of Trade — Sherman Act.* U. S.

The suit of the United States against the Philadelphia & Reading, the Lehigh Valley, and other anthracite coal-carrying railways for an alleged general combination in violation of the Sherman anti-trust law was lost, the United States Supreme Court holding, in an opinion filed by Mr. Justice Lurton on December 16, that the evidence introduced by the Government did not prove the contention that a general combination existed. The charges were dismissed on the ground that the Government had no right to make the smaller groups, within the alleged general combination, defend their action in a suit which charged, first of all, a general combination. "The case is barren of documentary evidence of solidarity," said the Court, adding that if there existed a general combination its existence must be deduced from specific acts.

The Court found, however, that "certain contracts made with producers covering between 20 and 25 per cent of the total annual supply of coal, known as the 65 per cent contracts, by which such independent producers bound themselves to deliver the output of their mines, or any other mine which they might acquire, to the railroad companies for 65 per cent of the average market price at tidewater, were also void, because in violation of the anti-trust act as abnormal and illegal restraints upon interstate commerce." Of these contracts the Court said: "It is not essential that these contracts, considered singly, be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other states, and thereby suppress competition in the price as between their own output and that of the independent operators, would come plainly within the terms of the statute and as parts of the scheme or plot would be unlawful." The Government according won on this point.

The Court also found that "the principal defendants did combine, for the purpose of shutting out from the anthracite coal fields a projected independent line of railroad, the New York, Wyoming & Western Railroad, and to accomplish that purpose it is found that the stock of the Temple Iron Company and of the Simpson & Watkins collieries, was acquired for the purpose of and with the intent, not of normally and lawfully developing trade, but of restraining interstate commerce and competition in transportation, which would have presumably come about through the construction and operation of the proposed competing line of railroad between the mines and tidewater."

The Court reiterated the doctrine of the *Standard Oil* case, that an act of Congress does not "forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." Nevertheless, it held that the acts which it found in this case to be illegal, the Temple Iron and 65 per cent contracts, were not within this class, but on the contrary were abnormal in their character and directly added to and were intended to illegally restrain trade and commerce within the statute.

Contract Limiting Field of Business not Void under Anti-Monopoly Statute — Restraint of Trade. Miss.

A contract by a telephone company doing only long-distance business, with a local company doing no long-distance business, by which the former undertakes to furnish apparatus to the latter, and requires it not to extend its lines so as to transact long-distance business or make long-distance connections with other companies without the consent of the contracting party, is held in *Cumberland Teleph. & Teleg. Co.* v. *State ex rel. Hudson* (Miss.) 39 L.R.A. (N. S.) 277, not to violate a statute making unlawful any combination or contract in restraint of trace, or which shall monopolize or attempt to monopolize the production, management, or control of any kind of business.

See Unfair Competition.

Negligence. *Rescuer May Bring Action for Injuries Sustained in his Attempt to Save Life — Issues of Fact.* Minn.

If a person rescues or unsuccessfully attempts to rescue one who is in peril, may he recover for injuries received in the attempt, from the one whose negligence imperiled the life of the rescued person? This question has lately been before the Supreme Court of Minnesota in a case where plaintiff, a servant of a mining company, attempted to save a fellow servant, who, not having been warned of the dangers of blasting with dynamite, had placed himself in peril — close to a lighted fuse. Realizing that the man was in great danger, plaintiff left a place of safety and started towards him, calling him in the meantime, for the purpose of rescuing him. He was too late. The charge of dynamite exploded. The man about to be rescued was killed and plaintiff was seriously injured.

In an action against the mining company, *Perpich* v. *Leetonia Mining Co.*, 137 Northwestern Reporter 12, the court ruled in answer to the question, that a recovery would lie, providing that the act of attempted rescue be not one of extreme recklessness. In this case, whether plaintiff's act was so reckless and rash as to constitute contributory negligence or assumption of risk, the court held, was issue of fact for the jury. The court said: —

"Persons are held justified in assuming greater risks in the protection of human life than would be sustained under other circumstances. Sentiments of humanity applaud the act, the law commends it." Verdict for plaintiff was affirmed.

Unfair Competition. *Statute Prohibiting Price-Cutting to Crush Competitors in Particular Sections Upheld — Equal Protection of the Laws — Court Cannot Review Economic Grounds of Legislative Action.* U. S.

In *Central Lumber Co.* v. *South Dakota* (Oct. Term, 1912, No. 51), it was held by the Supreme Court of the United States, in an opinion filed on Dec. 2, sustaining the Supreme Court of South Dakota, that a statute making it a crime punishable by fine for any one "engaged in the production, manufacture or distribution of any commodity in general use, intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity or to prevent the competition of any person who in good faith intends and attempts to become such dealer," to discriminate between different sections, communities or cities of the state "by selling such commodity at a lower rate in one section . . . than such person . . . charges for such commodity in another section, . . . after equalizing the distance from the point of production," was not in conflict with the Fourteenth Amendment.

In reply to the contention that the statute in question was a denial of equal protection of the laws, because it affected the conduct of only one particular class, Mr. Justice Holmes said: —

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed: *Lindsley* v. *National Carbon Gas Co.*, 220 U. S. 61, 81; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205.

"That is not the arbitrary selection that is condemned in such cases as *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. The Fourteenth Amendment does not prohibit legislation special in character: *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294. It does not prohibit a state from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws: *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law: *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411.

"We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts."

The Editor's Bag

ARBITRATION OF THE PANAMA CANAL DISPUTE

THE President's view that the exact issue in the Panama Canal controversy has not yet been determined evidently springs from a conviction that in the course of diplomatic negotiation the questions will emerge in sharper definition. This attitude is not difficult to understand. It may be that there is not in the present status of the case what may be called a definite joinder of issue, in the sense of an agreement between the parties to the exact question to be determined. This does not imply, however, that the complainant nation has not stated a definite ground of action, or that the legal question presented is not clear and readily ascertainable. The formal protest of the British Government lays stress on the equality of all nations as the fundamental principle underlying the Hay-Pauncefote treaty, and the several allegations regarding the impropriety of specific sections of the Canal Act all relate to the single subject of the interpretation of treaties in accordance with the rules of international law. Definite relief is also asked for, in the form of such steps by this Government as will remove the objections expressed to the act, and failing the compliance of this Government Great Britain makes an offer of arbitration. This expression of a willingness to arbitrate will be construed as tantamount to a request for arbitration if negotiations fail.

Arbitration is a slow and expensive process, but might possibly reach a termination in time to avoid serious business uncertainty and inconvenience before the canal is open. In view of the obvious advantage of advising commercial interests of the regulations of the canal as far in advance of its actual opening as possible, the repeal of such clauses of the Canal Act as would be unlikely to be upheld by an international court would offer the ideal way out of the difficulty. The easiest and best solution unfortunately seems impracticable in view of the attitude of Congress, and the recent elections seem not to have materially affected that attitude so as to offer the incoming Administration any prospect of success should it desire to resort to this remedy, which is doubtful. The most expeditious way of settling the controversy would therefore be for the present Administration to exert itself to bring about an early submission of the matter to arbitration.

The present attitude of the Senate is the most disturbing factor, but as we must consent to arbitration sooner or later, why not do so at once when we can with the better grace in view of the fact that England has not formally demanded it? When the time comes, the Senate simply cannot refuse to arbitrate. A power greater than that of Great Britain determines surely and irresistibly how our Government shall act, the power, namely, of international public opinion, and an ultimate refusal

to arbitrate is unthinkable. As Dr. Baty says:

> If a country which has agreed in general terms to arbitrate cannot find a suitable set of arbitrators anywhere on earth which would be fair to herself and to her opponent, the public will not be long in directing upon her exactly the same force of irresistable disapproval as if she had refused to carry out an award.[1]

We are bound not only by the terms of the Hay-Pauncefote treaty, but also by the obligation which we assumed when we agreed to arbitrate all differences arising between this country and England except those involving vital interests and national honor. A dispute involving the technical construction of treaties and other matters only to a minor extent cannot be withdrawn from the field of arbitrable questions without making this country ridiculous in the eyes of the world.

A common argument heard in many quarters is that from the Hague Permanent Court as at present constituted an impartial determination of the question is not to be had. This conclusion is hardly sound. It is urged that the objections upon which the plea for the establishment of a Court of Arbitral Justice has been based apply with particular force to the subject-matter in hand. The chief reasons put forward for the constitution of the International Prize Court as a Court of Arbitral Justice, it will be remembered, were the so-called diplomatic rather than judicial character of the Hague Permanent Court, and the need of a tribunal possessing continuity of membership and function which could always be looked to for disinterested application of the law without fear or favor. We cordially approve the project for a Court of Arbitral Justice, and such a court, in our judgment, to attain its maximum of usefulness should be composed chiefly of lawyers, namely, of experts in international law and men of ripe judicial experience. Such a court should not be too small, its moral authority being the greater in proportion to its numbers and it is desirable that representatives of the nations interested in the dispute should always sit in the court if possible in order to assure the question being examined from every possible standpoint.

Such a court would be more useful for certain kinds of controversies than the Hague Permanent Court as now constituted. The disputants could always count upon an impartial application of the rules of international law. For a dispute purely legal in character, governed by existing rules of law rather than by general notions of equity, it would offer the ideal mode of arbitration. But for certain other classes of disputes it might be less adapted. If the dispute turned, for example, on some question of law not clearly settled, views of leading international jurists would be likely to be pretty well known in advance, and the technical proficiency of the court would present in many cases an insurmountable obstacle to the submission of a question to arbitration by the nation almost certain to lose. Again, international law like all law is growing, but professionals may incline to be more tenacious of traditional rule and stereotyped principle than non-professionals, and the growth of the equity side of international law may perhaps come less rapidly through the efforts of international lawyers than of statesmen. For these reasons, we believe that some more elastic mode of arbitration needs to be available than that provided by the proposed Court of Arbitral Justice, and that the existing Permanent Court, which the new court is

[1] International Law, p. 11.

designed to supplement rather than to supplant, offers a more satisfactory and a fairer method for the settlement of controversies not solely legal in character but complicated to a greater or less extent by other elements.

An international court need not be rendered subject to national bias merely by the presence of representatives of the litigant nations in its personnel. In the North Atlantic Fisheries arbitration a splendid exhibition of judicial impartiality was furnished by Sir Charles Fitzpatrick and Judge Gray. Under the rules of the Hague conventions, the United States would not secure in a court of five judges more than two nationals, and would more likely have only one. The same would hold true of Great Britain. The seating of these nationals in the tribunal could hardly be anything but an aid rather than a bar to a fair judgment.

Those who speak of the diplomatic character of the court make a somewhat loose use of language. In the roll of the Permanent Court as now made up there are a large number of diplomats it is true, but those who have served as high officers of state in their respective countries outnumber the diplomats, and statesmen are not as a class so dominated by the habit of compromise as to confuse justice with expediency. The proportion of international jurists and municipal court judges is large. It would be easy to select from the panel, statesmen of a disinterested attitude to act as arbitrators, to say nothing of judges and prominent counsel available. The traditional detachment of our bench from politics renders easy the nomination of a suitable arbitrator from the ranks of our judiciary, who would have power to deal dispassionately with any political feature of the controversy.

Certainly the United States would not be justified in declining arbitration on the ground that not rules of international law alone are involved, but the right of a nation to regulate its own domestic affairs as well, and that no tribunal is available for the impartial determination of the controversy in all its aspects. If this nation fears to submit its case to the judgment either of statesmen or of international lawyers, to what other sort of tribunal should it be submitted? It must be a very bad case indeed for our country to decline arbitration on such insecure grounds.

THE CASE OF ELIZABETH ROBINSON

JUST now, when the question of the existence or non-existence of a criminal type is receiving so much attention, lawyers and criminologists will be especially interested in the case of Elizabeth Robinson, who on October 9 pleaded guilty in a London court to a charge of shoplifting and was sentenced to eighteen months imprisonment with hard labor. The *London Times* makes the following statement with reference to the case:—

"A wardress from Holloway Prison produced the following record of the woman's sentences: 1854, four months imprisonment; 1854, eight months; 1857, fourteen days; 1858, three months; 1859, six months; 1859, three years penal servitude; 1864, seven years; 1869, ten years; 1882, ten years; 1890, twelve months; 1896, twelve months; 1897, three months; 1898, three months; 1900, four months; 1901, three years; and 1910, twelve months."

The defendant received the first of her eighteen sentences when twelve years of age, and, at the time of her latest, she had just attained the three score years and ten allotted unto her by the Psalmist. She is of "the gentler sex."

Moreover, she commenced her career early and has followed it with a jewel-like consistency to a ripe old age. And, in view of these facts, it is only reasonable to suppose that the defendant finds consolation during her present incarceration in the reflection that her record is probably without a parallel in the history of criminal law.

RECOLLECTIONS OF AUSTIN

IN HER exceedingly readable reminiscences entitled "The Fourth Generation," Mrs. Janet Ross gives some interesting recollections of her grandfather, John Austin. She was deeply impressed in girlhood with the force of his intellect, and speaks of his having instructed her in the importance of clear thinking and precise language. She reproduces letters received by her grandmother from men of distinction at the time of his death, which show in what high regard his gifts were held, and how eagerly his opinions on all questions were sought by leading men of the time.

John Austin was the son of a miller, who married the daughter of a small gentleman farmer or yeoman. The father's education had been neglected, but under the influence of his wife, who was well educated, he tried to overcome its defects, and was fond of reading books on history and political economy. From him the son seems to have inherited a very exact mind, though the exceptional abilities of the mother perhaps played a more important role in his heredity.

Carlyle's description of Austin as "a lean, grey-headed, painful-looking man with large earnest eyes and a clanging, metallic voice — a very worthy sort of limited man," tallies with the granddaughter's recollections in some points but not in all. She recalls his voice as rich and musical, and while she speaks of the strain of melancholy inherited from Austin's mother, she says that it was relieved by the Austin love of fun, recalling, how as a boy, he would so deeply engage his father with his own conversation at table that the father did not notice that John had drunk up his glass of beer. Carlyle's phrase, "a very limited man," conjures up an impression of something the opposite of brilliancy, but we are assured by Mrs. Ross that Austin was most eloquent, and that once he was launched in a discussion it was almost impossible to stop him. Undoubtedly, however, much of the attention which Austin received from brilliant men of his time was due to the remarkable gifts of his wife, whose *salon* in Paris was said by a writer in the *Athenæum* to rival that of Mme. de Staël in distinction.

Austin is also recalled as "remarkably handsome, with splendid eyes and a very erect carriage." His eyes must have been inherited from his grandmother, who had gypsy blood in her veins.

The Austins were not wealthy, and Mrs. Austin could only offer her distinguished guests a cup of tea. After the revolution drove the family from France to reside at Weybridge, it seems to have been Sarah Austin's literary labors which partly at least served to maintain them during the remaining twelve years of Austin's life, during which his health was greatly impaired.

Mrs. Austin lived for eight years after her husband's death, long enough to complete the great task of editing his lectures, on which she labored hard for six years. "The work was a difficult one for a woman already old and suffering from disease of the heart to undertake, and only what St. Hilaire aptly termed her *intelligence virile* enabled her

to complete so noble a monument to her husband's memory." Surely no homage to the author of "Lectures on Jurisprudence" can be adequate which does not pay tribute to the devotion of his accomplished wife.

MR. JUSTICE LAWRANCE

IN CONNECTION with the death of Sir John Compton Lawrance, for twenty-two years a Judge of the King's Bench Division of the English High Court, the *Law Journal* recalls that he was described by Lord Brampton as a pleasant colleague, and it may have been partly because, as the *Law Journal* says, he was possessed of "a dry humor which was inspired by common sense."

"Your able and learned counsel," he once told a prisoner, "has described you as an upright man. He may be right. I see that in 1890 you were convicted of coining; that of itself may be an attribute of rectitude — I express no opinion. In 1893 you were sent to prison for three months for keeping a gambling-house — that again may be an attribute of rectitude. Since then you have been convicted of forgery, which also, perhaps, is consistent with rectitude — and again I express no opinion. But on the whole I think you had better go to prison for six months with hard labor."

THE WORM TURNED

DR. L. M. THOMPSON, formerly superintendent of the Home for the Feeble-Minded at Marshall, Missouri, was on the stand the other night as an expert witness in a case where one side claimed the testator was of unsound mind. In answer to the long hypothetical question of the attorney who called him, Dr. Thompson gave it as his opinion that the testator was afflicted with "senile dementia."

Across the room sat a young attorney with a formidable battery of medical books close to hand. It was his duty to cross-examine the expert and to show his opinion was at variance with the books. The stenographer sweat blood while the young lawyer fired interrogatories with ten-jointed italic words at the witness's head. In varying forms the same questions were asked and reasked at wearisome length. Dr. Thompson was good-natured and stood the ordeal without complaint until nearly midnight. Then retribution came as simply and as naturally as an infant's smile.

"Doctor," said the young cross-examiner, pointing a severe finger at the witness, "you have given it as your judgment that the testator was suffering from what you are pleased to term 'senile dementia.' Now, I wish you would repeat to this jury some of the evidences of 'senile dementia' in a patient."

There was just the ghost of a gleam in the doctor's eyes as he replied.

"Well, the books say when a man has 'senile dementia' one of the symptoms is to ask the same question over and over again after it has been clearly answered."

THE RECALL DEMANDED

A judge in a New York night court declares that "No man has a right to make an ass of himself."
— *News Item.*

THE courts have reached a pretty pass
When judges talk that way.
The ancient right to be an ass
And balk and kick and bray
Is older than the Constitution, —
Inherent in humanity,
Christian, Hindu and Confucian, —
And there'll be some profanity
If this decision stands.
Teddy I'll tell you what!
Let's form a coalition.
Republican and Democrat,
Progressive, Prohibition,
And Socialist will all

Demand immediate recall
Of such a rank decision.
Some rights we can surrender
And let some insults pass;
But on this point we're tender;
The right to be an ass
Is ours while runs the water
Or grows the verdant grass.

SIRIUS SINNICUS.

THE FIRST ATTACK

(Communicated by William H. Hamby, Chillicothe, Mo.)

THE old adage, "the first attack wins half the battle," was proved by the experience of Jerry Naylor.

Jerry was the young prosecuting attorney of a mountain county, and during his first year in office convicted and caused to be sent to the penitentiary Red Dugan, a notorious timber thief.

As Red Dugan's term was about to expire frequent warnings came to the young attorney to be on his guard, as the convict had made threats on his life. Jerry knew that Dugan was a dangerous man and prepared to defend himself.

But one day, soon after the ex-convict had returned home, Jerry went to a neighboring town to try a case. On his return he had to ride through a long stretch of lonely woods, and in the most unfrequented strip of the road he saw Red Dugan standing beside the road with a double barreled shotgun. Jerry, who weighed less than one hundred and twenty-five, was suddenly and acutely conscious that he was entirely unarmed, but he was already too near to turn back. Instead he rode leisurely forward and just when opposite Dugan, sprang from the saddle, and with a suddenly terrible and ferocious voice demanded: —

"Red, I hear you threatened to kill me on sight. How about it?"

Red suddenly turned pale. His hands shook, and he replied unsteadily: —

"Why — why — why, Mr. Naylor, it's a lie."

"Then shake," said the young attorney, extending his hand. A moment later he jumped on his horse and rode away unmolested.

COLONIAL SUMPTUARY LAWS

THE founders of Boston were thoroughly English in their social traditions. They believed in distinctions of rank. Only a few persons of unquestioned eminence, including ministers and their wives, received the title of Mr. or Mrs. The higher magistrates also took the title, but deputies to the General Court were not honored with it. They, along with the great body of citizens, were dubbed Goodman, and their wives Goodwife.

If a Mr. lost his reputation — in those days that followed immediately upon his loss of character — he was degraded to the rank of Goodman. Officers of the church and of the militia received the titles of their rank or office. Servants were not accorded any prefix to their names. They were plain John or James.

The distinctions of rank were also preserved by differences in the style and material of dress. But a democratic leaven and a desire for fine clothes were both at work. They soon told upon the manners of the settlers.

Within fifteen years from the settlement of the town, men in humble station began to dress as their betters. The statute-book shows that the magistrates were sorely troubled, both to preserve the traditional distinctions in dress and to keep fashion within the bounds of decorum.

A man not worth two hundred pounds was forbidden to wear gold or silver lace, or buttons, or points at the knees. Women whose property did not reach

two hundred pounds in value were ordered not to wear silk, or tiffany hoods, or scarfs, or any apparel with any lace on it, gold, silver, or thread.

The General Court was plain-spoken in giving its reasons for enacting this law. It records "its utter detestation and dislike that men of mean condition should take upon them the garb of gentlemen."

The court's "detestation and dislike" also extended to "women of the same rank" who wore the garments "allowable to persons of greater estates or more liberal education." Such practices, "in persons of mean condition," the court judges "intolerable."

But though "intolerable," the court had to endure not only this leveling spirit, but the desire for display. They passed laws against "slashed clothes," which showed the linen underneath, and against "short sleeves, whereby the nakedness of the arm may be discovered."

But the democratic spirit, aided by the women's fondness for dress, was too strong for the legislature to master it.

They reluctantly acknowledged that the colony had outgrown its minority, and was not to be retained in leading strings, by abolishing these sumptuary laws. Thenceforth men and women were allowed to dress as their taste dictated.

HUMORS OF GERMAN COURTS

IN Berlin not long ago an iron-worker was sent to prison because he had laughed at a policeman. It appears that, as this man was proceeding along a street one day, his risibilities were aroused by the sight of a particularly stout policeman giving chase to a dog. The offender was promptly haled into court and "sent up" for "scandal."

A German, in attempting to board a moving train, fractured his leg. After six months in a hospital, he was discharged; whereupon the State Railway Department at once prosecuted him for "infringement of regulations." He was fined a sum equivalent to five dollars.

Upon entering an omnibus a man trod on the foot of a woman, who was so incensed by the incident that she remarked that he walked like a hen. For this term of reproach the lady was fined twenty marks.

Claire Waldoff, the Berlin singer, once cleverly outwitted the police. She had been warned that if she sang any of her songs on Easter Sunday there would be trouble. But announcement was, nevertheless, made that Claire Waldoff was positively to appear. She did so — so did the police; and she sang the German National Anthem. The promised prosecution did not take place.

MUMM'S THE WORD

A member of the Mumm family of Paris, whose name is a household word with champagne drinkers, was recently shot by an American woman said to be socially prominent. No arrest was made and the family made every effort to keep the matter quiet. *News Item.*

BEHIND this little tragedy
Enacted in Paree,
No doubt there lies some comedy,
For it is plain to see
She would not shoot without a cause
Considering that it
Is dead against all laws.
But silent as the grim old Sphynx
And as an oyster dumb
Are all who know the facts.
Mumm says, "Keep mum."
I wonder why!

SIRIUS SINNICUS.

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

USELESS BUT ENTERTAINING

Railroad Attorney—" You are sure it was our Flier that killed your mule? What makes you so positive?"

Rastus—" He dun licked ebry other train on de road."—*Puck*.

We have yet to learn the name of the American lawyer mentioned by London *Law Notes*, who lost no opportunity of paying attention to the members of the jury, and on one occasion, when his voice was drowned by a loud peal of thunder, turned to the jury and said solemnly, "Gentlemen, pardon this unseemly interruption."

An Indian judge, when first appointed to his position, was not well acquainted with Hindustani. He was trying a case in which a Hindu was charged with stealing a "nilghai." The judge did not like to betray his ignorance of what a nilghai was, so he said, "Produce the stolen property."

The court was held in an upper room, so that the usher gasped, "Please, your Lordship, it's downstairs."

"Then bring it up instantly!" sternly ordered the judge.

The official departed, and a minute later a loud bumping was heard, mingled with loud and earnest exhortations. Nearer came the noise, the door was pushed open, and the panting official appeared dragging in the blue bull.

The judge was dumbfounded, but only for an instant.

"Ah! That will do," said he. "It is always best, when possible, for the judge personally to inspect the stolen property. Remove the stolen property, usher." — *Bombay Gazette*.

The Legal World

Monthly Analysis of Leading Legal Events

The proceedings in the dynamite case at Indianapolis, consuming twelve weeks and including the testimony of more than five hundred witnesses for the prosecution, seem to have been needlessly protracted notwithstanding the magnitude of the case. Clearly Judge Anderson labored to give the defendants a fair trial, and it is impossible to avoid the conclusion that if any error was committed by the Court, it was in giving the defendant labor union officials the benefit of too many doubts. But the outcome was a vindication of justice. The trial perhaps exhibits the constant presence, in a democratic society, of menacing symptoms of public opinion, in this case emanating from the labor unions, which compel a court to defer unduly to the power of class prejudice. In a community which prided itself on the efficiency of every department of its government the courts would have a freer hand and could act with greater dispatch, with less fear of wounding the feelings of social classes.

The action taken by the Law Association of Philadelphia at its annual meeting places the responsibility of reforming the court system of Philadelphia on the shoulders of the legislature, which cannot now evade it. The association had two projects before it, one for the addition of a new judge to each of the five Courts of Common Pleas, the other for a constitutional amendment rendering possible the establishment of a Municipal Court on the lines of that of Chicago. The Municipal Court is clearly desirable, the lesser judicial functions at present devolving upon police magistrates who make up a superannuated machinery. The association hesitated to ask the legislature for two distinct measures, fearing that only one could

be secured, but its action shows that it regards the two as of equal importance, and is more frank and satisfactory than emphasis either on the need of immediate relief or on that of provision for the future would have been.

Dr. Eliot's timely remarks on the abuse of the pardoning power are interesting in connection with the fact that Governor Foss pardoned ninety-six convicts in Massachusetts in 1912. Governor Donaghey of Arkansas pardoned 360 convicts on Dec. 17. The Governor's action seems to have been dictated by worthy motives, in the endeavor to break up a pernicious convict lease system, the pardoned offenders having been sentenced in many cases by small justices of the peace to terms of fifteen years or more for minor felonies. In this connection, however, it is well to emphasize the principle that "no Governor, no matter how great his intellectual equipment or how pure his motives, ought to have such power." This quotation from the recent comment of the *Outlook* on the Patrick case well expresses the need of a Governor's having the advice of a competent board of penal experts in such matters.

The Governors' Conference at Richmond failed to take any decisive action on important subjects such as the proposed uniform acts proposed by the Uniform State Laws Conference, but adopted a commendable resolution deprecating lynch-law which is hopeful as reflecting a sound public opinion on the subject.

Personal

Hon. Charles M. Start, for the past seventeen years Chief Justice of the Minnesota Supreme Court, sat with his colleagues of the court for the last time Dec. 24. On the first of the year Calvin L. Brown, Associate Justice, became Chief Justice of the Supreme Court. The retiring Chief Justice was presented with a beautiful cane of Spanish snakewood by his associates on the bench.

President Taft has made up his mind to accept the proffer of the Kent professorship of law at Yale and probably will take up his duties at New Haven early in the spring. The President, is said to have determined uon accepting the Yale professorship for several reasons. He will not be restricted merely to lectures to Yale students, but will be permitted to lecture, if he desires, in other law schools or upon the platform, or to engage in any other occupation which he sees fit.

Hon. William W. Morrow, judge of the United States Circuit Court at San Francisco, announced Dec. 2 that he would retire from the bench in July, on the day when he attains the age of 70. He will take advantage of the opportunity of quitting the bench after twenty-two years of service. During these twenty-two years Judge Morrow has rendered 600 decisions. He has held court in California, Oregon, Alaska, Washington, Montana, Idaho, the Hawaiian Islands, and in the United States Court for China. Among his notable services was the establishment of the United States District Court in the new state of Arizona.

Judges Albert Haight and Irving G. Vann retired from the New York Court of Appeals Dec. 31, under the age limit. Judge Haight had had a service of forty years on the bench and Judge Vann a service of thirty-one years. On the last day when the Court was in consultation they were presented with loving cups by their associates on the bench. nO

Jan. 2 Judge Vann was the guest of honor at a dinner tendered him by the Oswego County Bar Association at Oswego. On Jan. 6 Judges Vann and Haight were honored at a dinner given by the Albany Bar Association. They are succeeded in the Court of Appeals by Judges Hogan and Cuddeback, who were elected in November.

Mr. John Kennish, having completed his term of service as Judge of the Supreme Court of Missouri, has resumed the practice of the law and has become a member of the firm of New, Kennish & Krauthoff, with offices in the Gloyd Building, Kansas City, Missouri.

The Sherman anti-trust law is proving its adequacy as a civil statute, and there is no necessity for the much discussed proposed amendment particularizing unlawful practices in restraint of trade, according to George W. Wickersham, Attorney-General of the United States, in his annual report submitted to Congress Dec. 5. On the other hand, however, the Attorney-General does not pass judgment upon the efficacy of the anti-trust act as a criminal statute. He merely says: "The experience of the last year in endeavoring to enforce criminal liability under the Sherman law has not been encouraging." The Attorney-General defends the Commerce Court, the abolition of which was attempted at the last session of Congress. A return to the old methods of distributing litigation arising from the orders of the Inter-State Commerce Commission to the district courts would be injurious to the interests of the public and delay the administration of justice, says Mr. Wickersham.

Bar Associations

Nebraska. — Frank B. Kellogg of St. Paul, speaking before the meeting of the Nebraska State Bar Association at Omaha Dec. 30, defended the integrity of the American judiciary and condemned what he said was a disposition to criticize the courts. He declared that of all the branches of the Government, the judicial, in his opinion, was the least subject to the exercise of arbitrary power, to scandal, or improper influences. Mr. Kellogg said he believed it to be a fact that the Supreme Court of the United States is the most progressive and liberal branch of this Government, and that it has always been solicitous for the rights of the people. "The people," he said, "who are denouncing the Supreme Court as reactionary and the 'last resort of the vested interests' should remember that but for the decisions of that Court, commencing with those written by John Marshall and ending with the latest decision under the commerce clause, the nation would have been powerless before the greatest combinations of wealth and power that any age has ever seen."

Pennsylvania. — A midwinter meeting of the Law Reform and Executive Committees of the Pennsylvania Bar Association was held at Philadelphia Dec. 28. The Committee on Law Reform will have the bills recommended by the Association at the last annual session introduced in the legislature. They are as follows: (1) "An Act regulating trial by jury in civil causes in courts of record of this Commonwealth," which requires the trial judge, at the request of either party, to direct the jury, in addition to the general verdict rendered by it, to answer specific questions submitted by the parties, the answers to be recorded with the general verdict; (2) "An Act providing what effect shall be given to admission to practice in the Supreme Court when the person

so admitted applies for admission to practice in the other courts of this Commonwealth"; (3) "An Act providing that no judgment shall be set aside or reversed or new trial granted unless the error complained of has injuriously affected the substantial rights of the parties"; (4) "An Act relating to the beginning of elections." Cape May has been selected as the place for the annual meeting of 1913.

Philadelphia Law Association

At the annual meeting of the Law Association of Philadelphia, on Dec. 3, the following resolution was adopted, after the submission of a report from the Special Committee on the Judicial System of Philadelphia County, of which George Wentworth Carr was chairman: —

"*Resolved*, That the report of this Committee be adopted; that the Committee be continued with power to cause to be introduced into the next session of the General Assembly, and to take all proper measures to secure the passage of, an act adding one judge to each of the five Courts of Common Pleas of Philadelphia, and for securing an amendment to the Constitution to permit the establishment of a Municipal Court along the lines of the Chicago Municipal Court."

Mr. Carr, in presenting the report, said that the chief arguments in favor of a Municipal Court were a more rapid trial of cases and a special judge for domestic relations cases and juvenile court work, both of which could be obtained at once by increasing the number of our present Common Pleas judges, and that the trial of small cases without juries, which was another advantage of the Municipal Court of Chicago, could be facilitated by a special statute to be introduced in our next legislature, giving our present Common Pleas judges that power. There was some debate on the subject, several speakers questioning the advisability of asking the legislature to increase the Courts of Common Pleas and also to take the initial step toward amending the Constitution so as to provide for a Municipal Court.

A proposed resolution opposing the principle of the recall of judicial decisions was opposed by Dean William Draper Lewis and referred to a committee for consideration.

The following officers were elected: Chancellor, Hampton L. Carson; vice-chancellor, Frank P. Prichard; secretary, Meredith Hanna; treasurer, William W. Smithers.

The Governors' Conference

The fifth conference of the Governors of states was held at Richmond, Va., early in December, dealing with a variety of subjects criticized by the New York *Evening Post* as not concerning the majority of the Governors assembled. The newest subject to come up for consideration, that of agricultural credit, was discussed at Washington at the invitation of President Taft. A committee of five was appointed to draft uniform state legislation under which old style farm mortgages could be replaced with short or long farm bonds. Governor O'Neal suggested that a committee should be appointed to prepare a bill to authorize the organization of land mortgage banks for incorporation under state charters and similar to those that exist in Germany.

The subject of the punishment of criminals attracted most attention. Governor Shafroth of Colorado advocated lenient but certain punishment, and cited his own state as an example of the successful working of this system. Gov-

ernor Baldwin of Connecticut advocated more rigorous methods, such as the restoration of the whipping-post and sterilization. He would have criminals convicted of rape sterilized. Governor Blease, in this connection, made his sensational defense of lynching for rape, but was met with a defense of lawful and orderly government by Governor Kitchin of North Carolina, Governor Gilchrist of Florida, and Governor Mann of Virginia. On the next day Governor Carey of Wyoming asked Blease if he had not taken the oath to uphold the Constitution. The South Carolina Governor replying with an intemperate slur on the Constitution, the Conference, at the suggestion of two Southern Governors, O'Neal of Alabama and Mann of Virginia, adopted by an overwhelming majority an anti-lynching resolution: —

"*Resolved*, That it is the sentiment of the Conference of Governors in session at Richmond, Va., December 6, 1912, that the whole power of the several states should be used whenever necessary to protect persons accused of crime of every kind against the violence of mobs and to provide for speedy, orderly, and impartial trials by courts of competent jurisdiction, to the end that the laws for the protection of life and property be duly enforced and respected by the people."

Governor Blease's attitude has been generally denounced by the Southern press.

Discussion of a state income tax was led by Governor McGovern of Wisconsin, who read a paper. Ex-Governor Augustus E. Willson of Kentucky also read a paper on the subject. Governor McGovern asserted that the Wisconsin income tax had succeeded as strikingly as the old personal property tax failed, in compelling persons of means to pay their just share of the support of the state government. He attributed the failure of the income tax plan in other commonwealths to lax administration.

"The country has gone railroad mad," said Governor Foss of Massachusetts in an address designed to arouse public sentiment to concerted action in the development of inland waterways. He asserted a transportation crisis faced the country, and that the key lay in waterway development.

Papers were read by Governor Oddie of Nevada and Hawley of Idaho, on uniformity in laws governing divorce.

The Conference adjourned to meet in Colorado Springs next year.

The Dynamiting Case

The prosecution of officials of the International Association of Bridge and Structural Ironworkers in connection with the dynamiting of the Los Angeles Times Building in October, 1911, and other outrages was concluded at Indianapolis Dec. 28, when verdicts of guilty against thirty-eight labor leaders were returned. Indictments having been found by the federal grand jury Feb. 6, 1912, the trial opened on Oct. 1, just two years after the Los Angeles explosion. Of the fifty-four original defendants, some were discharged, and two others, McManigal and Clark, pleaded guilty. A jury was secured in thirteen hours, on October 3, consisting mostly of farmers. At the trial before federal Judge Anderson the Government presented 549 witnesses, whose testimony covered 25,000 pages, and a quarter as many witnesses appeared for the defense. The jury was out seventeen hours. The prosecution cost the Government in the neighborhood of $750,000. Judge Anderson passed carefully upon every phase of the complicated trial. His efforts to give the convicted men every possible chance under the law, and his attitude of mercy in passing sentence, were strik-

ing features of the final session in the case on Dec. 30. The Court declared that the evidence showed some of the men to be guilty of murder, but that as they were not charged with that crime in the indictments, they could not be punished for it. "The certainty of punishment, not its severity," said the Court, "is the important consideration in the administration of criminal justice." Accordingly, the heaviest sentence imposed was that passed on Frank M. Ryan, president of the Ironworkers' International Union, who was given seven years' imprisonment. Eight others were sentenced to prison terms of six years.

The Panama Canal Protest

The text of the formal protest of the British Government against the provision of the Panama Canal act exempting American coastwise shipping from paying tolls was first made public early in December. The protest, which was in the form of a letter to Ambassador Bryce from Earl Grey, was a cogently reasoned document, moderate in tone, which concisely stated arguments already largely familiar, and carefully forbore to dispute the legal rights of the United States to control the canal and to aid American shipping by subsidy if it should so desire. The Senate received the protest in the same spirit as that in which it treated the exemption of American coastwise shipping last summer, with about the same majority in favor of dealing with the question of tolls as purely a domestic question involving no breach of treaty obligations. The President of the United States has missed the opportunity to dignify the closing months of his administration by urging that the issue of the alleged violation of the Hay-Pauncefote treaty be submitted to the Hague Permanent Court of Arbitration as soon as practicable. He did, in his speech before the International Peace Forum in New York, Jan. 4, declare himself in favor of arbitration, "when we have reached the exact issue" and when diplomatic negotiation has failed, thus exhibiting a slight modification of his views since his recent utterance in favor of determination of the questions in our national courts. But the issue has already been presented, and a government which seems to be in the wrong can scarcely rely on diplomacy to right itself.

Society for Judicial Settlement of International Disputes

"Essentials to be Applied by an International Court" and "Sanctions of International Law" were special topics for discussion at the third annual conference of the American Society for the Judicial Settlement of International Disputes held at Washington, D. C., Dec. 20–21. A strong sentiment showed itself in favor of the arbitration of the Panama Canal dispute. Everett P. Wheeler made a notably persuasive address in which he urged that the President of the United States accept the proposal of arbitration contained in the formal protest presented to this Government by Earl Grey. He quoted from the treaties of 1850, 1901 and 1908, between the United States and Great Britain, and from his quotation drew the conclusion that "it would be better a thousand times that the United States should submit its case to the Hague tribunal than that it should be false to its plighted faith and the honorable traditions of one hundred and twenty-five years."

Governor Simeon E. Baldwin of Connecticut presided and in his annual address discussed the international court as an incident of the evolution of the

modern world. Attorney-General Wickersham discussed the Supreme Court of the United States as a prototype of a court of nations.

Professor Paul S. Reinsch of the University of Wisconsin declared in an address that "a state is internationally responsible for injuries which may be inflicted upon the subjects of other states within its territory," and he added that it is unworthy of the United States that "where we have always been inclined to hold other nations responsible for injuries to our citizens we have failed to make arrangements by which our national Government shall be responsible in similar cases."

Henry B. F. McFarland said that it would not be the armies and navies of the world which would make an international tribunal powerful, but an enlightened public opinion behind it. If a supreme court of the world were once established, the various countries would vie with each other in appointing to it their ablest and most honorable men.

Joseph E. Davies of Madison, Wis., declared that world-wide public opinion would support the judgment of a wise and capable international court in the majority of cases which might be brought to it for settlement.

Thomas Willing Balch of Philadelphia expressed the opinion that many improvements might be made in the existing body of international law and that much could be accomplished through constructive legislation by future peace congresses.

Joseph H. Choate of New York was elected president and Dr. Charles W. Eliot vice-president of the Society. Dr. James Brown Scott was chosen secretary and J. G. Schmidlapp of Cincinnati treasurer, with an executive committee composed of the above-named and Theodore Marburg, Minister to Belgium; John Hays Hammond, Governor Baldwin, W. W. Willoughby and Henry B. F. McFarland.

Prominent Organizations Meet in Boston

Many interesting papers were presented at the annual sessions of the American Political Science Association, the American Economic Association, the American Sociological Society, the American Association for Labor Legislation, the American Historical Association, American Statistical Association, and the Efficiency Society, held jointly in Boston during the last week of December. A large amount of attention was devoted to the general subject of social welfare legislation and to recent social tendencies, and many distinguished scholars and publicists took part in the proceedings.

An important paper was read before the American Political Science Association by Professor Walter J. Shepard of the University of Missouri, on "The Theory of the Subjective Right to Vote." The speaker maintained the doctrine of popular sovereignty to be an outworn fallacy; "we must learn to recognize the electorate as an organ of government." At the same meeting Professor Roscoe Pound of Harvard Law School discussed "The Political and Economic Interpretations of Jurisprudence," and Charles H. McIlwain of Harvard University spoke on "The Tenure of English Judges." Professor Frederic J. Stimson defended the initiative and referendum, but opposed the recall of judicial decisions as tending to obliterate the distinction between constitutional and statute law. Professor William F. Willoughby, Professor Frank J. Goodnow, and others spoke on national budgets. An interesting conference on "The Press and Public Opinion" was participated in by Talcott Williams, Rollo Ogden,

Arthur Brisbane, Professor Henry Jones Ford, and several newspaper editors.

At the meetings of the American Economic Association Professor Irving Fisher presented his well-known plan for the standardization of the gold dollar, and this subject and many others, such as that of banking reform, were discussed. There was a debate on "Governmental Price Regulation," Professor J. M. Clark of Amherst College and Professor F. W. Taussig of Harvard holding its future to be uncertain, but Professor Chester W. Wright of the University of Chicago and Professor John H. Gray of the University of Minnesota urging its benefits. Professor David I. Kinley of the University of Illinois was elected president for the coming year.

The newest social movements were strongly reflected in a paper read by Professor Albion W. Small of the University of Chicago before the American Sociological Society, the meetings of which he opened as its president. Taking for his topic "The Present Outlook of Social Science," he said in part:

"Most of the recent demands by various types of agitators for economic reform have spent their strength in challenging the justice of our distributive system, and in proposing substitutes. Beneath these relatively superficial matters, however, is the antecedent question, which has scarcely been formulated, namely: Whether capitalism, as we know it, is compatible with social solvency.

"How far can our practice of accelerated capitalization go before it will overtake the capacity of production operations to carry the increasing burden? The question challenges not economists alone. Our present knowledge that the latifundia system undermined the strength of Rome came through the combined work of our whole apparatus of social science. The most vital task of our period is confirmation or removal of the suspicion that the capitalism of our era is a social fallacy as patent and as fatal as the Roman latifundia.

"The task will not be finished without the co-operation of all our social sciences from the historical, functional, moral and instrumental standpoints."

Before the same body, President Walter F. Willcox of the American Statistical Association urged the need of social statistics to enable courts to dispose correctly of the questions of fact arising in controversies involving labor, occupational, and health conditions.

Professor Pound read a paper at these meetings also, on "Legislation as a Social Function," and E. R. James of the University of Wisconsin Law School discussed "Social Implications of Remedial and Preventive Legislation in the United States." Among the numerous other speakers were C. E. Merriam of the University of Chicago, who disapproved of the influence of extremists, whether stand-patters or socialists, on social legislation.

The sessions of the American Association for Labor Legislation were opened by Professor Henry R. Seager, the president. Factory inspection and the minimum wage were among the subjects receiving the attention of several speakers. Professor Seager advocated the minimum wage, from a study of conditions in certain industries, and Professor John R. Commons agreed with him in general, though he could not see how there would be any escape from the necessity of a mothers' pension law to supplement the minimum wage. John Fitch favored legislation for one day's rest in seven, based on the European model, and Charles Earl urged a new federal workmen's accident compensation act.

Ex-President Roosevelt opened the meetings of the American Historical

Association with an address on "History as Literature," which was a plea for imagination in the writing of history, without slighting the claims of science and specialized research, to which he conceded a function of importance. Among the many papers read were the following of particular interest to readers of this magazine: "Profitable Subjects for Investigation in American History, 1815–1860," by Professor William F. Dodd; "The Court of Star Chamber," by Edward P. Cheyney; "Sumptuary Laws in the 18th Century," by John Martin Vincent; and "Profitable Fields of Investigation in Mediæval History," by James Westfall Thompson. Professor William A. Dunning of Columbia University, the historian of political theory, succeeds Colonel Roosevelt as president.

Obituary

Currey, John, former Chief Justice of the San Francisco Supreme Court, who died at his ranch near Dixon, Cal., Dec. 18, at the age of 98, was the last of the noted politicians of antebellum days in California. He was elected a Justice of the Supreme Court in 1863, being chosen Chief Justice in 1866.

Davis, Jeff, United States Senator from Arkansas, died Jan. 3 at Little Rock, at the age of fifty. He studied law at Vanderbilt University, becoming state attorney in 1892 and Attorney-General of Arkansas six years later. Two years afterward he was elected Governor, serving for three terms.

Hall, John I., a leading lawyer of Macon, Ga., and in his prime one of the foremost lawyers of the South, died Dec. 31, aged 72. He had served in both Houses of the legislature and as judge of the superior court, and had been general counsel for the Georgia Southern and Florida Railroad.

Hopp:n, William W., a lawyer who was a member of several charitable boards, died at his home in New York City Jan 3. He was a Governor of the New York Hospital.

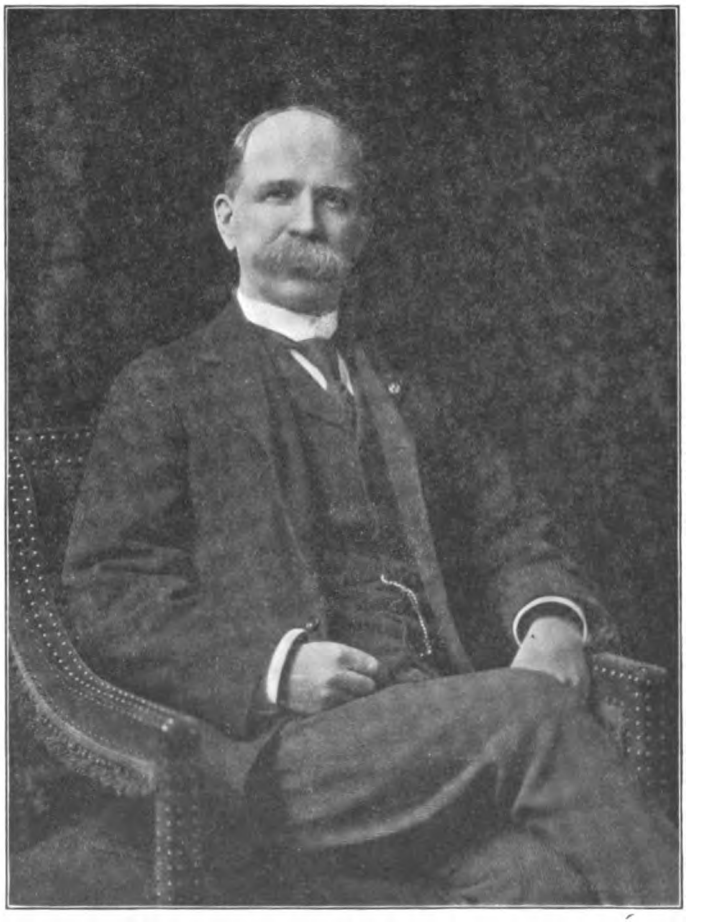
Lemon, Richard A., author of the present Illinois parole law, died in Clinton, Ill., Dec. 29. He was president of the first Board of Pardons, inauguarted during the administration of the late Governor Tanner.

Lewis, Virgil Anson, state archivist of West Virginia, and founder of the *Southern Historical Magazine*, died at Mason City, West Va., early in December. He early relinquished the practice of law to devote his time to literary and educational work. Among his many writings were "History of West Virginia," "Life and Times of Anne Bailey, the Pioneer Heroine," "History and Government of West Virginia," "Story of the Louisiana Purchase," etc.

Paul, Capt. Frank W., a leading Philadelphia attorney, who won distinction in the Civil War, died at Villa Nova, Pa., Dec. 25, aged 72. After the war he studied law and became one of the most aggressive advocates in the country.

Price, William S., the oldest lawyer in Philadelphia, died Dec. 17, aged 95. He was a member of the bar for seventy-three years and was engaged in many important cases. He was for many years chancellor of the Protestant Episcopal Diocese of Pennsylvania.

Reeder, General *Frank*, once a law partner of Chester A. Arthur, died in Easton, Pa., Dec. 7. He was a former Secretary of the Commonwealth of Pennsylvania, and former Banking Commissioner of the state.



THE LATE CHARLES C. SOULE

LEARNED IN THE LITERATURE OF THE LAW

(*Litterarum Juridicarum Magister*)

FOUNDER OF THIS AND OTHER LAW JOURNALS

The Green Bag

Volume XXV March, 1913 Number 3

Charles Carroll Soule

IN OFFERING its tribute to Mr. Soule, who died on the 7th of January, the *Green Bag* can hardly find words to express what it owes to him as its founder, and publisher during the greater portion of its existence, or how much legal journalism owes to Mr. Soule, for he was if we are correctly informed the founder of both the *American Law Review* and the *Central Law Journal*. The truth is that legal periodical literature, quite as much as legal literature in general, profited by the influence of Mr. Soule's unusual personality. What he could not find time to do himself he inspired others to do in a spirit akin to his own. That he would have made an ideal editor if he could have escaped from the meshes of a business which he cultivated with an ardor akin to that of the bibliophile is not to be questioned, for his wit was ever ready, his pen facile, and his mind alertly receptive. The files of *Legal Bibliography*, no ordinary publisher's circular, afford evidences of this ripe faculty, and contain occasional examples of finished paragraphing showing the earmarks of his personality.

Dean Wigmore, in his appreciative notice in the current number of the *Illinois Law Review*,[1] describes Mr. Soule as "emphatically an idealist in business." That is to be interpreted as meaning that Mr. Soule, though by no means a poor business man, was considerably more than a man of business. Idealism, or whatever you choose to call it, does not take kindly to harness, and Mr. Soule was not content to devote his whole energies, like most men, to one special pursuit, whether of bookselling, publishing, bibliography, editorship, or library management. His large and many-sided interest in books sought and found a vent in all these several channels. Specialization in any one of them would have brought sufficient distinction. Instead, Mr. Soule sought to unite these several interests in his business, and succeeded in building up an establishment which reflected and expressed his own temperament. Hardly any interest can be said to have dominated the others, and we therefore refrain from the attempt to characterize Mr. Soule as distinctly and primarily a law bookseller or a legal bibliographer for fear of giving a false impression. The ideal to which he devoted himself was not only larger than that of any business, it was also larger than that of any profession. The motive force of his idealism was to be found mainly in his delight in books in generous response to their many-sided appeal alike to the scholar, to the collector, to the cataloguer, and to the antiquarian. What originally drew this man of books to the books of the law and led him to make them his life-work we do not know. It can hardly have been mere circumstance, for among them he was clearly in his native element.

Probably no one in this country had

[1] 7 *Ill. L. Rev.* 438 (Feb.).

more extensive knowledge of the bewildering mass of American and British law books, or was so competent an expert in this field. He early made an exhaustive and authoritative study of editions of the old Year Books.[2] Through his trips to England he gained methodical and accurate knowledge of editions of old reports and abridgments, and librarians found his advice in the matter of purchases of invaluable aid. At a time when the advent of modern conditions of business competition had not yet rendered such a thing impossible, he made of his business a profession, and a learned profession. He was far above any imputation of self-seeking. His "Lawyers' Reference Manual of Law Books and Citations," which appeared in 1883, was a unique work in its field. Various publications issued by his firm set high standards in legal bibliography, and have been of great assistance in helping the selection and distribution of works, old and new, of approved scholarship and accuracy.

As Dean Wigmore has testified to Mr. Soule's high and honorable aims as a law publisher, and services to legal authorship in this country, we will not add anything to what he has expressed in terms of such warm gratitude and esteem. "His personal geniality and enthusiasm meant more for the encouragement of legal literature than any mere commercial genius could achieve." His scholarly tastes and accomplishments made him the friend and helper not only of law librarians but of deserving authors. "A particular service to the profession" was rendered through his undertakings to publish, for the American Bar Association, the Bulletin and Codes of the Comparative Law Bureau, and for the Association of American Law Schools the Modern Legal Philosophy Series.

Mr. Soule was born in Boston in 1843, and was the son of Richard Soule, one of the compilers of "Soule's Synonymes," and the compiler also of a dictionary. His mother was Harriet Winsor of Duxbury, Mass. He was prepared for college in the Brookline High School and was graduated from Harvard in the class of '62. Enlisting with the 44th Massachusetts, he later became captain in the "55th," the second of the two Massachusetts colored regiments. One who was with him in the service speaks of him as "a model officer, brave, enterprising, helpful, considerate of his men, courteous toward his associates, and in all respects above reproach." Captain Soule was slightly wounded in the arm at Honey Hill but remained under fire. After the war, he was one of a commission superintending labor contracts between planters and freed negroes, being stationed at Orangeburg, S. C.

Mr. Soule engaged in the law book business in St. Louis for a number of years, being from 1869 to 1878 a member of the firm of Soule, Thomas & Wentworth. He was one of the founders of the University Club of St. Louis, and married Louise C. Farwell of that city.

Returning to Boston he became in 1878 a partner in the long established law book firm of Little, Brown & Company. This connection lasted until May, 1881. Mr. Soule in that year formed a partnership with James M. Bugbee for the purpose of publishing and dealing in law books. The firm was located first at 12 Court street, Boston, and later at 37 Court street. The late Professor Ames's Cases on Bills and Notes was one of the first publications to be announced. In October, 1884, the partnership was dissolved and Mr. Soule moved the

[2] "Year Book Bibliography," 14 *Harvard L. Rev.* 557 (1901).

business to 26 Pemberton square. In two years it was again moved, this time to larger quarters in Freeman Place Chapel, 15½ Beacon street. The Chapel was built in 1848 for James Freeman Clarke's congregation, and was later occupied by various religious bodies, the last being a French Catholic church.

Mr. Soule conducted the business in his own name till 1889, when he incorporated it as the Boston Book Company. He was its president up to his death, and actively supervised its affairs as long as his health permitted. Two years ago he suffered a paralytic stroke, but he strove with undaunted spirit to recover as much of his former vigor as possible, attempting an almost daily attendance at the office. He doggedly performed the greater part of the work on his recent book, "How to Plan a Library Building for Library Use," in this condition of shattered physique. He was even contemplating the preparation of a second volume on some related phase of library science.

Besides the publications already noted, Mr. Soule was the author of "Library Rooms and Buildings," and in earlier life, of "Hamlet Revamped, Modernized, and Set to Music," and "Romeo and Juliet: A New Travesty."

To those of us who recall Mr. Soule's vigor less than five years ago, his going was premature even though he rounded out the entire three score and ten. A mellower and finer civilization might have dealt more fairly with such a man, carefully husbanding his strength for another productive decade. Yet Mr. Soule did not depart leaving his work unfinished. We can look back with satisfaction, and with no little admiration, on a life which skillfully and fruitfully performed its chosen task without suffering it to overshadow and dim the beauty of fine aspiration and magnanimous endeavor. His character and ideals have left a permanent impress, and have assisted the ripening process of American legal literature and legal scholarship. That we have advanced so far beyond primitive conditions in law publishing is due in no small degree to his indefatigable enthusiasm and to the effect of his example.

Sydney Smith and the Law

By Roy Temple House

MEMBERS of the profession should read with approval the record that the wittiest and perhaps in one interpretation of the word the most eloquent of Anglican divines would have entered the law instead of the ministry if he could have followed his own inclinations. But when he took his Oxford degree, in 1792, we are told that the financial affairs of the family, with the failing health of his mother and the necessity of preparing his brothers for life, made it desirable that he begin earning money at once. So it came about that instead of reading law and waiting for clients in London, he took a pitiful country living two hundred miles away. But though his talents brought him in a short time to a much more comfortable situation in the Church, and eventually to fame and almost fortune, he never ceased to regret the profession he had vainly hoped to enter, and in Lady Holland's Memoir he is quoted as saying,

at the moment when he was the most eagerly listened to preacher in the Island, "The Law is decidedly the best profession for a young man if he has anything in him," —even though "in the law he must have a stout heart and an iron digestion, and must be as regular as the town clock."

Sydney Smith had all these merits in a high degree — we might, if space allowed, stop and illustrate them in detail — and he never ceased to show a keen and intelligent interest in legal matters. In 1824, as Chaplain to the High Sheriff, he preached two appropriate sermons in the York Cathedral at the spring and summer Assizes. The text of the first one was Acts xxiii, 3, and the subject was announced as "The judge that smites contrary to the law." Here, as many times again, he insists that in the present state of English civilization the judges have the prosperity and the morality of their country in their hands; if England thrives and conducts her affairs uprightly, "First the Gospel has done it, and then Justice has done it." The judge needs more than human aid to discharge his delicate responsibility aright; "he must remember that he beareth not the sword in vain," but he must keep in mind also the strength of temptation, the weakness of man's nature, and especially the helplessness of the poor and ignorant: "All magistrates feel these things in the early exercise of their judicial power; but the Christian judge always feels them, is always youthful, always tender, when he is going to shed human blood; retires from the business of men, communes with his own heart, ponders on the work of death, and prays to that Saviour who redeemed him that he may not shed the blood of man in vain."

The second sermon was preached from Luke x, 25, and was called "The lawyer that tempted Christ." This sermon contains what is perhaps the clearest statement in literature of the peculiar character of the lawyer's activity: "Justice is found, experimentally, to be most effectually promoted by the opposite efforts of practised and ingenious men, presenting to the selection of an impartial judge the best arguments for the establishment and explanation of truth. It becomes, then, under such an arrangement, the decided duty of an advocate to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others. However useful this practice may be for the promotion of public justice, it is not without danger to the individual whose practice it becomes. It is apt to produce a profligate indifference to truth in higher occasions of life, where truth cannot for a moment be trifled with, much less callously trampled on, much less suddenly and totally yielded up to the basest of human motives." The injunction the lawyer most needs is, as it is put elsewhere in the sermon: "do not carry the lawful arts of your profession beyond your profession."

The second main theme of this appeal to the bar is "the honorable and Christian task of defending the accused; a sacred duty never to be yielded up, never to be influenced by any vehemence nor intensity of public opinion . . . if you do this, you are a guilty man before God."

In one of these same Assize sermons, the speaker paints a glowing picture of the noble part England has been playing in European affairs. "And why? Because this country is a country of the law; because the Judge is a judge for the peasant as well as for the palace; because every man's happiness is guarded by fixed rules from tyranny and caprice.

. . . The Christian patience you may witness, the impartiality of the judgment-seat, the disrespect of persons, the disregard of consequences. These attributes of justice do not end with arranging your conflicting rights and mine; they give strength to the English people, duration to the English name; they turn the animal courage of this people into moral and religious courage." And yet Smith was not ready to accept English institutions as complete and perfect; his works bristle with keen, wise and witty suggestions for their improvement. Find in the *Edinburgh Review*, year 1826, a scathing arraignment of the then existing system of requiring prisoners to speak for themselves. The argument had been advanced that employing counsel was an expense to the prisoner; and Smith burst out: "— just as if anything was so expensive as being hanged! . . . 'You are going . . . to be hanged tomorrow, it is true, but consider what a sum you have saved!' "

Jeremy Bentham had complained that the English Government was not careful enough to publish her laws, so that all might know when they were in danger of committing an offense,— which reminds the compiler of a story of a German peasant, unknown to Sydney Smith it is true, who was brought before a local magistrate for stealing wood, and who urged in his defense that he had just moved in from another province, and had not learned that stealing wood was a crime in that section of the country. Smith remarks very aptly in answer to Bentham that "we do not happen to remember any man punished for an offense which he did not know to be an offense"; and adds, a little later in the same article, " The people, it is true, are ignorant of the laws; but they are ignorant only of the laws which do not concern them."

He is much concerned at the discrimination between poor and rich which the practice of releasing on bail induces, but has no remedy to offer. " The imprisonment of a poor man, because he cannot find bail, is not a gratuitous vexation, but a necessary severity; justified only, because no other nor milder form of security can in that particular instance be produced."

He is never at a loss for an appropriate illustration. One of his favorite themes is the danger of making crime attractive by showing the criminal too great consideration. He tells how, a century before in Denmark, condemned prisoners were handled so gently, conducted to execution in so noble a procession and preached to so eloquently before the trap fell, that " This spectacle, and all the pious cares bestowed upon the criminals, so far seduced the imaginations of the common people, that many of them committed murder purposely to enjoy such estimable advantages, and the government was positively obliged to make hanging dull as well as deadly, before it ceased to be an object of popular ambition."

He is a determined advocate of capital punishment, chiefly for the reason that " Death is the most irrevocable punishment, which is in some sense a good; for however necessary it might be to inflict labor and imprisonment for life, it would never be done. Kings and Legislatures would take pity after a great lapse of years, the punishment would be remitted, and its preventive efficacy therefore destroyed."

He had no sympathy with a prison humanitarianism which made the culprit's lot so easy that he would rather be in prison than out. Perhaps his most picturesque statement of his convictions in this direction is the refined bit of sarcasm from the *Edinburgh Review* for

1821: "There are, in every county in England, large public schools maintained at the expense of the county for the encouragment of profligacy and vice, and for providing a proper succession of housebreakers, profligates, and thieves. They are schools, too, conducted without the smallest degree of partiality or favor, there being no man (however mean his birth or obscure his situation) who may not easily procure admission to them. The moment any young person evinces the slightest propensity for these pursuits he is provided with food, clothing, and lodging, and put to his studies under the most accomplished thieves and cut-throats the country can supply."

With all his preference for the legal profession, he finds its members lacking in *esprit de corps:* "If a lawyer is wounded, the rest of the profession pursue him, and put him to death. If a churchman is hurt, the others gather round him for his protection, stamp with their feet, push with their horns, and demolish the dissenter who did the mischief."

The list of whimsical, piquant, clever, and often useful comments on legal, governmental and related questions could be swelled almost indefinitely. It is true that Smith was so voluminous and versatile a writer that it would be easy to catalogue at great length his utterances on a variety of subjects. But at least one of his readers has come to the conclusion from the testimony he has left himself, that there was no other line of thought, not even excepting the line to which his profession devoted him, which interested him quite so much as the line we have been discussing.

Norman, Oklahoma.

Neo-Hegelianism in Jurisprudence

AS EXEMPLIFIED BY DR. BEROLZHEIMER

BY THE EDITOR

I

OF the thirteen works chosen for translation in the Modern Legal Philosophy Series, edited by a committee of the Association of American Law Schools, Dr. Berolzheimer's "The World's Legal Philosophies" is likely to be prized as containing the most satisfactory presentation of the leading types of legal theory throughout the course of historical development.[1] The book shows great facility in compressed exposition of the salient points of individual doctrines. Its character is that of a historical and critical essay, rather than of a constructive treatise. Yet the

[1] The World's Legal Philosophies. By Fritz Berolzheimer, President of the International Society of Legal and Economic Philosophy at Berlin. Translated from the German by Rachel Szold Jastrow of Madison, Wis. With an introduction by Sir John Macdonell, Professor of Comparative Law in University College, London, and by Albert Kocourek, Lecturer on Jurisprudence in Northwestern University. Modern Legal Philosophy Series, v. 2. Boston Book Co., Boston. Pp. lvi, 477 + 12 (index). ($4.25.)

writer intermittently indicates his own positions, and at times elaborates them with a degree of fullness. His own philosophical attitude, therefore, is quite as much to be reckoned with as the attitudes examined and described. With Dr. Berolzheimer's personal attitude the present article deals. The features of his historical presentation may be passed over without belittling the value of the book in its chief aspect, that of a historical review. Only a fragmentary and tentative statement of his philosophical position can safely be attempted without reference to his other works, including the four other volumes of the series from which "The World's Legal Philosophies" was chosen.

Before taking up this subject, it may be worthy of remark that the epitomization of such a voluminous mass of ancient, mediæval, and modern theoretical writings is a striking performance, and has been carried out with such pains and skill that the author may more readily than not be excused for any sins of omission, and may be pardoned for exemplifying the inevitable tendency of every selective treatment to choose what most plainly suits the given purpose, and to overlook what though apparently irrelevant may be of cardinal importance. If some theories have been wrongly labeled, and if a theory has not invariably been stated with its qualifications, and in the light of its manner of disposing of hostile arguments, it may be borne in mind that the execution of a work of similar compass avoiding all such pitfalls would be a wellnigh superhuman task.

The clear literary form, in which the author has been seconded with rare ability by the translator, is also worthy of comment. Of course no style, however clear, could make the cloudy metaphysics of some eighteenth century German speculation easy of comprehension. But the author is not to be taken to task for faults of matter rather than of presentation. The latter exhibits Dr. Berolzheimer's distaste for technical phraseology. He adopts a literary rather than a scientific terminology, which is at once a defect and a virtue; his mind on the whole is rather averse to abstractions, and he is possessed of a keen sense for the actualities of practical life. His terminology is not always ideal, but his meaning is not often mistakeable.

The theoretical position unsystematically built up by Dr. Berolzheimer throughout the volume may be freely interpreted as follows. The idealism of the eighteenth century and first half of the nineteenth erred through its lack of a sense of reality, and was followed by the inevitable reaction of a naturalism which went equally far to the opposite extreme, committing the mistake of excluding from the field of knowledge everything but the world of mechanical cause and effect. The latter extremism has provoked another necessary reaction, and what is needed is an idealism possessing a full sense of reality. Evolution is not a purely logical process of the unfoldment of the idea of absolute reason, of which empirical reality is only the appearance, but the conception of an actual external evolution must be substituted for the Hegelian view. This actual evolution is not a mechanical process to be explained solely by the operation of natural laws, for such a view would be fatalistic, contradictory to the nature of the human will, and refutable by the plain facts of experience and by the entire course of history. An idealistic view of human activity and of the forces of progress is therefore necessary, the will being conditioned by environmental conditions, but not absolutely determined by them in its action

This conception of the relatively free will harmonizes with the Hegelian system, but Berolzheimer thinks it futile to follow Hegel in his speculations regarding an absolute free will, as that would be looking too far into the dim future of humanity. The will seeks to solve its problems in the light of the available sum-total of experience, and to shape existing institutions to the ends of a progressive culture. The goal of the cultural forces is intimately connected with that personal liberty for which the will strives, and is the goal of increased human efficiency. Government, law, and morality are cultural forces working toward the attainment of this ideal of freedom. Progress is thus not a "Heraclitean flux," in accordance with the Hegelian conception, but a process the basis of which is to be found in the cultural ideal in every age. The impulses toward increased human efficiency and power demand expression in progressive economic conditions, and law and economics are related as form and content, as shell and kernel. Philosophy of law must appreciate these ideal ends toward which society strives, must recognize a spiritual aspiration rather than mere physiological phenomena as determining the course of development, and a descriptive sociology of law is therefore inadequate. The historical evolution of law is to be viewed as a process of human emancipation, and the law of a given age is to be studied in the light of economic conditions. The movement of history gradually reached the point at which it could be viewed as a movement for the emancipation of economic classes. One after another the classes have been emancipated, the laboring class being last to attain its freedom in the closing years of the nineteenth century. We are thus at the beginning of a new era foreshadowed by the modern "class-state" in which all the classes share equal rights. It would be foolish to predict the final outcome of this new movement. Socialism represents the partisan interest of the laboring class, and it will be necessary for the proprietary and professional classes to bestir themselves to prevent their enslavement to the laboring class. The problem of the legal philosophy of the present is to formulate the demands of the new order, in a manner which shall assure maintenance of the ideals of individual liberty and intellectual freedom. This problem, stated by Rousseau and Kant, must now be restated with consideration of new economic conditions and altered intellectual outlook.

If the reader is disposed to complain that the foregoing exposition of Berolzheimer's views is vague, he is unlikely to gain from the volume under consideration more definite expressions of the exact nature of law, of the precise meaning of culture, and of the real relation subsisting between legal and economic institutions. The author either has not had the inclination to bring out these matters with greater distinctness, or has felt that such an exposition would lie outside the scope of the present work.

Such is Berolzheimer's philosophy of law in general outline, perhaps with the omission of some of its essential features. It is neither a pure idealism nor a pure realism. It is a transcendalist philosophy. The Hegelian view that progress is governed by a transcendental principle, rather than by natural forces, has been handed down to the "Neo-Hegelian" group. Kohler more clearly brings out the idea that progress is governed by such a principle.[2] Berolzheimer implicitly if not expressly accepts the same view. His attitude toward the facts of

[2] See Mr. Kocourek's Introduction, p. xvii.

science and toward empirical reality is influenced by the modern spirit; he deems the study of concrete evidence, such as that of economics for instance, of great importance. In the present work he treats the natural world as something more than the manifestation or emanation of pure ideas. Yet the empirical world is not alone to be considered. There is also the world of the will. The workings of the will are not to be explained by natural law. The positions of vitalism and voluntarism are assumed, in opposition to those of the mechanical theory and phenomenalism. Berolzheimer's philosophy is a dualistic voluntarism, diverging from monistic naturalism on one hand, and from monistic idealism on the other. The reader will be able to judge from what follows to what extent Berolzheimer's theory, seemingly at variance with the Hegelian tendency, actually conforms to it.

While Berolzheimer disavows the Hegelian dialectical treatment of ethical progress as the emanation of an abstract ideological movement,[3] he does not rest ethical development on the foundation of objective dynamic processes. With Hegel the absolutely rational and moral will is free; the will in its lower stages of development is free only in itself, because instincts and direct impulses form determining motives.[4] But this acknowledgment of the determining effect of instinct recognizes no objective process of causation, but only a dialectical process of pure thought.[5] Berolzheimer does not accept the Hegelian view of the morally free will of absolute reason, being concerned, instead, with the will as actually expressed in historical progress. Emotional conditions are decisive factors.[6] Yet the individual is not to be considered fatalistically, for "his spontaneity and initiative are to be taken into consideration," as well as his status as a member of society; his "position and efficiency as an individual" make possible a view of the individual as the active director of forces of evolution to the realization of an objective goal of endeavor.[7] The supposition that the moral progress proceeds according to natural laws "would lead to fatalism, resignation, the acknowledgment of human impotence in the presence of mighty forces of nature; in which case it is futile to enlarge upon what may be ethically desirable."[8] Emotional conditions, if decisive factors, lie outside the realm of dynamic forces. Berolzheimer thus rejects the positions of determinism and naturalism.

II

A few of the more salient features of this "Neo-Hegelian" doctrine may be briefly pointed out:

(1) It implies acceptance of the economic interpretation of history, but the subordination of this interpretation to the cultural interpretation, and an "idealistic" view of economic institutions in contrast to the "materialism" of a purely mechanical view of economic forces.

(2) It measures the life of the past by contemporary standards, and is a formulation of the spirit of modern democracy.

(3) The ideal law for existing human society cannot be deduced by processes of empirical reasoning, but problems of legislation are to be met only by the spontaneous activity of a culture which seeks expression in a law embodying its own freely determined purpose.

[3] P. 231.
[4] Pp. 217–8.
[5] P. 220.
[6] Pp. 217–8, 350.
[7] Pp. xlii–xliii, 368–9, 427.
[8] P. 363.

(4) Yet the formulation of a statement of what the law ought to be is a legitimate problem of legal philosophy, and a definite position on political questions is consistent with an unprejudiced treatment of objective facts.[9]

These positions may be more minutely examined.

I. *The Parallelism between Law and Economics.* The outcome of Berolzheimer's presentation of his views is unsatisfactory, notwithstanding his use of pertinent historical illustration, if one is looking for detailed argument in support of the theses advanced. A vague general concept of the correlation of legal and economic institutions will not suffice to explain the evolution of law throughout history. History shows that economic institutions influence, if they do not determine, the law, and that they are likewise acted upon by the law. The mode of this interaction is a sociological problem requiring careful investigation before general principles can be formulated. Any one can see that economic and legal changes do not move forward *pari passu*, but that each offers resistance to the other, yet the theory of so close a relation as that between form and content implies that changes in the law are automatically embodied in economic institutions, and *vice versa*. There can be no true parallelism, but only a correlating tendency the nature of which needs to be accurately determined. This holds equally true if the two kinds of institutions are viewed as separate products of the life of society; the field of investigation is then broadened, rather than shifted, and the interaction of the two specific forces cannot be overlooked merely because the entire complex of social forces is considered. The vagueness of Berolzheimer's conception destroys its scientific value, and his parallelism is obviously a speculative rather than a dynamic principle which fails to offer a reasonable explanation of the causes of the legal and economic movements of history. His explanation of the emancipation of the fourth estate at the close of the nineteenth century as an economic movement, for example, without any light on the actual causes of this movement, whether they were internal economic causes or external social causes, is not satisfactory, for it implies overconfident generalization on economic or sociological premises. Even if "culture" itself is an inexplicable phenomenon, and philosophy means something more than sociology, an auxiliary sociology must be employed to define the objective processes through which culture shapes institutions. Berolzheimer's treatment of history is superficial because he is indifferent to causes and concerned only with results. His indistinct notion of law as a reflex of economic movements stops at the threshhold of a fertile subject and offers no real explanation of the processes of legal evolution.

Dr. Berolzheimer's historical treatment reveals vast industry and wide learning. Yet in such a panoramic treatment scant opportunity is afforded for giving to each period the study necessary to a thorough comprehension of its forces. With the inevitable emphasis on the concrete, there is not room for an exhaustive critical survey of the cultural tendencies of each epoch, and of their interactions in the field of social institutions. Law is but one of the manifestations of these cultural tendencies; governmental, economic, and ethical institutions also require investigation, and the part played by law in the drama of this progress is to be ascertained only by discovering the nature of the forces at work in its production

[9] Author's Preface, pp. xlv–xlvii.

at a given moment, which requires not only a study of the institutions but of the strength and weakness of human nature, and of the tastes, aptitudes, and prejudices of mankind. A thoroughgoing philosophical treatment of history is necessarily sociological in method, for thus only can we explain the genesis of cultural movements and the causation of great transformations of law and society. A vague general concept of the interrelation of law and economic institutions as matter and form will not suffice to explain the evolution of law throughout history. It is necessary, on the contrary, to show just how, from within, society can generate the force acting upon its own complex. If we say, for example, that the Reformation was primarily an economic movement for the emancipation of the middle class, we are on the threshold of a much broader inquiry. The economic demands of the middle class remain to be explained. Were they due to economic conditions rendering the position of the middle class less favorable than in the previous age, to the moral deterioration of the governing class, or to a sudden elevation of the cultural standards of the middle class? These important questions are entirely ignored.

We know that there is a tissue of social institutions not one of which may be changed without affecting every other institution. In the complex of moral, economic, legal, and miscellaneous institutions, and not only of fixed institutions but of changing habits, tastes, and capacities, there is a *Zusammenhang* which makes it fruitless to consider one institution but in its interactions with all the other factors. Accordingly, the "modern inter-class state" is too complicated an entity to be disposed of as merely a juxtaposition of economic groups. Granted that the most powerful economic group will always succeed in mastering every weaker group, and will thus exert a most potent action in determining the characteristics of the community in general, it remains to show the sources of its power and the nature of the various cultural elements which not only confer power upon it but provide means for its exercise.

II. *The Absolute Criterion of Progress.* — A correct use of the word "emancipation" presupposes that a mediæval class demanding emancipation was oppressed according to contemporary standards, yet that would often be difficult to establish, and Berolzheimer gives no indication of having made the inquiries necessary to give his conclusions support. On the eve of the Reformation, Aquinas declared it the subject's duty "to be justly obedient,"[10] and that view was presumably concordant with the prevailing morality not only of the ruling class but of all classes. "The distinctive characteristic of the Middle Ages may be said to be the bondage, social and spiritual, of the individual,"[11] but the individual acquiesced in that bondage in feudal Germany as truly as in feudal France. Can the Reformation in Germany be treated as a movement for the breaking of these bonds when there was every reason why a similar movement should have arisen likewise in the Latin countries? The historical problem is large and by no means free from difficulty for the historical student. Even greater would be the task of establishing by induction the thesis that all great historical movements originate in a contemporary demand for greater individual liberty. In fact this is not the view which Berolzheimer seeks to estab-

[10] P. 99.
[11] P. 113.

lish. He judges the past in the light of the present, by modern standards, and he makes individual liberty, according to the modern conception, the absolute criterion of progress. This confusion of relative with absolute ethical standards is a serious defect. It obscures the actual, objective character of human development, and sees the past through colored spectacles. The motive purpose behind political change needs to be stated in terms of the ideas of the epoch under consideration, rather than of those of a subsequent era. Otherwise the motive impulse receives a mystical rather than a scientific expression. In the absolutism of Berolzheimer's goal of emancipation or personal liberty there is something akin to the absolutism of Hegel's conception of pure rationality as affording the explanation of all progress.

III. *The Fluidity of Culture.* — The fundamental fallacy of Hegel's philosophy lay in the assumption that all reality can be expressed in terms of consciousness, that the cosmos of nature is a cosmos of ideas, and that the goal of philosophy is achieved by the formulation of a complete doctrine of ideas. This fallacy led to a one-sided and distorted philosophy possessing sterility on the phenomenological side, in view of the want of a clear interpretation of the dynamic or mechanical cosmos, resulting from what was tantamount, in the identification of subject and object, to a denial of the objective category of being. This grave defect is particularly noticeable in the ultimate bearing of Hegel's theories of society, government, and law.

One of the chief ideas adopted from the system of Hegel by the Neo-Hegelian school of jurisprudence is the concept of culture. "It is Hegel's greatest merit as a political philosopher to have replaced the *Rechtsstaat* by the *Kulturstaat*," says Berolzheimer, "to have accomplished the affiliation of law with culture."[12]

It would appear that the doctrine of culture is rather to be associated with Kohler than with Hegel. Pound says: "Kohler takes as his starting point a dictum of Hegel that law is a phenomenon of culture."[13] And Kohler has worked out a definition of culture.

Culture, he says, "is the development of the powers residing in man to a form expressing the destiny of man."[14] This is vague. "The culture of a people," he says, "determines the development and form of its law."[15] This explains the action of culture, without explaining its genesis or function. It would not be difficult to define culture from a sociological standpoint. We are here concerned with a special point of view. From passages cited by Berolzheimer,[16] it may be concluded that culture is the collective view of life taken by society, including ethical and religious views; it is a tissue of ideals which strive for embodiment and expression in the actual law. The effort to embody culture in law may be conscious or unconscious.

Culture being thus a complex, it would seem, of ideals, it would be unnecessary to show the basis of the impulse to realize them in practice, for culture is from the very nature of the definition teleological and contains its own motive impulse. The critic of Kohler's culture doctrine perhaps need not complain of the lack of fuller light on the mode in which culture expresses itself. The possible modes of realizing

[12] P. 230.
[13] "Sociological Jurisprudence," in 24 and 25 *Harvard Law Rev.*; see v. 25, p. 155.
[14] Pound, *ibid.*, p. 157.
[15] Berolzheimer, p. 422.
[16] Pp. 422–4.

a practical end are many and various. In so far as they can be realized directly in action we need not concern ourselves with the mode of operation of cultural forces. In so far as they require to be realized mediately, through the instrumentality of various agencies, a field for more careful investigation opens itself, but it may be maintained that this is one of the by-paths of jurisprudence. Far more vital is the importance of explaining the origin of culture, and of explaining why culture is not stationary but is always a modification of an antecedent culture. Hegel would have been content to account for this origin and evolution of culture merely by an ideological solution; he would have sought the explanation not in dynamic factors, but in the successive stages in a progress of ideas to the goal of reason. In so far as Kohler dispenses with any inquiry into the etiology of culture or the dynamic principles of its development he can be accused of betraying an unfortunate ideological bias, bringing him into closer mental kinship with Hegel than might superficially be suspected from the general character of his philosophy.

Kohler attaches much importance to ethnological and historical research, but he seems to have employed them rather as tools for discovering the cultural stages of periods than as means of accounting for the evolution of culture itself. He is concerned with the expression of culture more than with the manner in which a culture is determined. Ethnological facts and general institutions will serve as evidences of the cultural state of a people, but Kohler seems to pay little heed to them as factors molding culture.

Berolzheimer's comment on Kohler's theory of culture brings out the point that according to it "we are part of an endless stream of development, involuntary instruments of a rational idea, in which we believe but which we cannot direct."[17] There are no points of arrest in this stream, says Berolzheimer, and there is only, for society, the "distracted pursuit of a constantly shifting purpose." To give continuity and direction to a practical philosophy of human action, something more than the Hegelian view of law as an expression of culture is necessary; it "must be supplemented by considering that personal liberty is the object for which the cultural forces strive; this personal liberty is intimately related with the impulses toward "progressive economic conditions,"[18] toward increased human efficiency,[19] toward restoration and increase of "that power which humanity has sacrificed in culture and through culture, that is, the natural exercise of impulses lost or enfeebled in the course of civilization."[20]

Berolzheimer thus seeks to escape the evil of the Heraclitean conception that all things are in perpetual flux by taking refuge in the doctrine of a culture seeking the goal of individual liberty and "increased human efficiency."[21] His hostility to determinism prevents a desire to investigate the dynamic processes through which culture is created and transformed. He has no inclination to study the manner in which a new culture springs forth from the roots of the previous life of society. He shows that law is not fluid, but the expression of cultural tendency, thus breaking with the notion of a fluid law which he finds implicitly contained in the Hegelian system.[22] But he succeeds only in link-

[17] P. 427.
[18] P. 24.
[19] Pp. xliii, 427.
[20] P. 421.
[21] P. 427.
[22] Pp. xviii, 231.

ing law with a fluid culture wandering in the maze of history with no goal save that of the empty abstraction of liberty, of human efficiency. Consequently he fails to perceive that a study of contemporary morality and other factors of civilization affords the materials for an inductive forecast of tomorrow's developments, in principle if not in practice; for the prodigious complexity of such a task would not justify the conclusion that human development is not governed by definite laws which it is the business of science to ascertain. He correctly views legal, like other institutions, as an artificial force, but he fails to see that the law may be at once an artificial and a natural force; that the harnessing of this social agency, so to speak, can come only as the result of a dynamic pressure, that legislation, though a deliberate process in the legislator's mind, is also the production of a social force. A ripened process of deliberation on the part of the legislator aspires under modern intellectual conditions to a mastery of scientific method, and the formulation of that method is one of the tasks of modern legal philosophy.[23]

IV. *The Rationality of Culture.* — It is one thing to find that Berolzheimer's philosophy really results in the doctrine of the fluidity of culture, and another to suppose that he is conscious of the attitude which must thus be described. He is not aware of the Heraclitean position he occupies. He does not see that by detaching culture from the field of natural law he leaves it entirely without stable foundations. His dualism[24] enables him to conceive of a culture which, though uncontrolled by natural forces, is nevertheless controlled by something belonging to its own inward nature. "Man is a being endowed with a divine spirit, a being whose knowing and thinking, though dependent upon his material organization, is not restricted by it."[25] This is but another way of saying that cultural forces are supernatural forces, partly at least. Berolzheimer is plainly in sympathy with the deeper interpretation to be placed upon Kohler's remark that man is not a mere placental mammal but has the capacity of acquiring the attributes of godliness.[26] He acknowledges that his philosophy is in a sense neo-Platonic.[27] A supernatural element enters his philosophical system. For the moral chaos mistakenly connected with naturalistic philosophy is substituted the order superimposed by a rational, transcendental spirit. A rational solution of all practical problems is thus possible. Legal philosophy, equally with politics, must be directed toward the future of social conduct.[28] Repudiation of social dynamics on one hand, and of Hegelian dialectics on the other, therefore does not lead Berolzheimer to a non-ethical descriptive empiricism but to an ethical valuation of the current situation. The doctrine of a culture not determined by empirical conditions is supplemented by the doctrine of the necessity of empirical knowledge to further the interests of culture. The principle of an undetermined fluid culture is modified by an important qualification — reason should determine the succeeding stages of culture. This want of perfect logical con-

[23] Commenting on Wundt's social philosophy, Professor Barth of Leipsic says: "Die kausale Betrachtung [der Geschichte] erst macht die Soziologie oder Geschichtsphilosophie zu einer fruchtbaren Wissenschaft. Sie ermöglicht dem Politiker aus erkannten Ursachen Mittel zu machen, um gewisse Zwecke herbeizuführen." — "Wilhelm Wundt als Sozialphilosoph," *Archiv für Rechts- und Wirtsch.-philosophie*, v. 6, p. 133.

[24] Paulsen notwithstanding; see p. 461.

[25] P. xlvii (footnote).

[26] Pp. xvii–xviii.

[27] P. xlvii.

[28] P. xlvi.

sistency is a consequence of the dualistic position. Berolzheimer is neither a consistent empiricist nor a consistent idealist. He tries to combine two irreconcilable positions.[29]

III

Natural law of the eighteenth century, and at all earlier periods, was a static system. "All schemes of natural law have undertaken each in its own way to furnish a project of an ideal code with an unchangeable, unconditionally valid content."[30] The break with this theory came with the recognition of what we may call ideal law — the law suggested by morality — as a changing rather than a stationary system, with the substitution, in other words, of an evolutionary ideal law for natural law. The break came with the idealistic philosophy of law dating from the formulation of the evolutionary doctrine of Schelling and Hegel. Both of these thinkers denied the reality of the object, their conception of evolution being ideological rather than dynamic. Schelling's position, however, gave an impetus to the formation of a new school, inaugurated by Savigny and Puchta, which applied the historical and empirical method to the study of past systems of law, yet gave its attention to positive rather than to rational or ideal law, and refrained from formulating any theory of ideal law supplanting the old theory of static natural law. Hegel developed Schelling's conception of a changing rational law, by demontrating that the rational law coincides in its development with each successive stage of the will. He conceived of the ideal law as changing rather than static, but not changing in the dynamic sense, that view being reserved for the sociological attitude, for evolution was treated as a dialectical rather than an objective process. The ensuing preoccupation of one school of jurisprudence in Germany with historical study of positive law, and of another school with an evolutionary idealism which threw no light on the determination of the ideal law for a given period, was perhaps the result of the sterility of the Hegelian dialectic in throwing virtually no light on the manner in which the logical necessities of a given epoch impress themselves upon its institutions. Consequently, in the ensuing period, we have the barren evolutionary idealism of Krause, Ahrens, and Herbart, the historical positivism of Savigny and Puchta, and the mingling of the two in Dahn and Lasson.

The break with this revised theory of *Naturrecht*, this theory of a changing rather than static law of the reason, and the substitution of the concept of a dynamic legal ideal, was to come not through a rebirth of abstract philosophy but through the transition from historical positivism to systematic positivism and sociological theory. The influence of Comte and Spencer directed attention to principles of mechanical causality, and contributed the groundwork of social mechanics to a progressing science of social dynamics still, at the present day, in process of development. The views of Ihering have been of great importance in helping to an understanding of the causation of legal institutions, in the light of his studies of social dynamics and the psychology of the strife for the realization of legal conceptions. Berolzheimer's criticisms of Comte and Spencer are in large measure justified, if they might be more satisfactorily

[29] While the naïve types of idealism and realism are contradictories, the critical types converge toward a common position, in the opinion of the present writer, but Dr. Berolzheimer's method is not of this sort.

[30] Stammler, quoted by Pound, 25 *Harv. L. Rev.* 150.

expressed; his comments on Ihering, if tantamount to an observation that he has not adequately appreciated the subtlety of psychological factors, can be accepted in the main, though overemphasizing Ihering's shortcomings. When Berolzheimer comes to the consideration of later exponents of sociological doctrine, such as Gumplowicz and Ratzenhofer, it is apparent that he withdraws his sympathy from much that is wholesome and truly constructive in their mode of procedure, even though it cannot be accepted as an adequate formulation, and that he fails to realize the full significance of the break with evolutionary idealism, in the substitution of a truly dynamic for a merely flexible concept of law. While treating the law as the expression of cultural forces, Berolzheimer does not seek to explain these cultural forces in the light of natural laws. On the contrary, he would consider such an explanation fatalistic, robbing ethics of all practical significance.[31] Wundt, like Berolzheimer a voluntarist, but a voluntarist of less extreme type,[32] says that moral conceptions vary widely, and that experience shows they cannot be determined *a priori*, yet they do not depend upon mere chance — the individual will must be brought into harmony with the general racial progress. Such a position is unsympathetically characterized by Berolzheimer "a stoicism upon a racial-psychological basis."[33] Exactly where Berolzheimer himself stands he does not state, but he can be described as occupying an intermediate position between the Hegelian dialectical theory of progress and current social dynamics. According to Berolzheimer, culture is not a natural but an artificial force,[34] a statement innocuous taken by itself, but which expresses the transcendentalist position when considered in conjunction with the segregation of the active will from the world of natural cause and effect.

The outcome of Berolzheimer's attitude toward positive law and the law postulated by cultural forces is that to be expected from his inability to accept a dynamic view of law. He finds fault with the Hegelian doctrine of evolution as having no fixed points of arrest, as implying a condition of universal flux.[35] The dynamic conception of evolution would establish the premises of morality and law for any given epoch, in so far as so prodigious a task may be at least partly and tentatively performed by the human intellect, and for the concept of indeterminate haphazard progress would be substituted a determinate scheme of ideal law as that best suited to the existing society. Berolzheimer cannot find refuge in that certainty which can come only from a thoroughgoing application of scientific method in every field of human life and conduct. He has to choose the middle position of a law answering to the demands of current culture, and the law is really not less indeterminate than before, for though law is determined by culture, culture is itself indeterminate. Consequently Berolzheimer, when he rejoices in the passing of the theory of absolute natural law,[36] is not able to replace it with anything which comes to much more than a theory of positive law. Berolzheimer's abandonment of the Hegelian dialectic, his failure to substitute a vigorous abstract analytic similar to that of Stamm-

[31] See pp. xlii–xliii, 313–4, 368–9, 427, 434, 459.
[32] For Wundt's voluntarism see his article "Ueber die Definition der Psychologie," in his "Philosophische Studien," v. 12, pp. 1–66. Wundt and Münsterberg hold opposite views with regard to the psycho-physical parallelism.
[33] Berolzheimer, pp. 433–4.
[34] P. xviii.
[35] P. 231.
[36] P. 219.

ler, and his low estimate of social dynamics, result in a failure of tangible contribution to the problem of stating the ideal law for a given time and place.

Neo-Hegelianism is a movement difficult to characterize with precision because we have no means of judging of its mode of dealing with the problems of external reality and of knowledge. Berolzheimer, it must be supposed, rejects the identity of subject and object,[37] and he apparently believes in a real external world. Through the position of voluntarism, rather than through a doctrine of objectless ideas, Neo-Hegelianism discovers its affiliation with the system of Hegel. Voluntarism is one of the dominant present-day tendencies, as need be made clear merely by citing the instances of Wundt, James, and Bergson. But the contemporary voluntarism is mostly a naturalistic voluntarism, in so far as such a phrase may be employed without a contradiction in terms. A transcendental version of the teleological interpretation is for the most part not attempted. Berolzheimer's empiricism makes up only a part of his philosophy. Something more is necessary in philosophy, he holds, which shall reflect the results of empirical science and yet pass beyond them.[38] But he is able to offer nothing to supplement empirical science but the interpretative or normative sciences, including ethics and law. What he really does is to dislocate them from their logical position in the empiric system. This practically amounts to a restriction of empiricism to the field of the descriptive sciences.

Berolzheimer's voluntarism has its root in his psychological attitude. Voluntarism and phenomenalism are opposite views in psychology; they may be combined by means of concessions on either side but cannot be merged into one.[39] Voluntarism in psychology calls for voluntarism in social psychology, and consequently in all the social sciences, including that of law. Berolzheimer's rejection of the naturalistic treatment of the will thus leads him to repudiate legal sociology as an adequate discipline. This is because he conceives of sociology as offering mechanical explanations that cannot account for volitional processes. For this reason, and perhaps also for the reason given by Small,[40] he belittles the claims of sociology, to which the normative sciences are actually related not as supplementary but as subordinate disciplines.

Berolzheimer's anti-naturalistic bias thus carries with it a predilection for the interpretative in contrast to the descriptive treatment of legal institutions. His economic parallelism springs from the desire to formulate an ethical interpretation rather than a dynamic theory of law. He does not perceive that this interpretation requires for its soundness the active co-operation of sociology. On the contrary, he segregates his philosophy of law from the empirical sciences, thereby taking up a position which he assumes to be idealistic, because opposed to empiricism, but which is really in antithesis not to empiricism but to dynamic sociology. The position therefore comes close to being a vitalistic realism, rather than an ordinary idealism, and the term Neo-Hegelian does not so well describe the philosophical doctrine of the school as its general temper. Dr. Berolzheimer is in manifest sympathy with Hegel as shown by his inability to reconcile free-will and determinism, his disposition to treat

[37] P. 229.
[38] P. 8.
[39] See "Psychology in the System of Knowledge," by Hugo Münsterberg, Harvard Psychological Studies, I, 642.
[40] Pound, in 24 *Harv. L. Rev.*, pp. 618–9.

institutions as manifestations of culture rather than factors molding it, and his preference of the Hegelian concept of the state as dominating society to the concept of society as dominating the state. But his leading principles are hard to class as Hegelian.

This pseudo-idealism, perhaps better to be described as a vitalistic realism, is quite as one-sided and inadequate as the old positivistic realism against which it protested. The new realism must pass beyond both transitory phases of doctrine and take a larger view of social science, and the new philosophy of law, resting on sociological foundations, must apply a more comprehensive and adequate method than that which has been applied by either Positivists or Neo-Hegelians.

Circumstantial Evidence

By Robert McMurdy
of the Chicago Bar

THE story of circumstantial evidence told in "The Upas Tree," the recent lawyer's novel from my pen, is not more remarkable than many of the recorded cases. Indeed it seems impossible to invent a fiction plot not outrivaled by fact, and in every-day life we meet with incidents that would be counted overdrawn if found in a writer's tale. Every combination of circumstances which seems to lead to a particular conclusion, nevertheless raises the question whether it is not mere coincidence, and whenever the attention is habitually drawn to the frequency and strangeness of the almost daily coincidences of life one begins to question whether they are not governed by some law which the psychologists and metaphysicians have entirely overlooked.

These odd happenings swear continually at the doctrine of chance and many are undeniably removed from any telepathic or other mental influence. To illustrate from an incident which arose in my own family: one of its *truthful* members, on his way to England, desiring to make an unusual present to two old friends by the names of Paine and Sourby who lived in different places, had taken with him two tame prairie-dogs — a male intended for Paine and a female for Sourby. Off the coast of Newfoundland the ship gave a heavy lurch which threw the male across the deck into a watery grave. As near as the time could be calculated, at that very instant Paine fell over a precipice and was instantly killed. If both the actors in this tragedy had been persons, one might conjure up a theory of occult attraction or divine co-ordination between lives intended to be intermolded, or the calamity might be conveniently ascribed to predestination, but between prairie-dog and man it must be accepted as purely a freak of destiny unrelated to any law unless there be one governing mere coincidences.

Numerous other incidents might be recounted out of my own experience, and it has been no more extended than that of the average man. It is an interesting experiment, which I have tried myself, to have each member of a fair-sized company of credible people relate

the most remarkable coincidence within his observation. By the time the last tale is told he of the most besetting wonderlust is sitting appeased and astonished.

In some respects the story in "The Upas Tree" is no more remarkable than some of the odd coincidences connected with its preparation.

After a born itch for scribbling had taken the form of rhymes, short stories and a couple of impossible plays, I conceived the ambitious idea of producing another lawyer's novel. "Ten Thousand a Year" was then practically the only distinctive story of the legal profession, and it was the sole answer customarily made to the repeated question, "What novels portray the every-day life of the lawyer?"

During the first years of practice a member of the bar has ample leisure for book-writing and in the spare time of my "starving period" the second lawyer's novel, as it was hoped, was written, with the plot substantially as in the now finished story. But the early years are not ripe in knowledge of life nor full in experience either in letters or in the world. They do not count for much in ability to write fiction. Few novelists have achieved success, but fewer still among those who are on the near side of forty. The result in my case was merely a disappointment. The task of rewriting to meet friendly criticism was indeed an *opus*, rendered more difficult by a law practice sufficient to absorb all the day-time strength, so that months at a time would elapse before any attention was paid to the manuscript. The plot of my story ends in 1887 and it was originally completed about that time. Long periods of indifference, subsequent rewritings, the expunction of errors of youngness and modifications of detail, carried the work through a generation into the summer of 1912. When the galley-proofs came at last they were forwarded to a New York lawyer, formerly an assistant of District Attorney Jerome, to be sure that no slip had been made in setting out criminal procedure in a foreign state. With the returning proofs came an ominous note, "I advise you to consult the Patrick case!"

There was the reality, in many respects stranger than the fiction, and in a number of essential details it proved to be identical: —

Both cases (the actual and the fanciful) arose in New York City.

In each case a lawyer was tried for his life.

In each, the deceased had no immediate family and left a large estate.

In one, the dead man was poisoned; in the other, it was claimed that poison had been attempted.

In each case a will made the lawyer trustee of the estate, although in the real case the will was claimed to be a forgery.

In one, a codicil provided for cremation; in the other, a letter so provided, although it, also, was alleged to be a forgery.

In both cases cremation was in fact consummated.

Other similarities between the two cases may be noted by comparing my novel with the majority and dissenting opinions — in themselves a novel of over ninety pages — *People* v. *Patrick*, 182 N. Y. 131.

Nor is this all. Another circumstance, lately noted in the newspapers, but not mentioned in the opinions, runs parallel with the novel; Patrick's wife, whom he married while in the Tombs, throughout all his long confinement, remained faithful to him and devoted to a belief in his innocence.

And the incident does not end here. "The Upas Tree" had been published but a few weeks when the Governor of New York pardoned Patrick, in ignorance of the coincidence he was completing — an act having special interest for any lawyer who will follow the events of the book beyond the book itself. The pardon came a little over twelve years after Patrick's alleged crime, and the alleged murder took place a little over twelve years after my companion plot was on paper.

Another incident is less dramatic, but only a little less singular. Four or five years ago, while the manuscript was still being polished in the evenings and on Sundays, the daytime being prohibited in recognition of the warning of that old saying that "the law is a jealous mistress," a book appeared written by a colored man, detailing the woes of his race, under the title, "In the Shadow." At that time the title selected for my book was "In the Shadows," which, under the conditions, I felt constrained to abandon. It adds to the flavor of the circumstance that I have for years been connected with organizations for the benefit of the negro, like many another son of abolition parents. I soon chose the present name for the novel, and a year or two later in checking up on the poison referred to in the book, digitalin, I was startled to stumble on the fact that digitalin and the toxin of the upas tree are of the same family of poisons.

Later, when my publisher was putting out the work, he advertised it in the *Publisher's Weekly* and in the same number another "Upas Tree" (by Mrs. Barclay) was likewise advertised — and each advertisement took up a full page. My book was already printed and immediately appeared, the other being published later. I had no redress, as there is, of course, no copyright on the title of a book. Meanwhile an old book of the same name, out of print, with dancing as its subject, had been discovered; and still another, more recent, in England, Mrs. Barclay's home, a contraband book on immorality. My publisher, in despair, telephoned: "The woods are full of upas trees."

To complete the incident it is necessary to go back a few months to a time when I was hesitating about the particular publisher to whom I should submit the manuscript. I wrote a letter to an Eastern firm mentioning the subject-matter, without stating the title of the book, but the negotiations went no further. This was the firm that eventually published the other "Upas Tree!"

A minor incident has its special appeal. The suggestion was made to me to return to the old custom of placing quotations at the head of the chapters. I readily adopted the hint because it seemed that quotations would tend to lighten somewhat the serious text and would tend to give some literary cast to a first venture. To do this well under all the circumstances proved to be an immense labor, particularly in searching original sources. Nowhere could be found, however, any reference to the upas tree itself. But after months of desultory search I happened upon the long desired treasure, part of a nature poem by Erasmus Darwin, which was promptly put on the title-page and which the publisher quite as promptly rejected, for it contained the word *death*, and in the rules of practice of iterary courts you are non-suited if such a word appears on the title-page of a novel. It so happens that one of the few boon companions of a lifetime, who is bound to me with hooks of steel, has occasion to make use of a *nom de plume* and for many years he has used the name *Eras-*

mus Darwin. In view of the sentiment involved it can be imagined with what misguided satisfaction I had undertaken to put the pseudonym of my companion on the introductory page of an endeavor to create something that would "live forever."

My faith in the reliability of circumstantial evidence, always weak, has now become still weaker. But what really holds me is the question whether there is a law governing pure coincidence. That is a nice problem for lovers of the curious and the occult, for the analyst and for those who believe that all things are governed by rule or law — that nothing happens but everything takes place.

Further Light on the Judicial Recall

THE MEETING OF THE NEW YORK STATE BAR ASSOCIATION

CO-OPERATING with the American Bar Association in a nonpartisan campaign of popular education against the movement for judicial recall, a Committee of Fifteen appointed last April by the New York State Bar Association is able to report that a majority of the county bar associations of New York State, on having the matter brought before them for action, have adopted resolutions condemning the recall of judges and judicial decisions, and that in several of the other counties favorable action is anticipated.

This same Committee of Fifteen was authorized to investigate the causes which have produced any feeling of discontent with the present methods of administering justice in New York State, and a sub-committee of five was appointed to make this special investigation under the chairmanship of Judge D-Cady Herrick.

The sub-committee sent out copies of a letter last June to a number of representatives of labor organizations, among others, the recipient being asked if he would "kindly advise the Committee whether to your knowledge or in your experience there is any considerable feeling of discontent with our courts, or with the manner in which justice is administered; the causes for that feeling of discontent, if any exists, and any suggestions that you can make as to remedies therefor."

A large number of replies were received, and are printed in Appendix D to the sub-committee's report. A few examples will illustrate the main trend of criticism.

The secretary of the New York State Federation of Labor wrote: —

> Complaint against the judge is, to put it into concrete form, the lack of real interest in the humane side of life. Too much attention is given by the judges to conserving so-called business interests and not enough to conserving the welfare of those who create the wealth of the country.

The secretary of the Amalgamated Meat Cutters and Butcher Workmen replied that a large majority of the people "have but very little respect for the judiciary of not only this state but the United States, as a whole, as they firmly believe that the judiciary cater to the financial interests of the country to the detriment of the working class."

The chairman of the Brotherhood of Locomotive Firemen and Enginemen

declared that the people are not satisfied with the naming of judges, in New York State, by political and business "interests," subjecting them to the influence if not the control of men who have no sympathy with organized labor or with the masses; moreover, from a bench thus selected "we do not get or expect any favors, and not always even-handed justice," almost all labor laws being crippled by construction or held to be nullities.

Another labor leader said that judges should be made to understand that their functions are judicial and not legislative, and "that they are paid for the enforcement of law as enacted by the legislature and not for the annulling of that law and creating laws of their own."

It is not necessary to make further quotations. The notion that the courts fawn on the rich and frown on the poor underlies most of the criticisms and is presented in a variety of forms. Some of the replies are more specific than others in specifying the labor statutes thought to have been wrongly decided unconstitutional, and in denouncing fancied abuses of the injunction.

Mr. Guthrie, in a supplemental report, concedes that the writers of these letters are sincere, and is also encouraged by the spirit of the replies to hope for candid co-operation in an impartial and thorough investigation. Nevertheless, says Mr. Guthrie, "many of the statements show an utter failure to investigate the facts and an entire indifference to the truth, and some are obviously puerile, or inexcusably inaccurate. . . . The pity is that many of the critics of our courts are lamentably ignorant of the subject about which they are writing or declaiming, and, unconsciously and unintentionally in some instances, misrepresent and distort the facts."

Mr. Guthrie then points out that the courts should not be blamed for the faults of the legislature; in the case of *Knisley* v. *Pratt*, 148 N. Y. 372, for instance, the court in rendering decision took account of the fact that the statute did not disclose a plain intent on the part of the legislature to abrogate the assumed risk doctrine, and for seventeen years, since that decision was pronounced, the legislature has failed to change the law, though it could easily have done so. Yet the Court of Appeals has in the meantime "been assailed before the whole country for its lack of sympathy with the poor and helpless and with social progress!"

With regard to the so-called selection of judges by the "interests," Mr. Guthrie's report condemns this baseless accusation and points out the need, not of "indiscriminate criticism or unfounded abuse of the courts," but of such practical remedies as shall bring about the nonpartisan election of judges, greater permanency in the tenure of prosecuting officers, and such competent assistance as the district attorney may require for the prompt transaction of the business of his office.

The misinformation of attacks on the injunction as a means of oppressing labor is pointed out, by calling attention to the fact that in New York a permanent injunction is never granted without notice and without an opportunity to be heard, while a temporary restraining order is never issued without notice of hearing unless the danger of irreparable injury from delay be very grave.

The alleged hostility of the courts to legislation has also led Mr. Walter Shaw Brewster to make an examination of the subject in a special report (Appendix B). He draws attention to the fact that by the common law of England combinations to raise wages were unlaw-

ful, yet while our courts have restrained and enjoined combinations in restraint of trade which also had for an object the raising of prices, they have refused to enjoin, but on the contrary have encouraged, combinations of laborers for the particular purpose of raising wages. "In fact neither legislators nor courts have in reality treated combinations of capital and combinations of labor on a plane of equality. For many years there has been increasing leniency toward combinations of labor, while in recent years there has been increasing severity toward combinations of capital." Furthermore, injunctions are not granted to restrain what may lawfully be done; "they only restrain against the doing of unlawful acts," and while the injunction is a remedy which should be used with great caution, there is no reason to believe that this caution has been violated — the cases have been studied with great care, and "do not show in any instance the enjoining of a lawful act."

The sub-committee has thus, it would seem, refuted the accusation that the courts are to be blamed for a hostile attitude toward labor. The assailants of the courts, who clamor most loudly for the recall of judges and judicial decisions, fail through a lack of accurate information and through a failure to understand the constitutional function of the courts to substantiate their charges. This is not to deny that the laboring classes may have grievances needing to be remedied by changes in the laws; it is not to deny that the courts may, without exceeding their constitutional function, bear at least some share of the burden of molding the law to meet contemporary conditions. The error lies in the assumption that the courts are themselves responsible for the social and economic grievances of labor. It is the old cry of judicial tyranny, which comes from the failure to perceive that the judges are the servants of the constitution and not its masters.

In his presidential address, which dealt with "Pending Questions," Mr. Nottingham devoted most of his attention to the judicial recall. "It cannot be said," he observed

> that the authors of the policy for the recall of judicial decisions have made rapid, or in fact, as yet, any considerable headway toward convincing the public judgment. While the idea was viewed with curiosity on account of its exceeding novelty, no feasible plan for putting it in operation was presented by its advocates, nor seemed to occur to others who gave it serious consideration. This inherent weakness has doubtless thus far prevented the theory, as first broached, from maintaining a place in the arena of serious debate.
>
> But the very thought of thus subverting the proper function of the courts under our form of government is abhorrent to the legal mind. We believe also that the sincere and thoughtful layman, when made fully aware of its effect when put into practice, will reject a fallacious and pernicious theory which renders justice unstable and individual rights uncertain, and makes the safeguards of the fundamental law less valuable than the sanctions of a statute. . . .
>
> When a self-governing people frames and adopts a constitution, it declares, in effect, that it chooses to be ruled by its judgment rather than its passions. When it clothes the provisions of that fundamental law in general terms, and prescribes a definite and deliberate method for its amendment, it intends thereby that the principles embodied shall be flexible, but not fluctuating. . . .
>
> Respect for the courts and reverence for the law have here gone hand in hand; and any hasty and intemperate criticism of them or their decisions upon important questions affecting sections or classes of people which tends to impair their hold upon the public esteem, reacts upon the enforcement of the law, spreads dissatisfaction, promotes disorder, and hinders the progress of sound and stable government. . . .
>
> It is not sufficient answer to the foregoing suggestions, to say that the majority should always rule; and then by fallacious reasoning seek to extend this principle to the control of the Judge in the discharge of his duties or to secure the reversal by the voters of his judgment

upon the rights of the individual. Might does not make right, even when might is the power of the many. The oppression of a capricious and transient majority is more unbearable than the rule of a single despot. Power impatient of constitutional restraint or regulation by law, whether it reside in the many or the one, has ever been a foe to human progress. This malign spirit which baffled the genius of Mirabeau in the tribune of the people was the same that sent Sydney to the scaffold.

The prominence of the issue of the recall was likewise illustrated by the guest of honor of the Association, Governor Hadley of Missouri, who in the annual address, choosing the subject, "Progressive Jurisprudence," gave much attention to the recall. "Law," he said, "is but the concrete expression of the moral judgment of any period of time." After speaking of recent changes in the law of liability for those injured in industrial accidents, and the maintenance of an "archaic rule" till recently, he expressed the view that the failure of legal justice to keep pace with social justice is "not entirely the fault of either our courts or our profession." The theory associated with Jefferson, that that government is the best which governs least, has retarded the working out of social, industrial, and economic problems.

When we consider that up until a few years ago this was the general trend of American thought and that one of the great political parties urged the necessity of such a theory of government, should we be too prompt to criticise our courts if in passing upon questions affecting industrial and social conditions they have not been fully abreast of what seemed to the advanced public opinion of the period?

But those who charge that all the fault has been with our courts contend that we cannot enjoy genuine popular government or secure a proper measure of social and industrial justice, except by making the courts more responsive to and representative of the people. And they contend that this result can be accomplished only by providing for the recall of judges and the recall of judicial decisions.

It is my opinion that both of these proposed methods are unnecessary and unwise. . . . It would, in my opinion, be a backward step to substitute a judgment of unpopularity for a judgment of wrongdoing in the removal of public officials from office. It would be advisable that the processes by which they can be removed should be made more simple, direct and prompt, but the removal itself should be accomplished in accordance with the forms of law and under those safeguards incident to the procedure by which any citizen can be deprived of that which is of value to him. . . .

It is apparent that when a court decides that a state law is unconstitutional, it is exercising legislative functions, and in a government founded upon the principle that all legislative power rests with the people, their opinions upon economic, social and industrial questions should finally control, against even the decisions of the court.

But whether there is need of a simpler or more direct method by which the people can exercise their authority to overrule or recall the decisions of their courts is another question. That the right exists is not open to question. It is my opinion that under the initiative method for amending the constitution and even under existing methods, it is within the power of the people to make their wishes in matters of general public policy effective, even though the courts set up their opinions upon such questions as against the opinions of the people as a whole.

The address of Henry W. Taft was on the subject of "Recall of Decisions — A Modern Phase of Impatience of Constitutional Restraints."

Whenever the people seek to eradicate abuses in the administration of the government, (he said) or when they aspire to elevate their social or industrial or political condition, they become impatient of any restraint imposed upon their zeal by the constitution; and it is upon the courts, whose duty is is to impose the restraint, that their discontent is naturally visited. The demand for the recall of decisions is the result of impatience of this kind because the courts have not found some way to overcome the constitutional obstacles to securing a complete and immediate readjustment by legislation of social and industrial relations — which it is thought will correct some intolerable conditions which have arisen in the rapid development of American civilization in the last two decades. . . .

If the principle of the recall is once conceded, there is no reason, either theoretically or practically, why it should not be extended to all judicial questions, where the social, industrial or political interests of the people are involved.

Whatever the question involved, the vote of the people would be based upon no clear or enduring principle which could be formulated, nor could the reasons of the voters be ascertained with any degree of cer ainty, for use as a precedent for the guidance in the future either of constitutional conventions or courts or legislatures, or even of the peqple themselves. Upon a subsequent referendum upon a similar question, it might well happen, therefore, that through some factitious circumstance, political, social, industrial or personal, a different vote might be cast; and as a result of repeated referendums we would soon have an irreconcilable conflict of popular decisions, without the possibility of deducing any safe or certain guide for future action.

The foregoing views of several speakers tend to emphasize more strongly the misconceptions underlying misguided attacks on the courts, and to confirm the conclusions of Judge Herrick's capable sub-committee. The feeling of dissatisfaction was stated by the subcommittee to have arisen from the following among other causes:

1. Misstatements and misrepresentations of the decisions and attitude of the courts.
2. Misapprehension of the powers and duties of courts and judges.
3. The delay and expense involved in civil and criminal cases.
4. The fault-finding of defeated litigants and their attorneys.
5. The manner of selecting judges, and the qualifications and fitness of some of them.

Reference was also made to many acts supposed to be for the benefit of workingmen and mechanics which were crudely drawn; some had clauses inserted, it would seem, almost for the purpose of having them declared invalid, many were passed when their invalidity was apparent. Legislatures and Governors, appreciating the invalidity of such statutes, but with a fear of offending those in whose real or supposed interest they were enacted, instead of frankly explaining their defects, passed them on to the courts for their adjudication and thus placed upon the courts the responsibility and odium of thwarting measures intended for the benefit of certain classes.

The New York State Bar Association held its 36th annual meeting at Utica January 24–25. The subject of the recall was not scheduled to receive special attention, but was forced into a position of greater prominence than it occupied on the program. The reports and addresses dealing with the subject have already been noticed.

Other business on the opening day consisted of reports from the committees on Commitment and Discharge of the Criminal Insane, Contingent Fees, and Publication of Legal Notices. The first of these reports was supplemented by liberal quotations from Dr. Haynes of Rochester, who condemned the practice of a person escaping punishment on a plea of insanity and later gaining freedom by regaining sanity.

Secretary Wadhams read the report of the committee appointed to attend the annual meeting of the Illinois State Bar Association, at which the subjects of procedural reform and recall were discussed. The New York men found the meeting one of profit to all.

Hon. Willis E. Heaton reported for the New York State Association of Surrogates, telling of the many duplications in the surrogates' law, and showing the urgent need for its revision and simplification. In this connection it is of interest to note that the Revision Committee of the New York State Association of Surrogates, meeting at the same time in Utica, made tentative changes in the surrogates' law, with the understanding that their recommendations would soon be made law. The revision was general in scope, said Secretary Southard, with simplification and codification as its object.

Frederick D. Colson, law librarian, in discussing "The Rapid Creation of the New State Library," after telling what a great loss was sustained by having the library destroyed by fire, showed how it had been possible in a comparatively short time to get together a very fair working library.

Charles A. Boston reported for the Committee on Judicial Statistics. This committee was named

a year ago to secure information as to the terms of court held during the past five years by Supreme Court Justices, how many days they have held court, number of contested cases tried with or without a jury, and in short, information which would form the basis for some determination of the efficiency of our courts, measured by work accompished.

The report stated that it was impossible to present any accurate figures covering the state. Records are kept in such varying forms, and in many cases are so fragmentary that no just deductions could be drawn from any statistics which might be quoted. The first district furnishes a conspicuous exception to the rule, for there the judges are keeping records of their own, and these are most admirable in form and the matter noted. The report stated that present methods of keeping records in this state are inadequate, with the exception of the first district, and recommended that a committee be instituted to report at the next meeting an adequate law for the collection of judicial statistics. A general discussion of this matter followed.

The report of the Committee on International Arbitration of the Panama Toll Question, submitted by Everett P. Wheeler, went deeply into the status of the dispute and advocated the passage of a resolution urging the President to submit to the Senate a special agreement for the submission of the question to the Hague Permanent Court of Arbitration. The Association, after debate, adopted a resolution of somewhat different form, more favorable to President Taft, as follows: —

"*Resolved*, That we reiterate our adherence and devotion to the principle of international arbitration as heretofore announced by this association, and cordially approve the position of President Taft on the Panama question, as stated in his speech of January 4 and quoted in Mr. Butler's minority report."

The Committee on Amendment of the Election Law with Regard to Judicial Candidates told of the effort that had been unsuccessfully made to secure the passage of the bill taking the judiciary out of politics by providing a separate ballot for judicial candidates. After the presentation of this report, Ansley Wilcox, chairman of the committee, introduced a resolution in support of this bill, which omits party designations from the ballot, and Judge Hale precipated debate by offering a different resolution recommending bipartisan nominations. Judge Alton B. Parker spoke in favor of bipartisan nominations. There was a sharp debate, which ended with the adoption of Adelbert Moot's pacific resolution sending back the matter to the committee, with instructions that it take all the suggestions and bring about a resolution favoring nonpartisan nominations as against bipartisan.

A report was presented by the Committee on Workmen's Compensation, Frederick B. Campbell, chairman. Everett V. Abbott and J. Hampden Dougherty filed dissenting reports. The report was debated nearly two hours and in the end the majority report was adopted. It was an unusual report, the majority saying it was not entirely satisfied that it was right, but believed it best to be submitted in order to get certain matters before the people through the Legislature. The report favored amendment of the constitution to provide compensation for men injured in hazardous occupations, instead of extra-hazardous as at present.

Charles A. Boston delivered a carefully prepared address on "Disbarment in New York," which was a comprehensive statement of the law and precedents of disbarment, and an exposition of marked value as a monograph likely to afford assistance to the bench and bar of all states. Mr. Boston spoke of the activity of the Grievance Committee of the Association of the Bar of the City of New York, in investigating complaints against lawyers, and presenting them, in proper cases, to the Appellate Division of the Supreme Court for disbarment or other discipline. He also spoke of the work of the Committee on Professional Ethics of the New York County Lawyers Association in advising lawyers respecting proper professional conduct, and of the latest rules of the Court of Appeals for the admission of lawyers to practice, which now require them before admission to pass examinations before the State Board of Law Examiners upon the canons of ethics of the American Bar Association. He said that all these agencies are operating to elevate the standards of professonal conduct, though they merely serve to impress high standards upon all lawyers, and to enlighten youthful ones, in respect to them; for there is nothing novel in their principles which have always been known and observed by the great majority of the profession.

At the banquet on the closing night the speakers included President Nottingham, who acted as toastmaster, Judge D-Cady Herrick. J. E. Martin, K.C., of Montreal, Judge A. T.

Clearwater, and Mr. Justice William Renwick Riddell of Toronto.

Officers were elected as follows: —President, Hon. Alton B. Parker; vice-presidents, first district, Eugene D. Hawkins; second district, James D. Bell; third district, D-Cady Herrick; fourth district, Francis A. Smith; fifth district, John N. Carlisle; sixth district, Henry R. Follett; seventh district, James S. Havens; eighth district, Daniel J. Kenefick; ninth district, J. Mayhew Wainwright; secretary, Frederick E. Wadhams; treasurer, Albert Hessberg.

Reviews of Books

NEW POLITICAL DEVICES

The Courts, the Constitution and Parties: Studies in Constitutional History and Politics. By Andrew C. McLaughlin, Professor of History in the University of Chicago. University of Chicago Press, Chicago. Pp. 299 (index). ($1.50 *net.*)

The Democratic Mistake. Godkin Lectures of 1909. By Arthur George Sedgwick. Charles Scribner's Sons, New York. ($1.60 *net.*)

The Initiative, Referendum, and Recall. Edited by William Bennett Munro. Assistant Professor of Government in Harvard University. National Municipal League Series. D. Appleton & Co., New York and London. Pp. 365 (index). ($1.50 *net.*)

Documents of the State-wide Initiative, Referendum, and Recall. By Charles A. Beard and Bird E. Schultz. Macmillan Co., New York.

The Initiative, Referendum, and Recall in America. By Ellis Paxson Oberholtzer. Charles Scribner's Sons, New York. ($2.25 *net.*)

Direct Elections and Law-making by Popular Vote: The Initiative, the Referendum, the Recall, Commission Government for Cities, Preferential Voting. By Edwin M. Bacon and Morrill Wyman. Houghton, Mifflin Company, Boston.

Majority Rule and the Judiciary: an examination of current proposals for constitutional change affecting the relation of courts to legislation. By William L. Ransom, of the New York bar. With an introduction by Theodore Roosevelt. Charles Scribner's Sons, New York. Pp. xx, 183 (index). (60 cts. *net.*)

Government by All the People; or, The Initiative, the Referendum, and the Recall as Instruments of Democracy. By Delos F. Wilcox, Ph.D. Macmillan Co., New York. ($1.50 *net.*)

THE foregoing titles, in addition to Nicholas Murray Butler's "Why Should we Change our Form of Government," Professor Beard's "Supreme Court and the Constitution," and Mr. Dougherty's "Power of Federal Judiciary over Legislation," make up the list of the more notable books issued since the appearance of Judge Lobingier's "Popular Law-Making." Not one of them is of outstanding importance as a treatise on political science, but several are of value. Professor McLaughlin, for example, has brought together five timely studies with the purpose primarily of stating facts, but with the actual result of offering a dispassionate discussion of some problems of the day, on which his conclusions are happily free from any partisan bias. He has thrown additional light on the origin of the power exercised by courts in declaring statutes unconstitutional, and he makes some sensible observations on the necessity of the party system of government and of the party manager or boss. He thinks that in time we shall work out a more efficient system of party government which will not give rise to that outcry against abuses with which we are now familiar.

There is a great deal that is suggestive and that is sound in Mr. Sedgwick's contention that the cardinal mistake of popular government in this country has been the attempt to secure responsibility in public officials by popular election at short intervals. That this is *a* democratic mistake is undeniable; whether it is *the* democratic mistake is solely a matter of emphasis and is really of secondary importance. Mr. Sedgwick's conclusions that efficient government can come only with lengthening of official tenure and increase in the num-

ber of appointive positions are sensible even if unlikely to be popular.

Professor Munro has brought together a collection of fifteen papers written from various points of view, *pro* and *contra*, and bearing upon various phases of the subject of direct government. Some of the papers are new, but the majority, such as those of President Lowell and Col. Roosevelt, are reprints. Professor Munro's compilation is of use because of the information brought together with regard to the actual working of direct government where it has been tried. Needless to say, some of the papers have also the higher value that comes from impartial scholarly research. Professor Munro's introduction offers a clear statement of the issues, and a moderate, cautious estimate of what is sound and what unsound in the new proposals. Discussion of statutory provisions is omitted, and this need is supplied by the technical and comparative study made in Professor Beard's and Mr. Schultz's timely compilation of documents.

Dr. Oberholtzer's treatise is of course recognized as an indispensable book giving facts, figures, and theories of the various schemes of direct government applied in this country. The new edition is a useful re-issue of a standard treatise. Another book of value because of its documentary information is that prepared by Messrs. Bacon and Wyman, merely in order to give definite information regarding the origin and progress of the devices of direct government. The authors offer no specific comment, but make some appropriate quotations from Woodrow Wilson and other well qualified experts.

Of works of less value, we may mention first that of William L. Ransom of Brooklyn, N. Y. Mr. Ransom comes forward as a protagonist of radical democracy, and offers a lawyer's argument in favor of what is popularly known as the "recall of judicial decisions," or more accurately defined, the settlement by popular vote of the validity of social legislation involving the scope of the due process clause. A believer in the wisdom of majorities, he has made about as strong an argument as is possible in support of his dubious position, without falling into the greater error of endorsing the recall of judges.

Dr. Wilcox also appears as a partisan of the newer democracy, and argues from a theoretical study of the shortcomings of our constitutional system, rather than from facts and figures, that popular government really calls for the new machinery to render it effective. He too defends the referendum on judicial decisions.

TAXATION IN MASSACHUSETTS

Taxation in Massachusetts: A treatise on the assessment and collection of taxes, excises and special assessments under the laws of the Commonwealth of Massachusetts. By Philip Nichols. Financial Publishing Company, Boston. Pp. 826. ($6 *net.*)

THE brief references to taxation in the Massachusetts constitution were a summary of the practice of Colonial days in an agricultural community where all property was visible to the assessors and easily valued. Old decisions of the courts have fixed a rigid interpretation upon these clauses ill adapted to modern conditions. The functions of the state have multiplied, thereby increasing the state's demand for revenue. There has developed deep antagonism between the citizen and his representative, the tax gatherer, until tax evasion has been followed by more complicated tax laws and those by more evasion. The revision of our Tax Statutes in 1909 showed a surprising growth in a few years. Hence the need of a local book expounding the local practice.

Mr. Nichols' book, however, is more than a collection of local statutes and decisions. It comprises a brief but comprehensive outline of the entire law of taxation, though the application of those principles is confined to Massachusetts statutes. It includes an analysis of the constitutional limitations on the power of taxation and chapters devoted to the annual direct tax, its collection and tax litigation, and chapters devoted to the corporation tax, the inheritance tax, and special assessments. The author begins each subject with a valuable historical summary which is essential to an understanding of the present complications. His method is generally to quote the statute and then comment upon it. The chapters relating to collection of taxes and levying of special assessments ought to be extremely valuable to public officials charged with those duties. Lawyers will find the entire book of value, but especially the chapters on excessive or illegal taxation and the special chapters on the corporation tax, the inheritance tax, and special assessments. A good specimen of the helpfulness of the book can be seen at a glance on pages 166 and 167, where the author presents a clear condensed analysis of the kinds of personal property taxable and the right to set off the debts of the taxpayer.

S. R. W.

LETTERS TO A YOUNG LAWYER

Letters to a Young Lawyer. By Arthur M. Harris of the Seattle Bar. West Publishing Company, St. Paul. Pp. 193. ($2.)

WE followed the letters to a young lawyer as they came out in the *Docket* and found them entertaining as well as very suggestive. In fact, the writer clipped them out and now has them preserved among "Miscellaneous Papers" at his office. It was therefore a pleasure to find them published in attractive book form. They are written in an easy, colloquial style, as letters ought to be. And yet they are serious and informing discussions of subjects that may well concern nearly all young lawyers. For instance, the letter regarding the young man's choice of a place to start practice touches upon a proposition that looms large during one's last year at law school. The author very evidently holds a brief for the moderate sized cities of the West. And we must admit that he states his case persuasively even though we of the larger eastern cities may disagree with his conclusions. Then, too, the letter on hard work is well worth reading, for we cannot remind ourselves too often that hard work is the price of success.

Much of the substance of the letters would be equally appropriate if written to old lawyers, and whether appropriate to us old lawyers or not, we are all interested in the young lawyer. We are often sarcastic or contemptuous of the young lawyer's efforts and training, but we do love to give him advice and to recount to him our own experiences. After we have been giving such advice for some years and have gradually gathered in more and more experience to talk about, we like to read up what others may have to say along similar lines.

Altogether we recommend this little book to both the young and old lawyer.

F. T. C.

NOTES

"Trade Marks and Trade Names" is the title of a brochure recently issued by Munn & Company, New York and Washington. There are illustrations of familiar trade marks, and the legal requirements of names suitable for trade marks, and the formalities of registration under the federal statutes, are described. The book is intended primarily for business men, technical terms being avoided.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administrative Law. "Some Powers and Problems of the Federal Administrative." By Jasper Yeates Brinton. 61 *Univ. of Pa. Law Review* 135 (Jan.).

"Great as are the evils of bureaucracy, their cure is not to be found in the narrowing of administrative responsibilities or in the tightening of judicial control. By responsibility only can we develop efficiency, and what seems to be needed is rather a recognition of the true importance of the administrative system and a scientific study of administrative problems."

Aliens. "The Jurisdiction of Courts over Foreigners; I, European Law." By Prof. Joseph Henry Beale. 26 *Harvard Law Review* 193 (Jan.).

"The extent of the judicial jurisdiction of a sovereign, especially where the jurisdiction depends on some power over the person of the defendant, is a puzzling question as to which the courts of civilized nations are very far from an agreement. Nor is this disagreement likely to be removed by any international movement such as the Institute of International Law. Each state is wedded to its own views as to its power over foreigners, while at the same time it is apt to deny to all other states the extreme powers over its own citizens which it exercises itself over foreigners. The fact of this extreme claim by a state of jurisdiction for itself, coupled with the denial of similar jurisdiction for other states, leads to curious questions as to the legality within a state of the exercise of such extreme jurisdiction, and as to the action of third states, when such jurisdiction is brought in question in their courts. It seems that the most satisfactory way of dealing with the subject is to examine in the case of the principal states their claim of jurisdiction for their own courts, and their attitude toward similar jurisdiction by foreign courts."

Banking Law. See Negotiable Instruments.

Bankruptcy. "Preferences by Insolvent Corporations to Officers, Directors or Stockholders." By John L. Campbell, Jr. 61 *Univ. of Pa. Law Review* 163 (Jan.).

"It will be seen from the decisions that the courts consider the actual relation to the corporation occupied by the stockholder, and base their holdings on that rather than on the mere fact that he is a stockholder. The whole question of preferences to members of a corporation rests on equitable grounds of fairness, and equality and equity should not allow, between creditors whose claims are equally meritorious, that one creditor should obtain an advantage over another, not through any diligence or virtue in himself, but merely because he holds an office or occupies a position in respect to the corporation, that enables him at an earlier stage to see the approaching calamity and secure himself against it."

Biography. *Martin.* "Luther Martin and the Trials of Chase and Burr; II, The Impeachment of Burr." By Hon. Ashley M. Gould. 1 *Georgetown Law Journal* no. 2, p. 13 (Jan.).

Constitutionality of Statutes. See Social Legislation.

Corporations. "Notice to a Corporation from Entries on its Books." By Edwin H. Abbot, Jr. 26 *Harvard Law Review* 237 (Jan.).

"Both upon principle and upon authority a corporation as matter of law is charged with knowledge of entries made upon its books on its behalf in the usual course of business. If facts so recorded are material the corporation cannot escape the effect of such notice because the agent who acts on its behalf is ignorant of the entries. The cases suggest that the agent is constructively charged with such knowledge. . . . It is far simpler and more logical to hold that entries made upon the corporate books on its behalf and in the usual course of business are notice directly to the corporation as matter of law."

See Bankruptcy, Monopolies.

Criminal Procedure. "Criminal Procedure in Scotland, I." By Edwin R. Keedy. 3 *Journal of Criminal Law and Criminology* 728 (Jan.).

A full account of the organization of the courts and of the rest of the legal system, including advocates, law agents (solicitors), and prosecuting officers, together with a description of the several stages of pleading and practice.

See Privilege against Self-Incrimination.

Criminology. "The Prevalence of Crime in the United States and Its Extent Compared with that in Leading European States." By Julius Goebel, Jr. 3 *Journal of Criminal Law and Criminology* 754 (Jan.).

"In the face of a serious situation such as confronts our nation, nothing could be more frivolous and dangerous than mere experimentation. The disease which is eating into the very marrow of our social body needs heroic treatment. At all events the situation is one which demands the attention and study of the leaders of American thought and action. The shocking amount of crime in the United States, and especially unpunished crime, is exceedingly discreditable to us as a nation and indicates a standard of civilization of which we cannot be proud."

See Indemnification for Errors of Criminal Justice, Penology.

Disparagement of Property. "Disparagement of Property, I." By Prof. Jeremiah Smith. 13 *Columbia Law Review* 13 (Jan.).

A luminous analysis, containing one of the most notable of recent legal expositions.

"We have stated *ante* two alternative propositions, one or the other of which must be proved in order to hold a rival claimant. (In brief: either that defendant did not believe in his own statement; or that he was actuated by a wrong motive.) There are other and more common forms of stating the essentials to the liability of a rivial claimant. What are the reasons for discarding these common forms and for adopting those here substituted? . . .

"Now malice is an ambiguous, and often misleading term. Sir Frederick Pollock wisely said that 'the less we have to do with it the better.' It is preferable to drop the word 'malice' altogether and to substitute for it the meaning which is really intended to be conveyed by it.

"Here we have stated two alternative grounds of liability. Either of these standing alone is sufficient, without aid from the other."

Due Process of Law. "The Evolution of Due Process of Law in the Decisions of the United States Supreme Court." By Francis W. Bird. 13 *Columbia Law Review* 37 (Jan.).

"It seems reasonable therefore to believe that there is nothing contained in the fourteenth amendment as expounded by the Supreme Court of the United States which will interfere with the power of the legislature, state and national, to adopt soundly progressive legislation for the protection of its citizens."

Federal and State Powers. "A Historic Judicial Controversy and Some Reflections Suggested by It." By S. S. Gregory. 11 *Michigan Law Review* 179 (Jan.).

Dealing with the circumstances of *Ableman* v. *Booth*, 21 How. 506, in which Chief Justice Taney upheld the constitutionality of the Fugitive Slave law and the right of the United States to enforce its penalties without the consent of the courts of the state in which the culprit was found. In this historic decision Taney, though of a party of which state sovereignty was one of the battle cries, "made a vigorous assertion of national power which would have done credit to John Marshall."

Federal Incorporation. See Monopolies.

Fourteenth Amendment. See Due Process of Law.

Government. See Federal and State Powers, Social Legislation, Recall of Judicial Decisions.

Indemnification for Errors of Criminal Justice. "European Systems of State Indemnity for Errors of Criminal Justice." By Edwin M. Borchard. 3 *Journal of Criminal Law and Criminology* 684 (Jan.).

"Austria, France, Portugal and Geneva (code of criminal procedure, January 1, 1885), grant an indemnity for the injury suffered by reason of conviction and imprisonment where on retrial an acquittal takes place. Indemnification both for acquittal on appeal after a conviction, and for detention pending trial followed by acquital or discharge is provided for in Sweden, Norway, Denmark, Germany, Hungary, Berne, Fribourg, Neuchatel, Basle and Tessin. The award of an indemnity is *compulsory* in case of acquittal on appeal after a conviction — that is, a right of action is given to the individual — in Germany, Norway, Denmark, Hungary, Portugal, Mexico, Neuchatel and Basle. It is also compulsory in case of detention followed by a discharge from custody or acquittal on first trial in Germany, Denmark and Norway. In Germany, however, before the action lies, the court acquitting the accused on retrial, must, simultaneously with the judgment of acquittal, issue a decree to the effect that an indemnity in the case is warranted by the facts, which decree is a condition precedent to the right of action. The relief is *discretionary* in both cases — acquittal after conviction and detention pending trial — in Sweden and Fribourg. It is discretionary in case of acquittal after conviction only in Austria and France, and discretionary in cases of discharge from custody in Hungary, Vaud, Neuchatel and Basle."

Insane Prisoners. "Insanity and Criminal Responsibility." (Report of Committee B of the Institute.) By Edwin R. Keedy, Chairman. 3 *Journal of Criminal Law and Criminology* 719 (Jan.).

"It is not the desire of this committee to engage in an academic debate with the New York committee [of the New York State Bar Association], nor to indulge in captious and unimportant criticism. However, since the purpose of each committee is to reach a proper solution of the problem of dealing with persons suffering from mental disease who are charged with crime, a comparison of the two plans proposed and the contemplated results of each is deemed desirable. On many points the two committees are in agreement. Both committees favor overthrowing the legal insanity test of *M'Naghten's* case; both wish to secure the conviction and punishment of persons who are relying upon feigned insanity as a defense; and both urge confinement in a hospital for persons who by reason of their mental condition are a public menace. This committee deems it of great importance that any new legislation should provide for the proper disposition of all cases, no matter what the character of the offense nor the symptoms of mental derangement. This defense is by no means confined to prosecutions for homicide. Following are some of the crimes of which defendants have been convicted when mental disease was set up as a defense; rape, burglary, forgery, running illicit distillery, larceny, mailing obscene literature, writing forged instruments, abduction, arson, embezzlement, robbery, slander, and incest. The statute proposed by this committee would cover all these, no matter what the character of the mental disease, because the statute is based on the proper relation of mental disease to criminal responsibility. In addition to declaring a test for determining what treatment,

whether penal or remedial, shall be accorded a person who commits a wrong while suffering from a mental disease, the proposed statute provides a method, which it is believed will be effective, for securing the proper release and preventing the improper release of persons who have been confined because of their unsound mental condition. The proposals are, however, presented tentatively, and further consideration and criticism of them are desired."

Insurance. "Election in Insurance Cases." By George Richards. 13 *Columbia Law Review* 51 (Jan.).

Taking issue with the suggestions of a recent writer on this subject in 12 *Columbia Law Review* 619 (see 24 *Green Bag* 563).

International Arbitration. "A Permanent Court of International Justice." By James L. Tryon. 22 *Yale Law Journal* 203 (Jan.).

In view of the appearance of other current contributions to the subject, this article is reserved for special notice in the *Green Bag* next month.

International Law. See Aliens.

Legal History. "The Genius of the Common Law; VII, Perils of the Market Place." By Sir Frederick Pollock. 13 *Columbia Law Review* 1 (Jan.).

See 24 *Green Bag* 225.

Marriage and Divorce. "A Divorce Court in Canada." By E. F. B. Johnston, K.C. 49 *Canada Law Journal* 1 (Jan.).

"The want of uniformity in Canadian divorce law is one of the strangest features in an otherwise reasonable Constitution. In British Columbia there is a Divorce Court based somewhat on the principles of the English law, under the Act of 1857. Courts for granting absolute divorces were established in New Brunswick, Nova Scotia and Prince Edward Island before Confederation, and these were continued by sec. 129 of the B.N.A. Act, 1867. Ontario, Quebec and the remaining provinces of the Dominion are without Courts of Divorce, and the application for relief must be made to Parliament, both bodies having to pronounce the dissolution of the marriage obligation, which is done by a hearing of witnesses before a Senate Committee, and if a proper case is made out, this is followed by a private Act of the House of Commons. It is certainly one of the most remarkable anomalies in the history of constitutions. The exclusive right to legislate on marriage and divorce is given by the British North America Act, 1867, to the Parliament of Canada, and yet notwithstanding the British North America Act there is no uniformity of the law, and the right is, as I have stated, exercised under a saving clause by several of the Provinces to the exclusion of Dominion authority."

Monopolies. "Trust Regulation, II: Expediency of Commodity Court." By Albert Fink. *North American Review*, v. 197, p. 222 (Feb.).

"It would seem that the suggestion of a Commodity Court or Commission with the jurisdiction and powers proposed is not only unnecessary, but utterly impraticable, except with such fundamental changes and modification of commercial intercourse as would meet the approval of no one."

"The Evil of Special Privilege." By J. Newton Baker, LL.D., J. D. 22 *Yale Law Journal* 220 (Jan.).

"That a merely permissive federal incorporation statute would be of little value is manifest because only those corporations which thought they might secure some advantages through Federal incorporation would resort to it, while if they thought they could profit better by state incorporation they would not submit themselves to federal jurisdiction, and therefore it would be an option solely for the advantage of the corporation. Instead of being merely permissive it should be compulsory, and if permissive, only such corporations would come under its provisions voluntarily as sought an avenue to escape the general condemnation that is threatening their business and credit."

Negotiable Instruments. "Bank Deposits and Collections; II, Deposits of Commercial Paper." By Ralph J. Baker. 11 *Michigan Law Review* 210 (Jan.).

"It is hoped that the discussion has at least made this much clear, that the definite issue is whether the deposit (whether of money or of paper) creates between the bank and its customer the relation of debtor and creditor, or on the other hand, of agent and principal or bailee and bailor; and that it is impossible for the bank, with respect to the same subject-matter of deposit, to be both debtor and agent of the depositor at the same time. The two relations are mutually exclusive, and the consequences of one make impossible the consequences of the other."

Penology. "Prison Bars." By Donald Lowrie. *Forum*, v. 49, p. 76 (Jan.).

Mr. Lowrie draws attention to some startling contrasts in the administration of the law in California.

"I know," he states, "a professional 'crook,' a man thoroughly familiar with court procedure, who was sent back to San Quentin for his tenth offence with a sentence of one year. He had served nine previous terms for felony. I know another man who came back the seventh time with a sentence of two years. I know five youths, all under 21 years of age, who were sentenced to serve 50 years each for their first offense. A particularly atrocious robbery had occurred in the community, and they, the subsequent and minor offenders, were used as 'examples.'"

"Do you wonder," Mr. Lowrie adds, "that I advocate the indeterminate sentence?"

See Indemnification for Errors of Criminal Justice, Insane Prisoners.

Privilege against Self-Incrimination. "Inference from Claim of Privilege by Accused." By Walter T. Dunmore. 3 *Journal of Criminal Law and Criminology* 770 (Jan.).

"The writer believes that the weight of practical considerations is all that makes it expedient to continue the privilege against compulsory self-disclosure in criminal cases, that these practical considerations have not the same weight in connection with the inference from claim of privilege and that, in view of the extreme need in America of more certainty of punishment, the inference permitted by the Ohio amendment will be of decided value in criminal prosecutions."

Procedure. "Some Suggestions as to Technicality and Delay in the Law." By Clarence R. Wilson. 1 *Georgetown Law Journal*, no. 2, p. 20 (Jan.).

"If by technicality is meant the strict observance of forms, it is inherent in any system of judicial procedure when properly administered. Lax procedure makes lax lawyers, and the result is confusion and delay. The modernized common law pleading is as good a system as can be devised for reaching issues to be tried by a jury; but in its last analysis the speedy and prompt administration of justice depends upon the ability and integrity of the trial judge, the skill and honesty of the lawyer, and lastly, the honesty of the litigant."

"The New Equity Rules of the United States Courts." By Prof. John Wurts. 22 *Yale Law Journal* 241 (Jan.).

"Contrast the way causes will be speeded hereafter with the way they have been delayed heretofore. Until now, if a bill were filed on the 12th day of January, it might happen that the defendant could not be held to enter an appearance until the first Monday in May, and then he could not be compelled to disclose the nature of even a dilatory defense until the first Monday in June, and to predict the time within which a complainant could dispose of exceptions and demurrer and plea, and force the defendant to an issue on the merits would be to risk one's reputation as a prophet.

"Now, the defendant must file his answer twenty days after service of the subpœna, and, as replications are abolished, except in special cases, the cause is then at issue and ready for trial."

"The New Jersey Practice Act of 1912." By Edward Q. Keasbey. 22 *Yale Law Journal* 236 (Jan.).

"The effect of the plan embodied in the statute and the rules will be to give the courts of common law much more latitude than heretofore in dealing with cases brought before them. The courts of law and equity are necessarily distinct courts under the constitution, but this statute gives to the courts of law some powers ormerly characteristic of equity tribunals."

"Directing a Verdict for the Party Having the Burden of Proof." By Edson R. Sunderland. 11 *Michigan Law Review* 198 (Jan.).

"The common test for directing a verdict is that stated by the Supreme Court of Minnesota in *Webber* v. *Axtell* (110 Minn. 52) in the quotations given above, that if a verdict for one party would, if given, necessarily be set aside by the court as contrary to the evidence, then a verdict for the other party should be peremptorily ordered by the court. This rule, which is adhered to in most jurisdictions where the *scintilla* doctrine does not obtain, is usually invoked *against* the party having the burden of proof, but if the reasoning employed herein is sound it should be equally available *in favor* of the party who carries the burden of the issue."

See Criminal Procedure.

Professional Standards. "Lawyer and Physician: A Contrast." By G. M. Stratton, former president of the American Psychological Association. *Atlantic*, v. 111, p. 46 (Jan.).

"The readier response, the leadership, which the medical profession shows, is not merely apparent and due to the lagging of the lawyers. There are special conditions favorable to free movement. And first of these is the dependence of medicine upon natural science, from whose advance some motion must inevitably be caught. . . . A second cause of the physicians' spirit of progress, in contrast with the conservatism of the bar, is that the immediate end and object of medicine is not in conflict with other great social ends. The doctor does not need to heal one man at the cost of health to another. The lawyer, in extending the boundary of one man's right, too often must contract another's."

"The Lawyer as a Citizen." By Walter George Smith. 76 *Central Law Journal* 58 (Jan. 24).

"With a provinciality that is a direct inheritance from England, he [the old-fashioned lawyer] looks with suspicion and almost contempt upon the laws of other peoples. The common law is the perfection of reason and all outside of its sphere are wandering in irrational darkness. But a light is breaking; the study of comparative law, the researches of such students as Austin, Pollock, Maitland, Ames, Thayer, Baldwin and Pound are leading us along a path that must result in the advantage of the entire community and of a better educated profession."

Real Property. "Estates Tail in Missouri." By Manley O. Hudson. 7 *Illinois Law Review* 355 (Jan.).

"It is submitted that the way is now clear for the court to say, under the statute of 1865, that primogeniture does not obtain; that the statutory remainder is contingent in the donee's heirs of the body in general, or in special heirs of the body if designated; and that the ultimate interest is an alternate contingent remainder, limited on a definite failure of issue."

Recall of Judicial Decisions. "The Recall of Judicial Decisions." By Daniel W. Baker. 1 *Georgetown Law Journal* no. 2, p. 1 (Jan.).

"Instead of amendments which merely create new litigation, raise new questions of constitutional law, is it not common sense, is it not reasonable, to have amendments that go direct to the heart of the matter, and amendments that will destroy and recall the decisions of courts without having to await for a further decision of a court? Is there anything revolutionary in this? Is it not a plain, reasonable proposition?"

Slander of Property. See Disparagement of Property.

Social Legislation. "The *Zeitgeist* and the Judiciary." By Felix Frankfurter. *Survey*, v. 29, p. 542 (Jan. 25).

"One ventures the suggestion that it is demonstrable, as Professor Roscoe Pound has shown, that one of the prime factors contributing to the current dissatisfaction is the fact that judges have thwarted legislative efforts at just such readjustment, not because of any coercion of the constitution, but by reason of their constitutional conservatism. . . . The courts should be a restraining but not a hampering force. Doubtless grave mistakes in legislation will thus go unchallenged through the courts, but legislation is essentially empirical, experimental, and the constitution was not intended to limit this field of experimentation. Think of the gain of having experience demonstrate the fallacy of a law after the supreme court had sustained its constitutionality! For, as a wise man has truly said, to fail and learn by failure is one of the sacred rights of a democracy."

"The Constitution, The Court and The People." By Ralph W. Breckenridge. 22 *Yale Law Journal* 181 (Jan.).

Address delivered last November before the California State Bar Association.

"I have referred to the niggardliness of the people toward the judiciary. One cause of the delays experienced by litigants, is that in the centers of population, there are not enough judges to do the business of the courts with reasonable dispatch, and nearly every court of last resort in the United States has a congested docket. . . . Moreover, the salaries of the judges are so absurdly and pathetically inadequate as to create surprise that the public has been able to command so much high class judicial talent for the pay that has been grudgingly given."

See Due Process of Law, Professional Standards.

Wills. "Striking Words Out of a Will." By Roland Gray. 26 *Harvard Law Review* 212 (Jan.).

"Courts of equity have no power to rectify or reform wills, on account of mistake, similar to that exercised by those courts in the case of deeds. So-called reformation or correction of mistakes in wills, without the aid of extrinsic evidence of intention, by disregarding or implying terms, is an entirely different process, being purely a matter of construction; nor has a court of equity greater power in that respect than a court of law. . . .

"If a court of equity cannot reform a will by adding words to it, much less can a court of probate do so, which is a court of law, whose office is to determine what instrument, if any, the deceased executed as his will."

Workmen's Compensation. "The Law of Procedure Under the Illinois Workingmen's Compensation Act." By David K. Tone. 7 *Illinois Law Review* 344 (Jan.).

"We know of no place where the litigant will encounter a greater number of perplexing legal problems, than when he attempts to grope his way through the maze of uncertainties and imperfections that compose the law of procedure in the act under consideration."

Latest Important Cases

Insurance. *Parties to a Burglary Insurance Contract may Stipulate that it Shall Apply only if there are Physical Evidences of the Commission of Burglary.* N. Y.

A policy of burglary insurance contained a clause providing that the insurer should not be liable "unless there are visible marks upon the premises of actual force and violence used in making entry into the said premises or exit therefrom." Two persons gained access to a warehouse just after the door had been unlocked in the morning, and threatening two employees with pistols took away a quantity of silks. In *Rosenthal* v. *American Bonding Company*, the New York Court of Appeals held Dec. 31 that there was no liability on the part of the insurer. The provision quoted contravenes no principle of public policy, and its meaning, said the Court (Hiscock, J.), is plain. "The only inquiry can be whether the parties have assented to the incorporation in their agreement of a provision which clearly calls for such proofs of their alleged loss which the plaintiffs have not furnished. We think they have. We believe that the requirement that the violence and force employed in effecting a burglarious entry into premises must produce 'visible marks upon the premises' thus entered is plain beyond the need

of argument and that it means that the force and violence in 'making entry' must create visible traces upon the premises themselves which survive the act that produces them, and which being seen are evidence of a burglary; that it would be a distortion of the meaning of language to hold as argued that this provision is satisfied under the circumstances of this case. . . ."

Cullen, Ch. J., and Haight, J., dissented. Reported in *N. Y. Law Journal*, Feb. 1.

Marriage and Divorce. *Extra-territorial Effect of Illinois Statute — Domiciled Citizen Temporarily Leaving State to Obtain Divorce.* Ill.

Section 1a of chapter 40, Hurd's Revised Statutes of Illinois, 1911, provides: "That in every case in which a divorce has been granted . . . neither party shall marry again within one year from the time the decree was granted; . . . and said marriage shall be held absolutely void." The Supreme Court of Illinois, in *Wilson* v. *Cook*, decided Dec. 17, held that under this statute a marriage celebrated in St. Louis, outside the state of Illinois, within a year after a decree of divorce, was invalid.

The Court (Dunn, C. J.) said: "It is undoubtedly the general rule of law that a marriage valid where it is celebrated is valid everywhere, but there are two well recognized exceptions, viz., marriages which are contrary to the law of nature, as generally recognized by Christian nations, and those which are declared by positive law to have no validity. Every state has the power to enact laws which will personally bind its citizens while sojourning in a foreign jurisdiction provided such laws profess to so bind them, and to declare that marriages contracted between its citizens in foreign states in disregard of the statutes of the state of their domicile will not be recognized in the courts of the latter state though valid where celebrated. (*Roth* v. *Roth*, 104 Ill. 35.) The question, therefore, is whether the statute quoted was clearly intended to apply to marriages contracted outside the state, for unless the intention is clear, the operation of the statute must be limited to marriages within the state."

This question was decided in accordance with the construction of a similar statute adopted by the Supreme Court of Wisconsin. The latter court said: —

"There is no limitation as to the place of the pretended marriage in express terms, nor is language used from which such a limitation can naturally be implied. It seems unquestionably intended to control the conduct of the residents of the state, whether they be within or outside of its boundaries. Such being, in our opinion, the evident and clearly expressed intent of the legislature, we hold that when persons domiciled in this state and who are subject to the provisions of the law, leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provisions of the law and will not be recognized by the courts of this state." *Lanham* v. *Lanham*, 136 Wis. 360.

Monopolies. *Application of Sherman Act to Cotton Corner — Involuntary Restraints of Trade Unlawful — Direct and Material Burdening of Trade.* U. S.

Though the Circuit Court had held a cotton corner such as that in the case at bar not within the terms of the Sherman anti-trust act, the United States Supreme Court held otherwise in *U. S.* v. *Patten* (L. ed. adv. sheets, no. 6, p. 141), decided Jan. 6. Mr. Justice Van Devanter delivered the opinion of the Court, saying in part:

"We come, then, to the question whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the states, and thereby to enhance artificially its price throughout the country, and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of § 1 of the anti-trust act, which makes it a criminal offense to 'engage in' a 'conspiracy in restraint of trade or commerce among the several states.' The circuit court, as we have seen, answered the question in the negative; and this, although accepting as an allegation of fact rather than as a mere economic theory of the pleader the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy. The reasons assigned for the ruling, and now pressed upon our attention, are (1) that the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce, and agree to suppress competition among themselves, (2) that running a corner, instead of restraining competition, tends, temporarily at least, to stimulate it, and (3) that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not to be a restraint in the sense of the statute.

"Upon careful reflection we are constrained to hold that the reasons given do not sustain the ruling, and that the answer to the question must be in the affirmative.

"Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein. *Loewe* v. *Lawlor*, 208 U. S. 274, 293, 301, 52 L. ed. 488, 496, 502, 28 Sup. Ct. Rep. 301. . . .

"It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

"Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view. . . .

"Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that, by its necessary operation, it would directly and materially impede, and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the antitrust act is designed to prevent."

Lurton and Holmes, JJ., and the Chief Justice dissented, mainly on the ground, it would appear, that the counts in the indictment did not charge a corner, the majority opinion holding, on the contrary, that the counts were treated by the circuit court as alleging a scheme by which the market could be cornered.

Lumber Middlemen Enjoined — Wholesaler's Right to Compete Freely for Consumer's Trade — Sherman Act. U. S.

Judges Lacombe, Coxe, Ward, and Noyes, sitting in the federal District Court for the southern district of New York, granted a permanent injunction on the petition of the Government against the Eastern States Retail Lumber Dealers' Association and several other associations of retail lumbermen, on Jan. 9. The petition of the Government charged that the associations had formed a conspiracy among themselves for the restraint of trade, contrary to the Sherman act. They drew a sharp distinction between the wholesaler and the retailer, and they blacklisted all wholesale dealers who seemed to them to trespass on the field of the retail man. Moreover, it was alleged, they expelled from membership in their associations "poachers" or retailers who invaded the territory of another retailer, and "scalpers" who cut prices, and they arbitrarily fixed the prices of lumber and lumber products.

The retailers also adopted a system of "official reports" to check what they considered the unfair competition of the wholesalers. These reports contained lists of the wholesale firms which had been reported as having solicited, quoted, or sold direct to consumers, and requested the members of the associations to supply, if possible, information of any such acts on the part of the wholesalers.

"It is now well settled," said the court, "that the words 'restraint of trade' in that act are to be construed as including 'restraint of competition.' Full, free and untrammeled competition in all branches of interstate commerce is the desideratum to be secured. . . . That free and unrestricted competition may be productive of evils does not militate against the fact that such is the law now governing the subject. *U. S.* v. *Freight Association*, 166 U. S. 337."

Consequently the court decreed that the circulation of the "official reports" was contrary to the Sherman act, and issued a permanent injunction against it.

Vital Statistics. *Statute Requiring Prompt Returns of Births Unconstitutional.* O.

The provisions of an act to establish a bureau of vital statistics, and to provide for a prompt and permanent registration of all births and deaths occurring within the state, which require a physician or midwife in attendance upon the birth of a child to certify, without compensation, as to legitimacy or illegitimacy, and, if legitimate to supply information in regard to the parents of the child, are held in *State* v. *Boone* (Ohio) 39 L.R.A. (N.S.) 1015, to be an unreasonable and arbitrary exercise of the police power, and therefore unconstitutional and void.

The Editor's Bag

PENSIONS FOR JUDGES

"PUBLIC sentiment everywhere supports the view that when a judge has discharged the arduous and exacting duties of the bench for a reasonable length of time and reached an age which in the course of nature might be expected to lessen his physical energies, it is due himself and the people that he retire and enjoy the rest and compensation earned by a long service."

In expressing the foregoing view, the *St. Paul Dispatch* has in mind the New York law, which retires every judge on attaining the age limit, and provides a pension after service for a specified term of years. It is probable, we are told, that a similar law will be enacted by Minnesota at the present session of the legislature.

Pensions for the Justices of the United States Supreme Court are being urged upon Congress for favorable attention. In England, judges always retire on pensions. Louisiana gives the judges of its Supreme Court pensions after fifteen years of service.

The evil of election of judges for short terms, to which Dr. Charles W. Eliot referred in the address which we printed last month, cannot be laid at the door of as many of our states as one might imagine. In Louisiana, judges of the Supreme Court are chosen for terms of ten years, and are usually re-elected. "The consequence has been," says the *New Orleans Times-Democrat*, "that justices have been retained in office as long as possible, and generally until a physical breakdown or the age limit has been reached."

Rhode Island provides pensions for its judges, which are elected by the General Assembly. Chief Justice Dubois, who has lately announced his wish to retire, at the age of sixty-five, will become entitled to a pension.

We do not believe in compulsory retirement of judges at a specified age limit, for one man may be more hearty and vigorous at seventy than another at sixty. An age limit of seventy, in the Supreme Court of the United States, would seriously cripple its efficiency, and one of its ablest and most useful members is two years past that age. Yet an opportunity may well be given the judges of this or any other supreme court to retire voluntarily when they feel that their strength has become impaired. Such a system would not tempt judges who love their work, and readily meet its demands, to leave the bench too soon, while it would provide something approaching a fair reward for the labors of lives which have spent themselves in judicial service and cannot look for other means of livelihood.

AN ANECDOTE OF HAMILTON

SINCE the publication of the story of Hamilton's cross-examination of Croucher, on page 43 of our January issue, we have been informed that Senator Henry Cabot Lodge expressed his conviction that the anecdote is without

substantial foundation, in a contribution to the *Outlook* of August 26, 1911. The story contains, in fact, internal evidences of a want of authenticity. From what we know of Hamilton, we are led to believe that he would have secured the acquittal of a prisoner by the force of his eloquence and skill as an advocate, rather than by resorting to melodramatic devices. That he should have shifted suspicion to the actual culprit without any effort to bring him to the bar of justice taxes credulity even more.

THE CASE OF MARK WILKS

(Communicated by Alvin Waggoner, Esq.)

THE fact, not generally known, that in England, a man may be imprisoned for his wife's failure to pay her income tax, should be of interest just now in this country where we are in the act of adopting an income tax amendment to our own Constitution. With a proposed exemption of five thousand dollars we need not remind ourselves that few lawyers are likely to go to jail for failure to pay the tax on their annual incomes, but if the English procedure should be adopted here, who can foresee what may come upon any one of us for a wife's delinquency in this regard. It behooves us then to consider the case of one Mark Wilks.

Dr. Elizabeth Wilks is an English physician. From her practice and property she has an income sufficient to bring her within the tax on incomes. Dr. Wilks is a suffragette. With others of her sex, she believes that taxation without votes is tyranny, and is an enthusiastic member of the Woman's Tax Resistance League. As concrete evidence of opposition to a man-made government, when her income tax became due, she refused to pay it. The government decided to make an example of —— Mr. Wilks! He was called upon, under the statute, for the tax his wife owed. Whether it was a matter of principle or cash with him does not appear, but he also failed to pay the tax. Whereupon he was taken to jail. A wife, less conscientious and fixed in her opinions, might have wavered, but not Dr. Elizabeth Wilks. She stood on the doorstep and watched the detestable government cart her husband off to jail, feeling, no doubt, that her martyrdom was as sweet as it was peculiar. Other women had gone to jail for the cause; she had sent her husband!

The situation was sufficiently novel to attract a great deal of public attention. It was seized upon by the conservative press as a new subject for ridicule of the present government and its policies. The Wilks case soon assumed an importance equaled only by the Home Rule Campaign.

A great meeting of protest was held under the auspices of the Woman's Tax Resistance League in London early in October. Sir John Cockburn presided. George Bernard Shaw was the principal speaker, and a newspaper report quotes him as saying:

> I knew of cases in my boyhood where women managed to make homes for their children and themselves, and then the husbands sold the furniture, turned the wife and children out, and got drunk. The Married Woman's Property Act was then carried, under which the husband retained the responsibility of the property, and the wife had the property to herself. As Mrs. Wilks would not pay the tax on her own income Mr. Wilks went to jail. If my wife did that to me, the very moment I came out of prison I would get another wife. It is indefensible.

Mr. Israel Zangwill, the novelist, added to the gaiety of the occasion by suggesting that "marrying an heiress might be the ruin of a man." Possible American complications, involving some

of our best families, do not seem to have been pointed out, however, by any of the speakers.

In the end, after Mr. Wilks had been in jail several weeks, such an uproar was created that the Government receded from its position, and the prisoner was released.

The *London Times*, commenting editorially on the affair, declared that the Government had blundered in sending Wilks to prison, pointed out that this was "admitted by his release," and added:

> Mr. Wilks's case is also worth noting because it illustrates the anomalies of the law of husband and wife, most of them very much to the disadvantage of the former. From one extreme the law has gone to another. The husband is liable for the wrongs committed by his wife, though he has no power to prevent her from committing them. She for many kinds of contracts is his agent, and can bind him practically to almost any amount. He may be compelled to find her in funds wherewith to carry on proceedings in the Divorce Court. Liabilities founded upon the identity of husband and wife are continued when, by reason of the Married Woman's Property Acts, it no longer exists. Of these anomalies we rarely hear, though, as any one conversant with proceedings in Courts of Law is aware, they lead to cases quite as hard as that of Mr. Wilks. Somehow, then, is kept well in the background the fact that, in a Parliament elected by men, laws placing them in a position of inferiority and disadvantage are passed.

As usual the *Times* extracted the large fact of sober significance from an affair that was in most of its phases a comedy. Barely half a century ago, so far as property rights were concerned, the English law regarded the husband and wife as one person, and the husband as that one. Today she not only has her own property, but he may be imprisoned for her delinquency in paying her taxes. And yet there are those who say that the legal world does not move.

THE ADELPHOMACHOUS CAT

HERE is a story that illustrates some fine points of law and equity that arose in the carrying out of an amicable contract, and if it is not a new one it is no fault of ours. The editor would be pleased to have readers send him any facts of its pedigree.

There were four brothers who had inherited a storage warehouse from their father. He had divided the property equally among them.

Among the appurtenances was a cat — a fine animal, excellent for mousing. This, too, was divided, the eldest brother owning the right front quarter, the second brother the left front quarter, and the younger brothers the two hind quarters.

Now, unfortunately, the cat, in one of its nocturnal prowls, injured the right front paw, and the eldest brother attended to that portion of his property by binding the injured member with a greased rag.

The car, thankful for this relief to its sufferings, went to sleep contentedly before the fire; but in the midst of its slumbers a falling coal ignited the rag, and the animal, howling with agony, dashed through the warehouse, and coming in contact with some combustibles, set the building on fire.

When the loss came to be figured out, the three younger brothers wished to throw it all upon the eldest, on the ground that had he not tied up his part of the cat with the inflammable rag, the building would not have been destroyed.

He, on the contrary, contended that had the cat only been possessed of the front right paw, his property, it would have stood still and burned to death. It was the three other paws that caused the damage.

The brothers argued the case until they died, but they never reached an agreement.

MEN OF SCIENCE AND THE LAW

(From the *Law Journal*)

THE late Sir George Darwin, though he was never a practising member of the profession, may be numbered among the distinguished men who have brought law and science into closer connection. The second wrangler and Smith's prizeman at Cambridge in 1868 — the year in which Lord Moulton was senior wrangler — he was called to the bar at Lincoln's Inn in 1872. There have been other eminent men of science whose connection with the law was much more active. To mention but two honored names in the modern annals of science, Sir William Grove, after a distinguished career at the bar, became a judge of the Queen's Bench Division, and Lord Armstrong practised for several years as a solicitor at Newcastle-upon-Tyne before he founded the great works at Elswick.

The bar narrowly missed the distinction of adding Lord Kelvin to its roll of distinguished men. His biography shows that while he was at Cambridge he had serious thoughts of joining the bar. "I think," he wrote, "I could reconcile myself to the bar, though it would be a great shock to my feelings at present to have to make up my mind to cut mathematics, which I am afraid I should have to if I wished to get on at the bar." Though he never became a member of the bar, yet he became a not unfamiliar figure in the courts. Those who remember Lord Kelvin as the most famous of all the expert witnesses in patent cases realize how great a lawyer was probably lost in the scientist, just as those who know how to appreciate Lord Moulton's attainments are wont to say that a great scientist has been lost in the lawyer.

CHIEF JUSTICE RYAN'S PRAYER

A MILWAUKEE friend of the *Green Bag* asks us to print the prayer composed by Chief Justice Ryan of Wisconsin and found among his papers after his death. The prayer can truly be said to rival the Prayer Book itself in beauty of diction. As printed by the *Living Church* it is as follows:

"O God of all truth, knowledge, and judgment, without Whom nothing is true, or wise, or just; Look down with mercy upon Thy servants whom Thou sufferest to sit in earthly seats of judgment to administer Thy justice to Thy people. Enlighten their ignorance and inspire them with Thy judgments. Grant them grace truly and impartially to administer to Thy justice and to maintain Thy truth to the glory of Thy name. And of Thy infinite mercy so direct and dispose my heart that I may this day fulfil all my duty in Thy fear and fall into no error of judgment. Give me grace to hear patiently, to consider diligently, to understand rightly and to decide justly. Grant me due sense of humility, that I may not be misled by my wilfulness, vanity or egotism. Of myself I humbly acknowledge my own unfitness and unworthiness in Thy sight and without Thy gracious guidance I can do nothing right. Have mercy upon me, a poor, weak, frail sinner, groping in the dark; and give me grace so to judge others now, that I may not myself be judged when Thou comest to judge the world with Thy truth. Grant my prayer, I beseech Thee, for the love of Thy son, our Saviour, Jesus Christ. *Amen.*"

It is interesting to note, comments the *Living Church*, that Chief Justice Ryan's present successor, Chief Justice John B. Winslow, is an active churchman and chancellor of the Protestant Episcopal diocese of Milwaukee.

Magistrate. — "If I let you off this time will you promise me to take the pledge?"

Delightful Prisoner (excitedly). — "Oi will, yer Honor, an' drink yer health."

— *London Tit-Bits.*

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

Correspondence

The Evil of Electing Judges for Short Terms

To the Editor of the Green Bag: —

Sir: I notice in the January issue of the *Green Bag* that the Chicago Bar is seriously discussing the advisability of electing their judges from a non-partisan judicial ballot. This agitation, I suspect, has grown out of certain results of the election in that city on November 5 last.

I also noticed some time ago, that one of Chicago's most popular and best equipped judges is about to retire from the bench on the ground that, in his opinion, it is only a question of time, under their system, when "politics will get him." That incident together with the proposed action of the bar and public, suggested to my mind that it would not be a bad idea for Chicago and Illinois to come to Ohio and learn a lesson.

Our last legislature adopted the so-called non-partisan judicial ballot, the purpose being to remove the bench not only from politics, but from those other selfish, subtle and dangerous influences that have crept into the judicial service.

The more observing and intelligent element in this community know that that law has failed of its purpose. In the last campaign for the election of judges for all the higher courts in this state, it is a well-known fact that partisan politics took a hand quite as effectively as it ever did under the old system. Party organizations unfurled the banner of their own nominees in utter defiance of the spirit and purpose of the statute, with the result that the dominant organization, as a rule, came off a glorious victor.

Instead of having an independent judiciary as the people in all good faith intended, we shall have a judiciary dominated more or less by party organization and certain allied newspaper interests in plain and open violation of our so-called Corrupt Practice Act.

There can be no such thing as an independent judiciary so long as we have the short elective system for our judges where the whims, prejudices and conceits of unprincipled, heartless demagogues have selfish interests to subserve.

There are, in my judgment, just two ways to procure what every good citizen desires — a fearless and able bench. Our judges must either be elected for a long period of years, say fifteen to eighteen, and ineligible for re-election, surrounded by certain safeguards to the public, providing for inefficiency or misconduct (the ever-present recall), or they must be appointed by our Governor to hold their positions during good behavior, with like restrictions.

New York State has in substance the former system and the judges of that state are an exceedingly able body of men. They are elected for a period of fourteen years and are paid salaries which not only permit them to live in comfort and in conformity to the dignity of their office, but which permit them to save something for their declining years when they shall have retired to private life.

The judges of the Supreme Court of that state, corresponding to the Common Pleas Judges of Ohio and the District Judges of other states, are elected for a term of fourteen years and

receive a minimum salary of $12,000 a year.

The judges of the New York Court of Appeals, which, in dignity and ability, is second only to the Supreme Court of the United States, are elected for a like period and are paid a salary of $17,500 a year. Under such a system as this a judge should possess that independence and case which are requisite to efficient service. The framers of Ohio's new constitution seem to have had this thought in mind when they provided that the minimum service shall be six years, thus leaving the door open for a more extended period.

In the state of Massachusetts, the mother of us all, the judges are appointed by the Governor for life and no state in the Union has a better judiciary than that old Commonwealth. No lawyer of any standing will deny it. Her decisions upon all mooted questions are cited and received with pleasure and confidence. The salaries there are not so large as in New York, but the life term, with pay on retirement, compensates for the difference. We can safely trust our Governors. They are men of character, quite generally high grade lawyers, and have a keen appreciation of the dignity and power of the judge and of the kind of men who should fill the position.

It hardly seems necessary to mention the English, European, Canadian and our own federal system of judicial appointments for life. Some such system as these must prevail in our state courts sooner or later or our entire bench will be emasculated. Instead of having judges of ability, independence and fairness, we shall have, under the present system, a lot of weaklings, time-servers and apologies. To say that a judge elected, as our candidates usually are, under the present system of short term, can enjoy that freedom and independence which is requisite to efficient service is simply to utter an absurdity. Judges have not yet ceased to be human. President Eliot's address before the Massachusetts Bar Association, published in the *Green Bag*, upon the subject, is illuminating. Listen to these words from this distinguished layman:

> In view of this uneasiness one cannot doubt that the abandonment of the policy of electing judges for short terms would contribute greatly to the re-establishment of the bench in the loyal regard of the American people.

The late attempt of Congress to limit the Presidential service to one term of six years, with ineligibility, is to my mind, very suggestive. An unshackled judiciary is more important than an unskackled President.

Of the two systems suggested, I have always preferred the appointive. Our judges should not become the plaything of the partisan, nor, should they become an object for the assault of the vicious and yellow on the eve of an election.

There is something divine about the judicial position. When A. and B. submit their honest differences to a court for adjudication, isn't it preposterous, isn't is ridiculous and nauseating, isn't it really awful that the judge hearing the case should consult the possible political effect upon himself of his own decision? If ever there is a moment in his life when he should be fearless and at the same time feel secure, it is when he is passing upon the property or personal rights of his fellow-citizens. His fiat, like that of divinity itself, may be final. The destiny of his fellow-man may be directed upward toward the skies or downwards toward Hell. May this Republic be delivered from the judge afraid, and from the system that makes him so!

HARVEY R. KEELER.

Cleveland, O.

The Legal World

Monthly Analysis of Leading Legal Events

"We believe it will be the prevailing feeling of the country that, in his answer to the British note protesting against the exemption of American coastwise shipping from Panama Canal tolls, Secretary Knox has interpreted his duty as requiring him to be the defensive counsel in a bad cause rather than the statesman seeking in a broad way a basis of settlement that would be honorable and satisfactory to both parties at issue." [1] Secretary Knox's reply to Earl Grey's note was an attempt to prove that the British objections rest upon a mere imaginary contingency, rather than upon actual discrimination against British shipping through the tolls fixed by President Taft. It is a question of fact, he held, and it is not necessary to discuss an issue which has not yet arisen.

This opinion of the Secretary of State has evidently been received with deference in some quarters, and Senator Root has been criticized for arguing principles without determining whether there are facts to which the principles apply. An example of Secretary Knox's keen sense of fact was perhaps afforded by his statement that foreign shipping would not suffer in consequence of the exemption of American shipping, as the rate of $1.25 per ton established by the President had been the rate calculated by Prof. Emory R. Johnson on the basis of non-exemption of American coastwise trade. If Mr. Knox had desired to present a more thorough analysis of the facts, he could have shown that Professor Johnson's conclusion was that "if tolls were levied alike upon American and foreign ships, it would apparently be possible to make the canal self-supporting during the first decade, but that it would not be possible to secure from foreign shipping alone revenues sufficient for that purpose. Of course we should get all the traffic would bear. His estimate of gross revenue for 1915 was $12,600,000, made up of $1,200,000 on coast-to-coast American shipping, $864,000 from American shipping carrying foreign commerce, and $10,536,000 from foreign shipping. If we remit $1,200,000 of American tolls, either we must assess that sum upon foreign shipping or face a serious deficit in canal operation." [2] The situation was made even clearer in Professor Johnson's address before the Chicago City Club Feb. 6.

The evasive treatment of the question by Secretary Knox and the continued indifference of the Senate disappoint those who would like to see the nation carefully living up to its treaty obligations. Even Senator Root's eloquent demand for arbitration in the Senate Jan. 21 can hardly be said to have expressed the views of even a substantial minority in the Senate.

To turn from this aspect of our national life, which can hardly be said to show our unbounded faith in the principle of legal settlement of international disputes, we may perhaps find satisfaction in several other latest legal developments. Take for example the reform of procedure. The New York Code practice is likely to be simplified by the enactment of a short practice act to be supplanted by rules of court, in accordance with the approved doctrine. New York procedure has not been so much in need of reform as that of some other states.

[1] *Boston Transcript*, Jan. 24, 1913.

[2] *New York Times* Dec. 11, 1912.

The doctrine of insubstantial error has been developed, and the statutes that may be adopted to express the desires of the Board of Statutory Consolidation, will not, by forbidding reversals on mere technicalities, have the same significance which the adoption of the American Bar Association measures might have elsewhere. It is rather on the side of expedition and simplicity that the New York practice is in need of reform, and the example of the United States Supreme Court and of the State of New Jersey, in their recent reforms of equity and common law practice, is likely to have its influence in New York.

The Council of the National Municipal League has decided by a vote of its members, that the most vital subject before the country today is the efficiency of the system of administering justice. Congress is the power which at present can accomplish immeasurably more than any other agency for the remedy of the law's delays. By adopting what Mr. Thomas W. Shelton's committee recommends, and bringing about the reform of common law procedure in the federal courts, it can realize the end toward which the American Bar Association has been striving, and with a model procedure in the federal courts, the several states will one by one fall into line and bring the procedural system of the entire country up to a high level.

The movement for recall of judges and judicial decisions has furnished no development during the month so significant as the distinctly encouraging expression of right sentiment from New York State. A constitutional amendment permitting the recall of judicial decisions has been defeated in the Massachusetts legislature just as we go to press. In Michigan, a somewhat ingenious method of tempering the extravagance of the recall is provided for, in the bill lately introduced by Representative Glassner. Judges are to hold office for two years with entire immunity from recall, and are chosen for life on non-partisan ballots. After a judge has been exonerated by popular vote, recall proceedings cannot be started against him again for four years.

Simplification of New York Code Practice

The Board of Statutory Consolidation, composed of Judge Adolph J. Rodenbeck, William B. Hornblower, John G. Milburn, Adelbert Moot, and Charles A. Collin, has reported a plan for "the classification, consolidation, and simplification of the civil practice" in New York State, as a result of the investigation which the Board was ordered to make by chapter 393, Laws of 1912. Governor Sulzer in transmitting the report to the legislature, accompanied it with a special message expressing his complete approval of the report, which proposes that the present Code of Civil Procedure be abandoned and makes the following general recommendations: —

"There should be prepared a short practice act which would preserve in statutory form the fundamental and jurisdictional matters of procedure in the Code of Civil Procedure, with such changes as may be deemed necessary to adapt those provisions to present conditions, the substantive law and special practice in the code being distributed in appropriate consolidated laws or if necessary in new statutes.

"There should be prepared rules of court which would preserve and regulate the important details of practice now in the Code of Civil Procedure and in the present court rules, the unimportant minute details of practice being

omitted and the practice thus regulated being simplified as hereinafter suggested.

"There should be made such changes in the practice, regulated by the practice act and rules of court, as will simplify and modernize the practice so as to secure a prompt and final determination of legal controversies according to the substantive rights of the parties, and to that end the following suggested changes in the practice are recommended."

Dean Frank Irvine of the Cornell University Law School, who for several years has been a member of the special committee of the American Bar Association on Remedies for Delay and Unnecessary Cost of Litigation, is quoted as saying: —

"If the Field Code of 1848 had been received in the proper spirit when it was first adopted there would be little ground for the present demand for a simpler and more expeditious practice. Unfortunately, it received in many particulars a construction by the courts tending to check its successful operation. The Legislature proceeded by frequent annual additions and amendments to destroy its simplicity. In 1876 a revised code was enacted, which now contains something more than 3,400 sections. This has had the effect of making law practice in New York more technical and more complicated than in any other English-speaking country. It is probable that a greater proportion of cases are decided in New York on questions of procedure without reaching the merits of the controversy than in any any other state in the Union — certainly a greater proportion than in England or in her dependents."

The Federal Income Tax Amendment

In view of the action of Wyoming, the approval of three-fourths of the states, necessary to the adoption of the sixteenth amendment, has been secured, and an amendment authorizing the income tax will become a part of the federal Constitution, reading as follows: —

"Article XVI. — The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the states, and without regard to any census of enumeration."

Congress will enact a law to levy the tax, probably during the extraordinary session to be called by President Wilson in April.

Professor Bruce Wyman of Harvard Law School in a recent newspaper article said: —

"It is rather untimely to have a federal income tax coming upon us just as we were beginning to work out a general system of income taxation in the separate states. By this process the states were finding out that they could really collect a general tax upon all property tangible and intangible. The subjection of all property in the state to the burdens of the state was in sight by this hopeful programme. An income tax is a proper complement to a property tax. If direct taxation is left to the states, as I believe it should be, the states would have kept on in this course of taxing all property effectively. I suppose it is useless to hope that the federal Government in its present hands will keep the income tax now authorized for great emergencies. And if we get a federal income tax this year, as we probably will, I very much fear that the state legislatures generally will not impose a state income tax in addition. No man wants to pay two income taxes, especially as practically nobody is even paying one at present. A state would fear driving away people by making two income taxes grow where there was one before.

Very probably this is an illogical position. If income taxation is a necessary part of a general scheme of direct taxation, and if we are going to let the federal Government into the field of direct taxation, we ought not to hesitate at two income taxes. But I very much fear we will, and that a promising development in scientific taxation will thereby be much retarded."[1]

Juvenile Delinquency

In the annual report of the Denver juvenile court, Judge Ben Lindsey laid special emphasis upon the decrease of delinquency in the thirteen years that the juvenile court has been in operation. Dependency cases, however, have increased 400 per cent. Judge Lindsey attributes this to the difficulty of adequately reaching and punishing men who desert their wives and families. In 1901, the year the court was established, 560 delinquency cases were taken care of. In 1912 there were 419 delinquency cases.

Statistics contained in the biennial report of the Juvenile Court of Multnomah County, which contains the city of Portland, Oregon, indicate that better results are obtained among children by warnings than by actually bringing them to trial. The total number of cases not brought before Judge Gatens, but handled by the probation officers direct, was 1518, and, "in nearly all of these cases no further action was required." Of 1410 cases brought before the Judge, 245 came back on second and subsequent charges. Of the number arraigned before Judge Gatens, 958 were boys and 442 were girls. They are classified as delinquents and dependents, there being 967 of the former, 767 boys and 200 girls, and 443 of the latter, 198 boys and 245 girls. Under the head of ages, it is stated that 374 were 10 years and under, 377 from 11 to 13 inclusive, 33 were 14 and 15, 164 were 16 and 162 were 17.

[1] *Boston Transcript*, Feb. 8, 1913.

Personal

Chief Justice Shields of Tennessee has been elected United States Senator.

Hon. Le Baron Bradford Colt, United States Circuit Judge, was elected United States Senator from Rhode Island Jan. 21, succeeding George Peabody Wetmore. Judge Colt had been on the bench of the Circuit Court for nearly twenty-nine years. He holds degrees of LL.D. from both Yale and Columbia.

Chief Justice Edward Church Dubois sent his resignation from the Supreme Court of Rhode Island to the Governor on Jan. 13. Chief Justice Dubois, who was born in London, England, in 1848, was Attorney-General of Rhode Island from 1894 to 1897, and was elected to the Supreme Court in 1899.

President Taft has accepted the Kent Professorship of Law at Yale, and will reside in New Haven after March 4. The chair has not beeen filled since the date of Edward J. Phelps in 1900. Mr. Taft expects to give a special course of lectures upon his arrival at Yale. As the annual income from the Kent Foundation is only about $300, the corporation will add enough to assure an income of $5,000.

Clarke Howard Johnson, Associate Justice of the Supreme Court, was unanimously elected Chief Justice of Rhode Island by the General Assembly Jan. 23, to fill the vacancy caused by the retirement of Chief Justice Edward C. Du-

bois. Chief Justice Johnson was admitted to the bar in 1879, and during his first year as a lawyer was elected to the legislature. From 1881 to 1886 he was clerk of the House, and in 1886 he was made justice of the state dictrict court. In April, 1903, he was elected Associate Justice of the Supreme Court. The vacancy in the Supreme Court was filled on Jan. 28 by the selection of Justice Darius Baker of the Superior Court.

Revolution of the courts impends, unless the courts purge themselves of outworn methods and thus quell the merited impatience of the masses, said Justice Wesley O. Howard of the appellate division of the Supreme Court of New York Jan. 27, before the alumni of La Salle Institute at Troy, N. Y., in a broadside leveled at antiquated laws and the "timidity of judges." The recall of judges and judicial decisions promises no cure, Justice Howard said, but anarchy instead. "All men are supposed to be equal before our laws, but that seems not to be so. The road to justice should be straight, short and simple. Revolutionary measures are to be avoided. The movement should begin from within; it is well for the great jurists of the land, the judges of last resort, to take heed of the temper of the times, unbend from their conservatism and work out the reform themselves. Let us not deceive ourselves; the spirit of recall is spreading, the impatience of the masses grows deeper. Unless the judges act the people will act; if they do not resort to the recall they will revise the constitution and create new courts — courts to do rough justice; courts to do summary justice; courts close to the common people; courts without technicalities, sophistry and delay, and where substantial right prevails."

Bar Associations

American Bar Association. — The next annual meeting of the American Bar Association is to be held in Montreal on September 2–4, 1913, at the invitation of the Bar Association of Montreal.

Connecticut. — Speaking at the annual dinner of the Connecticut State Bar Association at New London Jan. 27, Hon. Alton B. Parker, president of the New York State Bar Association, made an urgent appeal to the Connecticut association to join the New York body in defending the courts from attack through the recall of judges and judicial decisions. It was voted that a committee investigate the matter and report at the July meeting of the Association. At the annual business meeting officers were re-elected as follows: President, Hadlai A. Hull, New London; vice-president, Charles Phelps, Rockville; Secretary and Treasurer, James E. Wheeler, New Haven.

District of Columbia. — At the annual meeting of the Bar Association of the District of Columbia held Jan. 14, the special committee appointed to recommend changes in the present methods of taking testimony and to consider the cost of appeals, reported that they had been in conference with Justices Wright and Stafford, of the Supreme Court of the District, in regard to conforming the rules of that court to the rules of equity practice promulgated by the United States. Should changes in the equity rules be made by the District Supreme Court, the rules of the District Supreme Court of Appeals will be conformed thereto. The officers elected include: President, John E. Laskey; first vice-president, Wm. Meyer Lewin; second vice-president, John Lewis Smith;

secretary, Edwin L. Wilson; treasurer, Charles H. Cragin.

Florida. — At the seventh annual meeting of the Florida Bar Association, held at Miami, Fla., Feb. 6–7, Sherman L. Whipple of Boston delivered the annual address, and William Jennings Bryan was the guest of honor at the banquet. Mr. Whipple's subject was "The Duty of Disclosure." He said: "I advocate as a part of the creation of the duty of disclosure the abolition of the privilege of confidential communications to counsel and the kindred privilege of one accused of crime to stand in silence at the bar. The communications which a man makes to his attorney are either harmless or harmful to his case. If harmless, there is no reason why they should not be disclosed; if harmful, the interests of justice and principles of fair play demand their disclosure. If the client's purpose be to conceal the truth and thus defeat justice, such purpose itself should be defeated. The existence of the privilege is an encouragement to dishonest conduct. The rule serves no useful purpose in the administration of criminal law and its only effect is to make difficult the tracing of crime and the punishment thereof."

Kansas. — Walker D. Hines of New York, general counsel of the Atchison, Topeka & Santa Fé Railroad Company, delivered the annual address before the Kansas State Bar Association at its annual meeting in Topeka Jan. 27–28. His paper argued the need of the same executive responsibility in the government which is demanded in great business enterprises. Regarding procedural reform Mr. Hines said: "In one respect a most important reform in the judicial department is feasible, and that is the vesting in the courts of full power to prescribe and change the rules of pleading and procedure so as to insure the most economical and expeditious administration of justice. At present the responsibility and power in this matter rest, generally speaking, in the Legislature, which does not come directly in contact with the administration of justice, and the courts which do administer justice have not the responsibility or the power to change pleading and procedure so as to accomplish the greatest expedition and economy." Papers were also read by President J: D. McFarland of Topeka; Henderson Martin, A. M. Keene, W. H. Russell, W. S. Glass, S. N. Hawkes, Dean William R. Arthur, Earl W. Evans and E. S. McAnany.

Maine. — The Maine State Bar Association held its annual meeting Jan. 8 in Augusta, with Oscar F. Fellows of Bangor presiding. Secretary Norman L. Bassett of Augusta read a paper on Admiralty Law, written by Hon. Edward H. Blake of Bangor. Job H. Montgomery of Camden spoke of the need of a law court distinct from nisi prius. Robert T. Whitehouse of Portland spoke on divorce and Associate Justice Leslie C. Cornish of Augusta upon the law's dispatch in Maine. Mr. Whitehouse recommended the passage of careful and uniform marriage laws throughout all states requiring licenses and declarations of intention, and prohibiting marriages before a certain age and when either party is physically defective. The following officers were elected: President, George C. Wing, Auburn; vice-presidents, Fred J. Allen of Sanford, Wallace H. White, Jr., of Lewiston and John Wilson of Bangor; secretary-treasurer, Norman L. Bassett of Augusta.

New York City. — William B. Hornblower of the law firm of Hornblower,

Miller & Potter, was elected president of the Association of the Bar of the City of New York at the annual election Jan. 14. His associates in office for the ensuing year are: Vice-Presidents, William N. Cohen, William E. Curtis, Robert W. DeForest, John G. Milburn and Morgan J. O'Brien; recording secretary, Silas B. Brownell: corresponding secretary, Herbert J. Bickford; treasurer, S. Sidney Smith.

Oklahoma. — At the annual meeting of the Oklahoma State Bar Association, held at Oklahoma City December 30 and 31, the annual address was delivered by Frank B. Kellogg. Papers read included "The Courts and the Agitation for Court Reform," by George S. Ramsey; "Sales of Real Estate through Probate Court," by H. H. Rodgers; "Review of the Decision of the United States Supreme Court in the Indian Tax Question," by Kirby Fitzpatrick; "Constitutional Inhibition against Unlawful Search and Seizure," by E. E. Grinstead; and "Guaranty of Bank Deposits," by C. M. Fecheimer. These officers were elected: President, James H. Gordon, McAlester; secretary, Grey Moore, Durant; treasurer, John H. Kane, Bartlesville.

South Dakota. The fourteenth annual meeting of the South Dakota Bar Association was held in Pierre on January 15–16. The annual address was delivered by the president of the association, James Brown of Chamberlain. An address was also delivered by Jesse W. Boyce of Sioux Falls. Much time was taken up in a discussion of the report of the committee on legal reform. This committee, appointed at the annual meeting of 1912, was composed of Charles S. Whiting of Pierre, Presiding Justice of the Supreme Court; John B. Hanten of Watertown, Charles M. Stevens of Aberdeen, Henry A. Muller of Sioux Falls and Norman T. Mason of Deadwood. It had spent considerable labor upon its report, which had been made into a volume of 166 pages and distributed among the members of the association early in December. Altogether the report submitted thirty-one proposed laws, including five uniform acts recommended by the American Bar Association. Seven of the laws proposed to regulate procedure on appeal to the Supreme Court. The remainder covered a variety of topics, ranging from a "blue sky" law to an act providing for an immunity bath for criminals who confess and give evidence in aid of prosecution. At the end of the two-days discussion of the report, twenty-nine of the acts were recommended by the association to the present legislature for enactment. The act requiring contracts for the compensation of real estate agents to be in writing fell by the wayside, as did the act providing for the appraisement of personal property before sale under legal process or chattel mortgage.

On the evening of the 15th, the association gave a dinner in honor of Judges Dighton Corson and Dick Haney, who had just retired from the Supreme Bench after long service. The president of the association presided as toastmaster. Nearly four hundred members of the association and friends were present and helped to make the banquet the most successful affair of its kind ever held in the state.

The following officers were elected for the ensuing year: Hon. J. M. McCoy, a judge of the Supreme Court, president; J. H. Vorhees of Sioux Falls, secretary, and L. M. Simons of Belle Fourche, treasurer. Mr. Vorhees and Mr. Simons have served the association in their respective offices for many years. An

executive committee was also elected, which will later designate the place for the next annual meeting of the association.

Two South Dakota Judges

On January 1, Judges Dighton Corson and Dick Haney retired from the Supreme Court of South Dakota. Judge Corson had served as a member of the court since the admission of the state in 1889. Judge Haney, upon the admission of the state, was elected a circuit judge, and was promoted by appointment to the Supreme Court in 1896, where he remained until his retirement. Both had thus seen more than twenty-two years of judicial service for the state.

Judge Haney was born in Lansing, Iowa, in 1852, and was graduated from the law department of the University of Iowa in 1874. For ten years he practised law in his home town of Lansing but in 1885 removed to Plankington, Dakota Territory. Then came in rapid succession public service as district attorney, circuit judge, and member of the Supreme Court. He has already returned to active practice, having formed a partnership with T. J. Spangler at Mitchell, South Dokota.

Judge Corson is, in every sense of the phrase, a pioneer lawyer. He was born in Somerset county, Maine, educated at Waterville, and admitted to practice in that state over sixty years ago. He removed to Milwaukee and was a member of the Wisconsin legislature in 1857. The following year, he was elected district attorney for Milwaukee county. In 1861, he settled in Virginia City, Nevada, and, upon the organization of that territory, was appointed district attorney for the district embracing Virginia City and the then famous Comstock mine. At this time Mark Twain was assistant secretary of the territory and a close friend of young Corson. In 1876, the discovery of gold in the Black Hills of Dakota was announced. A year later, Judge Corson, following the lure of the frontier, settled in Deadwood. He was thereafter a member of the constitutional conventions of 1885 and 1889. At the present time, he is eighty-five years of age, in full possession of his mental and physical vigor, but will not return to active practice.

Miscellaneous

A petition for the recall of Judge Charles L. Weller of San Francisco was put in circulation and signed by a number of women Jan. 15, in view of Judge Weller's action in reducing from $3000 to $1000 the bail of Albert Hendricks, charged with assault upon a young girl. The prisoner after gaining his liberty fled the city. Judge Weller argued that he had merely followed the usual custom of the police courts. Twelve thousand signatures to the recall petition were secured in ten days, five thousand more than necessary to compel a recall election.

Foulke E. Brandt, whom Judge Rosalsky of the New York Court of General Sessions sent to prison for thirty years in 1907 for burglary in the first degree, was granted a conditional pardon by Governor Sulzer on January 17, on his promising not to appear on the stage or otherwise to seek notoriety in connection with the case, and on his retracting all statements reflecting on the character of anyone connected with the affair. "Brandt is not a martyr," said the Governor. "As an individual he is entitled to little consideration. I have no sympathy for Brandt, but I have great regard for the due administration of justice."

The Medico-Legal Society of New York commemorated the approaching completion of four decades in its work at its annual dinner given on Jan. 24, under the presidency of Dr. T. D. Crothers, celebrating the work of the society since Mr. Clark Bell was elected president in November, 1872, by conferring Honorary Membership upon a considerable number of eminent names of the bench and bar and of prominent medico-legal jurists abroad. Mr. Clark Bell presented a historical report of the leading features of the work of the body for the last forty years. Hon. John R. DosPassos, who was a member of the society in 1872, read the paper of the evening, on the general topic of "Reform in the Law"; Judge John Woodward of the Appellate Division in the Second Department, responded to the toast of the Bench, and Nelson Smith, an octogenarian leader of the bar, responded for the Bar.

The conviction in the United States Senate, Jan. 13, of Robert W. Archbald, of Scranton, Pa., as guilty on five out of thirteen articles of impeachment, marks the first time in fifty years, and the third time in the history of the United States, that a judge has been removed from office as the result of impeachment proceedings. Three other judges during the past century have been impeached, but acquitted. The House voted to impeach Judge Archbald on July 7, and the impeachment was laid before the Senate on July 15. The trial did not begin, however, until Dec. 2. Senator Root, in a statement filed during the voting, said: "I have voted that the respondent is guilty under Articles I., II., III., V., VI., and XIII., because I find that he used the power and influence of his office as judge of the Court of Commerce to secure favors of money value for himself and his friends from railroad companies, some of which were litigants in his courts, and all of which were under the regulations of the Interstate Commerce Commisssion, subject to the review of the Court of Commerce. I consider this course of conduct, and each instance of it, to be a high crime and misdemeanor."

At the thirteenth annual conference of the National Civic Federation, held in New York City, Jan. 28-29, President Seth Low attacked the Sherman anti-trust law and recommended federal licensing of all state-created corporations. He advocated the appointment of an inter-state trade commision to have oversight of all large interstate business. He reviewed all the important industrial disputes of the year and highly complimented the American Federation of Labor as a constructive agency for the bringing about of industrial peace. His denunciation of the Socialist Party and the Industrial Workers of the World, whom he put in the same category, was emphatic. August Belmont read a paper which gave a *résumé* of the agitation for workmen's compensation. A draft butline of a proposed Model Safety Act for the prevention of accidents was presented. Proposed pension laws were debated by F. Spencer Baldwin, George T. Morgan and Arthur Williams. Emerson McMillin reported that a bill covering the regulation of public utilities would be ready for presentation to the Civic Federation within a few days. The investigation, he said, had been most exhaustive, and the cost, he said, had been $55,000. There were also discussions of the Federation's proposed amendments to the Erdman Railway Conciliation act and upon a proposed model state Mediation act. There was a debate on "The Practicability and

Desirability of Minimum Wage Required by Law," and a paper by Ralph M. Easley on "Industrial and Civic Progress in the United States."

Obituary

Antony, E. L., of Cameron, Tex., former Congressman, died Jan. 16 at Dallas.

Berry, James Henderson, former United States Senator, died at Bentonville, Ark., Jan. 30, aged seventy-one. He served in the state legislature, and was elected Governor of the state in 1882.

Breeden, Col. William, for fourteen years United States Attorney for New Mexico, died Jan. 27 at the home of his daughter, in Brookline, Mass., aged seventy-two.

De Haven, John J., judge of the United States court for the northern district of California since 1897, died Jan. 26 at his country home near Napa, Cal. He had served in Congress and as Associate Justice of the California Supreme Court.

Dodd, Amzi, first Vice-Chancellor of New Jersey, and dean of the New Jersey bar, died at Bloomfield, N. J., Jan. 22, aged ninety. He was a special Justice of the Court of Errors and Appeals from 1872 to 1882.

Hall, Frederic B., Chief Justice of the Connecticut Supreme Court of Errors, died Jan. 15, in his seventieth year. He had been a member of the court since 1897, succeeding Governor Baldwin as Chief Justice in 1910. He had been on the bench for thirty-six years.

Hudson, F. G., former Attorney-General of Louisiana, died at Hot Springs, Ark., Jan. 17.

McClain, Andrew, formerly Justice of the Tennessee Supreme Court and United States Attorney for the middle district of Tennessee, died Jan. 17 at Los Angeles, aged eighty-six.

Page, Henry, formerly state circuit judge, Congressman, state's attorney, and member of the constitutional convention of 1870, in Maryland, died in Princess Anne, Md., Jan. 7.

Platt, James P., Judge of the United States District Court, died at Meriden, Conn., Jan. 26. He was a son of United States Senator Orville H. Platt, and had been member of the legislature and city attorney ,and judge of the city court, before his elevation to the federal bench in 1902.

Steinert, Henry M., justice of the Court of Special Sessions in New York City, died Feb. 2. He was named for Special Sessions last spring, having previously been Assistant Corporation Counsel.

Templeton, Judge *Charles F.*, at one time Attorney-General of Dakota Territory, and later federal district judge, died at Grand Forks, N. D., Jan. 3.

Voorhies, Albert, former Justice of the Louisiana Supreme Court and Lieutenant-Governor of the state, died Jan. 21, aged eighty-four.

HON. JAMES C. McREYNOLDS

ATTORNEY-GENERAL OF THE UNITED STATES

The Green Bag

Volume XXV April, 1913 Number 4

The New Attorney-General of the United States

FOR Attorney-General President Wilson has chosen a man of unusually broad experience in the investigations and litigation arising under the Sherman anti-trust law, who has an exceptional understanding of the details of organization and management of large industrial enterprises and will place his large knowledge of business affairs at the service of the Government. What policy Mr. James Clark McReynolds will choose to pursue in the administration of the Sherman law cannot of course, be predicted. The view is freely expressed that it is likely to be a continuation of that of his predecessor. Mr. McReynolds has long been in training for the position to which he was lately advanced, and brings to it an ideal equipment on the practical side. He is no longer a subordinate department official, and if he has formed opinions of his own which differ from those of his predecessor, President Wilson is likely to place great confidence in his judgment and to allow him a wide range of discretion in determining what policy shall be pursued in suits against corporations.

Mr. McReynolds' work in connection with the prosecution of the tobacco and anthracite coal trust cases showed abilities of a high order. He has the faculty of getting quickly at the facts, and his grasp of practical matters, his insight into the technique of business, give him the equipment to be acquired only by extended experience and long familiarity with intricate subjects. It is difficult to believe that so thorough a discipline could not have steadied and ripened his judgment, with the result that the nation may look for speedy and certain convictions of corporations plainly violating the law, and a tolerant attitude toward those whose operations, however extensive, seem to be entirely legitimate.

Mr. McReynolds is fifty-one years old, and it was only ten or twelve years ago that he was a professor in Vanderbilt University Law School. He is a man with a broad range of accomplishments, who will doubtless uphold high professional ideals and exert a wholesome influence in the great office to which he has been advanced. The opportunities which that office offers, through the leadership of the American bar, for an exemplification of the finest traits and loftiest principles of the lawyer and advocate are tremendous, and it may be anticipated that a man of Mr. McReynolds' undoubted breadth and versatility will rise to them.

The new Attorney-General was bor- at Elkton, Ky., on July 23, 1862, and was educated at Vanderbilt University and in the law department of the University of Virginia. He was a professor there from 1900 to 1903, when he was appointed an Assistant United States Attorney-General by President Roose-

velt, despite the fact that he is a gold Democrat. Mr. McReynolds was not a stranger at the national capital, as he had spent a number of years there as secretary to Justice Howell E. Jackson of Tennessee. He was the second man from Tennessee to occupy the post of Assistant Attorney-General. He resigned in January, 1912, and took up his law practice at 141 Broadway. Mr. McReynolds is not only a lawyer of distinction, but a finished, forceful speaker as well and a man of the highest moral character.

The First Lawyer

By Dan C. Rule, Jr.

ONE day my little daughter, Dandylyn Artichoque Violabelle,
With her little pick and shovel was putting down a well.
When at a depth of seven feet — she was in search of fluid —
She struck a granite tablet on which an ancient Druid
Had carved some runic rhythms; but to my great chagrin
I couldn't read the language that they were written in.
To surmount this difficulty — the scheme was quite a gem —
Into the plainest English I straight translated them.
They are so very easy to read since that is done,
That in a playful spirit I pass them on for fun.

"With brow serene and thoughtful, with step sedate and slow,
By moonlight to the Council Rock came the cave-man Riatoh.
He blew the conch-shell lying there, he lit the beacon flame,
And answering those signals, his watchful tribesmen came
With spear and club and javelin, and they questioned, 'Is it war?
Stand forth and tell us, Riatoh, what this alarm is for!'
Then Riatoh addressed the Chief, a mighty man and old,
'O Master of the Mountains, attend while I unfold
A plan to change our government; in short, to separate
The judicial and executive departments of the state.'

" 'What makes mankind superior to all the beasts and birds?
'Tis mainly our ability to express our thoughts in words.
Therefore it clearly follows — I hope my meaning's plain —
The longest-winded speaker has the most efficient brain.
And where's the man or woman from Danube unto Po
Who for eloquence is equal to your servant Riatoh?
Then were it not far better, O Chief, for you to be
Our great war-leader only and leave the laws to me?
Now judge me, O my countrymen' — the speaker paused to sob —
'Am I not the man best fitted to manipulate the job?'

The Chieftain glumly nodded, and the tribesmen, row on row,
Exclaimed with approbation, 'By the Wingless Auk, that's so!'

"Then the lawyer strutted homeward, and as a litte joke,
Remarked to Mrs. Riatoh, 'My dear, observe my smoke
While on polished rocks, with chisels, I carve a thousand laws,
Not to mention several maxims and some ponderous legal saws.'
So every day 'twas rainy, and every day it snowed,
He chipped away with ardor on the Riatohnian Code;
And oft the Chief came thither, being curious to see
His industrious legislature making laws so merrily.
Meanwhile, a youth named Dog Tooth, among his other sins,
Planned to steal his war-lord's mantle of glossy otter skins.

"One night there was a scuffle in the Chieftain's rocky den,
A muffled imprecation, a yell, and all again
Was quiet, till, for seven miles around,
The startled clansmen trembled at the conch-shell's bellowing sound,
And skurrying to the Council Rock, they saw their leader stand
Beside the flaming beacon, his war-club in his hand.
He waved aloft his bludgeon, and spluttered in his rage,
'Was there ever such a caitiff since the Cenozoic Age?
That slinking little Pup Tooth — 'tis well that I awoke —
Crept into my royal cavern and stole my otter cloak!
Now after him, my warriors; bring him to me, and then —'
Most expressively he brandished his heavy club again.

"Then Riatoh stepped smilingly to his judicial throne:
'My Chief, with all due deference, I'll handle this alone.
If I recall correctly — some day I'll look it up —
As the citizen you've cited was never known as 'Pup,'
But is properly called *Dog* Tooth, by Rock-Pile forty-three,
R. C. four hundred sixty, this technicality
Releases the defendant; so Dog Tooth's hands are washed
Of any guilt whatever, and the indictment's quashed.'
The old Chief stood confounded, in uttermost perplexity,
One mighty hand caressing his forehead's bald convexity;
Then, confronting the attorney, hissed 'You Prehistoric Dub!'
And with Mesozoic logic, reversed him with his club.

"With solemn ceremonies, and much display of woe,
Beside the Council Rock they buried Riatoh,
And o'er the mound erected a *dinotherium's* jaw,
The symbol for *Attorney and Counselor at Law.*"

Clyde, O.

Science and the Law

By Joseph W. Bingham
Associate Professor of Law
Leland Stanford Jr. University

THE editor has kindly allotted me space in these pages for a brief reply to his criticism[1] of my theory of the field of legal study. I hasten to break a lance with him, partly because he has misunderstood and therefore misstated the gist of my sketchy argument, and partly because it may have been productive of similar misapprehensions in other minds.

The nucleus of my theory is indicated by the following passages from my article.[2]

The field of any science consists of sequences of concrete phenomena which are studied to determine their causes and effects, and, if the science is not purely historical, to predict concerning similar future sequences. The generalizations and definitions used are only mental implements manufactured by the mind and senses to aid in acquiring, retaining, and communicating knowledge of the objective phenomena within the scope of the science. I assume that no one will contradict that the field of law is part of the field of the science of government. What are the proper objects of comprehension within this field? Only or primarily rules, principles and definitions? No. The lawyer, as does the scientist, studies sequences of external phenomena and he studies them with a similar purpose — to determine their causes and effects and to acquire an ability to forecast sequences of the same sort.

I have stated that the field of law is part of the field of the science of government. I delimit it further by saying that it includes only the organization of the institutions and agencies of authoritative government, their concrete operations and effects, and the causal facts which bring about those operations. These things constitute external sequences of phenomena which correspond to the working field of the scientist. Knowledge of such concrete governmental phenomena obtained by observation, report, inductive and deductive reasoning, and the other implements of scientific investigation, may be generalized into rules and principles. A technical vocabulary and stereotyped methods of phrasing may be developed with accompanying definitions. When thorough knowledge so obtained has been fully organized we shall have that which may with propriety be called a science of law.

Though the entire range of the operations of authoritative government come within the scope of the lawyer's profession, he is usually concerned particularly with one sort of these operations — those of the law-determining bodies and their complementary and supplementary agencies. Of these, the courts are the most prominent in the view of the student of law, for in the great majority of cases, where stubborn disputes over questions of law are fought out, those questions are ultimately determined by the courts. It will facilitate our discussion and not prejudice its soundness, I think, to confine it to law which has been or may be so determined. . . .

To clarify the expression "external governmental (or legal) phenomena" which I shall use occasionally, imagine any case which passes through our courts of law to final judgment. The actual concrete facts on which the action is or might be based and defended are external and generally non-legal phenomena. When the suit is initiated, however, the string of legal consequences commences and continues until it finally is disposed of, by full execution of judgment or otherwise, and completion of the records. Such strings or combinations of interwoven strings of causal external facts and legal external consequences constitute the laboratory material of the lawyer and jurist. In using such material, their purposes are, first, to learn by mental processes similar to those employed in scientific investigation, essential causal elements in the strings of occurrences producing certain of the legal consequences in those strings, and

[1] 25 *Green Bag* 74 (Feb. 1913).
[2] 11 *Mich. Law Rev.* 9–12.

secondly, to base upon knowledge so obtained and other pertinent knowledge a forecast of the potential legal consequences of similar or analogous causal facts. Concrete occurrences to the lawyer are pregnant with potential sequences which threaten governmental action. His essential business is to predict these future sequences accurately and to induce the desired and guard against the undesired. The generalizations expressed in text books, on the statute books or in judicial opinions, have no value to him — have no practical value to any man — except insofar as they affect such problems or aid in their solution. They are but means to an end.

What of it? The field of law is far wider and more complex than an imaginary system of promulgated or developed stereotyped rules and principles. It is a field for scientific study analogous to the field of any other science. Concrete sequences of facts and their legal consequences are the external phenomena for investigation and prediction. Knowledge of the causative interrelations of such sequences and of the causes, organization, and operation of the governmental machinery entering into them constitutes knowledge of law in one of the legal senses of the word. Rules and principles have been developed for use in this field and technical terms with definitions more or less stereotyped have been adopted. They are only mental tools which are used to classify, carry, and communicate economically the accumulated knowledge of the law similarly to the use of generalizations and definitions in other sciences. . . .

Our field of law does not consist of rules and principles only. Similar fields existed before adequate rules and principles were developed to aid in comprehending them, just as the field of geology existed before the science of geology was developed. It would not be true, however, to say that the field of law exists independently of rules and principles as does that of geology. The objective phenomena of law include principally human actions and the legal sequences are brought about through voluntary action. The intelligent direction of human action necessarily involves the use of generalizations. Generalizations therefore have a causative force in producing legal effects, and that force must be estimated as carefully as any other operating within the field; but they are not the whole field.

I at once agree with Mr. Spencer that his is not a precise statement of my ideas. To attain precision — that is to indicate unmistakably everything that I would include within "the field of law" and how in details I would draw the line of exclusion, would require far more space than a periodical would permit and would not add materially to the force of my argument. The tediousness of completely prophylactic exposition affects the patient as would an anaesthetic and the impatient as would the slow jolting of an oxcart. Perhaps, however, I have not made clear even fragmentarily and generally my conception of the nature of the field of law. Mr. Spencer's interpretation would seem to indicate that I have not. In part he criticises as follows: —[3]

Nor is it accurate to regard the material with which the science of law deals as objective, however we define law. Governmental sequences may mean either of two things. They may mean the activity of society supplying an external basis for legal ideas, the actual human relationships with which we connect our ideas of right and obligation; or they may mean on the other hand the intentional striving of society for the realization of ideals of law, namely the human relationships which the sense of law itself creates. In the former case the dynamic basis of law is readily distinguishable from the law itself, and in the latter we are likewise driven to conceive of the law as idea rather than as external object. Legal science is concerned with something more than social phenomena, and its subject-matter is too broad to be comprehended in any purely objective science.

I confess that I do not perceive with complete definiteness and assurance either horn of the dilemma above which he precariously suspends me. With the sharpened residuary faculties of the blind, however, I see very clearly my own meaning and I am certain that it differs from either of those which he proposes. Perhaps I can throw a little more light on my vision by concrete illustration.

[3] 25 *Green Bag* 75 (Feb. 1913).

Jones and Smith have had business differences. They meet on the street. Jones stops Smith and accuses him of dishonesty. Smith angrily strikes Jones. Jones grabs Smith in his arms and holds him fast to prevent further "unpermitted physical contact" from the energetic operation of Smith's fury. Friends appear on the scene and separate the gesticulating, garrulous combatants. A truce is imposed by neutral persuasion and physical restraint. *Exeunt omnes*, Jones and Smith promising reciprocally future undesirable results.

Thus far I have stated no legal phenomenon. No consequences brought about through the operation of governmental agencies are included among the events narrated. I presume that Mr. Spencer would say that the panorama consisted of "social phenomena" only, and certainly I should not object to the use of the epithet. I agree that no part of "the law" has been indicated.

Let us proceed with the trivial history, however. Jones, in whose mind the memory of Smith's blow still rankles, appeals to Newsome, attorney and counselor at law, to verify his conviction that Smith's assault grossly violated the majesty of the law and the rights of Jones to personal security. After due inquiry and cogitation, Newsome informs Jones that he is entitled to satisfaction in damages in an action for assault and battery. Jones directs Newsome to commence such a suit. Consequently a summons is taken out and served on Smith in accordance with the proper procedure of the jurisdiction. The issuance of this summons initiates a string of governmental events consequential to the assault. The sequence now becomes a legal phenomenon, though, of course, not yet one from which the lawyer would derive much professional information. From this event on through the preliminary procedure, the trial, verdict, judgment, appeal, reversal, retrial, etc., etc., through execution of the judgment in favor of Jones and completion of the records, there continue sequences of consequential governmental occurrences which, with respect to their causes preceding them in these sequences and in other collaterally contributing sequences, and with respect to their subsequent effects, are phenomena of the sort that excite our professional interest.[4]

The lawyer's peculiar business is to predict accurately the content and probability of such future sequences as results of past and proposed events and conduct presented to him in the "cases" or "business" which he handles, and to so manage and conduct these "cases" or "business" as to bring about consequences of a desired sort and prevent those of an undesired sort. Accurate knowledge concerning such sequences is the sort of knowledge which he seeks. The fictional theory of law which I criticise is that the decisive links in such sequences are brought about through the operation of a system of authoritative rules and principles and that the proper avenue to mastery of the law is to seek out, learn, and learn to apply these talismanic agents. If this were a true theory, the law as a field of study would differ radically from that of any other learned profession. I do not deny that much knowledge of the law has been generalized into adequate rules and principles, nor that a great deal of accurate secondhand knowledge of the law may be acquired or imparted through the use of such generalizations; but it should be axio-

[4] The concrete governmental events in the sequences may result partly from the collaterally contributing consequential effects of precedent or legislation or custom, etc. See next page.

matic that the practical interest of lawyers and of laymen lies in the concrete operations and effects of governmental machinery and not in generalizations excepting insofar as they cause, explain, or indicate such phenomena; and I challenge any lawyer to produce the expression of a legal generalization which has authoritative, reliable, indicative value peculiar to its legal character and independent of any testing of its efficiency as a mental tool through the ordinary process of investigating the concrete details and results of particular "cases." That judicial generalizations are not inherently reliable is a fact which the case-system student of law learns before he has proceeded beyond the boundaries of elementary training and which the young lawyer sometimes relearns by bitter experience. Valid legislative expression is authoritative in the sense that courts and other law-determining agencies are constrained to "construe and apply" it; but no competent lawyer would venture to rely on an independent careful interpretation of constitutional or statutory expression as either an accurate or an adequate guide to the concrete effects which those agencies will give it through their "applications," without resort to investigation or his professional experience. In short, legal generalizations as depositaries of knowledge and accurate guides to solutions of legal problems never are authoritative. They possess a capacity as mental tools similar to the capacity of rules and principles concerning any field of scientific inquiry, but their reliability and efficiency can be determined only by methods analogous to those of any science.

Some of the "collaterally contributing sequences" to which I referred above may result from legislative expression which is "interpreted" and "applied" in the determination of the case, and generally there are some sequences whose causal contribution to the decision are precedents of one sort or another. I shall not repeat here the indications which I gave in my article of the causative effects of precedents and legislation upon subsequent cases; nor shall I repeat my summary of the different phases of the element of judicial generalization and its expression. With respect to such generalizations, however, I wish to correct a mis-perception which Mr. Spencer states in the third paragraph of his criticism. He says:—[5]

> . . . he includes in his definition of law not only the foregoing objective material, but also past judicial generalizations concerning the phenomena. He conceives of laws as mental processes in this sense, inasmuch, it would appear, as they are merely the reflection of the concrete sequences described. Other generalizations than these actual ones of the past he excludes. It is apparent, on examination, that in treating past judicial generalizations as the law, he refers not to the generalizations themselves but to their content. He says that we may by abbreviation speak of the science of law as "the law," but that when we use "the law" in this sense we mean not the law itself, but our knowledge concerning it, and he is on his guard against what he conceives to be pitfalls of such a catachresis. Essentially, therefore, he conceives of the law as external sequences of phenomena which not only afford material for legal rules but are to be identified with such rules.

I certainly include past judicial generalizations and also their expression in the official opinions among the phenomena in the field of legal study. I include them as part of "the foregoing objective material," however, and I would also include within objective potential governmental sequences the potential judicial generalizations and expressions in those sequences. I include official judicial generalizations in

[5] 25 *Green Bag* 74–75 (Feb. 1913).

their concrete entirety and not merely "their content," whatever meaning Mr. Spencer may give to that phrase. These generalizations are mental processes, it is true, but they are external to the mind of the legal investigator and are therefore objective to his thought. They are a most important part of the governmental sequences, because presumably they are important parts of the mental operations through which the judges as governmental agents determine the subsequent legal effects of the "case," but although the expression of these generalizations must be carefully studied in order that their own causative force and that of abstracted facts in the preceding events of the case may be appreciated properly, they are not necessarily accurate comprehensions of the efficient causative elements in the "case" nor authoritative trustworthy guides to prognostications of future decisions within their range. I will not trespass further on Mr. Spencer's space to explain this, but will refer the anxious mystified to my article for enlightenment. Necessarily I am touching rather lightly and partially only a few of the points of my theory in this cursory reply. I do not expect anyone to get from it an adequate understanding.

Three miscellaneous statements had better be made here to obviate possible objections. First: — Although the sequences of occurrences out of which a "case" grows and through which it is carried to completion are infinite in their details, of course not all of these details are of importance to the lawyer who conducts the case nor to an observer of its history. Part of the details never come to the notice of either, and of those that do, many are discarded as immaterial by the trained intelligence. Second: — Of course the governmental consequences which follow from the actual facts of "a case" may be brought about through failure to properly conduct the case, through inability to produce admissible evidence of the facts, or through failure to convince the triers of fact of the truth. These facts are within the range of the lawyer's field of study, and, indeed, to some extent are dealt with in works and courses on evidence and procedure. Third: — The governmental consequences and processes which lawyers study and with which they deal include those brought about by other governmental agencies than the courts. For instance, a client may wish to know what will happen at the customs if he tries to import a certain commodity; or may request legal services with respect to proceedings before a commission or legislative body; but in the great majority of "cases" which are fought to a finish, the ultimate authoritative direction of consequences is given by the judgment of a court. All actions by other governmental agencies upon his "cases" also are of practical importance to the lawyer, however, and are within his field of legal study.

In my article I distinguished, briefly, but with care, some seven or eight common technical legal uses of the word "law." Among others I discriminated its use to denote the objective field of the lawyer's profession — concrete events and their governmental consequences and the concrete contributing causes of such consequences — from its use to denote generalized knowledge concerning this field. I do not think the second use should be called a catachresis, not because it is a hard name to call an old acquaintance, but because the use is fully established and proper. Most emphatically, however, I do not identify the external objective material composing the field of legal study with the legal rules derived through study of this

material. I ask a peremptory charge for a verdict of not guilty upon this indictment.

Apparently Mr. Spencer regards me as a sort of linguistic anarchist. My iconoclastic tendencies may remind him of the debate between Alice and Humpty Dumpty in Lewis Carroll's "Through the Looking Glass."[6]

"'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less!'

"'The question is,' said Alice, 'whether you *can* make words mean different things.'

"'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"

I would not identify my opinions of language with those of Humpty Dumpty. However, one who has observed the tyranny which linguistic forms commonly exercise over even keen intellects would lend a sympathetic ear to the sad untold history of Humpty Dumpty's previous intellectual experiences and secretly envy his attainment of an arrogantly asserted emancipation. At the same time he would have to recognize the common sense of Alice's femininely conservative protest. With the limited capacity peculiar to mortals, each grasped tightly the fragment of truth which experience had allotted. We may avail ourselves of both fragments as suggestions to a broader view. We should be the masters of words and keep them in their proper place as pliable tools, but we should remember that their efficiency as tools depends entirely upon their capacity for carrying meaning with accuracy, economy, and distinctness, and that to force them to carry other than the meanings sanctioned by usage, without an accompanying and clear definition of the new use, is to break down the train of adequate communication at that point. On the other hand, it should be remembered that a similar result will be accomplished by a refusal upon the part of an interpreter to interpret intelligently and with the discrimination induced by knowledge that no word has a single stereotyped meaning and that even the various definitions in an unabridged dictionary are not necessarily exhaustive or accurate—especially when the term is a technical one which is used with respect to a range of ideas that never have been analyzed thoroughly. I could establish by examples that all of the uses of the word "law" which I discriminated in my article—and several other uses—are quite common, although they rarely are clearly defined and differentiated and often are confused. I do not relish wars over words, however, and am not inclined to wage them. If any of my terms offend, no one will offer less objection than I to discarding them. There is nothing with which I can part more willingly than words. Over the substance of my argument, however, I stand ready to battle valiantly, not for the preservation of personal ideas, but for a general acceptance of a sane, progressive, scientific attitude towards the law, based upon a clear comprehension of what it is and how it is made, and for direct forceful thinking on legal problems.

"Legal science," says Mr. Spencer,[7] "is concerned not with the delineation of external reality, but with an ideal material which offers a valuation rather than a description of human activity." I fear that this would make savory fodder for the Bull Moose. The most

[6] I am indebted to Mr. Joseph Osmun Skinner for reminding me of this passage by a reference to it in his interesting article on "Law and Philology; the Meaning of SS.," which appeared in the February, 1913, number of the *Green Bag*.

[7] 25 *Green Bag* 75 (Feb. 1913).

effective argument that could be made against the legal profession and prevalent "legal science," if it could be proven, would be that they and it are "not concerned with the delineation of external reality." The indictment, I submit, cannot be proven. Lawyers are concerned most intimately with "external realities" of a certain class, and with comprehending and delineating them; and we are in great need of a development of our science along lines which will give us a firmer and more intimate grasp of these realities and greater facility and efficiency in predicting, directing, and controlling them.

I appreciate Mr. Spencer's recognition of the bearing of my theory upon the problem of putting the law upon what he calls "a sociological basis." I am convinced that a most effective clog on the understanding of legal problems and results, on the successful administration of justice, and on the progress of law reform, is the old fiction that the law, (that is the thing of which the lawyer is supposed to have intimate, specialized knowledge,) consists of rules and principles which have an independent external existence, are imposed on governmental agencies by some external authority, and dictate particular governmental actions and effects. As long as this fallacy pervades legal thinking and dulls its edge for clear perception of the true objective field of legal study, we cannot reasonably expect that lawyers habitually will display a critical, investigating, unsatisfied attitude towards the phases of social existence under their charge and an alertness, professional eagerness, and scientific skill to make the concrete operations of government more efficient and progressively responsive to needs, similar to the intelligent activities which have produced such wonderful results in other fields of modern industry. It is time that our profession rid itself of an inherited incubus of ideas which are as befogging and misleading as were some of the pre-scientific medical fallacies, and became intelligently progressive, and learned in a sense that is not Pickwickian. An idea that even my feeble strokes may assist in hastening the accomplishment of such a result encouraged me to lay my lance in rest and spur Rozinante against Mr. Spencer's criticism.[8]

[8] I do not believe that the ideas expressed by my article are peculiar or novel. I believe that a great many lawyers have views concerning the law which substantially are in accord with mine, and that a great many more habitually think and act (perhaps semi-instinctively) concerning legal problems in a way which is an unconscious tacit endorsement of such views. Particularly are these statements true of careful students of the law and of those who have been trained in our modern law schools. My criticism is directed (1) against prevalent legal theory, (2) against lawyers who have only a commercial view of the profession and neither a very broad nor a very deep and thorough knowledge of the law itself, and (3) against those who do not see the necessity of studying intensively and thoroughly the concrete operations and effects of government in order to obtain professional mastery and learning comparable to that of masters of medicine, but prefer to follow the easier and more pleasant course of dallying with vague legal abstractions and generalities, definitions, and superficial dialectics.

EDITORIAL NOTE ON THE FOREGOING ARTICLE

It is always exceedingly difficult to state with accuracy the steps of an argument with which one disagrees. The task of criticism is two-fold, that of viewing a subject from the special standpoint of the writer considered, and at the same time from what one conceives a more normal vantage-point. Not only is language elastic and affected with what painters call "atmosphere," no matter how clearly subjects in its immediate foreground may be defined by precise

terminology; Mr. Bingham's "potential governmental sequences," for example, offer a wide range of possible interpretation, and he is right in saying that the dictionary definitions of a word may not be accurate or exhaustive if used with respect to a group of ideas which have not been analyzed thoroughly. Not only, to repeat, is language elastic and absolute exactitude of exposition unattainable, but in every false proposition or doctrine lurk all sorts of hidden implications which have momentous possibilities. The illogical speculations of Plato or Hegel teem with surprises for anyone who would gauge accurately their error. We do not compare Mr. Bingham, who impresses us as a positivist of extreme type, with Hegel or Plato, and we suppose that Darwin's doctrine of evolution has been almost as often misstated as any metaphysical system. Thought, like feeling, is mobile and indefinite; the truth and error of a doctrine are not only actual but potential; to the creator of thought alone, not to the critic of thought, is the power granted to grasp its full purport. We feel, therefore, that Mr. Bingham's theory of governmental sequences might be developed and clarified by its author or some kindred spirit to meet obvious objections, if not with complete success with a degree of success diminishing the range of error to be assigned to it. Of course a nice appraisal of the possibilities of partial truth in such fields of uncertainty cannot be attempted. Criticism is to be directed at the explicit rather than the implicit in Mr. Bingham's doctrine. It may be unable to measure accurately the extent of an error, yet may pursue a qualitative analysis which is a valid method of investigation.

Mr. Bingham makes it clear that he admits the propriety of using the term "law" with reference not to concrete social phenomena alone, but to mental generalizations as well. We did not overlook the several definitions of law given in his article. It is easy to see, however, which definition he favors, as best expressing the real nature of law. He prefers an objective definition. "Catachresis" was our word, not his; and if a writer conceives one sense of a word to be right, and other senses "fully established and proper" but inaccurate, then he is free to regard the use of the word in one of these other senses as a catachresis, which means simply the wresting of a word from its true signification. Mr. Bingham conceives the field of law in the same way as a physicist conceives the field of physical phenomena. Through study of objective facts he would formulate principles the validity of which rests solely on empirical proof; he would obviously deduce laws of "law" analogous to laws of gravitation, and just as it would be a solecism to describe laws of gravitation as gravitation, it would be unscientific to identify ideal principles of law with Mr. Bingham's "law." As we have said before, this sense does violence to the plain and natural meaning of words. It is proper for an investigator to twist words from their ordinary meaning when anything but obscurity is to be gained by doing so, and when a satisfactory term, such as "legal material" in this instance, is not supplied by the vernacular. But it is not merely a twist of words, but a twist of ideas with which one is here concerned, and it may be remembered that the colloquy between Alice and Humpty Dumpty arose in a highly absurd context. When the materials of law are conceived as only legal forms are fit to be conceived, and a formula is made out to be merely something which the state does, there is more to

find fault with than simply an artificial terminology.

One point needs to be made clear — Mr. Bingham does include in his material of legal science not only purely objective phenomena, but the quasi-objective phenomena of legal rules formulated in the past and co-operating with other causes in effecting the external development under consideration. Judicial generalizations in the past are deemed important. But they are not treated as the most important legal phenomena, or as "law" itself rather than merely factors in its growth. Mr. Bingham could not consistently treat them as "law" without adhering to his material rather than formal definition, and referring not to these "generalizations" as such but to the concrete facts on which they were based — their "content."

If law be briefly defined as an enforceable norm of conduct, there are three elements in the definition, force, norm, and conduct. What Mr. Bingham does, in effect, is to discard the second element, on the ground that it is merely a "generalization" of the first. The first element, that of force, he elevates by means of his conception of governmental sequences; by treating them as virtually synonymous with the law he confuses what is only the attribute of law, its enforceability, with law itself. Thus he abstracts a certain quality from law and exalts it above the matter to which it relates. He abstracts from law its mechanical function, conceiving it as the whole of law, and in so doing, instead of approaching nearer to the concrete, as he supposes, gets further away from it.

Many interesting points are touched in Mr. Bingham's reply, which we are tempted to discuss, but as we discover no reason for modifying or enlarging views already expressed, we refrain from more extended comment.

THE EDITOR.

Stogenics

THE REPORT OF A POSTHUMOUS CASE RECENTLY BEFORE THE ALL-IN COURT

BY SABINIUS BENEDICTUS

WHEN the clerk was arranging the docket one day,
Several groans from above made him look up that way,
Where Judge Stogy's picture, though he's long since dead,
Was perplexedly frowning and shaking his head,
When that ancient man with visage most grim
Bestirred himself slowly and thus spoke to him: —

"Young man," quoth he, with accents grave,
"I cannot make my ghost behave,
For there's just one case, I could not solve,
When I was dwelling here above:

When riding one night on the B. & O.,
To relieve my mind of care and woe,
I checked my brand new pair of pants
Lest I should lose the same, perchance;
On awaking, I tendered the porter the check,
And gruffly demanded my breeches back,
But the porter merely grinned at me
For the pants he wore conspicuously
And said he had become trustee
To wear those splendid pants for me."
Then the clerk replied: " 'Tis very clear,
This little trip has cost you dear,
But the All-in Court will sit tonight
And no doubt relieve you from your plight."

(*Cur. ad: vult. The opinions were delivered seriatim.*)

This is the opinion of Snagsby, J.: —
"None can my knowledge in law gainsay,
Volenti non fit injuria —
The pants were stolen now who must pay?
Why! *Qui facit per alium facit per se,*
This is as easy, as easy can be
The railroad's stuck most certainly
For pants and outraged modesty."

Then up spake Chancellor Guppy: —
"This cause should lie in Equity
For the porter *said* he was trustee
But *Vigilantibus non dormientibus æquitas subvenit* —
Which says as plain as plain can be,
That *Sleepers* get no Equity
The Fool-man Company works this plan,
If the railroad does then this court can."

Judge Jobling spoke quite learnedly:
"I agree with the reasons of Brother Guppy,
But from them the opposite conclusion deduce
That the Defendant here has no excuse."

Seeing how the opinions went
Judge Fogg sprang up, shrieked, "I dissent!
For with all respect to Stogy, J,
He owes money and he must pay
The presumption is he forgot the tip,
He owed the porter on a former trip
So the porter had a lien you see
And thereby got the pants in *fee:*

Since he went through the pants he now produces
Like seisin through the feoffee to uses
A warranty Judge Stogy broke
And so he is the man to soak!"

Good Sergeant Buzzfuzz thought the chance
For a coon to get some brand new pants
Was an Act of God, so an exception
Relieving a carrier from compensation.

Then Lord Chief Justice Weevle awoke,
And with kindly benevolence he spoke,
"Great Plaintiff, good defendant, share
The friendly law's impartial care;
A leg for him, a leg for thee
This is the rule of Admiralty,
And for their use, I would surmise
De minimis non curat lex, applies."

The court adjourned then without day,
While Stogy's ghost in dire dismay,
Shivered once — then passed away.

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A New International Court

A QUESTION FOR THE THIRD HAGUE CONFERENCE

A PERMANENT Court of International Justice is urged by Mr. James L. Tryon upon the consideration of the Programme Committee of the Third Hague Conference.[1] Such a plan, he writes, would not imply the creation of a new international court. The existing court and two proposed courts "should remain substantially as they are, but should be properly related to one another in their respective jurisdictions, each being so organized as best to serve the purpose for which it is intended. The Permanent Court of Arbitration should be for the voluntary settlement of semi-political disputes, or for any controversies that nations are unwilling to submit to the Court of Arbitral Justice. The Court of Arbitral Justice, a better name would be the Court of International Justice, like the Internal Prize Court, should have an obligatory jurisdiction and be strictly judicial in its procedure; but for the sake of prompt and economical administration both courts should be combined in one institution with two chambers."

The organic act submitted by the second Hague Conference not only gives the Court of Arbitral Justice juris-

[1] "A Permanent Court of International Justice." By James L. Tryon. 22 *Yale Law Journal* 203 (Jan.).

diction to decide questions of law, but also gives it concurrent jurisdiction with the Hague Permanent Court over questions other than those of a judicial nature. Mr. Tryon would evidently limit the jurisdiction of the former court to purely juridical questions. Dean Henry Wade Rogers would likewise restrict the jurisdiction of the Arbitral Court.[2]

Mr. Tryon thinks that the procedure of the Permanent Court of Arbitration could be improved by the adoption of a system of orderly pleading, and that the arbitrators should be required by the terms of submission to know the languages that are to be used in a trial. He also has something to say on the question whether nationals should be allowed to sit in the tribunal.

We have already expressed the view that the seating of nationals need not embarrass a fair judgment.[3] Everything of course depends upon the character of the nationals. The ripe judicial temperament and qualifications of Sir Charles Fitzpatrick and Judge George Gray no doubt had much to do with the attitude of careful impartiality which they maintained in the *North Atlantic Fisheries* arbitration. Judicial experience does not, of itself, insure detachment from national bias, of course, nor is there any guaranty that men of judicial qualifications will be named as arbitrators. Yet, on the other hand, a provision that nationals shall not sit in the court would be insufficient to guarantee its absolute impartiality, for a nation not desiring a dispassionate decision is in a position to nominate neutrals in sympathy with its cause. The only real guaranty of impartiality is that offered by the growing sense of international justice and the growing desire for the fair determination of every question which a nation has decided to be suitable for arbitration. If it is worth while to arbitrate at all, we may as well have a fair arbitration while we are about it: this is likely to be the attitude to which the nations will in the main try to conform. Real arbitration will come when the world really wants it, and not until then, and artificial restrictions on the personnel of the tribunal cannot hasten the day of impartial decisions. The provision that nationals may sit in the court need not delay the coming of this ideal régime, in view of the abundant material which every nation may draw upon for unbiased arbitrators. It may have been, as Mr. Tryon says, that "with notable exceptions, such as the *Fisheries* and *Grisbadarna* cases, nationals when used on arbitral tribunals have shown a tendency to oppose decisions injurious to their country's interest." Yet these two important exceptions make it impossible to generalize by laying down the rule that under no circumstances should nationals act as arbitrators. As the Hague Permanent Court grows older, it will evolve a cumulative body of traditions of its own which will exert no little influence upon both its organization and its procedure.

That nations as a rule have been unwilling to submit their disputes entirely to the judgment of neutrals, and that nationals may be useful because of their knowledge of the systems of law peculiar to their respective states, Mr. Tryon recognizes, and his conclusion is:—

> If the Permanent Court of Arbitration were to be the only court of nations, it might be advisable to propose that nationals be finally excluded from its tribunal and used on outside boards of arbitration; but, if there is to be a Court of Arbitral Justice also, there is still, in view of the *Fisheries* and the *Casablanca* cases,

[2] "The Essentials of a Law Establishing an International Court." 22 *Yale Law Journal* 277, 291.

[3] 25 *Green Bag* 93.

so successfully tried under the present arrangement, an argument for continuing nationals on the present court when, for special reasons, they are desired.

Changes is the mode of appointment of nationals and neutrals alike, to ensure their greater impartiality, may well be recommended for consideration. Yet with all these improvements, the international court would still be an inconvenient mode of settling differences, says Mr. Tryon, in comparison with a court regularly in session, to which resort may be had without delay, and maintained out of a common international fund instead of from funds deducted from the awards received by individual claimants. "The best of arbitration tribunals, even those that sit at The Hague, are only temporary." The world is ready for a new court.

This does not imply that the Hague Permanent Court ought to be abolished. While there is necessary delay in making up the panel of judges, this delay may be offset by certain advantages. Arbitration by a court of varying and elastic personnel, not continuously in session but requiring to be constituted for each particular controversy, offers a flexible procedure which may be adapted to the needs of particular situations, and we believe that a flexible system of arbitration is necessary at the present time, and that a rigid, uniform system would hinder rather than assist the progress of the movement toward international justice.

Yet while we need this elastic mode of arbitration, it may also be said that many international disputes, purely legal in nature, do not call for so flexible a system, but that a continuous court of fixed constitution is competent to pass upon them to the satisfaction of the parties without the delays necessitated by the more cumbrous system. Thus there is a reason for maintaining two parallel systems of arbitration, one elastic, and the other rigid. This, to our mind, is the reason for establishing a second court, such as the Court of Arbitral Justice the draft for which was approved at the second Hague Conference.

The advocacy of the new court need not spring from the conviction that the Hague Permanent Court does not administer justice impartially. Professor Lammasch has insisted under criticism that the decisions of the present court have been legal, and there are "publicists who, while admitting that arbitration has in the past utilized the methods of diplomacy, deny that the present court has resorted to them and maintain that it is legal in its methods." There is a visible tendency to regard the function of the existing court as diplomatic rather than judicial. Mr. Tryon is influenced by it, finding the word "arbitration" to have a different connotation from adjudication. There are, however, two kinds of arbitration, juridical and non-juridical, and because "arbitration" is the word commonly applied to settlements made outside regular courts, by non-professional arbitrators, a misinterpretation of the real nature of arbitration is apt to occur. The judicial arbitration that preceded the establishment of Roman republican and imperial courts was evidently a genuine application of rules of law.[4] There have been juridical arbitrations at The Hague by professionals, and there have been non-juridical arbitrations by statesmen whose attempt was to reach an amicable compromise rather than to apply rules of law of which they were ignorant. But on the whole there

[4] See quotations from Ihering, in "The Evolution of Permanent International Judiciary," by James Brown Scott, 6 *American Journal of International Law* 316.

is little in the history of the Hague Permanent Court to warrant the interpretation that it has been a diplomatic commission rather than a court of judicial arbitration. Mr. Tryon himself concedes that "the Permanent Court of Arbitration, whatever the legal attainments of its judges, cannot be impeached in respect to the legality of the great majority of its decisions." As a matter of fact the diplomats are outnumbered in the panel by statesmen who have had no diplomatic experience, and the proportion of international jurists and judges of domestic courts is large. Consequently the traditions of the court have become impressed with the character less diplomatic than juridical.

The tendency, however, to regard arbitration as antagonistic to impartial judicial settlement has shown itself in recent discussions of the Panama Canal question. On this question whether the country could in fact get an impartial tribunal, in spite of what Senator O'Gorman and others have said regarding the impossibility of securing one, two recent utterances have appeared which confirm the position taken by the *Green Bag*. One writer says:

> With the example of Charles Francis Adams in the Geneva arbitration and of Lord Alverstone in the Alaskan Boundary dispute before us, not to mention the highly honorable record of the British admiralty courts and of the Supreme Court of the United States in prize cases, can it be fairly maintained that we could not get an impartial hearing before the Hague Court because of the interests of other nations in the issue at stake? Is it to be supposed that international jurists of the stamp of the late Professor de Martens, of Asser, Savornin Lohman, Gram, Lammasch, and Renault, some of whom have sat on as many as four Hague tribunals, would place the shipping interests of their countries above their sense of justice and their good repute as jurists?[5]

Another writer says:

> It has been suggested that "Switzerland is perhaps the only country capable of furnishing international jurists of high standing, who would probably be free from all pressure of selfish public opinion when acting as judges of the case." Switzerland could undoubtedly furnish them. So could many other countries, including Great Britain and the United States. . . . In nearly all countries of the civilized world there are today international jurists who, whether engaged in the practice of law at the bar, administering it on the bench, or holding chairs in our universities and law schools, possess the requisite knowledge, courage, and judicial spirit to declare and administer the law applicable to this and similar differences of a legal nature. The time has, indeed, passed when it can be seriously maintained that such disputes are incapable of judicial solution.[6]

The Court of Arbitral Justice proposed as an alternative to the Hague Permanent Court is by no means free from perplexing questions of organization. Whether Mr. Tryon can declare, with absolute accuracy, that "we of the United States believe in the juridical equality of nations" is perhaps questionable. This doctrine of equality may place some obstacles in the path of a good working agreement among the nations, as the greater are not eager to allow the weaker equal representation with themselves, and the justice of such an arrangement will not be universally conceded. This question of the rights of the smaller powers was one of the stumbling-blocks at the second Hague Conference which prevented an agreement as to the mode of organizing the court. Should the United States see fit to claim an individual judge in the court, in violation of the principle which Mr. Tryon enunciates, we cannot see how it would be rejecting "the juridical as opposed to the arbitral principle." The agreement respecting the Prize Court provided

[5] John H. Latané, in *American Journal of International Law*, v. 7, p. 23 (Jan.).

[6] Professor Amos S. Hershey, in no. 63 of publications of American Association for International Conciliation, sub-station 84, New York City.

that the United States and seven other leading powers should always be represented by one judge each, the other judges being selected by vote. The principle of the equality of nations would interfere with the adoption of the constitution of the Prize Court for the Arbitral Court, as urged by Mr. Knox and other American publicists.

Developing his view that "arbitration" suggests compromise, Mr. Tryon offers the suggestion that the word is suited to the character of the Hague Permanent Court, but that it would be better to substitute for the other court the name "Court of International Justice" in place of "Court of Arbitral Justice." This would in our judgment create a false distinction between the character of the two tribunals which is avoided by the present phraseology.

Mr. Tryon further suggests that the number of judges in the Court of Arbitral Justice be reduced. Fifteen, he says, might prove unwieldy as well as expensive. Nine he thinks would be a number more suitable. But diminishing the number of judges will no doubt make an agreement as to the constitution of the court more difficult. If this difficulty can be overcome it is hard to see any need of so large a court.

An excellent suggestion is that the Court of Arbitral Justice and the International Prize Court, both of which were approved in 1907 but whose judges have not been appointed, be united in a single court of two chambers, one with a special jurisdiction in prize cases, the other with general jurisdiction. Mr. Knox endeavored to bring about the combination, which "would seem to be not only feasible, but in the line of economy and prompt administration." This is accordingly submitted as a topic for consideration at the third Hague Conference.

Dean Rogers also thinks that there would be a considerable advantage in merging the Court of Arbitral Justice and the International Prize Court in a single tribunal, thereby increasing the dignity of the Court.[7]

With regard to the question whether the Court of Arbitral Justice should have mandatory or voluntary jurisdiction, we cannot accept the conclusion that it would be better to make its jurisdiction obligatory, for the reason that it cannot become in fact obligatory, whatever it may be in theory, until the nations, by binding their future action by treaties of general arbitration, make it so. The idea of compulsory arbitration of all serious international controversies can only gradually establish itself, and a court of voluntary jurisdiction would be regarded by the powers with far greater favor than one to which they were theoretically obliged to submit all differences. As such reservations as those made by the United States Senate in amending the general arbitration treaties gradually disappear, and genuine general arbitration becomes a reality, the court of optional jurisdiction will spontaneously transform itself into one of compulsory jurisdiction. The nations will doubtless be much readier to ratify the proposed court on this basis.

A good reason why the Court should not be given mandatory jurisdiction is also to be found in the present situation with respect to the codification of international law. It is easy enough for Great Britain and the United States, accustomed as they are to the administration of justice according to common law precedent without a code, to look with favor on a court which has no definite body of written law to apply. But other nations, though they may be

[7] 22 *Yale Law Journal* 291.

willing to accept the principle of judicial precedent, have developed it solely in dependence upon a code system, and shrink from acceptance of a court which has only unwritten law to administer, or at best law only partly codified. "To await the codification of the law and the acceptance of it by forty-six nations would be," as Dean Rogers says, "to postpone indefinitely the establishment of the Court." We should therefore establish the Court, and ask nations to submit their controversies to it only in so far as they are satisfied that the law administered will be the right law. We should not compel any nation which desires a codified international law to subject itself unwillingly to the jurisdiction of a court of unwritten law. "An international court," says Dean Rogers, "can administer justice according to international law and international equity without waiting for the establishment of an international code, however desirable such a code may be." That may be a good reason for urging reluctant nations to accept the Anglo-American system of uncodified law, but is not a reason for making them do it against their will, and the jurisdiction of the Court should be voluntary rather than compulsory if it is to aim at receiving the general support of the nations.

The jurisdiction of the new Court should be so defined as not to be confused with that of the Hague Permanent Court, one tribunal existing for the settlement of semi-political controversies, or controversies involving problems of domestic policy, the other for the determination of questions which may be settled by the application of known principles of international law and equity. The line between the two jurisdictions should be indistinctly rather than sharply drawn, in accordance with the principle that the less a nation is hampered in the selection of the court, the more willingly it will consent to arbitrate. For this reason we cannot approve Mr. Tryon's suggestion that an appeal be allowed to the Court of Arbitral Justice, not alone from municipal courts but from the Hague Permanent Court as well. Neither court should have final and exclusive authority, but the functions of the two should be specialized and no delay occasioned by provision for an unnecessary appeal. A nation which has agreed to be bound by an award may well be given a chance to show its good faith by accepting it without asking for an appeal.

The decisions of a court of voluntary jurisdiction have the same sanction as those of one of mandatory jurisdiction. The sanction of its decisions is found in public opinion, which compels those who have pledged themselves to arbitrate to accept the terms of the arbitration. To those who claim that no sanction save that of force is sufficient, it is enough to answer that public opinion is force, not organized force it is true, but indeterminate, fluctuating, multiform social force, ready to assert itself should occasion arise, and quite as efficacious, in the long run, as the force exerted by government agencies. An elastic system of voluntary arbitration cannot fail to create courts of as much sanction and authority as a system which assumes, notwithstanding the non-acceptance of the idea of world federation, that arbitration rests on the principle of co-ercion by a world-sovereign rather than on freedom of contract between independent states. The era of international arbitration is to be established solely by agreements between the powers, and the project should be presented to them in a form to which they will readily assent. The social contract is a fic-

tion which contributes little to the theory of national origins, but in the realm of international relations in an era of civilization, it is a living reality, and the court of nations must be founded on the principle of international compact and in no other way can it come into being. Nothing short of a flexible system, in the light of these considerations, is practicable.[8]

[8] Since the foregoing was written, Professor Hershey's notice of Schücking's "Der Staatenverband der Haager Konferenzen" has come to hand. The author of this book maintains that a World Confederacy was established *ipso facto* by the first Hague Conference, a conclusion which can evidently be accepted if the word "confederacy" be given an elastic sense. Schücking proposes that this incipient World Confederacy, which has begun purely as an organization for the administration of justice, shall next proceed to organize periodical conferences at the Hague under the terms of a statute which could be adopted at the third Conference. Even if this be accomplished, it will still be a long step forward from World Confederation to World Union, namely from an international tribunal the authority of which may be acknowledged or repudiated at pleasure by independent units composing the confederacy, to an international court the authority of which would be sustained by the collective will of a united community from which it would be impossible for any state to secede. (See 7 *American Political Science Review* 158, Feb. 1913.)

The Patent System Defended in Congress

By Gilbert H. Montague
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CONGRESSMAN Oldfield, when reporting from the House Patent Committee last August his bill to revise the patent laws, declared that the committee's purpose was to "give the people of the country the opportunity to see what is provided for in the bill, and ascertain what is the sentiment of the country upon the proposal." The storm of protest against the Oldfield bill that immediately arose throughout the country unmistakably showed that the sentiment of the country was against the proposal. The "minority views," submitted by six out of fourteen members of the House Patent Committee just before the close of the session, show that defenders against the assault upon the patent system are not lacking in the House Patent Committee itself.

How completely the minority of the House Patent Committee — which lacks but one of being half of the entire committee — shatter the claims and pretensions upon which the Oldfield Bill rests can be appreciated only by reading their views as submitted to Congress. Fourteen pages long, hardly half the length of the report with which Congressman Oldfield bolstered his bill, these "minority views" constitute the tersest and most incisive analysis of the patent situation that has yet appeared.

At the outset, the minority state that in the twenty-seven public hearings upon the Oldfield bill, not a specific instance was cited to support the assertion that many patents are bought up for the mere purpose of suppressing competition. Even the decisions of the federal courts, upon which the majority report relied, are shown upon analysis to disprove this contention. "If the practice of buying up patents for the purpose of extinction is as prevalent and as harmful as the majority con-

tends," declare the minority, "it is somewhat extraordinary that the majority has been unable to show a single case of the purchase of a patent for such a purpose."

The efficacy of the Sherman law, which was practically ignored in the majority report, is strongly emphasized by a timely quotation from the *Bathtub* decision (*Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20) decided since the majority report was published, from which it appears that most of the terrors ascribed by the majority to the patent system have long since been abolished by the Sherman law.

The proposal to adopt in the American patent system innovations from the patent laws of Great Britain, Canada, Germany and France is significantly disposed of with the remark that "the majority report does not even state that such laws have operated satisfactorily and to the public benefit," and with the conclusive explanation that the patent laws of these countries differ so radically in theory from the American patent laws that they afford no safe analogy.

After remarking that the great preponderance of the testimony before the committee showed that any policy of "compulsory license" such as the Oldfield bill proposes, would be "an extremely discouraging thing to invention and industry, . . . uncalled for and dangerous," and certain to entail "positive harm to the patent system," and "widespread bad effects," the minority examine critically the provisions for compelling the patent owner to grant a license. No opportunity is afforded a licensee who has previously purchased a license from the patent owner to intervene or be heard in the proceedings to compel the granting of a subsequent license. Indeed, there is no requirement that a licensee shall even be notified when an application to compet the issuance of a subsequent license has been filed. The frequent case of patents standing in the names of several owners is not anticipated in the bill. Whether all the joint owners must be made parties to compulsory license proceedings, or whether such proceedings can be had by bringing in only one of the joint owners, are questions whichapparently never occurred to the majority. The bill provides that when a "patented invention" is being "withheld," proceedings for a compulsory license may be begun. Every claim in a patent purports to state an invention, and there may be more than a hundred in a single patent. By the express language of the bill, therefore, compulsory license proceedings may be brought in respect to each and every claim set forth in the patent. The burden of such proceedings becomes apparent, when it is noted that the questions involved include all the questions that can be raised in an infringement suit, and in addition the question of whether the invention is being "withheld." By a peculiarity of phraseology, it is provided that compulsory license proceedings may be begun only when "the patented invention is being withheld or suppressed . . . with the result of preventing any other person from using the patented process . . . in competition with any other article or process." "In other words," the minority remark, "the mere 'shelving' of a patent is not a sufficient ground on which to base an action for compulsory license. This plainly is an invitation to the easy circumvention of the law by the simple expedient of assigning the patent which it is desired to suppress to some one not engaged in producing any article in competition with the

patented invention." Since compulsory license proceedings may be begun three years after the filing of the application for the patent, interference proceedings lasting for three years in the Patent Office may result in compulsory license proceedings being begun on the very day that the patent was originally issued. Whether the court in such proceedings can compel the granting of an exclusive license — which would virtually deprive the owner of the invention; how the court with justice can fix the royalties for the entire life of the patent; and how the royalties shall be fixed and readjusted, in the event of the subsequent granting of additional licenses — these are all questions to which the bill gives no answers. Obviously the legal expense involved in such proceedings must be so enormous as to give the greatest advantage to large corporations equipped with resources sufficient to stand such expense. Last and most serious of all, no provision has been nor can be devised to compel the applicant who has subjected the patent owner to these expensive compulsory license proceedings to accept the license upon the conditions and terms of royalty which the court may prescribe.

"The evils arising from the vendors of patented articles fixing the price at which the article may be resold to the public," and "the evils arising from the vendors of patented articles prohibiting their use except in connection with other unpatented articles purchased by them," were deeply lamented in the majority report. The minority remark, however, that "the majority report contains no specification of the 'evils' " and a "great majority" of the witnesses who appeared before the committee "opposed any change in the law in this respect." "Hundreds of letters," declare the minority, "were received by the committee from small retailers all over the country asserting that the proposed legislation would demoralize their business." The minority quote Mr. Louis D. Brandeis to the effect that the maintenance by an individual manufacturer of the resale price of his patented goods develops conpetition, preserves industrial independence, stimulates invention, insures fair prices and is entirely different, in substance and in effect, from a conspiracy among a group of combining manufacturers to maintain prices on their combined products; "the majority," declare the minority, in conclusion, "make absolutely no attempt to show any bad result of the right of a manufacturer of a patented article to fix resale prices, which has been well recognized and established for many years."

"The action and the report of the majority," explain the minority, "was based on a total misapprehension of the legal effect of the decision in *Dick* v. *Henry* (*Mimeograph* case). . . . That these fears expressed by the majority were not justified, appears by referring to the recent decision in *Standard Sanitary Manufacturing Company* v. *United States* (*Bathtub* case)." This decision, and others which the minority mention, show that, contrary to the belief of the majority, patent rights are effectually curbed by the Sherman law, so that "the *Dick* case did not, as the majority of the committee seem to have supposed, overturn what has always been the law with respect to limitations on patent rights. Indeed, the law is now what the majority admits it was before the Dick decision, and the fears expressed in the majority report as to what might result from that decision have proven groundless. . . . These fears being now dispelled, the proposal to change the law rests on nothing at all."

That portion of the Oldfield bill "designed to amend the Sherman act, so far as it applies to businesses involving patent rights" is summarily disposed of by the minority. "No bill for this purpose," the minority state, "was ever considered by the committee, no hearings were had upon the subject, and there was no public announcement that the committee contemplated such legislation, until after these provisions had been inserted as a part of the substitute for the original Oldfield bill, after very brief discussion by the committee in executive session. . . . As there was no proper consideration of these amendments, the undersigned do not feel called upon to express any opinion at all as to whether or not the amendments have merit as a matter of general legislation. Certainly they are unfair as applied alone to those dealing in patented articles, for the reason that such legislation would amount to a lessening of the value of patents, to which we have already stated we are opposed. The House has a right to presume that matters favorably reported from its committees have been considered in committee. This presumption is absolutely not supported by fact in this case, so far as the proposed Sherman law amendments are concerned."

With the views thus expressed by the minority, "the sentiment of the country," which Congressman Oldfield last August expressed his desire to learn, will undoubtedly heartily agree.

Reviews of Books

MONOPOLY AND COMPETITION

The New Competition; an examination of the conditions underlying the radical change that is taking place in the commercial and industrial world — the change from a *competitive to a co-operative basis*. By Arthur Jerome Eddy, author of The Law of Combinations, etc. D. Appleton & Co., New York and London. Pp. 343 + 17 (appendices) + 14 (index). ($2 *net.*)

The Control of Trusts. By John Bates Clark and John Maurice Clark. Rewritten and enlarged. Macmillan Co., New York. Pp. 202.

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

Railroads: Rates and Regulation. By William Z. Ripley, Ph.D., Nathaniel Ropes Professor of Economics in Harvard University. With 41 maps and diagrams. Longmans, Green & Co., New York. Pp. xviii, 646 + 2 (appendix) + 11 (index). ($3 *net.*)

Industrial Competition and Combination. Annals of the American Academy of Political and Social Science, v. 42, no. 131, July 1912. Philadelphia, Pa. Pp. 333, appendix. ($1).

MR. EDDY, notwithstanding what he says about the change in the industrial world from a competitive to a co-operative basis, believes in competition — a competition purged of all unfair, deceptive practices. His open price association, based upon a number of existing trade associations which have accomplished fruitful results, would not aim to fix prices, but would afford every facility for fair competitive bidding. Thus the chief danger of legalized combination, that of discouragement of progressive enterprise by an artificially maintained stability of prices, would be avoided. Mr. Eddy's open price association would therefore not be objectionable as tending to oppressive monopoly — it would rather tend toward that monopoly which is legitimately achieved and is conducive to the general welfare. He would regulate without suppressing monopoly, by compelling all corporations engaged in interstate commerce to furnish complete and truthful information regarding costs,

sales, and prices charged, by prohibiting sales at or below cost and discrimination between individuals or localities, and by establishing a federal commission possessing visitorial powers which would adjust all controversies and see to the enforcement of the law.

Mr. Eddy's views may be somewhat utopian, for it is doubtful whether the commercial world is yet ready for the frankness and publicity that he advocates. The difficulty of reaching an agreement as to the meaning of fair profit, fair price, and price-cutting, is also a stumbling-block. But it is refeshing to have a direct, forcible statement of views based on a knowledge of business conditions and addressed to the understanding of the hard-headed business man of today. Mr. Eddy, as someone has said, is on the right track, and his opinions are worthy of careful consideration.

Professor Clark's book is more conservative in tone, but reflects somewhat similar views without dealing in any novel and sanguine proposals. Professor Clark and his collaborator believe in competition, though they believe that the *principal* unfair methods of competition should be stopped and that the principles underlying the *Standard Oil* and *Tobacco* decisions should be reduced to precise statute law. Competition is declared to be not played out, but necessary to force monopoly along the ever-open road of progress. Legalized combinations should prove their right to exist solely by demonstrating their industrial efficiency. As Mr. Eddy would likewise leave the door open to competition the two books have much in common. But many readers will prefer Professor Clark's more cautious conclusions and his more moderate remedies for the existing situation.

In contrast to a popular work devoted to general economic considerations regarding the control of monopoly, we have a lawyer-like discussion of common-law principles applicable to the same object of regulation. Professor Wyman shows the conservative bias frequent among lawyers in favor of unwritten as opposed to statute law. He does not share Professor Clark's view that the principles of the *Standard Oil* and *Tobacco* decisions should be defined in new legislation. On the contrary, he considers that there is already abundant substantive law for the regulation of monopolies. More remedial legislation may be needed, and Professor Wyman takes for granted the establishment of whatever administrative machinery may be required. We are likely to have more legislation, "but the lines upon which this legislation will proceed have been laid down by the courts already" (p. 212).

The author expounds the development in the common law of restraint of trade and of public callings, and declares that we need to apply the old principles of the common law to the old problem of monopoly in a modern guise. The law of public callings, which requires that all who come shall be served, and that they shall be served with adequate facilities, at reasonable rates, and without discrimination, has long been applied to public service corporations, and the author agrees that we should apply the same law to private monopolies, as they too are affected with a public interest.

We may observe that this conception of the public character of industrial monopoly leads logically to public ownership, as well as to public control. Where directors have a two-fold responsibility and a two-fold interest, public and private, the community is not in a position to reap the full advantage of public control. But as private manage-

ment is more skillful and more capable than public management, the community must forego some portion of the advantages of complete public control. Consequently Professor Wyman's view that public regulation is preferable to public ownership is sound. He perhaps makes the over-confident assumption that public regulation can offer an ideal solution of the trust question; in fact no perfect solution is possible at the present time.

We cannot accept Professor Wyman's opinion that the law of monopoly and fair competition does not need to be set down in statute form. We have codified other branches of commercial law, and a uniform monopoly statute which could be adopted throughout the country in federal and state jurisdictions, is something toward which the modern business world is tending. But the times are hardly ripe for a model state statute, nor is it certain that much substantive law has not yet to be created. The first thing to do is to codify federal law and replace the Sherman act with a more specific statute. When a man who believes in competition so genuinely as Professor Wyman maintains that existing law is unobjectionable, it is not vain to hope for an agreement as to the terms of a statute legalizing monopoly under proper conditions.

"It is not unlikely, in my judgment," writes Professor Ripley, "that the final solution of the so-called trust problem in the United States, whether for good or ill, may ultimately contain as one important feature the determination by governmental authority of reasonable prices for such prime necessities of life as milk, ice, coal, sugar, and oil, when produced under monopolistic conditions." We hope that price-fixing will be long deferred. In efficiently managed industries, where costs approach a minimum, the prohibition of unreasonable profits would alone keep prices at the proper level, and artificial stability of price would check the effort for higher productive efficiency. In less skillfully conducted industries, a fixed price would perpetuate stagnation by virtually subsidizing inefficiency. But it does not follow that the Government, while not fixing prices, should not define a range through which prices may fluctuate, and should not determine whether a given price is within this range of reasonableness. From this standpoint the Government ought to fix maximum and minimum rates for railway traffic, through the orders of the Interstate Commerce Commission, but should not determine absolute rates. It is to be hoped, therefore, that if Professor Ripley's premonition of regulation of prices in other fields than that of transportation should come true, the analogy of railway rates would be correctly applied.

Professor Ripley has written a notable work treating of the history of American freight transporation since early in the nineteenth century, the history of rate-making by the carriers, and the vicissitudes of federal rate regulation. His book, which is to be followed by a second volume treating of railway finance, represents the scholarly and able performance of a large undertaking, and is likely to retain undisputed predominance as the standard authority in its particular field of economic history.

A suggestive solution of the problem of regulation of monopoly prices is offered by James M. Beck, in the paper printed with other valuable articles on the subject of "Industrial Competition and Combination," read last year before the American Academy of Political and Social Science. After advocating civil rather than criminal procedure under

the anti-trust law, and a lay tribunal to determine whether complaints should be certified to the courts for hearing, he said:—

> With respect to the real element which affects the public, namely the question of extortionate prices, I would apply, if we are going to abandon the principle of *laissez faire*, and attempt to solve this most difficult problem by legislation, to the corporation the principle contained in what we know as *Munn* v. *State of Illinois*. In that case it is held that whenever a corporation is of such a character as to be a semi-public agency, as a public utility corporation, an electric light company, a railway, an elevator company, or a ferry, then to prevent extortion the state had the right by maximum charges to stop the quasi-governmental body from making more than a reasonable return upon its actual investment of capital. Therefore I would have this governmental tribunal, upon complaint of a given number of consumers, make an investigation, and if it found that the party charged did by reason of its magnitude of capital as compared with the capital of competitors or by its relative percentage in the trade or by any other circumstance, have as a fact such a control of sources of supply, or for any reason such a monopolistic control over the industry, then I would treat it as I would treat a railroad, an electric light company, or any other public utility as charged with a public use; I would find out what was its actual investment and by a maximum price give it a fair return on its investment and no more. But if it were not a monopolistic combination, then I would leave, with respect to the price of the product, free play to economic forces. (P. 302.)

PINGREY'S LAW OF SURETYSHIP AND GUARANTY

A Treatise on the Law of Suretyship and Guaranty. By Darius H. Pingrey. 2d ed. by Howard C. Joyce. Mathew Bender & Co., Albany. Pp. 140 + xvi. ($6.)

IN THE twelve years that have passed since the first edition of this book the law of suretyship and guaranty has been constantly growing. While the fundamental principles remain unchanged, their application to novel situations and unforeseen circumstances furnish an opportunity for the law to develop with modern business conditions. The growth of surety companies in America has been very rapid, and has presented to our court new and interesting problems. Today we have some of our courts who hold that contracts of surety companies are contracts of indemnity and are to be construed as contracts of insurance. Other courts go so far as to decide that surety company obligations stand on a different footing from ordinary surety obligations and are to be treated as uncoupled with any condition except those specified in the letter of the contract itself. This advanced view and the view that makes no distinction in law on account of the character of the surety are still debatable in most of our courts. This volume presents the subject intelligently, together with many others which arise in the course of every active lawyer's practice, and are live issues in our courts.

Today the performance of building contracts is so generally guaranteed by a surety that during recent years our books are full of cases dealing with the various phases of the questions that have arisen in such contracts.

To anyone familiar with the conflict of authority on the various close questions that have bothered the profession on this branch of law, a clear and succinct exposition of conflicting decisions with a plain statement of the weight of authority is a welcome aid when your practice presents such problems.

The book does not waste time on any extended discussion of theory. Its aim is practical. It is a ready working tool for the busy lawyer who must put his hand on actual decisions; clear, concise, and at the same time comprehensive, it presents the law pointedly and intelligently.

The author may rightly say of his work that "a more elaborate work could have been constructed with less time and labor."

This volume will prove a valuable he p to give ready access to the law l suretyship and guaranty. L. M. F.

WOODWARD'S QUASI-CONTRACTS

The Law of Quasi-Contracts. By Frederic Campbell Woodward, Professor of Law in Leland Stanford Junior University. Little, Brown & Co., Boston. Pp. lxi, 477 + 20 (index). ($3 *net.*)

TWENTY years ago when Professor Keener published his work a separate text-book on the law of quasi-contracts appeared for the first time. Many of the older practitioners of that day were inclined to scoff at the subject as some new-fangled theories of the Harvard Law School.

Since that time, however, the subject has found a place in the teachings of all law schools and the quasi-contract idea is familiar to the profession at large. As modern courts have developed the law of quasi-contracts, many interesting and instructive cases have settled important principles that were without precedents ten and twenty years ago.

No adequate text-book has handled this subject since Professor Keener's. There is no recent edition of that work, so there is a real place for a good up-to-date work on this subject.

Professor Woodward has given the profession an adequate and intelligent treatise that will prove of real value to the bench and bar. His method of presentaion is clear, concise and illuminating. This book is a model of the best method of handling precedents and theories. Decisions are discussed so as to leave the reader in no doubt as to what the law is. Where there is a conflict of authorities or where a decision does not meet with the author's approval, the different view-points are so presented that each reader may form an opinion of his own on the merits of the controversy. There is no padding, no mass of indigested citations, and no dreary hack work. The whole book gives the impression of thoughtful competency of a master of the subject.

This is just the kind of book that is helpful alike to bench, bar and law student. It is to be regretted that in the large output of law books today, we meet so few that have so high a standard of excellence as Woodward's Quasi-Contracts. L. M. F.

STEDMAN'S MEDICAL DICTIONARY

A Practical Medical Dictionary. By Thomas Lathrop Stedman, A.M., M.D., editor of Twentieth Century Practice of Medicine and of the *Medical Record*. Second revised edition. William Wood & Co., New York. Pp. 1028. (Thumb-indexed, $5 *net;* plain, $4.50 *net.*)

LAWYERS have to know a little of everything, and one of the hardest subjects they have to absorb in preparation for trial is the medical dialect. This book is very comprehensive, but by use of thin paper and small but distinct type the book is kept within a compass which can be conveniently handled. Bound in flexible covers and thumb-indexed on the margin, it is a thoroughly useful hand-book.

For this second edition, appearing one year after the publication of the first edition, new plates were made, and all typographical and other errors inseparable from a new work have been corrected. Between two and three thousand new titles and sub-titles have been added, a table of symbols has been added in the appendix, and the biographical data have been brought down to date. The second edition is bound in red leather, it having been found that the green color used for the first edition was liable to fade and discolor.

WRIGHTINGTON AND ROLLINS' TAX-EXEMPT SECURITIES

Tax-Exempt and Taxable Investment Securities: a summary of the laws of all the states and the District of Columbia relating to the taxation of securities, from the standpoint of the banker and investor. By Sidney R. Wrightington and Weld A. Rollins, of the Boston bar. Financial Publishing Co., Boston. Pp. 234. (Flexible leather, thumb-indexed, $5.)

THIS is a short reference manual presenting its information in itemized form rather than in that of a treatise. A uniform basis of classification is adopted, which is easy to comprehend and which gives the key to the facts desired, the matter of the book being grouped by states in alphabetical order under the headings Stocks, Bonds, Notes, and Bank Deposits. In their preface the authors explain some of the difficulties of reducing to simplicity a complex subject upon which the law is not clearly settled in all respects, and in which actual practice does not always conform to the directions of the statute. The authors, in offering their work to the public, thus make certain reservations which render the high value they set upon accurate construction of the law and accurate technical definitions all the more conspicuous. They have evidently consulted many judicial decisions, though the scope of the work excludes citations, and have been in communication with taxing officials throughout the country, and their synopsis is the outcome of more painstaking labor than might be apparent at a first glance. The work is worthy of the excellent professional standing of its authors and should prove highly useful.

JENKS' SHORT HISTORY OF ENGLISH LAW

A Short History of English Law from the Earliest Times to the End of the Year 1911. By Edward Jenks, M.A., B.C.L., of the Middle Temple, Barrister-at-Law, Principal and Director of Legal Studies of the Law Society. Little, Brown & Co., Boston. Pp. xxxviii, 379 + 11 (index). ($3 *net*.)

THE field of English legal history is so vast, and its literature has been enriched by so much brilliant writing on the problems presented by particular periods, that we see only a limited use for a short treatise in a single volume of less than four hundred pages. The great standard books remain the best as well as the most inviting means of introducing the historical student to the subjects of which they treat. The chief interest of Professor Jenks' volume, for us, lies in its treatment of recent development subsequent to the periods covered by Maitland and Holdsworth. It is convenient to have a clear summary of the nineteenth century, especially of the recent evolution in civil and criminal procedure and court organization. In the chronological treatment of the earlier development admirable symmetry has been preserved, lucidity of statement is a conspicuous merit, and the author has shown ability to think for himself as well as wide learning. The hurried reader will be assisted to gain at once what he needs, and the curious reader will be tempted by the attractive presentation to study more widely. As a college text-book the volume had better be used only in conjunction with fuller histories. On the side of constitutional development it is purposely superficial. As a book of reference it is well arranged.

HERSHEY'S INTERNATIONAL LAW

The Essentials of International Public Law. By Amos S. Hershey, Ph.D., Professor of Political Science and International Law in Indiana University, author of The International Law and Diplomacy of the Russo-Japanese War. Macmillan Co., New York. Pp. xlviii, 523 + 26 (index). ($3 *net*.)

UP-to-dateness is not a distinctive merit at a time when new revised editions of standard treatises on international law are constantly appearing.

Yet Professor Hershey's work has the freshness which comes from a contemporary reformulation of the whole subject in an entirely new text-book. The arrangement of the contents, moreover, is excellent. The division into sections dealing with "subjects" and "objects" of international law, and with adjective as opposed to substantive international law, is perspicuous, and the grouping of a great amount of illustrative and bibliographical matter in footnotes relieves the text of the burden of non-essential detail. A succinct text such as this, prepared with conscientious care, is itself a considerable boon. The bibliographical notes are full and constitute one of the chief merits of the book.

Unless a less sketchy outline of the subject is desired, no recent work on international law is likely to be found of more all-round helpfulness, either for purposes of instruction or for general use.

DOCUMENTS ON THE TRUSTS

Industrial Combinations and Trusts. Edited by William S. Stevens, Ph.D., Columbia University, Macmillan Co., New York. Pp. xvi, 593. ($2 *net.*)

THE editor of this volume has attempted to present the materials at first hand concerning trusts and the trust problem. Original documents, such as pooling agreements, factors and international agreements, court decisions, statutes, legislative investigations, are collected together and laid before the reader. Very wisely Professor Stevens has not attempted to use his material to demonstrate any theory or advocate any panacea. He has two objects in mind: to place within reach of students in colleges material which would otherwise be "too often difficult of access or else altogether unavailable"; and secondly to give the ordinary reader an opportunity to study at first hand the historical development of the trust movement in the United States.

The work is admirable and shows painstaking and intelligent effort skilfully directed. It must prove a valuable aid to students and general readers who desire to form an independent opinion on this all important subject. While the book is not all comprehensive it contains a wealth of material that will do more to educate the intelligent reader than many volumes of exposition on partisan polemics. L M. F.

BAR ASSOCIATION REPORTS

The report of the thirty-fifth annual meeting of the American Bar Association at Milwaukee last August (see 24 *Green Bag* 468) is worthy of use as a reference work on account of the important committee reports. The president's address was read by Stephen S. Gregory of Chicago, who commented upon Congressional action and important developments in federal and state statute law. In the annual address, Frank B. Kellogg of St. Paul discussed the initiative and referendum, which he favors under certain conditions, and the recall, to which when applied to judges he is opposed. Other papers comprised a symposium on the general topic, "The American Judicial System," divided into three sub-topics: "The Judges," by Henry D. Estabrook, New York; "The Lawyers," by Joseph C. France, Baltimore; and "The Procedure," by Frederic N. Judson, St. Louis. The papers read before the Section of Legal Education were of particular interest and value: "The Relation of Legal Education to Simplicity in Procedure," by Chief Justice John B. Winslow of Wisconsin; "The Importance of Actual Experience at the Bar as a Preparation for Law Teaching;" by Dean Harlan F. Stone, Columbia University Law School; and "The Recent Movement toward the Realization of High Ideals in the Legal Profession," by Charles A. Boston of New York. The increase in membership was encouraging, 564 new members having been elected during the year. The association had 5584 members at the time of the August meeting.

The Proceedings of the thirty-third annual session of the Ohio State Bar Association, held at Cedar Point last July, contain the president's

address, delivered by Hon. Frederick L. Taft of Cleveland, also an interesting paper on "Judicial Recall," by Hon. F. B. Kellogg of St. Paul, and a memorial address, "Hon. James L. Price," by Hon. James W. Halfill of Lima. The committee reports are timely, particularly those on "Judicial Administration and Legal Reform."

The Proceedings of the thirty-fifth annual meeting of the Alabama State Bar Association include these papers: President John Pelham's address on "Procedural Reform"; "Increase of Crime, the Law's Delay — The Cause, the Remedy"; by Governor Emmet O'Neal; "Law and Procedure," by Virgil Bouldin; "Progressive Ideals for the Lawyer," by Clement R. Wood; and "The Pending Revolution," by Alfred P. Thom of Washington, D. C.

The report of the seventh annual meeting of the Mississippi State Bar Association, held at Jackson on May 8–10, 1912, contains the different committee reports, the address of the President, Hon. A. F. Fox, reviewing state and federal legislation, and the annual address on "The Government and the Citizens Considered with Relation to Their Obligations, Rights, and Remedies," delivered by Hon. Charles B. Howry. A notable paper on "Equalization of Taxation" was read by Hon. Clayton D. Potter. The codification and classification of the laws relating to the federal judiciary was discussed by Hon. J. S. Sexton in his paper entitled "The Judicial Code." The eighth annual meeting of the Association will be held at Greenwood, on the first Tuesday after the first Monday in May, 1913.

In the Proceedings of the eighteenth annual meeting of the Iowa State Bar Association, held at Cedar Rapids last June, report of the committee on law reform was of special interest, recommending abolition of appeals based on purely technical errors, an increase in the number of Supreme judges, and the division of the Supreme Court into two sections. The President's address, read by Senator C. G. Saunders, dealt with "The Judicial Recall." Other papers included "The Administration of the Parole Law: The Indeterminate Sentence," by Senator William Berry; "The Early Bench and Bar of Iowa," by Major John F. Lacey; "The Constitution of the United States and Canada," by Mr. Justice William R. Riddell of the King's Bench of Ontario; and "Some Railroad Problems," by Hon. J. L. Parrish. The nineteenth annual meeting of the association will be held at Sioux City, Iowa, on June 26 and 27, 1913.

BOOKS RECEIVED

The Old Law and the New Order. By George W. Alger. Houghton Mifflin Co., Boston and New York. Pp. 296. ($1.25 *net.*)

Socialism and Democracy in Europe. By Samuel P. Orth, Ph.D., author of "Five American Politicians," "Centralization of Administration in Ohio," etc. Henry Holt & Co., New York. Pp. 270 + 75 (appendix) + 7 (index). ($1.50 *net.*)

Mishnah: A Digest of the Basic Principles of the Early Jewish Jurisprudence. Baba Meziah (Middle Gate), Order IV, Treatise II. Translated and annotated by Hyman E. Goldin, LL.B., of the New York bar. G. P. Putnam's Sons, New York. Pp. 193 + 5 (appendix) + 7 (index).

The Cotton Manufacturing Industry of the United States. By Melvin Thomas Copeland, Ph.D., instructor in Commercial Organization in Harvard University. Awarded the David A. Wells prize for the year 1911–12 and published from the income of the David A. Wells fund. Harvard Economic Studies, v. 8. Harvard University, Cambridge, Mass. Pp. 389 + 16 (appendices) + 10 + (index). ($2 *net.*)

Statute Law Making in the United States. By Chester Lloyd Jones, Associate Professor of Political Science in the University of Wisconsin. Boston Book Co., Boston. Pp. xii, 308 + 19 (index).

Penal Servitude. By E. Stagg Whitin, Ph.D., general secretary of the National Committee on Prison Labor, assistant in Social Legislation in Columbia University. National Committee on Prison Labor, New York. Pp. vii + iii (introdution) 100 + 62 (appendices) + viii (index).

Penal Philosophy. By Gabriel Tarde, late Magistrate, and Professor in the College of France. Translated by Rapelje Howell of the New York bar, with an editorial preface by Edward Lindsey of the Warren, Pa., bar, and an introduction by Robert H. Gault, Assistant Professor of Psychology in Northwestern University and managing editor of the *Journal of Criminal Law and Criminology*. Modern Criminal Science Series, v. 5. Little, Brown & Co., Boston. Pp. xxxii, 567 + 14 (index). ($5 *net.*)

American Pure Food and Drug Laws: comprising the statutes of the United States and of the several states of the Union on the subject of foods and drugs, their manufacture, sale, and distribution, whether in interstate or foreign commerce; the administrative rules and regulations of the federal and state departments and commissioners, and the standards of purity, etc.; to which are added chapters on related subjects. With full editorial commentaries and numerous citations to federal and state decisions. By James Westervelt, M.A., of the New York and New Jersey bars. Vernon Law Book Co., Kansas City. Pp. x, 1450 + 30 (appendix) + 4 (cases cited) + 51 (index). ($7.50 delivered.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administrative Powers. "The Delegation of Legislative Power to Administrative Officers." By Stephen A. Foster. 7 *Illinois Law Review* 397 (Feb.).

"Aside from the limitation that the delegation of power must conform to the 'due process' provisions, it is difficult to lay down any general rules for determining whether or not a given delegation of power is or is not lawful. We believe that our analysis of recent decisions by the Supreme Court of the United States sufficiently demonstrates that so long as it appears that the law-making body has gone as far as it reasonably can in the way of positive legislation and has only left to the administrative officers the filling in of details, that court will not declare a statute unconstitutional or void merely because no definite 'primary standard' has been established, and even though the function which the administrative officers perform may be legislative in its character."

Alabama Claims. "The Arbitration of the *Alabama* Claims." By William Conant Church. *Century*, v. 85, p. 703 (Mar.).

Mr. Church starts his story from the beginning of the Civil War, and tells how much damage was done to the commerce of the North by Confederate privateers. He thus presents the circumstances leading up to the *Alabama* case, and his clear, untechnical statement of the chief questions involved and the way they were decided will attract the reader, who will also be glad to see the case in its human *entourage*, against the background of personalities such as those of Grant, Sumner, Adams, Evarts, Cockburn, and Lord Salisbury.

See International Arbitration.

Aliens. "The jurisdiction of Courts Over Foreigners; II, Personal Jurisdiction at Common Law." By Joseph Henry Beale. 26 *Harvard Law Review* 283 (Feb.).

"It has been intimated, particularly in the earlier cases, that the mere presence of property of a defendant within the jurisdiction of the court gives the court power to issue a personal judgment against him. . . . In most cases where this intimation is made the court probably meant no more than that the property was thereby subjected to the decree of the courts: a doctrine which will be examined in a later article. . . . It may now be said without question that no one is personally subject to the jurisdiction of a court merely because he owns property within the territory of the court."

See Workmen's Compensation.

Biography. "Cardinal Alberoni: An Italian Precursor of Pacifism [*sic*] and International Arbitration." By Mil. R. Vesnitch. *American Journal of International Law*, v. 7, p. 51 (Jan.).

Telling us that international arbitration was practised to a large extent in the Middle Ages and Renaissance, the author selects a great advocate of arbitration in the early eighteenth century as worthy of notice, though not the first pacificist of Italy in point of time, Sanudo and the immortal Dante preceding him.

"Upon some of Lord Cockburn's Oponions." By W. G. Scott-Moncrieff. 24 *Juridical Review* 302 (Jan.).

See Wilson.

Cabinet. "The President's Cabinet." By John A. Fairlie. *American Political Science Review*, v. 7, p. 28 (Feb.).

Mainly a sketch of the history of the cabinet, suggested by the historical studies of two recent writers.

Commercial Law. "The Dual System of Civil and Commercial Law." By Layton B. Register. 61 *Univ. of Pa. Law Review* 240 (Feb.).

"Commercial law is necessarily a more fluid, changing law than the civil law and no code has the pretention of claiming to provide for every possible contingency. It was born a customary law and codification added only the sanction that greater certainty must give. There still remains in each country an important mass of approved customs that are followed in the absence of written law, and which, in first instance, become a rich source of commercial legislation and finally a source of civil law. . . .

"Commercial law has been compared very graphically to a snow-capped mountain. The fresh snows that fall upon its summit represent the ever newly arising customs of merchants. The snow creeps down the mountain side hardening into glaciers and giving rise to streams that feed the rivers of the plains. So the commercial customs are crystallized into commercial laws from which they gradually pass into the realm of civil law."

Constitutionality of Statutes. "Legislative and Judicial Attacks on the Supreme Court of the United States — A History of the Twenty-fifth Section of the Judiciary Act; I." By Charles Warren. 47 *American Law Review* 1 (Jan.-Feb.).

The question whether a general right of appeal should be allowed to federal courts, no matter whether the state court has decided in favor of or against the constitutionality of a statute, is not a new question, and Mr. Warren's timely

historical study helps one to understand why the twenty-fifth section has so long stood unchanged in spite of all efforts for its amendment.

See Government, Social Legislation.

Contingent Fees. See Expert Witnesses.

Corporations. See Monopoly.

Courts. See Judiciary Organization.

Disparagement of Property. "Disparagement of Property; II, Actual Damage." (*Concluded.*) By Prof. Jeremiah Smith. 13 *Columbia Law Review* 121 (Feb.).

"The most frequent ground for recovery is the loss of a chance to sell or lease the property, the title to which is disparaged. But this is not the only instance where recovery is allowed. In the early case of *Newman* v. *Zachary* (1671) Aleyn 3, the false statement, instead of preventing a sale of plaintiff's animal, caused its seizure as an estray. Plaintiff recovered for the damage occasioned to him by the seizure."

Due Process of Law. See Property and Contract.

Evidence. See Juries.

Expert Witnesses. "Expert Testimony." By Edward J. McDermott. 47 *American Law Review* 35 (Jan.-Feb.).

"In all cases the compensation of an expert, whether called from the list of the court or selected by the parties alone, should be controlled by the court, and the expert should be criminally punished if he attempts to collect, or contracts for, any compensation other than that allowed by the court or the statutes. I once saw, by accident, the private ledger of a physician who frequently appeared as an expert witness in court, and his books showed that in cases in which he testified, he got no fee if his employer lost, and he got a big percentage if the amount recovered in case of victory. Such a practice must produce perjury and corruption."

Fifth Amendment. See Property and Contract.

General Jurisprudence. See Commercial Law.

Government. "Expert Administrators in Popular Government." By A. Lawrence Lowell, President of Harvard University. *American Political Scinece Review*, v. 7, p. 45 (Feb.).

"If democracy is to be conducted with the efficiency needed in a complex modern society it must overcome its prejudice against permanent expert officials as undemocratic. . . . Mr. Dalrymple, the manager of the Glasgow tramways, reported to the mayor of Chicago that it was hopeless for the city to think of operating the street railroads so long as the officials were appointed for short terms from political motives. . . . The merit of the commission plan will probably depend upon the capacity it develops for providing expert administration, and that in turn involves a matter little understood in America — the proper relation between the expert who carries on the public service and the representative of the public under whom he serves."

"A Government of Men." By Albert Bushnell Hart. *American Political Science Review*, v. 7, p. 1 (Feb.).

In this presidential address delivered before the American Political Science Association, Professor Hart does not oppose the influence of men of ability; he urges on the other hand the necessity of able leaders, in "that government of men which is to supplement, but not to supersede, the government of laws."

"The Presidency of the French Republic." By Prof. James W. Garner. *North American Review*, v. 197, p. 335 (Mar.) .

"In electing M. Poincaré President . . . the National Assembly has broken the custom heretofore followed of choosing only respectable and obscure politicians. He is the strong man of France today and the only real statesman and leader to reach the Elysée since Thiers's retirement in 1873. He is a distinguished scholar, orator, and lawyer, and his conduct of the foreign policy of France during the past year has been characterized by a high order of statesmanship which has won for him wide popularity at home and general respect abroad. Unquestionably the feeling is spreading in France that the President should be allowed to exercise more real power in the government of the country."

"Amending State Constitutions." By Chief Justice J. B. Whitfield, Florida Supreme Court. 11 *Michigan Law Review* 302 (Feb.).

Rather an exposition of the law governing the amendment of constitutions than a discussion of social or political aspects of the subject.

"The Virginians and Constitutional Government." By Thomas Nelson Page. *North American Review*, v. 197, p. 371 (Mar.).

"For the first time in more than a generation a man of Virginia birth, of Southern rearing, and of experience covering both the South and the North, and therefore of a knowledge of the conditions of both sections, has been elected President of the United States, Chief Magistrate of this nation. . . . A profound student of comparative politics from his youth, deeply read in the science of government, on which he has been a thoughtful commentator; absolutely familiar with the history of this country, he brings to the exercise of his exalted office as great promise of soundness of view, loftiness of purpose, and steadfastness of principle as any man has done since the days of Washington. . . . Old Virginia is doing her part in the new movement. She has of late years been coming to the fore and resuming her position of primacy in the national counsels."

See Administrative Powers, Cabinet, Constitutionality of Statutes, Judicial Recall, Social Legislation.

Insurance. "Life Insurance — Suicide and

Execution for Crime." By George Richards. 22 *Yale Law Journal* 292 (Feb.).

"To the life insurance fund, very often, wives and children have made large contribution in money, toil and sacrifice. Their title to the fund became vested prior to the commission of the crime. What difference should it make, whether the insured was killed by his own act, or by the act of some stranger or by accident?"

Interlocking Directorates. See Monopoly.

International Arbitration. See Alabama Claims, Biography, North Atlantic Fisheries Case, Panama Canal Dispute.

International Law. "The Sanction of International Law." By Frederic R. Coudert. 61 *Univ. of Pa. Law Review* 234 (Feb.).

"The causes of modern war are often said to be commercial. This is true in a superficial sense only. Commercial friction and commercial ambition may indeed be the proximate causes, but they not the real and ultimate causes. There can be no war today where the temper and sentiment of the people is not such that they can be inflamed into a general passion. . . . The governments of today cannot make war in defiance of public opinion, nor is there the slightest chance of their taking so great a responsibility."

"The Executive, Legislative and Judicial Recognition of International Law in the United States." By Charles G. Fenwick. 11 *Michigan Law Review* 296 (Feb.).

"The recent Panama Canal Act furnishes an example of a case in which the sanctity of treaty obligation should have been recognized as imposing a limitation upon the legislative power of Congress. The debates in Congress prior to the passage of the bill do not suggest as great an anxiety as might be desired on the part of Congress, as a body, to keep the provisions of the act squarely within the terms of the Hay-Pauncefote treaty."

"Diplomatic Affairs and International Law, 1912." By Prof. Paul S. Reinsch. *American Political Science Review*, v. 7, p. 63 (Feb.).

Dealing with the Tripolitan and Balkan wars, the naval rivalry between Great Britain and Germany, the Chinese revolution, the foreign relations of the United States, and Latin-American affairs.

See Maritime Law, Panama Canal Dispute.

Judicial Recall. "The Recall of Judges and of Judicial Decisions." By Howard Wiest. 11 *Michigan Law Review* 278 (Feb.).

"Today we are threshing over again the old straw of a hundred years ago. To hear some persons talk, and to read some late writings, a person not familiar with the history of the country would get the opinion that it is necessary — to get back the government of the fathers — to take from the court the power to declare unconstitutional legislation, null and void."

See Social Legislation.

Judiciary Organization and Administration. "The Administration of Justice in the Modern City." By Prof. Roscoe Pound. 26 *Harvard Law Review* 302 (Feb.).

This is doubtless to be reckoned the leading article of the month. The subject is viewed in its broadest aspects, the problems of the administration of justice in the city being one with those of its administration throughout the entire country. Professor Pound's paper is so full of pregnant observations that an adequate abstract is impossible, and it should be read in its entirety by every one concerned with the problems of a progressive jurisprudence. It gives an inspiring survey of legal development in this country, and shows how we are still endeavoring to apply a law which originated in and is suited only to rural conditions to our modern urban conditions. How the law needs to be brought to every man's door, how it must be administered with increased efficiency and economy by a simpler, more skillful judicial organization, how the problem has become chiefly one of enforcement rather than of law-making, how the responsibility of the court of first instance has broadened — these considerations are clearly brought out. It is particularly to the needs of the poor litigant in the city that the machinery of the law must adjust itself. Professor Pound thus closes one of his most valuable and richly suggestive papers:

"In conclusion, to make the administration of justice in the modern city what it should be, we must have, first, more thorough knowledge of the social conditions in our cities, for which law must be devised and to which it must be applied. We must have sociological teaching and study of the law and of the theories upon which law shall proceed. Second, we must have a much larger degree of municipal autonomy and at least a fair proportion of city judges upon our highest courts. Third, we must organize the judicial department as a unit; give it an administrative head with power to prevent waste of public time and public money and to direct the whole energies of the judicial organization to its work for the time being, and with responsibilities corresponding to this power; give it strong judges to whom large powers may be safely entrusted; give it full control of its clerical and executive force, and power to utilize this force as experience dictates to further the purposes of judicial administration. Finally, we must not be in too great a hurry. These are not things which can be brought about by legislative fiat day after tomorrow. The social interest in scientific administration of justice is much greater than the public commonly conceives. We must not overturn what has been built up by judicial experience. We must rather learn how to use it. The social science of today is largely unlearning that of yesterday. We must not bring our law so thoroughly up to date today that it will be out of date tommorrow."

"Some Practical Observations on Reforming the Administration of Justice." By W. L. Sturtevant. 76 *Central Law Journal* 94 (Feb. 7).

Suggestions on the improvement of conditions in St. Louis, by the chairman of the local bar association committee. Obviously Mr. Sturtevant's principles have points of resemblance to those advanced in Professor Pound's proposals:

"Eliminate all useless jurisdictions and officials;

"Eliminate all rules of procedure which augment the labor of litigant and court, and delay justice;

"Eliminate antiquated rules of evidence;

"Eliminate the duplications of work of the judges;

"Make the procedure a direct, short means to the end of administering justice;

"Shorten the trial by compelling candor in pleading and by modernizing the rules of evidence;

"Classify the work on the basis of saving labor;

"Unify the system."

Juries. "The Jury System Under Changing Social Conditions." By John Wurts. 47 *American Law Review* 67 (Jan.–Feb.).

"The present day jury is no longer the body of presumably ignorant men for whom, we are told, these rules of evidence were formulated by the judges centuries ago because their minds were so untrained that they were incapable of making nice discriminations as to the weight of testimony. This is to say that the rules of evidence have not kept pace with the development of the jury idea and with changing social conditions."

Legal History. "The Date and Authorship of the Statute of Frauds." By George P. Costigan, Jr. 26 *Harvard Law Review* 329 (Feb.).

From a thorough first-hand investigation, Dean Costigan concludes that the date of the final passage and royal assent was April 16, 1677.

"The proper division of the glory of authorship of the statute, if indeed it be glory, may be left to others, but in conclusion it may be well to point out the significance of the fact that various Lord Keepers and Lord Chancellors played a part in the statute's enactment."

"The Ancient Brehon Laws of Ireland." By M. J. Gorman, K. C. 61 *Univ. of Pa. Law Review* 217 (Feb.).

"The existence of an hereditary legal caste like the Brehons withdrew the laws from the criticism of public opinion and, in a measure, no doubt prevented the establishment of legislative and judicial authority. While therefore much that has been said against these laws by prejudiced and ignorant English writers is open to strong objection, still it must be admitted that they were an obstacle in the way of any considerable social or commercial progress. The laws were made largely for the advantage of the ruling classes. The English real property laws were at one time certainly open to the same objection."

"The Genius of the Common Law; VIII, The Perpetual Quest." (*Concluded.*) By Sir Frederick Pollock. 13 *Columbia Law Review* 93 (Feb.).

See 24 *Green Bag* 225.

See Constitutionality of Statutes.

Libraries. "American Libraries and the Investigator." By Herbert Putnam, Librarian of Congress. *North American Review*, v. 197, p. 312 (Mar.).

"In law, the richest single collection in the United States is still, doubtless, that at Harvard. But the collection at Washington is being developed rapidly, as becomes its proper future as the library of our highest tribunal and as the appropriate source of knowledge of the laws of all foreign countries; not merely those under which they have developed, but those under which they are living and acting today. For the student of comparative jurisprudence it is likely that this collection will offer the completest resources to be found in this country."

Literature. "Law from Lay Classics; II, Dr. Johnson on the Legal Profession." (From Boswell.) 7 *Illinois Law Review* 431 (Feb.).

"This you must enlarge on, when speaking to the committee. You must not argue there as if you were arguing in the schools; close reasoning will fix their attention, you must say the same thing over and over again, in different words. If you say it but once, they miss it in a moment of inattention. It is unjust, sir, to censure lawyers for multiplying words, when they argue; it is often necessary for them to multiply words."

Maritime Law. "The Legal Status of Hudson's Bay." By Thomas Willing Balch. *Annals of the American Academy of Political and Social Science*, v. 45, no. 134, p. 47 (Jan.).

"From the foregoing brief survey of some of the historic facts and rules affecting the international status of the waters of the Hudsonian Sea, it is evident that that great body of salt water forms, like Bering Sea, the Baltic Sea, the Adriatic Sea and many other similar large sinuosities, part of the high seas. And that consequently Hudson's Bay is still what it was when Vattel wrote in the middle of the eighteenth century, an open sea."

Monopoly. "Public Utilities and Public Policy." By Theodore N. Vail, president of the American Telephone Company. *Atlantic*, v. 111 p. 30 (Mar.).

"The vicious acts associated with aggressive competition are responsible for much, if not all, of the present antagonism in the public mind to business, particularly to large business. These vices are the necessary accompaniment of the methods of destructive competition. The reason for the public's encouragement of such competition lies in the belief that from it they will derive some benefit. In the long run, however, the public as a whole has never benefited by destructive competition."

"Regulation of Industrial Corporations." By J. Newton Baker. 22 *Yale Law Jour.* 306 (Feb.).

The author favors federal incorporation, prohibition of the formation of holding companies except under special conditions, limitation of capitalization to actual value of assets, and prohibition of interlocking directorates.

"Interlocking Corporations." By Harold M. Bowman. 11 *Michigan Law Review* 265 (Feb.).

"The time may not yet have come for broad, general laws forbidding intercorporate directorates. For the next few years we seem destined to give most attention to deeds, to the acts that are hostile to our economic and social welfare. It is well that the emphasis is placed there. The energy that seems now behind it might be dissipated, even destroyed, if it were sunk in the abstractions of mere organization. But we shall be fatuous beyond belief if in hammering at deeds we lose sight of these abstractions, for they embrace the real. There are even now certain corporation aggregations which menace the movement against destructive trade practices and agreements, chiefly because of the fact that they are dominated by common directors or common owners. . . . Interlocking management for that specific class of corporations will have to give way or the public policy itself will have to give way."

"The Decision on the Union Pacific Merger." By Stuart Daggett. *Quarterly Journal of Economics*, v. 27, p. 295 (Feb.).

"In view of this very broad conception of the nature of competition in rates and service, it is curious that the Supreme Court failed to recognize the existence of the 'financial' or 'diplomatic' competition which has been continuously in existence between the western groups of roads, a competition no whit less important than that upon which the Court laid stress. This took such forms as the threat of new construction, the readiness to divert traffic in one section to secure favors in another, or the purchase of huge blocks of a competitor's securities as a demonstration of financial strength. It is not to be supposed, of course, that this sort of struggle is limited to western lines. Great railroads are like great nations, in that open warfare is the crudest weapon which they employ."

"Trust Regulation: The Solution, III. By Albert Fink. *North American Review*, v. 197, p. 350 (Mar.).

"Unpopular as the suggestion will no doubt prove, and notwithstanding the deep suspicion with which it will be viewed, nevertheless the Sherman Anti-Trust Act should be forthwith repealed. As pointed out, it is wrong in principle, unnecessary for the purpose for which it was invoked, and has brought about the very conditions which it was designed to hinder. It is without place in sound economics. Its net result is the waste of human energy, and by commanding the eternal warfare 'of each against all' the inevitable consequences of its operative effect is to destroy that which it was calculated to conserve. In its place should be enacted such a Federal Incorporation Law as will compel not only all the great industrials, but also all others who are engaged in interstate commerce, to abandon their state charters and accept in lieu thereof those offered by the national Government."

North Atlantic Fisheries Case. "The Final Outcome of the Fisheries Arbitration." By Chandler P. Anderson. *American Journal of International Law*, v. 7, p. 1 (Jan.).

Much has been already written about this arbitration, but the particular merit of Mr. Anderson's article comes from the fact that it is reviewed and weighed as a completed transaction by the agent of the United States in the arbitration, Mr. Anderson having borne the duty of preparing and presenting the case for the United States and having had control of the proceedings on the part of this Government, which was represented by six counsel in addition to the agent.

"The importance of reaching a common basis of fact in the discussion of international disputes before submitting such disputes to arbitration is not always appreciated, and resort might be had more frequently with advantage to the hitherto somewhat neglected expedient of employing an impartial commission of inquiry for the purpose of securing an agreed statement of facts as a basis for reaching, if possible, an adjustment by direct negotiation between the parties, rather than by arbitration."

If both parties could have been in possession of all the facts in the *Fisheries* controversy, says Mr. Anderson, an agreement could quite probably have been reached by diplomatic negotiation.

See International Arbitration.

Panama Canal Dispute. "Neutralization and Equal Terms." By Crammond Kennedy. *American Journal of International Law*, v. 7, p. 27 (Jan.).

"Some recent writers have contended that it is 'unthinkable' that the United States should allow public vessels of a nation with whom it might be at war to pass through the canal, but taken literally that is just what the 'neutralization' provided for in the Hay-Pauncefote treaty seems to mean."

The article is one of the ablest that have appeared on the questions whether the effect of the Hay-Pauncefote treaty, impartially construed, is equivalent to "neutralization" and if so in precisely what sense. Mr. Kennedy's readers may be tempted to regard the analogy between the Panama and Suez canals closer than they ever dreamed, and as something more than a mere general resemblance.

"The Panama Canal and Treaty Rights." By D. Oswald Dykes. 24 *Juridical Review* 262 (Jan.).

The two questions of the right of the United States to fortify the canal, and its duty to fix tolls on a basis of equality among the nations, are considered, both being answered in the affirmative in an article which formulates no unorthodox conclusions.

"The Panama Canal Act and the British Protest." By John Holladay Latané. *American Journal of International Law*, v. 7, p. 17 (Jan.).

See p. 175 *supra*.

Procedure. "Reformed Legal Procedure, Federal and State." By Everett P. Wheeler. 47 *American Law Review* 48 (Jan.–Feb.).

An address given before the Cornell University School of Law.

"It was the intent of Field, who drew the Code of 1848, that the practice under that Code should be what this new statute requires. That Code abolished writs of error, and provided that the review of judgments should in all cases be by appeal. David Dudley Field intended by this provision to enlarge the power of the Appellate Court. In 1848 it was perfectly well understood, as it still is in the federal courts, that on a writ of error it was the function of the court issuing the writ to inquire whether there was a reversible error apparent on the record. But an appeal carried up the whole record, and the Appellate Court was bound to render such judgment upon this record as the law and equity of the case required. This practice had come down to the courts of chancery and admiralty from the Roman law. . . . But unfortunately, the Court of Appeals in *Griffin* v. *Marquardt*, 17 N. Y. 28, adopted a more narrow rule and applied to appeals, even in equity cases, the practice that had come to prevail upon the decision of writs of error. The reason of this decision was that the judges of the Court of Appeals had grown up in the old system, were not in sympathy with the new, and therefore inclined to give to the new statute a strict and even narrow construction — or, to put it differently, the Code which Field drew and which the Legislature enacted was in advance of public sentiment and even of judicial sentiment."

"The New Rules of Practice for the Courts of Equity of the United States." By James L. Bishop. 4 *Bench and Bar* (n. s.) 16 (Feb.).

"The result unquestionably is a forward step in the simplification of pleadings and practice which will guide the way to similar reforms in state practice and in the practice on the common law side of the federal court. The admirable style in which the new rules are presented furnishes in this respect a most acceptable model."

See Judiciary Organization and Administration, Juries.

Property and Contract. "The Nature of Tax Exemptions." By Prof. Frank J. Goodnow. 13 *Columbia Law Review* 104 (Feb.).

Discussing the subject involved in the decision of the United States Supreme Court in *Choate* v. *Trapp* (1912), 224 U. S. 665. "The only reason then for considering as property, tax exemptions granted for a consideration is the desire to protect them from repeal upon the part of legislatures which constitutionally have the right of repeal. But it is doubtful if such a purpose is sufficient to justify the court, without citation of cases, to introduce into our law a doctrine which tends both to promote confusion and to impose upon the powers of both Congress and the state legislatures a limitation which has not hitherto been supposed to exist."

Public Service Corporations. See Monopoly.

Railways. See Monopoly.

Social Legislation (Constitutionality). "The Judicial Censorship of Legislation." By Frederick Green. 47 *American Law Review* 90 (Jan.–Feb.).

"Granting that in some states courts seem committed at present to too narrow a view of governmental power, still we may be confident that present methods of amendment, the people's control over the personnel of the bench, the susceptibility of judges' minds to reason, and the wholesome influence of discussion such as the country has been having of late will be enough to remove just discontent without sacrificing the benefits of our present system."

"The Courts and Legislative Freedom." By George W. Alger. *Atlantic*, v. 111, p. 345 (Mar.).

"The legislatures and constitutional conventions are debating proposals for the recall of judges, and the bar associations are adding to the general confusion by sweepingly denouncing, as demagogic attacks upon the courts, all proposals of change except certain excellent, though tardy, measures of procedure-reform emanating from themselves. The platform of one political party advocates a simplification of the methcd of impeachment. Between indiscriminate attack and unreasoning defense, the courts suffer both from their enemies and, if possible, still more from their friends; and sober-minded citizens are left without light or leading."

See Government, Judicial Recall.

Statute of Frauds. See Legal History.

Suicide. See Insurance.

Taxation. See Property and Contract.

Trusts. "Power in Trustees to Make Leases." By Prof. Albert M. Kales. 7 *Illinois Law Review* 427 (Feb.).

A succinct exposition of the law, with little commentary.

Wills. "The Form of a Will in Germany." By Henry Happold. 38 *Law Magazine and Review* 154 (Feb.).

Wilson. "The President." By E. S. [Ellery Sedgwick.] *Atlantic*, v. 111, p. 289 (Mar.).

"Mr. Wilson is a very human person, detached from his fellows partly by shyness, partly by a native austerity, partly by a dutiful conception of life alien to most of us; a man who, seldom able to chat intimately with a friend, thanks God for one friend, at least, who will always chat intimately with him, and goes off cycling by himself with *Elia* crammed into his pocket; a

punctilious man, who finds in the conventions a refuge from current intimacies of speech and manner; a soberly ambitious man, disliking the superfluities of intercourse; a man devoted to the cultivation of his talents and to the expansion of his energies, fitting himself unceasingly to be the instrument of effective service."

"Woodrow Wilson as a Man of Letters." By Bliss Perry. *Century*, v. 85, p. 753 (Mar.).

"His style is undeniably 'bookish,' as Lamb and Stevenson are bookish. . . . As compared with the unconscious, pure style of John Fiske, or the veracious sentences of Mr. James Ford Rhodes, it seems to be just a trifle aware of itself, knowing what 'sets my genius best,' as Alan Breck Stewart said of his favorite sword-play. And Alan Breck himself was not more gay and alert than are the best passages of Woodrow Wilson. It is witty, high-spirited, exhilarating writing."

See Government.

Workmen's Compensation. "The Equities of Non-Resident Alien Dependents under Workmen's Compensation Laws." By Prof. Charles Cheney Hyde and Charles H. Watson. 7 *Illinois Law Review* 414 (Feb.).

"Any workmen's compensation act, federal or state, discriminating against non-resident alien dependents is believed, for the reasons given above, to be open to the following objections: (*a*) It is contrary to the enlightened spirit that has found legislative expression in numerous states of the United States and European countries; (*b*) it tends (especially in the case of an act of Congress) to check the freedom of the President in concluding new and much needed commercial treaties with Europe; (*c*) it tends to exclude workmen whose families live with them from every form of labor where an alien can be employed whose family lives abroad; (*d*) it strikes a direct blow at the alien laborers whose families are victims of discrimination; (*e*) it works injustice to non-resident alien dependents by ignoring the extent of their pecuniary loss through a disregard of the earning power of the victim at the time of accident."

Latest Important Cases

Contract. *Action to Recover for Medical Services — Mother Calling Physician to Attend Married Daughter not Liable on Implied Contract.* N. Y.

Where a woman called a physician and asked him to attend her daughter, who was seriously ill, and was married and living with her husband. it was held in *McGuire* v. *Hughes*, that in the absence of an express agreement whereby some other person than the husband of the patient is to pay the physician for his services, the mother is not legally liable therefor. The decision of the New York Court of Appeals followed the authority of *Crane* v. *Baudouine*, 55 N. Y. 256, which held an implied obligation on the part of the husband to exist to supply his wife with needed medical services, even though the physician was called in and consulted by the patient's father. *New York Law Journal*, March 19.

Illegitimacy. *See* Marriage and Divorce.

Interstate Commerce. *Interstate Transportation of Women for Immoral Purposes — "White Slave Law" Constitutional.* U. S.

The constitutionalty of the Mann Act of 1910, known as the White Slave Law, was unanimously sustained by the United States Supreme Court February 24. The case was that of Effie Hoke of Beaumont, Texas, and Basile Economides, a New Orleans saloon-keeper, sentenced to the penitentiary for illegal transportation of women from New Orleans to Beaumont. *Hoke* v. *U. S.*, L. ed. adv. sheets No. 8, p. 281.

The Court's opinion was delivered by Mr Justice McKenna, who said in part:

"Commerce among the states, we have said, consists of intercourse and traffic between their citizens and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property . .

"And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided, or transportation induced in interstate commerce for the immoral purposes mentioned. But an objection is made and urged with earnestness. . . . . It is said that it is the right and privilege of a person to move between the states, and that, such being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exercise of it, and 'that the motive or intention of the passenger, either before beginning the journey or during or after completing it, is not a matter of interstate commerce.'

"The contention confounds things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for

indecent and immoral use from one state to another. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. It is the right given for beneficial exercise which is attempted to be perverted to justify baneful exercise, as in the instances stated. This constitutes the supreme fallacy of the plaintiff's error. It pervades and vitiates their contention. . . .

"Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the Congressional power is the same, only the matter of its exercise must be accommodated by the differences in its objects. It is misleading to say that men and women have a right. Their rights cannot fortify or sanction their wrongs, and if they employ interstate transportation as a facility of their wrongs it may be forbidden them to the extent of the act of July 25, 1910."

Marriage and Divorce. *Illegitimacy of Child — Void Foreign Divorce Obtained not at Matrimonial Domicile, upon Substituted Service.* N. Y.

It was held by the New York Court of Appeals in *Baylis* v. *Baylis*, decided Feb. 25, that a decree of divorce obtained by a wife in a state which was not the matrimonial domicile and without her husband's appearance in the suit or personal service of the summons upon him in that state is void.

The statutory provision that "where it appears and the judgment determines that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes the legitimate children of the parent who at the time of the marriage was competent to contract," was held not to include a case where the innocent party acted on the erroneous belief that the other party had been legally divorced. (Reported *N. Y. Law Jour.*)

Monopoly. *Combination of Non-Competing Groups not Unlawful — United Shoe Company Properly Organized — Sherman Anti-Trust Law.* U. S.

The Government suffered its first big defeat in the recent anti-trust campaign Feb. 3, when the Supreme Court of the United States held that the officials of the United Shoe Machinery Company did not violate the Sherman anti-trust law by organizing that company. The Court, however, did not pass upon the legality of the system by which the company leases machines on terms that no "independent" machinery be used.

The action of the Supreme Court grew out of the annulment by the Massachusetts federal court of one of two indictments brought against the Shoe Machinery Company officials. The lower court took the position that the indictment did not state an offense under the Sherman law. The Government in the indictment alleged that the defendants violated the law, first by organizing the United Shoe Machinery Corporation, and second by a system of leasing their machines, whereby patrons were compelled to promise not to use any machinery made by independents and to use only that made by the alleged combine.

Mr. Justice Holmes, announcing the unanimous decision of the Court, said that the lower court regarded the indictment as merely referring to the organization of the company, not to the "tying clause" leases. That being the case, he added, the Supreme Court must accept that interpretation without question. He said this reduced the case to a narrow compass, and pointed out that the several groups combined in the organization of the United Shoe Machinery were non-competitive. The Court declared that the Sherman law did not contemplate the doing of business by the smallest possible isolated units.

"On the face of it, the combination," said Justice Holmes, "was simply an effort for greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. It is hard to see why the collective business should be any worse than its component parts.

"We can see no greater objection to one corporation manufacturing seventy per cent of three non-competing groups of patented machines collectively used for making a single product, than to three corporations making the same proportion of one group each.

"The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree."

It was announced at the Department of Justice that the Government would prosecute the Company under the remaining charge of monopoly and unfair competitive methods.

The Editor's Bag

PANAMA CANAL TOLLS IN THE LIGHT OF MUNICIPAL LAW

PROFESSOR Eugene Wambaugh has thrown new light on the Panama Canal law by considering the exemption of coastwise shipping from tolls with respect to the doctrines of the common law as regards public callings.[1] He points out that a person who builds a private railway on his own land has the right to exclude all persons from using it and may exact such compensation as he sees fit for its use, but as soon as he announces that it is open for public travel the law imposes upon him peculiar duties, of which three may be specified, the duty of serving all comers, the duty of serving all comers on the same terms, and the duty of charging only a reasonable rate. Furthermore, a railway owned by the government would be subject to the same obligations as one owned by a private individual or corporation, for the state is created for public service exclusively, and while the state cannot be sued, "the absence of a remedy cannot blind anyone to the fact that a state owes duties." The United States cannot be sued in any court and there is no means known of enforcing an obligation of this character, but the United States, in entering upon any business belonging to the class of public callings, assumes as matter of principle all the duties which rest upon any other conductor of similar undertakings. Thus independently of treaties,

> One reaches the conclusion that by the rules of law observed in the United States and England the United States, whenever owning a public canal, is as a matter of principle under the duty of permitting the canal to be used by all comers, and at rates which do not discriminate, and at rates which are reasonable.

But Professor Wambaugh is not content to stop at this point; to do so might give a too strongly speculative turn to his discussion. He goes on to show how, though a nation is bound by these duties in the absence of a treaty, the chain of documents leading up to the Hay-Pauncefote treaty show clear recognition of the duties which pertain to all public callings and are to be construed in the light of the Anglo-American system of law, which furnishes the natural and necessary introduction and commentary for any treaty between Great Britain and the United States. This doctrine as to an isthmian canal has been recognized by the United States from the beginning, says Professor Wambaugh, and is the very essence of the Hay-Pauncefote treaty.

The argument is as convincing as it is simple, and if it appears novel, its novelty lies only in the application of familiar principles of municipal law to the field of international relations, or at least to the relations of the two countries concerned. Precedents may not be abundant enough to justify the conclusion that there is any accepted rule of unwritten international law which for-

[1] "A Point that Senator Root Omitted." —*Boston Transcript*, Feb. 8, 1913.

bids discrimination in the use of a public canal, in the absence of treaty stipulations, yet such ought to be the law and there are indications that it will be. It is difficult to conceive of the principle clearly asserted in the Suez Canal and Hay-Pauncefote treaties being repudiated by any nation hereafter in opening a new inter-oceanic canal. It seems a fair rule of construction that a treaty between the United States and England may be interpreted in the light of the domestic law of those two countries, and in considering the general obligations of all nations with reference to their internal law, it is even possible that an analogous principle of the duty to avoid discrimination might be deduced as a rule of international justice on which it would take little to confer legal as well as moral sanction.

A GREAT BRITISH JUDGE

THE demise of one of the most eminent and ablest British judges cannot pass unnoticed by the *Green Bag*. Lord Macnaghten, who died Feb. 17 at his London residence, was aptly characterized by the Lord Chancellor as "a great judge, with a passionate desire to do justice." His decisions were among the most learned of the House of Lords, and for the past quarter of a century his name was linked with the best work of that august tribunal. He came of a legal stock, his grandfather having been a judge in India, and his uncle author of a series of Chancery reports. He was the offshoot of an old Scottish family settled in Ulster, and was educated at Queen's College, Belfast, and Trinity College, Cambridge, his achievements in scholarship leading to his election as Fellow of Trinity and his prowess as an oarsman being also considerable. Called to the bar at Lincoln's Inn in 1857, he acquired a large practice but displayed at first no remarkable qualities, and did not become a leader till 1880. He was not an orator either in court or in Parliament, and his reputation as a leader was won solely through his solid attainments as a lawyer. He declined the Home Secretaryship and other offers, but in 1887 had the unsolicited and unique honor of promotion straightway from the bar to a Lordship of Appeal. The remarkable series of judgments which followed showed not only a judicial mind of the rarest order but a literary ability equaled by none of his contemoraries except Lord Bowen. He continued to perform his judicial duties till recently without any noticeable impairment of intellectual vigor, and died at the ripe age of eighty-three.

THE MYLIUS AND CASTRO CASES

EDWARD Mylius, the English journalist who was convicted of libeling the King and served a short term of imprisonment, arrived in New York harbor last December in the steerage of the steamer *La Provence*. He was refused admission at Ellis Island on the ground that he was a convicted criminal. The Political Refuge Defense League and the Free Speech League came to his aid, and argued before the Board of Special Inquiry that he was a political offender only and as such could not be deported. The case came before Secretary Nagel, who decided that a law which excludes anarchists and persons who advocate the overthrow of government certainly could not permit the entrance of the author of a false charge of bigamy on the ground that the offense was merely political. A writ of habeas corpus was then obtained by those who had exerted themselves on

Mylius' behalf, and was sustained by Judge Noyes in the federal District Court Feb. 19, the court holding that Mylius had not been "convicted of a crime involving moral turpitude." This decision was not based upon any doubts of the gravity of the particular libel in question, but upon the negligence of an editor who permits the publication of libelous stories but is not by so doing shown to be morally base. Judge Noyes did not in the slightest degree minimize the serious character of the petitioner's acts or reflect in any way upon the fairness and regularity of his trial in England. Mylius was then released and announced his intention to take up literary work in the United States.

The case of Cipriano Castro, ex-president of Venezuela, was in some respects similar. Castro, on his arrival from Havre on *La Touraine* not long after Mylius reached this country, was detained at Ellis Island for examination, on orders from Secretary Nagel. His deportation was ordered, and he was to have sailed for Germany, but George Gordon Battle secured a writ of habeas corpus, which Judge Holt dismissed on the ground that the examination by the immigration officials had not been completed and the court could not properly interfere. A month later, three days after Mylius' release, the writ was allowed by Judge Ward, who held that the act, in permitting the exclusion of persons convicted of crimes involving moral turpitude, requires evidence of a specified kind of the commission of the crime alleged, and that evidence of the specified sort had not been presented, to show Castro guilty of the murder of General Paredes in cold blood. Castro, after remaining in this country a week, sailed away to Havana of his own accord Feb. 22.

In both these cases the persons sought to be excluded can hardly be looked upon as desirable or welcome arrivals in this country. But this does not imply that they are morally base, nor does their exclusion appear to have failed merely through the difficulty of complying with technical requirements of the law. In one case the crime did not involve moral turpitude, in the other a certainty that it had been committed could not be established by the unsatisfactory evidence supplied by the Government,— one cannot even be morally certain that Castro committed the base crime alleged. Lengthy proceedings were required to reach the negative result, and it may be assumed that the authorities at Ellis Island could have administered their duties to better advantage with less interference from higher officials in Washington. A salutary instance of the subordination of administrative officials, even Cabinet officers, to the limitations of the law has been afforded, and it is well to have it emphasized, now and then, that the immigration act cannot be overridden by any one, however high in the Government, for reasons of a diplomatic nature or for any other cause.

COQUELIN AS FOREMAN

COQUELIN, the actor, was more than once called upon to do jury duty. The first time his name was drawn it was for service as foreman.

The case before the court was an everyday burglary — two men had been caught leaving a house with the stolen property in their arms. An amusing incident occured toward the end of the hearing. When, as foreman, M. Coquelin read the finding of the jury, he forgot to place his hand upon his heart, as decreed by the law. Thereupon one of the prisoners' counsel raised an objection on a point of procedure, which was

allowed. In explanation, M. Coquelin stated that though materially his hand was not upon his heart, it was so morally. A new trial, however, was necessitated by his inadvertence. "All of which," the actor used to say, "came from playing a rôle without first rehearsing."

(*Communicated.*)

A CORRECT STENOGRAPHIC REPORT

AN old rough looking practitioner stepped up to the bar of the Municipal Court of Chicago and said:

"If the court please, I tender for your signature a true and accurate bill of exceptions in the case of *Wink* v. *Wink*."

A young attorney pushed his way hurriedly through the crowded room, and, as he reached the bar, quickly said, "I object to it."

The judge removed his glasses from his fat face, looked down upon the young attorney and then dryly asked, "And what is the ground of your objection?"

"The Municipal Court Act provides that a 'Correct Stenographic Report' must be presented to the trial judge for his signature. My objection is that this is not a correct stenographic report."

"Well, your honor," interrupted the old practitioner, "while the Municipal Court Act may have called it a 'Correct Stenographic Report,' instead of a bill of exceptions, it is only such in name. What the statute contemplates is a correct report of the proceedings. This is a correct, accurate and true report of what actually took place on the trial of this case, and it should be signed."

"Well, then if the court please, I object to it because it is not a correct report," interrupted the young attorney.

"Prove then wherein it is not correct?" interjected the old practitioner.

"Wherein do you say it is not correct?" asked the judge.

"Well, I don't know just where. I haven't a full stenographic report of it. I would rather say it is wrong all the way through, as your honor will readily see by reading it."

"Your honor," interjected the old practitioner, "the rules of this court say that we must present a correct stenographic report of what took place at the trial of the case. I am now presenting that, and the burden is upon him to show wherein it is not correct. If he cannot show that it is wrong, then of course it must be correct and your honor must sign it according to the rules of this court. It is therefore not necessary for the court to take any time in reading it."

"That is the rule," admonished the judge.

"Well, your honor," said the young attorney. "Every question and every answer in this transcript has been framed to aid his side of the case, while my side of the case is entirely left out."

The judge picked up the transcript and turned through the two hundred pages, and then said, "This has regular questions and answers in the usual form, and appears to be a full stenographic report. Is this a transcript of the stenographer's notes, or what is it?"

"No, your honor," replied the old practitioner. "I didn't have a stenographer. It was his stenographer. I personally made this up from the notes I myself took on the trial, and I personally know it is a true, accurate and correct transcript of what took place at the trial of this case, and one that we are willing to stand by. And that is what the Act calls for."

"Then I will sign it, unless you are prepared to show that it is not correct," asserted the judge warningly.

"But your honor," said the young attorney, "then you will force me to go to the further expense of about $100

for a stenographic report to file as additional and a correct record in this case, and counsel's only ruse in presenting this, which he is so willing to stand by, is to have me do that. I will wager that the minute I file that he will withdraw his own. He wouldn't dare to let the reviewing court compare the two. This case has already been tried three different times, and we have been forced to considerable expense as it is. When I am willing to let him have the services of my reporter, he should be obliged to pay that expense, and especially when he is appealing this case, as he without any doubt whatever is, merely to cause us further expense and delay."

"Well, your honor," retorted the old practitioner, "we have a right to appeal, so that is immaterial here. What is material is for him to prove this is wrong. He said he couldn't prove it was wrong. I will show him I want to be fair with him, and have always wanted to be fair with him. I will do this. I will put up my notes and this transcript against any stenographic report or anything else he has to show this is not correct, and if he can now show a single place wherein my transcript here is not correct or is overstated the least bit in my favor, why then I will order a stenographic report and present that. I don't ask him to show it is all wrong here, but just a single place, and if he can do that, then I will pay for the reporter's record. Isn't that a fair proposition, your honor, and haven't I all the way through here acted fair with him?"

"I accept your proposition," said the young attorney eagerly. "Will your honor turn to the transcript of the testimony of Mr. Blank, the main witness, and read what he has in his transcript there?"

"Yes, I have read it," said the judge finally.

"I have here a stenographic report of the testimony of that witness. Will your honor look at that and see how it corresponds with counsel's version of that witness's testimony?"

A smile crept slowly over the judge's face. The old practitioner, with a perplexed look, turned to the young attorney and in a surprised and angry tone said, "Why, I thought you said you didn't have a stenographic report or anything to show it was wrong!"

"I said a full transcript. I forgot to say that I had anticipated your ruse and your willingness to be fair with me, so I prepared for you. But you heard me also say that I accepted your proposition, the proposition just made by yourself to pay for a stenographic record. If you are any kind of a sport, I think you will buy."

"Yes," finally concluded the judge. "I remember now what that testimony was, and I am afraid that you have it overstated somewhat in the one you present. It doesn't read like the same testimony at all. You had better order a stenographic report of it, don't you think, so long as he will let you have his stenographer?"

"Very well, then, your honor. To show him I want to be fair, I will stand by my offer. I may say here in explanation of this transcript, however, that when I made it up I got my notes of the evidence produced on the trial mixed with the testimony that I argued on my motion for a new trial, and I didn't just remember which was which, and it may be that I have it a little overstated."

HARRY RANDOLPH BLYTHE

WE REGRET exceedingly to record the death of Harry Randolph Blythe, a former contributor whose verses will be recalled by the readers of the *Green Bag*. Mr. Blythe died at the age of about thirty, at Swampscott,

Mass., Feb. 27, whither he had gone to reside after his marriage last October. He had an attractive, manly personality. He was president of his class while an undergraduate at Dartmouth and won the pole vault in the New England intercollegiate meet in 1907. His literary ability was recognized both at college and in the Harvard Law School, making him conspicuous for his writings in verse. A native of Nebraska, he chose to take up his professional work in the East after his graduation from the Law School in 1910, and became associated with the prominent Boston law firm of Mayberry, Hallowell & Hammond. Mr. Blythe was highly esteemed for many strong and endearing characteristics, and he was one who had in him that which goes to the making of an honorable and successful career.

HAPPENINGS IN COURT

I

ONE of the judges of the Circuit Court of Cook County was hearing default divorce cases in Chicago. A fine looking young attorney, when his case was called, stepped forward with three witnesses, three beautiful and very finely dressed young women.

"What is your name," asked the judge of the first one to take the witness stand.

"Mrs. Bertha Mills — Mrs. Bertha John Henry Mills."

"You are the complainant, are you?"

"Yes, sir."

"You charge here that your husband did cruelly beat and most wrongfully mistreat you."

"Yes, sir; he did."

"Tell us all about it from start to finish."

She did. When she finished, the judge continued his examination: —

"Did anyone see him do all this?"

"Yes, sir; my two sisters."

"And they will so testify?"

"Yes, sir."

"Let's see, did I ask how old you are?"

"I will be twenty, the fifth of next month, Judge."

"How long have you been married?"

"Almost two years."

"I suppose you want to resume your maiden name?"

"Yes, sir; I want my maiden name Dupont again."

"That is all. Step aside."

"Next witness, what is your name?"

"Miss Viola Dupont — formerly Mrs. Viola James Herbert Mills."

"Any relation to the complainant?"

"Yes, sir; I am her sister, and I married her brother-in-law."

"You mean you married her husband's brother?"

"Yes, sir; that is it."

"How old are you?"

"Twenty-one years old."

"Is your husband living?"

"Yes, sir; he says he is — we've been divorced a year."

"Tell us what you know of this affair on January 1st that your sister has described. Did you see that?"

"Yes, sir; I saw it all. I saw him pick up that hot biscuit and throw it at her across the breakfast table, and he got up real angry and went away and never spoke a word, and he simply stayed away and didn't return."

"How did you happen to be there at the time?"

"Well, judge, you see we three sisters all lived there with the three brothers, and — that is with the three until my husband went away, and then there was only two, and then when he left there was only one of them left."

After some further examination, the last of the three witnesses was called

to the stand, the youngest and prettiest of all, her whole face beaming with joy.

"And what is your name, Miss," asked the judge.

"Mrs. Marguerite Leonora Mills — Mrs. Marguerite Leonora Theodore Mills."

"Well, I suppose then, you married the third brother, did you?"

"Yes, sir, I did, Judge."

"You are not divorced, though?"

"No, sir, Judge, and I never am going to be."

"I hope you will always feel the same about it as you do now. I suppose you got the good one of the three, did you?"

"Yes, sir, the best man in the world."

"And how long have you been marmaried?"

"Almost four months, judge."

"All right, step aside. Call the next case."

II

"What is this motion?" asked one of the judges in the Municipal Court of Chicago.

Two middle-aged men, talking to each other and laughing as if it were great fun, stepped up to the bar, when one of them said: —

"Judge, this is a motion to have him file a more specific cross bill. He isn't explicit enough."

"Cross bill, you say?" inquisitively asked the judge. "This is a law court, and we don't have cross bills here. You mean an affidavit of merits, don't you?"

"Well, I don't know what you call it."

"Aren't you a lawyer?" asked the judge.

"No, judge," spoke up the other, "neither one of us is a lawyer, but we hope to be before we get through with this case. You see, we ran into each other's automobile We really don't know which one of us was to blame. So to settle it, we agreed that he should sue me and handle his own case, and I should handle my own case. Neither of us is to consult a lawyer, although we both may get your honor's advice and read as much law as we wish. Each machine was injured about $10.00. So he sued me, and he paid $6.00, for which the Code says we will get a jury trial. He filed his statement of claim, and I filed my cross bill to it, which is an exact copy of his original bill, word for word. Now, if he wasn't plain enough in his original bill, how can I help that I am not plain enough for him in my cross bill? I will admit that I couldn't understand what he meant in his bill, but that had he been more explicit I also would have been more explicit."

"Is that the only thing you fellows want here today, and is this all you have to do?" dryly asked the judge.

"Yes, sir; that is all we want today. You see this is a little diversion for us. We want to get an — an — an — issue — issue, is the word."

"Very well, motion allowed. I will give you five days to file it in."

"But, your honor," spoke up the other, "now, how in the world am I going to make it out?" He hesitated a few seconds, and then exclaimed, "I've got it! I make a motion that he be compelled to give me a more explicit original bill, so that I will have something to go by."

"Your motion is good. I will give him four days to file that in, and then you will have one day after that for yours."

"Very well, judge. And can we get a trial on that day, too? We have agreed that each one is only allowed to call one witness besides himself, so it won't take long to try it."

"Gentlemen, your case will be placed

on the regular jury calendar, and should be reached sometime late this fall or early next spring," answered the judge with a twinkle in his eye.

The two litigants looked at the judge and then at each other, in surprised amazement, and then as the judge called out, "Call the next case, Mr. Clerk," they cheaply sulked away.

III

What would you, as a lawyer, do if you should have the misfortune of losing your hearing? Did you ever think of that? Or what would you do if you should by accident lose your power of speech? That might happen to you any day. Or what would you do if you should happen to lose your sight? Would you leave the profession and bemoan your loss, or would you do as these three Chicago men have done? Think it over.

One of these men was recently trying a case in one of the courts. He had on his ears what looked like a big set of telephone receivers, which connected by a cord with a big megaphone box on the table in front of him. From this box ran a trunk line to a similar but smaller box in front of the judge. Another line ran to a similar box in front of the witness; another to a box in front of the reporter, and another to a box in front of the opposing counsel. This lawyer, though practically deaf, was overcoming his handicap by trying his case over this system of electric megaphones, and seemed as cheerful and happy as if he were testing out some new invention especially designed by himself for this work.

Another attorney has had the misfortune of losing his sight to such an extent that he cannot see to read at all, and can barely see enough to go about without a guide. He overcomes his handicap by employing three young men to constantly furnish him with data and citations, and to read everything to him. He is so cheerful in his manner, and is so artful in hiding his affliction that only his most intimate friends are aware of it.

The other attorney has lost his power of articulation. Yet by means of his loud whisper, which he has developed to a wonderful degree, he still conducts his trials and is maintaining a lucrative practice.

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

James O. Fagan tells of a suit brought against a railroad company by a woman who was injured by falling through a bench in one of its stations. The physician who was testifying on behalf of the railroad decided to show the jury the impossibility of an injury from such a cause, by producing a similar bench owned by the company and proceeding to fall through it. At last accounts he was suing the road for $10,000.

"Both of these gents," said the witness, "was standin' with their elbows on the bar conversin' with each other pretty hot and pointed."

"Relate the conversation," said the prosecutor.

"Oh, I don't remember it, exceptin' that they called each other what they was."

— *National Corporation Reporter.*

"I understand you went over to Crimson Gulch and lynched the wrong man?"

"No," replied Three-finger Sam. "You can't lynch the wrong man in Crimson Gulch. We jest got Piute Pete a little bit ahead of his turn."

— *Washington Star.*

The *Virginia Law Register* finds the following witticisms in some judicial opinions: "There is nothing certain about a law-suit except the expense of it." 78 Me. 49. "A locomotive and a mule may well pass over the same ground so that they pass at different moments of time." 56 Ga. 540. "Estoppel is the principle of law that does not allow a man to speak the truth." 35 S. C. 537. "A person who occasionally remains sober may be of intemperate habits." 68 Ala. 147. "Even if a man is drunk he has a right to suppose that a bridge open to the use of the public and under control of the county officials will bear up his load in crossing it." 15 Ore. 313.

The Legal World

Monthly Analysis of Leading Legal Events

There was little of far-reaching importance to record in the month preceding the inauguration of President Wilson. Congress enacted no deeply significant measure in the lull attending the extinction of the Taft administration, handing over the chief problems of constructive legislation to the next session. The state legislatures hardly got down to serious work, action on the reform of practice bills pending in New York and Illinois and the measures for the reorganization of the lower courts in Philadelphia and Boston being impossible so early in the year. February, moreover, is not a popular month for bar association meetings.

Assurance was given of the prospects of fairer treatment of the question of Panama Canal tolls by the inspiring action of the New York Chamber of Commerce, whose almost unanimous resolution, adopted Feb. 13, sustaining Senator Root's amendment and approving the principle of equal treatment for all nations, has had great moral weight and may have helped to confirm President Wilson in the convictions he is assumed to have formed.

President Wilson's cabinet, like that of his predecessor, is made up largely of lawyers, seven of the ten department heads having been at some time or other admitted to the bar. Mr. Redfield, Secretary of Commerce, Mr. Wilson, Secretary of Labor, and Mr. Houston, Secretary of Agriculture, are the only members who never acquired the right to practise law. Mr. Daniels, Secretary of the Navy, was admitted to the bar in early life but never practised. The others were all successful practitioners at the bar of their respective states though they had of late taken up other interests extensively, as in the instances of Secretary Bryan and Secretary McAdoo, or been commissioned with important positions of public trust, as in the cases of Attorney-General McReynolds, who was assistant Attorney-General under Roosevelt and Taft, Secretary of the Interior Lane, who was made Corporation Counsel of San Francisco and Interstate Commerce Commissioner, Secretary of War Garrison, who was appointed Vice-Chancellor of New Jersey in 1904, and Postmaster-General Burleson, who was a District Attorney for five or six years in Texas before achieving national prominence in Congress. There obviously will be no dearth of legal ability in the new Cabinet.

Important Legislation

The Dillingham-Burnett immigration bill, being vetoed by ex-President Taft, failed to secure enough votes in the national House Feb. 19 for the veto to be overridden. There had been num-

erous protests from various sources against the literacy test prescribed by the bill.

The Massachusetts house committee on constitutional amendment, in reporting unanimously against the Progressive party's bill, providing for the recall of state and county officers and for the recall of judicial decisions, reflects public sentiment in Massachusetts, where there is no popular demand for either of these recall provisions. An effort to substitute the bill for the adverse report of the committee failed in the house Feb. 18.

The women of New Jersey realized one of their greatest ambitions Feb. 26, when the Assembly, after hours of debate, concurred in the Senate resolution providing for an amendment to the state constitution giving women the right to vote. The House passed the measure by a vote of 46 to 5. The resolution will have to be adopted by next winter's legislature, and then at a special election the proposed amendment to the Constitution extending the right of franchise to women will have to be submitted to popular approval.

The United States Senate, by a vote of 63 to 21, and the House of Representatives, by a vote of 244 to 95, overrode Mr. Taft's veto of the Webb bill, prohibiting the shipment of liquor from "wet" into "dry" states, when intended for use in violation of state prohibitory statutes. Senator Root had attacked the bill as unconstitutional. The President had vetoed it on the same ground, saying that "The custom of legislators and executives having legislative functions to remit to the courts entire and ultimate responsibility as to the constitutionality of the measures which they take part in passing, is an abuse which tends to put the courts constantly in opposition to the legislature and executive, and, indeed, to the popular supporters of unconstitutional laws."

Personal

Judge Garrett D. W. Vroom and Judge John J. Treacy have both resigned from the Court of Errors and Appeals of New Jersey, the former because of ill health, the latter to practise law.

Judge Nathan Goff, who has been elected United States Senator of the legislature of West Virginia, is a man of ripe experience on the federal circuit bench and was Secretary of the Navy under President Hayes.

Hon. James Bryce has been appointed by the British Government a member of the Hague Permanent Court of Arbitration. He is to succeed Sir Edward Fry, formerly a member of the British High Court of Justice, who will retire from the Hague Court next August at the age of eighty.

Homer Albers, Dean of the Boston University Law School, was tendered a reception and dinner by his fellow members of the class of 1885 at the University Club in Boston Feb. 28. The occasion was the fiftieth birthday of Dean Albers, and the affair was attended by more than a dozen prominent lawyers and judges.

Arthur J. Small has been reappointed State Law Librarian of Iowa for the fifth time, for a period of six years. Mr. Small was one of the founders and organizers of the American Association of Law Librarians and was the first president, serving for three terms. He is also librarian of the Iowa State Bar Association.

Justice M. M. Neil of Trenton, Tenn., has been elected by the unanimous vote of the Supreme Court of Tennessee to succeed Judge John K. Shields, resigned, as Chief Justice of the Supreme Court. The new Chief Justice ranks as the senior member of the court, having been on the supreme bench since 1902. Before his service on the supreme bench he was judge of the Court of Chancery Appeals.

Chief Justice Stanton J. Peelle, of the Court of Claims of the United States, having attained the age of seventy years, retired from that court on Tuesday, February 11, after a term of service extending over nearly twenty-one years. The ceremonies attending the retirement were held in the courtroom, and a beautiful silver loving cup was presented to him by the court officers and employees.

Ambassador James Bryce was made the first honorary member of the Academy of Political Science at a meeting of the trustees, held March 14, at Columbia University. Mr. Bryce on returning to England will become one of the representatives of Great Britain at The Hague, and, while he did not talk at length on the topic of universal peace, he said that he felt the advance made in that direction depended largely on the support received from the United States and Great Britain.

It has been assumed that President Wilson will have the appointment of a judge of the United States Circuit Court of Appeals for the ninth circuit in July, to succeed Judge Morrow of San Francisco, who, it has been stated, will then retire from the bench. Judge Morrow may retire in July on a pension, if he chooses to do so. But retirement is not compulsory in the federal judiciary department, and as Judge Morrow is now enjoying good health and his duties are agreeable, he may not find it convenient or necessary to retire promptly on the stroke of the hour.

Chief Justice Arthur P. Rugg of the Massachusetts Supreme Judicial Court, speaking before Harvard Law School men March 2 on "The Lawyer in his Relation to Society," referred to the important changes that had come over the jurisprudence of the state during the twenty years he had been in active practice. "In 1887," he said, "came the Employers' Liability Act, an act in which Massachusetts was a pioneer in this country, with the single exception of Alabama, which was a year or two before us, and I count that law an advance in jurisprudence not only because it remedied the injustice of modern conditions by making manifest certain defects fixed in the common law, but in its larger aspects because of its influence in producing indirectly better industrial conditions. A few years later there came the provision enabling courts to sentence criminals over exceptions. When I first came to the bar it was one of the understood practices of defendants in criminal cases to get some sort of exceptions filed which of itself suspended the imposition or execution of sentence until the matter could be disposed of by the Supreme Court. I think the first year I was admitted to the bar the first volume of reports that came out contained forty-four criminal cases which involved no new or important point of law which deserved meritorious consideration of a court of last resort. The provision of the law for the sentencing of criminals over exceptions has marked a very important advance

in the administration of criminal law. Of course that leaves it still discretionary with the court to grant a stay of execution if there is any merit in the exceptions taken. Then came the establishment of the Torrens system of land legislation, and establishment of the Land Court. This has put into the Land Court almost every question of real estate law and has provided a certain and speedy way of settling and securing insurance of the soundness of title to real estate."

Bar Associations

American Bar Association. — Viscount Haldane, Lord High Chancellor of Great Britain, will come to America to deliver the annual address before the American Bar Association at its annual meeting in Montreal, Sept. 2–4. Ex-President Taft has also accepted an invitation to attend the meetings and give an address. He will speak on the general topic of the necessity for raising the standards for admission to the bar.

Kentucky. — The annual meeting of the Kentucky State Bar Association will be held at Olympian Springs, July 9 and 10, and former United States Senator Joseph W. Bailey of Texas has accepted an invitation to address the meeting on "The Initiative, the Referendum and the Recall." Other speakers and their subjects as announced by R. A. McDowell, secretary of the association, are as follows: "Why Cases Are Reversed and Other Things," Hon. John D. Carroll, Kentucky Court of Appeals; "Reporting Kentucky Decisions," James M. Yeaman, Henderson; "Some Great Lawyers of Kentucky," the Hon. Z. T. Morrow, Somerset; "Relation of Federal Compensation Act to State Laws on Damages for Personal Injuries," S. S. Willis, Ashland; "The Mechanical Side of Appellate Court Procedure," Robert L. Greene, Clerk of the Court of Appeals.

Crime and Criminal Law

A new court for delinquent girls, presided over by a woman, with women for court officers, held its first session in Chicago March 5. The judge is Miss Mary M. Bartelme, long identified with social settlement work.

A bill to parole United States prisoners became law in February. The statute is in the form of an amendment to the act of June 15, 1910, and its object is to extend the benefit of the parole law to prisoners who have been sentenced for life terms. It had been recommended by the members of the federal boards of parole, by individuals interested in prison reform, and by the Attorney-General in two annual messages.

Since the Mann law, or White Slave Act, went into effect in July, 1910, there have been 337 convictions under it, with sentences totaling 607 years and fines aggregating $66,605.50. There have been only thirty-five acquittals. One hundred and six cases were still pending at the last report. It has been pointed out that practically no cases have been lost in the federal courts, while all for similar offenses were lost in the state courts.

Frederick L. Hoffman of Newark, N. J., a leading statistical authority, has carefully examined the statistics of lynchings collected by the *Chicago Tribune*, and reaches the conclusion that lynching has steadily declined in the United States in the past twenty-five years, both actually and in proportion to population. Twenty-five years ago there were 2.6 lynchings per million

population; in 1912 the rate had declined to .67. Mr. Hoffman concludes: "It is no cause of satisfaction that there should have been sixty-four lynchings during 1912 in the United States, chiefly in the South; but the country may well be satisfied with the fact that, with a single exception, this was actually the lowest number of lynchings during the last twenty-eight years, and, without exception, in proportion to population, the lowest rate of lynching during the period for which the historical record had been preserved. Since, in all matters of social progress, the tendency is of most importance, it may safely be assumed that since the rate has steadily gone down the time is not far distant when lynchings North or South will be practically things of the past."

Centenary of the Louisiana Supreme Court.

The members of the bench and bar of Louisiana gathered in the Supreme Court room at New Orleans, March 1, to celebrate the one hundredth anniversary of the establishment of that court in the state of Louisiana. Mr. Joseph W. Carroll, president of the Louisiana Bar Association, under whose auspices the celebration was held, said that the celebration was unique in the history of the state. The speaker said that the people might well feel proud of the history of its Supreme Court, for during its hundred years it had kept faith with the state and had been unsullied by scandal or corruption. He read a letter from Chief Justice Edward Douglass White, a former member of the court, now Chief Justice of the United States, in which Judge White said that he regretted very much being unable to be present.

The minutes of the first session of the Surpeme Court were then read by Paul E. Mortimer, clerk of the Supreme Court. Governor Hall, as the head of the executive department of the state, responded in an address that was splendidly delivered. Looking back to the days of Matthews, Martin and Porter and recalling the part the Supreme Court had played, no Louisianian need be ashamed of its record, said the Governor.

The next speaker, Charles Payne Fenner, son of Justice Charles E. Fenner, who sat on the Supreme Court bench for many years, spoke on "The Jurisprudence," and reviewed at length the differences between the judicial system of the state and the other states of the Union. The speaker said the terminology of the Louisiana jurisprudence differs widely from that of other states, and that the jurisprudence itself differs in some respects radically from that of the common-law states, but 'to nothing like the extent that is generally supposed by common-law lawyers, and to nothing like the extent that might perhaps be *à priori* expected when it is considered that we have a written code of substantive law based upon the civil as contradistinguished from the common law." For, despite this fact, it is true that in a very large proportion of the cases decided by this court the law to be applied is sought from the same sources and by the same methods as are resorted to in the common-law states of the Union.

Mr. Henry P. Dart, who has made a special study of the history of the judiciary and jurisprudence of the state, followed with an interesting paper on the history of the Supreme Court from its birth up to the present time. Judge T. C. W. Ellis, of the Civil District Court bench, followed with an address that was rich in eloquence, and spoke of some of the great members of the bar who had long ago dignified the state with the reflection of their genius.

Chief Justice Joseph A. Breaux answered for the Supreme Court. He referred to the fact that the late James C. Carter, an eminent lawyer of his day, who spent the late years of his life in the study of the philosophy and growth of the law, commented most favorably upon the system of Louisiana law. While there are illustrious names in other fields of activity in the life of the state, said the Chief Justice, none are more prominent than her lawyers, for Jeremy Bentham has pronounced Livingston the first legal genius of modern times.

Bishop Davis Sessums ended the ceremonies by pronouncing the benediction.

Harvard University's Priceless Acquisition

The Harvard University Library has purchased at auction at Sotheby's, London, the extremely rare and valuable collection of early manuscripts and printed books relating to English law which was part of the great library formed by the late George Dunn of Woolley Hall, near Maidenhead. The collection consists of 355 lots. The auction price was $18,750. There is not a single piece in the collection that was not issued before the year 1600.

The library, before this recent acquisition, had probably the largest collection of Year Books in America, if not in the entire world. Its nearest rivals were the Congressional Library at Washington and the British Museum. Now no uncertainty in regard to possible competitors any longer exists. The new Year Books acquired are represented by 37 lots, three of which are manuscripts of the 14th century. Altogether in the new acquisition are more than one hundred Year Books. The ink is much clearer than in many books produced in the present century.

Some of the earlier legal classics are represented by manuscripts, such as one dating from the thirteenth century of Bracton's "De Legibus et Consuetudinibus Angliae," of which there is also a copy printed in 1569.

Sir John Fortescue's "De Laudibus Legum Angliae" is represented by five copies, including one of the rare first editions. The collection contains no less than sixty copies of Magna Carta. (The collection is described in *Law Times*, Feb. 15, p. 396.)

Miscellaneous

Secretary Knox and Ambassador Jusserand signed a convention Feb. 13 to extend for another period of five years the arbitration treaty between the United States and France which was to expire March 12. This is similar to the British arbitration convention which expires by limitation June 4, and which it was proposed to replace by the general arbitration treaty lately awaiting exchange of ratification.

Many applications for aid under the new Colorado mothers' compensation law have been pouring into the Denver Juvenile Court. Judge Lindsey has stated that under the appropriation for the present year only about forty families can be cared for. The appropriation is $4,800 and this would give forty families an average of $10 a month. The mothers' pension act has been subjected to some criticism in Chicago, as opening the door to fraud. It has been asserted that families have even moved into the county to take advantage of the fund. A sub-committee has accordingly been appointed to frame a new law.

The actual number of law schools in the United States only increased from 102 to 118 in the decade from 1902 to 1912, according to figures compiled at the United States Bureau of Education,

but the number of students studying law in these schools increased from 13,912 to 20,760 in the same period. Law students having a collegiate degree doubled in ten years. Financially the law schools show a remarkable advance. The endowment funds jumped from half a million to nearly two million dollars; the grounds and buildings tripled in value; and the total income in 1912 was $1,368,000, as against $523,000 in 1902. The 387,000 volumes in the law school libraries of 1902 had grown to 936,000 in 1912.

John H. Patterson, president of the National Cash Register Company, who with twenty-eight other officials or former officials of the company was convicted of criminal violation of the Sherman anti-trust law, was sentenced by Judge Hollister in the federal District Court at Cincinnati Feb. 17 to pay a fine of $5,000 and to serve one year in jail. The twenty-eight other defendants were sentenced to terms ranging from nine months to a year in jail and to pay the costs. The men were convicted Feb. 13 of having violated the criminal section of the Sherman anti-trust law. Judge Hollister severely arraigned the defendants, declaring that the maintenance of the competition department, with its "gloom room" and "morgue" constituted business methods that should not be countenanced. During the course of the trial, which opened on Nov. 19, and occupied more than fifty days in the courtroom, evidence was introduced which substantiated all that the Government had charged. So weak was the defense that the jury, despite the tremendous mass of testimony given, reached a unanimous verdict inside of ten hours. Formal notice of an appeal to the United States Circuit Court was given by attorneys of the defendants. The only other case under the Sherman act where prison sentences were imposed was in the so-called "turpentine" trust conviction of 1909, when five officials of the American Naval Stores Company were condemned to three months each, in addition to fines of $2000 to $5000.

Obituary

Barnes, William, Sr., a specialist in insurance law, and prominent as a former Republican leader in New York, died in Nantucket, Mass., Feb. 23, in his eighty-ninth year.

Bovee, Christian N., of the New York law firm of Woodford, Bovee and Butcher, died March 4. He was an attorney for the Metropolitan Life Insurance Company for a number of years and counsel for the Union Dime Savings Bank since 1897.

Carter, Joseph N., for nine years a member of the Illinois Supreme Court, five of which were served as Chief Justice, died at his home in Quincy, Ill., Feb. 6. He was a native of Kentucky and graduate of the University of Michigan. He served in the Illinois legislature and in 1894 was elected to the Supreme Court.

Ellwanger, William D., of Rochester, N. Y., was like his father before him an expert in the knowledge of shrubs and flowers. Mr. Ellwanger, who died Feb. 16, was at one time a partner in the oldest law firm of Rochester. Of late he had written much, both in prose and in verse, his works including "The Collecting of Stevensons," "Some Religious Helps to a Literary Style," "A Snuff Box full of Trees," "A Summer Snowflake and Drift of Other Verse and Song" and "The Oriental Rug."

Geeting, John F., a well-known Chicago lawyer, died in Washington, D. C., Feb. 28. He specialized in criminal and constitutional practice. At the time of his death he was editor of the American Criminal Reports and professor of criminal law in Kent Law School.

Henderson, Col. *Elliott*, a member of the Mississippi constitutional convention of 1890, and a brave Confederate soldier, died at Pass Christian, Miss., Feb. 12, aged eighty.

Holt, Col. *Orren Thaddeus*, former mayor of Houston, Tex., and a prominent lawyer and banker of that city, died Feb. 7.

Houghton, James Warren, Justice of the Appellate Division of the New York Supreme Court, third department, died Feb. 14. He was County Judge of Saratoga County from 1888 to 1899.

Jones, Thomas S., twice District Attorney of Oneida country and regarded one of the ablest trial lawyers in central New York, died Feb. 19 at his home in Utica, aged seventy-three.

Kilpatrick, J. D., former president of the Atlanta Bar Association, and a valued member of the faculty of the Atlanta Law School, died Feb. 28.

Major, Charles, author of "When Knighthood was in Flower" and other novels, who died Feb. 13 at his home in Shelbyville, Ind., practised law in Indianapolis and Shelbyville.

McIntyre, James William, chief of the publishing department of Little, Brown & Company of Boston, who died Jan. 9 at his home in Newton, Mass., was a master of his profession, and his efforts contributed in no small degree to the maintenance of the prestige of his firm both in law and in general publishing. An appreciative memoir of him, written by Dean Wigmore, appeared in 7 *Illinois Law Review* 440 (Feb.).

Miller, Joaquin, the "Poet of the Sierras," who died Feb. 17, in early life practised law a short time on the mining frontier in California and was for some years on the bench as a county judge in Grant county before he took to writing.

Pope, William H., formerly one of the most famous criminal lawyers of Texas, author of the "Jim Crow" law when he served in the state senate, and later state district judge, died at Waco, Tex., Feb. 15.

Valliant, Leroy B., former Chief Justice of the Supreme Court of Missouri, died March 4 at Greenville, Miss., aged eighty-four years. He was elected a member of the state Supreme Court in 1898 and served continuously for almost fourteen years.

Woodford, Gen. *Stewart Lyndon*, former Minister to Spain, died March 14 at his home in New York City, in his seventy-eighth year. He was assistant United States Attorney of New York, afterward serving with distinction in the Civil War. He was elected Lieutenant-Governor in 1866, United States Attorney for the southern district of New York in 1877, and later, member of the Greater New York Charter Commission.

H. SNOWDEN MARSHALL, ESQ.

Bain News Service

The Green Bag

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H. Snowden Marshall, New York's New United States Attorney

THE first important local appointment to be made by President Wilson was that of H. Snowden Marshall to be United States Attorney for the Southern District of New York. The choice was evidently carefully made by the President in consultation with Attorney-General McReynolds, after several strong candidacies had been considered. It resulted in the selection of a lawyer of ability commensurate with the duties of the federal district attorney in the most important of the eighty-six districts into which the United States is divided. The work of the position is by no means light or easy, as may be seen from the enormous amount of big litigation which went through the hands of the last incumbent, United States Attorney Henry A. Wise, whose term expired on April 8. The success of an Administration depends in no small degree upon the character of the men who can be counted upon to sustain the efforts of the Department of Justice in carrying out its policies, and the New York post particularly requires a man not only of sound professional training, but of vigorous and aggressive personality and the ability to think and act quickly. Mr. Marshall appears to be such a man, and the fact that he has not been active in New York politics and the party leaders did not propose his name certainly establishes a strong presumption that the appointment was made distinctly on the basis of merit.

The new United States Attorney, like his predecessor, is of Virginian stock. Though he was born in Baltimore, he is the son of Colonel Charles Marshall of Farquhar county. His father, who was a grand-nephew of Chief Justice John Marshall, was Military Secretary to General Robert E. Lee in the Civil War, and was with Lee when the latter met General Grant at Appomattox Court House to arrange the terms of peace.

Mr. Marshall was born in Baltimore Jan. 15, 1870. He was graduated from the University of Virginia in 1890, and from the University of Maryland in 1894. He first practised law in Baltimore, and was appointed Assistant United States Attorney of Maryland. This is the only public office he has ever held. He resigned in 1896 and moved to New York.

In New York City Mr. Marshall became connected with the law firm of Seward, Guthrie & Steel. Later he became a member of the firm of Weeks, Battle & Marshall, which later became O'Gorman, Battle & Marshall, the offices being at 37 Wall Street. The other partners of the firm are James A. O'Gorman, the junior United States Senator from New York, and George Gordon Battle.

Mr. Marshall was married to Miss Isabel C. Stiles of Savannah, Ga., in 1900. He lives at 128 East 60th street.

Mr. Marshall is an enrolled Democrat, but he has never been active in the organization though regarded a Tammany man, always being classed as independent.

The Supreme Court and its Slanderers

By James B. McDonough

of the Arkansas Bar

OUR Constitution is not without honor save in its own country. Speaking of it, the great English commoner, William E. Gladstone, said: "The American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." The great scholar and diplomat, James Bryce, the retiring British Ambassador to the United States, recently said of it: "Yet after all deductions, it ranks above every other written Constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle, with elasticity in details. The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring it is likely to prove. There is little in the Constitution that is absolutely new."

With few exceptions for a hundred and twenty-two years, the wisest and best men, the greatest constructive statesmen and publicists, the soundest reasoners and thinkers, including all true friends of human liberty of all countries, including our own, have given it first rank as a scheme of human government; and during a hundred and twenty-one years of that time and up to the good year of 1911, it was praised, loved, yes, venerated and worshiped by the whole American people as a guarantor of human rights and of the highest and best freedom. Our American people, under its happy arrangement and fortunate division of powers, its wisdom, its strength and justice, in preserving and protecting all rights,human as well as of property, have become a great and mighty nation far beyond the wildest and fondest dreams of any of our forefathers, the framers and founders. True, in this period it has had its trials, including the terrible tragedy of a civil war, but in all it has been vindicated as the best scheme of human government ever devised.

But in the good year of our Lord 1911, and today, it has been suddenly discovered by a school of agitators and radicals, who, according to their own evidence concerning themselves, are the greatest, best and wisest mortals of all time, that there is something radically and deeply wrong with the Constitution, and especially the judiciary; and as a consequence the Constitution through this assault on the judiciary is being murdered in the house of its friends and former worshipers. These self-styled reformers, pretending to think and reason for the benefit of the people, endeavoring as they are to destroy a government of law, and to substitute in its place the absolutism of a single individual or the absolute rule of the legislature, claim, without the slightest support in truth, to have discovered, and they accordingly assert, that the judges are the arch-enemies of the human race, that they are the uncontrollable masters and rulers of the people and

the other two departments of government, that their word and not the people's "is final and inviolate," that they are an oligarchy, that they are steeped in outworn philosophy, that they, by their rulings, have favored "the interests," entrenched privilege and wealth, thus blocking all progressive legislation of recent years, that they, the grim-visaged, wigged and gowned monsters and vampires, heartless and conscienceless, are sapping the life blood of the American people. They also assert that the Supreme Court of the United States, the arch-conspirator of all against human freedom, is the humble camel, the point of whose nose was admitted through favor and kindness, and that later this same camel, by stealth and noiseless advances, has become owner and possessor of the entire premises; that the nine men composing that Supreme Court are able to annul the will of the President, the Congress and a hundred millions of people, and that that court never had the lawful power to declare a legislative act void, and that prior to the decision of *Marbury* v. *Madison*, in 1803, there was no precedent in the civilized world for the exercise of such a power by any judicial body. If these groundless assertions were made only by uninformed and reckless agitators, it would not be worth while to give them serious discussion, because every reasonably well-informed citizen of the United States knows that these bald unsupported assertions are mere political claptrap intended to deceive and mislead the ignorant and the dissatisfied, and are made to further the political fortunes of demagogues. But are such baseless assertions made only by that class of agitators? Unfortunately they are not. They are made by many bad men who know better, and many good men who do not know better, and who honestly misjudge the causes of existing distress. Without pointing out the honest ones or the dishonest ones, the truth of history certainly demands that these serious assertions be examined into, and especially when they are made by Senators and Representatives in the Halls of Congress, by men once high in the councils of one of the great parties of our nation, by editors and magazine writers, all of whom ought to know better.

The limits of this article preclude the discussion of any of these assertions, except the false charge upon which all are primarily founded, and that is that there was no precedent in the civilized world prior to 1789, "for the review of the acts of a legislative assembly by any judicial body," and that it was not known to the framers or to the people at the time of the adoption of the Constitution, that such power was expressly given to the courts. The only trouble with these assertions is that they are untrue. The Constitution of the United States was framed at Philadelphia, in the summer of 1787. Did the framers have any precedents to guide them in lodging the above judicial power in the national courts? A brief review of the subject will convince any unbiased mind that they had numerous such precedents. Many of the framers were students and men of learning, well versed in the history of all governments, both ancient and modern. It is therefore fair to say that this judicial power was well known to them. This power of the courts, which is the power of the people speaking through the courts, to declare legislative acts void, which acts are not the people's acts, but the acts of their agents, is a most ancient power. It sprang into life with the dawn of civilization. It has existed from the beginning in some form in many kinds of govern-

ment, including pure democracies, representative republics, as well as absolute and limited monarchies. Its ancient forms and the evidence thereof will only interest the antiquary and the student. A striking and illustrious ancient example of the exercise of such judicial power is to be found in the Democracy of Greece in the brilliant age of Perikles. In the great Court of the Areopagus, the people of Greece lodged the power to declare the acts of their own Assembly void, as being in conflict with the established laws of the country. Nor was this judicial power unknown in Rome, a nation famed for the virility and wisdom of its laws. In the Code of Justinian it is recognized, and discussed. In that system it was a well-known principle that the act of a legislator in excess of his authority was a void act. The same judicial power was frequently exercised in England, prior to the Revolution of 1688. In *Rous* v. *An Abbot*, 27 Henry VI, a statute was held void. In *Prior of Castlaken* v. *Dean*, 21 Henry VII, it was determined that an Act of Parliament could not make the King to be a parson in violation of the Canon Law, which was a part of the English Constitution. In *Gadden* v. *Hales*, in the King's Bench, decided in 1686, it was held that certain provisions in the Constitution of 25 Charles II, chapter 2, were null and void, as infringing a constitutional privilege of the King. The same power has been exercised even in Germany and France, and exists today in the courts of Australia.[1]

In addition to the well-known ancient precedents, our forefathers had before them numerous then modern American precedents in which the courts had held legislative acts void. In the eleven years between the Declaration of Independence and the framing of the Constitution, nearly all the states had adopted written constitutions. Under these constitutions there had been a number of decisions prior to 1787, in which the courts had held legislative acts void. All of these were well known to the framers at the time that the convention was in session at Philadelphia. Even while that convention was in session, the Supreme Court of North Carolina in the case of *Bayard* v. *Singleton*, decided in May, 1787, held an act of the legislature of North Carolina void, because it was in conflict with the constitution of that state. This decision was well known to the framers. Richard Dobbs Spaight, one of the signers of the Constitution, discussed it publicly before he signed the Constitution. Other members of the convention also knew of the case. James Iredell, who was afterwards a Justice of the Supreme Court, was an attorney in the case. So was W. R. Davie, a member of the convention.

There are other illustrations. In Rhode Island, and probably before the North Carolina case, and in 1786, the case of *Trevett* v. *Weeden* was decided, in which case it was held that an act of the legislature of Rhode Island, depriving one of a trial by jury was void, because the same was in conflict with the *unwritten* constitution of Rhode

[1] On the subject of the power of courts to declare legislative acts void, attention is called to the decision of the Judicial Committee of the Privy Council of England. On January 30th, 1913, that body, on an appeal from the Supreme Court of the Province of Alberta of Canada, held that certain legislative acts of the legislature or parliament of the Province of Alberta were void, for the reason that said legislative acts of said parliament or legislature in effect injured or destroyed civil rights existing beyond the limits of the Province of Alberta. From this it seems that the principle authorizing judicial governmental agencies to hold legislative acts void still exists in portions of the English Government. The case referred to is the *Royal Bank of Canada et al.* v. *The King and the Provincial Treasurer of Alberta.*

Island. This decision brought on a sharp conflict and discussion between the court and the legislature, but the people generally approved the action of the court, and the legislature finally yielded, although they afterwards elected other judges. The decision, however, was not reversed, and was well known and discussed by the framers in the convention at Philadelphia.

In addition to the above well-known cases, similar rulings had been made before the framing of the constitution in the states of Virginia, North Carolina, Massachusetts, and even in Pennsylvania. In the latter state, a court of the state had in effect held an act of Congress void. Later the federal courts in effect reversed that ruling, upholding the law of Congress as superior to the law of the state.

By reference to the proceedings of the convention itself it will be found that Mr. Gerry on June 4th, expressly stated in the convention that the courts would have a sufficient check against encroachments from the other departments by their power of construing the laws which involved a power of deciding on their constitutionality, saying: "In some states the judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation."

Later, July 17th, Mr. Madison distinctly referred to the case of *Trevett* v. *Weeden*. As late as August 27th there was no objection to adopting the judicial clause of the constitution as written. On that subject Brinton Coxe says:

> As will be seen further on, there was no opposition on August 27th to organizing the judicial power of the United States, so that the Supreme Court could judicially decide acts of Congress to be unconstitutional, and hold them therefore void.

In addition, it is well known that the friends and enemies of the Constitution, in submitting it to the people for adoption or rejection, agreed that there existed in the judiciary the power to declare acts of Congress void. Hence the Constitution was adopted with that express understanding. This is clearly shown in the articles in the *Federalist*. The *Federalist* says:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

It is thus clearly demonstrated that the people of the United States adopted

the Constitution with the express understanding that the courts had the power to declare acts of Congress void. This view was entertained by all the great judges, statesmen and commentators of the time. Judge Story, who was one of the early members of the court, on that subject said:

> That this view of the Constitution was taken by its framers and friends, and was submitted to the people before its adoption, is positively certain.

Again, there were many decisions of the Federal Courts at the Circuit, and some by the Supreme Court itself, before the celebrated case of *Marbury* v. *Madison*. The first of these cases was a decision by Justices Patterson and Peters of the Supreme Court of the United States, in which they expressly held an act of the legislature of Pennsylvania void, because in conflict with the Constitution of that state. This decision was made in 1795. Before that, however, the same question had arisen in the Supreme Court of the United States, in what is known as *Hayburn's* case. With the exception of Mr. Justice Johnson, whose opinion is not known, the Supreme Court was of the unanimous opinion that the act of Congress involved in that case was void, but the court found it unnecessary to decide the question, because Congress provided some other way for the allowance of pensions. These opinions are preserved in volume 2 of Dallas Reports in a note to *Hayburn's* case. The court expressly refused to obey the act of Congress, because it was in conflict with the Constitution. This decision was in 1793, only four years after the court was organized.

The question next arose in the Supreme Court in case of *United States* v. *Todd*, in 1794. The court had no official reporter at that time, and the opinion of the court has not been preserved. However, the Court's judgment can only be sustained upon the theory that the act of Congress of March 23d, 1792, was unconstitutional and void. The case is preserved in a footnote to 13 Howard's Report, page 52. As early as 1789 Justices Iredell and Peters held that an act of the legislature in conflict with the Constitution was void. In 1795 in the case of *Pennhallow* v. *Doane*, the question was discussed in the Supreme Court, but was not decided. In that discussion the judges clearly showed that they were aware that the people in adopting the Constitution intentionally lodged the judicial power to declare acts of Congress void, in the courts. In 1796 the question was again incidentally discussed in case of *Ware* v. *Hylton*. The exact question involved in that case was whether the treaty between the United States and Great Britain of 1783 revived a debt due from a citizen of Virginia to a British subject. It has been often said that John Marshall, who was attorney for the defendant in this case, took a position as such attorney antagonistic to his opinion in the case of *Marbury* v. *Madison*. By an examination of the case it will be seen that such is not the fact. The argument of John Marshall had no reference to the extent of the judicial power arising under the Constitution of the United States. It was his contention that the act of Virginia could not be rendered void by international law, and that international law or the law of nations could not invalidate an act of Virginia, contending that the act of Virginia could only be restrained by its own municipal constitution, and as that constitution did not restrain said act of Virginia therefore the act of Virginia was valid, although the international law might be to the contrary. While the

court upheld this act of Virginia, confiscating the debt, the court sustained the plaintiff's right to recover on the ground that the treaty of 1783 restored the debt, and hence no argument or decision was made or had on the point as to whether the Constitution empowered a court to declare an act of Congress void. The opinion of the judges in that case shows clearly that it was generally conceded, at that time, that the courts had the power to declare legislative acts void when in conflict with the constitution.

In the case of *Cooper* v. *Tellfair*, decided in 1800, Mr. Justice Chase expressly states that it had been admitted by all the bar of the Supreme Court, and had been decided by the justices at the Circuit, that the Supreme Court had power to declare an act of Congress to be unconstitutional and void.

All of the above occurred before the decision of the Court in *Marbury* v. *Madison*, which was in 1803. From the beginning up to this decision, the question had been before the court, and not a judge entertained a doubt on the point, and, another thing which is a strong circumstance, there does not seem to have been a single argument made before the bar of the court at any time against the existence of such a power. In making that statement, the argument of John Marshall in *Ware* v. *Hylton* is not overlooked. As before stated, that case did not turn on any question of conflict between the Constitution and an Act of Congress. In arguing that Virginia had the power to confiscate the debt and was not restrained in so doing by any law in existence in 1777 and that the power to suspend a debt included the power to confiscate it, he said:

> The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution.

In that argument, so often misconstrued, it is expressly admitted that the courts have power to question the validity of a legislative act, when the Constitution so provides. In plain language he upheld the same principle in *Marbury* v. *Madison*. Even in that celebrated case no argument appears in opposition to the existence of such a power in the courts. From the adoption of the Constitution down to the time of the decision in this case, it seems to have been the unanimous opinion of the Bench, the Bar and the People that the latter, by express language in the Constitution, had imposed this duty upon the courts. In truth, as before stated, the great Chief Justice so held. After assigning his reasons supporting his view that an act of the legislature in direct conflict with the Constitution must yield, as the act of the creator, the people must be superior to the act of the legislature, the creature, he said: "Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written constitutions that a law, repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."

Though that decision for political reasons was criticised by the great Jefferson and his party, no amendment was proposed then or since to take this judicial power from the courts, and vest it in Congress. Therefore the people prefer that it remain where they lodged it. But the amazing assertion is made that "Chief Justice" Gibson of Pennsylvania, although he was not, at the

time, Chief Justice, delivered the ablest opinion on this subject in 1825 in the case of *Eakin* v. *Raub*, 12 S. & R. 330. By reference to that opinion it will be found that Justice Gibson admitted in that opinion that it had been universally held that courts had the power to declare legislative acts void, and it was the duty of the courts so to hold, but that the legislature also had power to pass upon the question. The majority of the court in that case including Chief Justice Tighlman, expressly held that such power was exclusively in the courts, saying: "But it is a duty, however irksome, which they are bound to perform, without regard to personal considerations, for no principle can be better established — none more conducive to personal liberty and security of property — none of which the people of this free country can more justly boast — none which so pre-eminently distinguishes our American Constitution over every other country and government, than the doctrine which has prevailed since their formation in the courts of all these states from Maine to Georgia, that the people possess the sovereign right to limit their law-giver, and that acts contrary to the Constitution are not binding as laws. The concurrence of statesmen, of legislators and of jurists, uniting in the same construction of the Constitution, may ensure confidence in that construction."

It is thus seen that this whole argument against the courts is based upon a false premise. Hence it is not only untrue, but immoral, to say that the nine men of the Supreme Court annul the will of a hundred millions of people. In America the people are the absolute masters and controllers of themselves and all their governmental agencies, and have the right to the last word always. They are the supreme power and recognize no superior. As the Supreme Court has often said, they may make and unmake constitutions at will. They may exercise all powers themselves or create governmental agencies and bestow upon these agencies just such powers as they please, and with such limitation as they may wish. No one will question the absolute right of the American people to create or abolish any governmental agency at will. They may destroy the Supreme Court, the Congress and the office of President. They have the right to destroy our representative republic, and establish an absolute monarchy, or any other kind of government, including absolutism or socialism, headed by a popular leader, if they wish. This question is one of wish, and wisdom, and not one of power. If the Supreme Court in the construction of a statute reads into it something not intended to be there, the Congress can at once pass another law changing the rule of the court. If Congress and the people were not satisfied with the reading into the Anti-Trust Act the word "reasonable," they had the absolute right at once to change the law and to make their will impertive upon the court. If the court renders a decision "striking down" an act of Congress or of the legislature of a state as in conflict with the Constitution, an amendment may be at once proposed and adopted by the people conferring upon Congress or the state legislature the necessary power. The "bakeshop" decision was rendered in 1905. Has any amendment yet been proposed giving the lacking power to the state? The people of the United States have no one but themselves and Congress to blame for the loss of revenue resulting from the invalidity of the income tax law, held void in 1895. When Congress met in December, 1895, it had the right and power to propose an amendment, calling

upon the states to call at once extra sessions of their legislatures or conventions to adopt or reject the necessary amendment. Eighteen years have passed, and an amendment has just been adopted, although the people under the Constitution could adopt one in eight months or less if they had so willed.

When the Supreme Court held that a private citizen might sue a sovereign state, Congress proposed an amendment denying that right, and it was adopted in less than three years. The thirteenth and fourteenth amendments were adopted in nine months each, and the twelfth in eight months. It is thus seen that our Constitution, if a majority of the people will it, may be easily amended. If complaint is made that less than two-thirds of Congress should have a right to propose amendments, then cure that by amending the Constitution in that respect. Such an amendment has been recently introduced. Do the people want it? They have the opportunity.

In "striking down" the acts of Congress, the court is not making a law. They are simply declaring that the will of the people, as expressed in the Constitution, is superior to the will of Congress. If that were not so, then the will of Congress would be supreme over the people, and if that principle is once established in this country, Congress can without reference to the will of the people change our form of government, at its option, making our government a monarchy, set up an hereditary king, make itself perpetual, and bestow the same power upon the heirs of the present members. This is not fanciful. It has been done in the past, and would be done in the future, if such power is given. Courts are the people's agents, to check this unlawful assumption of power. They cannot make laws. Their only power is to declare the law, deciding what is and what is not law.

If it is the purpose of these agitators who are enemies of the Constitution, to ask the people of the United States to amend the Constitution, and take from the courts the power to declare an act of Congress void, they should be candid and frank enough to treat the subject fairly. They should not attempt to falsify history by alleging that no such power was ever known or ever existed prior to 1787. They should not make the false assertion that the court for the first time assumed this power in 1803.

In pursuance of this same system of misrepresentation, these same agitators frequently assert that this power to declare a legislative act void exists today only in the United States. It is inconceivable that the public men who make that assertion could be ignorant of the existence of such a power in the courts of Australia. Australia is a wide-awake, progressive nation that has accomplished wonders in modern government. That country has in substance the same judicial system as that of the United States. The courts of that country adhere strictly to the Constitution, delaring legislative acts void when in conflict with that Constitution.

Fort Smith, Ark.

The Public Trustee of England

By W. L. Goldsborough

"Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

"1. There shall be established the office of public trustee. The public trustee shall be a corporation sole under that name, with perpetual succession and an official seal, and may sue and be sued under the above name like any other corporation sole. . . .

"7. The Consolidated Fund of the United Kingdom shall be liable to make good all sums required to discharge any liability which the public trustee, if he were a private trustee, would be personally liable to discharge, except where the liability is one to which neither the public trustee nor any of his officers has in any way contributed, and which neither he nor any of his officers could by the exercise of reasonable diligence have averted, and in that case the public trustee shall not, nor shall the Consolidated Fund, be subject to any liability . . . .

"16. This act shall come into operation on the first day of January one thousand nine hundred and eight."

I FIRST became interested in the English public trustee and his work two years ago when a copy of the act from which the above extracts are taken (6 Edw. 7, ch. 55), and of a paper read by the Public Trustee before the Royal Society of Arts, fell into my hands. As one of a committee just entering upon the work of codifying the laws of the Philippines, it seemed to me that an official on the English plan to take the place of frequently neglectful, incompetent and even dishonest executors, administrators and trustees, might be of great service in the Islands, and, for the matter of that, in the United States also. This impression was confirmed when, finding myself in London a few months ago on my way from Washington to Manila, I presented a letter of introduction from our embassy to Mr. Charles John Stewart, the Public Trustee, and Mr. Ernest King Allen, principal clerk, and spent parts of several days going through their office, studying its organization and administration, and receiving all the assistance by way of explanation and information, oral and written, which the utmost courtesy and goodwill could supply. I also received a refreshing inpression of absence of red tape, and of a thorough recording system combined with business dispatch.

The English Public Trustee Act was the outcome of a demand for greater efficiency, security and economy in the administration of estates. It had been found increasingly difficult to induce private persons to undertake the troublesome and arduous duties of executors and administrators. Many lacked the knowledge necessary to the efficient discharge of such duties; while those who had the knowledge were frequently unwilling to incur the responsibility. And when these preliminary difficulties had been overcome and a competent person had been induced to accept the burden, it was not an uncommon thing to have death, necessary absence, or other insuperable cause deprive the estate of his services just when they were most needed.

In many cases, also, the person appointed turned out to be incompetent or careless, so that the estate was neglected, and dissipated or allowed to deteriorate. Moreover, there had been a number of frauds committed by persons who had trust funds to administer. The act was designed to provide means for avoiding these difficulties and dangers, and for protecting estates from the expenses and losses which resulted therefrom. In the succeeding portion of this article an attempt is made to give in condensed form some idea of the degree of success attained by the act, and the public trustee's office organized thereunder, in supplying the needs above indicated.

Availability. The public trustee may be named as executor or trustee, or both, in a will; may be appointed administrator of a solvent estate either originally or as successor of a prior executor or administrator; may be named as trustee in an instrument creating a settlement such as a life estate, or may be appointed such trustee as successor of a previous trustee; may act either alone, or as one of two or more joint executors, administrators or trustees; and may be called upon to perform certain other duties under special Acts of Parliament. He and his staff are readily accessible to all interested parties. The central office is in London, but branch offices may be established elsewhere from time to time under deputy public trustees acting as subordinates of the public trustee. An estate or trust may be administered from the central office or a branch office as the public trustee directs. Under certain circumstances, the public trustee may decline to act as executor or administrator, or to accept a trust. For instance, he will not manage a continuing business enterprise, or administer an insolvent estate, or undertake a trust exclusively for religious or charitable purposes. But he does not decline to act in any proper case, and is especially enjoined by law to assume the administration of small estates. Where he has been named as executor in a will, and has signified his acquiescence in the designation, the will may be deposited with him for safe keeping during the lifetime of the testator, and a receipt taken therefor.

Continuity. As appears from the portion of the act quoted at the head of this article, the public trustee is at once an official guaranteed by the Government and a corporation sole "with perpetual succession." No other corporate trustee can hope to assert its permanency so confidently. In him the public have an executor or trustee who will never die, never become incapacitated, and never fail or be dissolved.

Legal Capacity. The public trustee, himself an able lawyer, has forty-one lawyers and other employees on the legal side of his office as at present organized. This force, chosen with an eye to fitness for the kind of work it is engaged on, is constantly studying and applying the laws which bear upon the special class of cases coming before it. The public trustee, with this highly specialized corps of assistants, is an expert on all questions of law which can arise in connection with the performance of his duties.

Business Capacity. The law and rules governing the public trustee's office, and the plan upon which it is organized, require him to maintain unceasing efficiency in handling all matters of a personal and business character coming under his control, and to be equipped with the varied knowledge necessary to that end. In addition to ample provision for taking over an estate and administering its fixed properties, a special department is constantly engaged

in collecting, verifying and classifying information concerning investments in all parts of the world. Investments may be made in any safe security authorized by the instrument creating the trust, and generally, upon taking over an estate, the public trustee finds that he can improve not only the character and stability of the capital, but also the income. In investing the money of an estate he distributes it geographically as well as commercially, so that it may not be subject to the fluctuations and risks of a single locality, or of a single industry. His varied and extensive experience and absolute disinterestedness make him a better guide for the care and investment of an estate and its moneys than any other corporation or individual can possibly be. A private trustee can rarely hope to do more for the estate than give it the benefit of his judgment in selecting those upon whose opinion in such matters he must rely, and is generally without means for keeping under ready observation the investment when made and thus minimizing the risk of loss or depreciation.

Economy. One of the conditions which the public trustee must meet is that his services shall be so cheap as to be available to all classes, rich and poor. In accordance with the provisions of the Public Trustee Act the fees are to be arranged from time to time so as to produce an annual amount sufficient to discharge the salaries and other expenses incidential to the working of the act and no more— the public trustee's office is to be self-supporting, but not profit-earning. The fees charged, originally low enough to be considerably less than the average expense to estates and trusts for like services, have been once reduced because they were found to be more than sufficient to pay expenses, and further reductions are expected to be made in the future. In addition to the low fees, savings are undoubtedly made in most cases through the expert knowledge brought to bear upon the administration of the estate and the placing of investments. And by employing the public trustee an estate is ever afterward saved the expense of securing and appointing a new trustee because the first one has died or become otherwise incapacitated.

Security. The public trustee's responsibility is insured by an ample government fund, the state guaranteeing his honesty. Moreover, all the officers and employees of his office are placed under bond for such sum as the Treasury may from time to time require. His books and accounts, and the money and property in his hands and under his control, are regularly audited, checked, and verified by government auditors, and at the request of an interested person a special audit by a chartered accountant may be had of an estate or trust. Subject to such information as interested parties are entitled to, and to the direction of the court, strict secrecy is required of the officers and employees of the public trustee's office in respect to every estate or trust in course of administration by him. And finally, any person aggrieved by an act, omission or decision of the public trustee in relation to an estate or trust may take the matter before the proper court, and the court may thereupon make such order in the premises as it deems just.

Expansion and Present Condition. The public trustee renders his annual report as of April first for the twelve months ending March thirty-first, and the success and popularity of the office is amply demonstrated by the report for 1912, which includes a statistical review of the four years and three months, beginning January first, 1908, and ending March thirty-first, 1912, since the act went into

effect. The number of cases of executorships, trusts, etc., accepted by the public trustee in the first three months of 1908 was 63, of the value of £384,317; for the twelve months ending March thirty-first, 1909, the number of cases was 381, of the value of £3,133,523; for the twelve months ending March thirty-first, 1910, the number of cases was 622, of the value of £4,989,191; for the twelve months ending March thirty-first, 1911, the number of cases was 877, of the value of £6,548,641; and for the twelve months ending March thirty-first, 1912, the number of cases was 1,050, of the value of £8,626,315. This gives a total of 2,933 cases, of the value of £23,681,987, in something over four years. In addition there were at the date of the report 126 trusts, of the value of about £1,000,000, in the course of being transferred from previous trustees to the public trustee; and 2,020 applications had been received from intending testators, whose estates were of the aggregate value of £44,030,000. Thus, the total value of the business of all kinds, present and prospective, negotiated by the office *in a little over four years* was approximately £68,712,000, or about *three hundred and thirty-five million dollars*. There had also been deposited with the public trustee for safe custody 1,166 wills; and the number of officials and employees in the office had grown to two hundred and twenty-five, of which eighty-five were in the accountant's department, forty-one on the legal side, twenty-two on the business (including investment and brokerage) side, twenty-one in the filing department, nine in the cashier's department, and forty-six classed as stenographers, miscellaneous clerks and messengers.

The public trustee says in his report: "Persons of means above the average have availed themselves as freely of the advantages of the statute as any other class. It would seem that these value the security of the state guarantee, the economy of a permanent trustee, and the freedom to nominate an executor or trustee who will certainly survive them, who from the measure of his success is necessarily highly skilled and experienced in his duties, and who, being remunerated, acts without any sense of personal obligation arising. Moreover, the fact that the fees are not to be profit-bearing gives a mutual character to the department, so that those who resort to it assist each other in effecting a reduction in the cost of administration. It is undeniable also that the success which has attended the work of investment has proved an attraction."

Manila, Philippine Islands.

The Impeachment of the Witness

By Rufus Walker

ONE of those attorneys who says he used to command $30,000 fees down in Kentucky, and who came to New York to become a great lawyer, but who is now trying petty cases in the city courts for a little collection agency, was to argue on behalf of the defendant a motion for a new trial.

When the case was called, he jumped to his feet, surveyed the table full of law

books at his side, and then smiled avariciously at the judge as he began his address.

The first ten minutes were spent in telling the judge how he had ruled that the stenographic notes taken at a previous trial by a court reporter who was employed by the plaintiff were privileged and could not be read in evidence for the purpose of impeaching the plaintiff on the subsequent trial of the same case. This point he iterated and reiterated until finally the judge interrupted him as follows:

"Yes, Mr. ——, I held that on the showing made by you, the stenographic notes of the reporter employed by the plaintiff at the first and second trials of this case were privileged, and could not be read in evidence as you requested for the purpose of impeaching the plaintiff's testimony at this third trial."

"Yes, sir, that is it exactly," replied the attorney, gloating over the admission and rubbing his hands in gleeful exultation as he glanced at the table full of law books at his side and continued: "I have here a great number of cases, and I shall show your honor that you have made a very grave error and that every one of these cases, yes, sir, every one of them, bears me out in my contention that the reporter's notes are not confidential and should have been admitted."

"I shall be glad to be enlightened," calmly replied the judge, somewhat irritated by the attorney's attitude.

Then the attorney began to read and quote from his cases, beginning at one corner of the table, and continuing row after row until he had consulted each volume. Each case the judge quickly dismissed with, "That was an official reporter," "That reporter was not employed by the party sought to be impeached," "That holds merely that the stenographic notes may be introduced, which I hold is bad law," or "That holds that the notes themselves are not admissible, and are merely private memoranda, not made for the purpose of binding any one."

"What I want you to show me," continued the judge, "is a case which holds that you, the defendant, can call the plaintiff's private stenographer and have him read his notes, taken at a previous trial of the same case, for the purpose of impeaching the plaintiff, without first showing that those notes are not confidential. I held that unless you showed those notes were not privileged, those notes were just as much privileged, under their objection, as were or are those of the attorney's private stenographer in his office."

"But, your honor," smiled the attorney, "this testimony was given in open court. I have taken a great interest in this case, and have searched all the state and federal reports, and there is not a single case in the whole United States — no, not even in all England or Ireland, where the other side's reporter was called for the purpose of impeachment. But I have here cases where it holds that I can call the opposite attorney and have him testify as to what took place in open court. Why then can't I call the reporter for the other side also? Proceedings in open court are not confidential or privileged, and anybody can testify to them."

"Yes, I agree with your latter statement," said the judge. "But if this has never been done before, do you think we should start anything so pernicious as this would be likely to become in the hands of an unscrupulous attorney?"

The attorney then, gathering fresh hope from this concession, launched furiously into the testimony of the case,

tirading the plaintiff, who by the way was a member of the bar, with the most bitter remarks of being a privileged liar, a falsifier, and a perjuror, whose proper home was in the county jail, where the Court would have been obliged to send him had he listened to the testimony which was offered.

The court interrupted him and cautioned him for the tenth time to confine himself to the record in the case, concluding, "If such testimony was given, why didn't you call the judge who heard it to testify from his notes? He was available, and you had the opportunity."

"Why didn't I call that, Judge? Because he made them take a non-suit!" he retorted, and then began a most outrageous and scandalous attack on that judge, concluding: "If you could have seen Hopkins, who was so sore at me that he sat up there in his chair swelled up like a big, fat, red porpoise, with tears of rage rolling down his cheeks! Why, he almost sent me to jail. Pretty near! Why he even called me a shyster, and then in place of giving me judgment as I was entitled to, he turned to the plaintiff and made him take a non-suit! What good would it have done me to have called him!"

"Mr. ——," interrupted the judge again. "Let me say this: You have defended this case as faithfully as I have ever seen any case defended. There was not a single point that you did not take advantage of, and if there was any evidence such as you now claim, I am sure you would have spared no effort to produce it. Besides, judgment has twice before been entered in favor of the plaintiff here, and each time you have had it set aside on some trivial technicality. Justice must be done some time, and as you have not shown a single authority to aid you in your motion, I must therefore overrule your motion for a new trial."

"Why, your honor, if I may get confidential, I have spoken to thirty-one judges of this court about this point, and not a single one would hold that the notes are privileged, and I am sure it will be reversible error."

"I don't know what your relations are to the judges of this court, but don't you think they may all be wrong? I do not say I can't be wrong, even after hearing all the facts and the law that has been produced in the case. However, if you are going to get confidential I may say I have spoken with one of the Supreme Court justices about this point. I am not saying what he said, but I have a great deal of respect for his opinion. Besides, in all my practice and as a member of the bench, I have never met this point before, and I have given it considerable attention myself. I could find no place where it has been allowed, and I have finally come to the conclusion that your point is wrong both in principle and in virtue. Your motion is overruled. Judgment will stand."

"Exception!" growled the attorney, and then, turning to the plaintiff, he grunted under his breath, "It will be a damn long while before you enjoy any of that money."

And then the listeners all wondered through what mode of reasoning had the judge arrived at this ruling, and what value as evidence, if any, have the stenographic notes of the reporter for the other side when he has been subpoenaed *duces tecum* and asked to read them.

Qualifications for Judicial Position

By Duane Mowry, LL.B.

IT IS not enough to say what the judicial officer shall not be. Mere negative statements can rarely, if ever, satisfactorily explain or define anything. Such statements are usually out of harmony with a truly constructive policy or seeming. They do not supply the reasonable demands of the inquisitive mind. They are disappointing.

In the quest for knowledge of any subject, it is the enlightened view, clear, positive and unequivocal, that is sought. This is informing. It is satisfying.

The ideal judge must be a good listener, honest and industrious. Need a more comprehensive definition of the worthy judge in action be suggested? Why does it not meet all of the reasonable requirements of the case? It is true that it is not a technical definition. It does not tread upon the territory of the scholar. It is not even intimated that the judgehead must be learned in the law. How then, it may be asked, can such an unscientific and "loose" definition be justified?

The answer is not difficult. Three primary requirements are contemplated by the suggested definition, viz.: the ability to listen, the possession of character, integrity, and the willingness to work. If the court has the patience to listen to what may be said in the witness box and at the bar, if he has the qualities of a decided character, a lively sense of justice and equity, if he is willing to labor diligently in order that the truth may be evolved from the law and the facts in the case in hand, so that the legal rights of the parties may triumph, surely such a judge accords with both judicial worthiness and judicial idealism.

But the need of legal learning, of having a liberal education, is not to be minimized. It is of paramount importance that the strong judge should come to his judicial responsibilities after he has passed through the schools both of theory and of experience. The judge should be a lawyer who has become pre-eminent in his profession by reason of his hard common sense, a quality which he has shown in the trial of causes; by reason of the varied experiences which his active practice of the law has given him; by reason of his disposition to dig deep and plod long and unremittingly in attempting to solve intricate and difficult problems of law and of fact; by reason of his utter and complete disregard of the *personnel* of both litigants and attorneys in every case which might be heard in his court; by reason of his ability to absorb every point of merit on either side of every litigated matter coming on to be heard before the court; by reason of his great familiarity, not only with the law, but with all debatable matters pertaining to the history of the law and of our country and its varied and increasing institutions. In a word, the really great and good judge should be a student of our country, of its needs and of its demands, as the same may be made manifest by our rapidly developing, increasing, and changing conditions, both under the constitutions and the laws enacted under and by virtue of them.

It is of small moment where, for instance, the occupant of the bench of our national Supreme Court may live or what is his political belief. These

are matters of minor importance. In making appointments to courts of last resort, it is not always wise to advance sitting members of the lower courts.

The best equipped and available member of the legal profession, on the bench or off of it, should receive this judicial distinction and honor. All thought of favoritism, of political considerations, of geographical location, should be ignored. Let the would-be appointee be a clean man, of profound learning, particularly in the law, of great industry, of an unsullied personal life, with an inherent love of legal justice. Cast aside mere reputation, which may, or which may not be, well deserved. Give us instead character in its largest and broadest sense. These are a few of the significant qualifications for the occupants of the bench of this country.

Milwaukee, Wis.

Reviews of Books

CONFLICTING USES OF ELECTRICITY

The Law relating to Conflicting Uses of Electricity and Electrolysis. By George F. Deiser, of the Philadelphia bar. T. & J. W. Johnson Co.,Philadelphia. Pp. xv, 128 + 10 (index). ($2.50.)

THE text-book which is probably the most useful to a practising attorney is one which covers a narrow subject exhaustively, for there he can find not only all the law on a case within the scope of the book, but can find it without wading through the extraneous matter and generalities of which the usual text seems chiefly to consist when definite information is desired on a specific point. Mr. Deiser's "Conflicting Uses of Electricity and Electrolysis" is an admirable example of this type. The book deals not only with a narrow subject, but with one of comparatively recent origin, the principles of which are not very generally understood. In clear and concise language Mr. Deiser lays down the general rules which control the liability of users of the electric current to the public and to each other and follows with a thorough analysis of the leading cases. The book does not discuss tort actions for the negligent use of electricity but confines itself to the more subtle problems which arise between electric light, telephone and telegraph and electric railway companies, out of the disturbing effects which electric currents in close proximity inevitably exert on each other in their normal operation.

The latter part of the book, which comprises in all but one hundred and thirty-eight pages, is a full consideration of the electrolytic action of escaping and grounded currents upon gas and water pipes, the steel work of buildings and the like. All the cases up to the date of publication have been included. The book should prove particularly useful to lawyers interested in the law of public service companies and municipal corporations.

HISTORY OF THE CALIFORNIA BAR

History of the Bench and Bar of California. Edited by J. C. Bates. With portraits. Bench and Bar Publishing Co., San Franciso. Pp. 572.

THE greater part of this book is made up of short biographies of

several hundred members of the contemporary bench and bar of California and of obituary notices of a few other recent leaders of their profession. About one-third of the book, however, consists of some prefatory chapters on the history of the legal profession in California. The author was a college-mate of the late Thomas B. Reed, and they taught school in California after their graduation from Bowdoin College until the close of the war, when Mr. Reed went back to his home in Maine. From his long residence in California, the author is thus able to write of earlier conditions with intimate knowledge, and he has absorbed a large amount of anecdotal and reminiscent lore of his profession, which makes his pages entertaining. Some of the most interesting of these stories deal with the way justice was administered in a rough frontier community.

INDERMAUR AND THWAITES' EQUITY

A Manual of the Principles of Equity: A concise and explanatory treatise intended for the use of students and the profession. By John Indermaur and Charles Thwaites. 7th ed., by Charles Thwaites, Solicitor. George Barber, London. Pp. xxxii, 515 + 46 (appendix of statutes) + 56 (index). (20*s*.)

THE treatise of Indermaur and Thwaites, designed primarily for the use of students, but incidentally for the use of the profession to a minor extent, is distinguished by great clearness of statement, and the American lawyer may find it serviceable if he desires to ascertain the English doctrines of any branch of equity. The work has been brought down to date in a careful new edition revised and in part rewritten, which cites over 360 cases that did not appear in the preceding edition. *Tulk* v. *Moxhay*, which has occasioned considerable discussion, is treated in the chapter on injunctions. The inclusion of the text of the Trustee and Partnership Acts is a convenience.

EDUCATION AND CITIZENSHIP

The Relations of Education to Citizenship. By Simeon E. Baldwin. (Yale Lectures on the Responsibilities of Citizenship.) Yale University Press, New Haven; Oxford University Press, London. Pp. 171 + 6 (index). ($1.15 *net*.)

THIS book constitutes the ninth volume of Dodge Lectures delivered at Yale University on a foundation the object of which is to promote among "educated men of the United States an understanding of the duties of Christian citizenship, and a sense of personal responsibility for the performance of those duties." The subject covered by the title of Governor Baldwin's lectures suggests the opportunity for a thoroughgoing appraisal of the purposes underlying our system of education, or for a critical survey of our institutions of higher education. Neither of these tasks is attempted; on the other hand the author has produced a series of desultory and rather commonplace discourses, embellished with literary allusiveness and aptness of comment, but thin in substance.

DONOVAN'S MODERN JURY TRIALS

Modern Jury Trials and Advocates: Containing Condensed Cases, with Sketches and Speeches of American Advocates; The Art of Winning Cases and Manner of Counsel Described, with Notes and Rules of Practice. By Judge Joseph W. Donovan. Fourth revised edition, enlarged. Banks Law Publishing Co., New York. Pp. xxi, 719. ($4.50.)

A MOST interesting book and one which it is a real relaxation to read is the latest edition of Judge Joseph Donovan's "Modern Jury Trials." Although it contains many examples of that ornate oratory which has well-nigh vanished from the court room, it is full of striking arguments, clever

bits of cross-examination, and hints upon trial work, which cannot but prove useful to the advocate. The extracts from reports of trials include the trials of Major-General Sickles, of Vanderpool, and of Beecher, the Burch divorce case, the Babcock conspiracy case, and the Haywood case. Among the opening and closing arguments and addresses are specimens of the work of Voorhees, Graham, May, Choate, Webster and Butler as well as many of more recent date. Well chosen and condensed as are the selections, it is to be regretted that they are not arranged and indexed in a more methodical order. The book should however find a place in the library of every advocate.

MARGARET DWIGHT'S JOURNEY TO OHIO

A Journey to Ohio in 1810, as recorded in the journal of Margaret Van Horn Dwight. Yale Historical Manuscripts. Edited with an introduction by Max Farrand. Yale University Press, New Haven. Pp. 64. ($1 *net.*)

THIS journal of a rough wagon trip from New Haven to Warren, Ohio, made by a girl of twenty, the niece of President Timothy Dwight of Yale, is interesting chiefly because of its vivacious description of the experiences of travel at a time when roads were poor and taverns ill-kept. The editor may properly speak of it as a "perfect gem," with respect at least to its charming animation of style, though the historian will probably find it too trivial to light up much more than the surface of the manners and customs of the period.

FORENSIC ELOQUENCE

Classics of the Bar: Stories of the World's Great Jury Trials and a Compilation of Forensic Masterpieces. V. 2. By Alvin V. Sellers. Classic Publishing Co., Baxley, Ga. Pp. 321. ($2.)

THE selections here brought together are of the same character as those in the first volume, previously reviewed in these pages (21 *Green Bag* 641). The forensic orators here represented include Ben Hardin of Kentucky, A. K. Syester of Maryland, Daniel Webster, William J. Hadley of Albany, and Senator Daniel W. Voorhees of Indiana. The speech of Webster in the White murder trial at Salem, Mass., occupies many pages. Besides the arguments in criminal cases the compiler has gone outside the purely forensic field to reprint Mayor Gaynor's address delivered before a club on "The Trial of Jesus from a Legal Standpoint."

NOTES

The report of the twenty-fourth annual meeting of the Virginia State Bar Association at Old Point, Va., last August contains the president's address on "The Present Status of the Trust Question," delivered by J. F. Bullitt of Big Stone Gap; the annual address by Judge Martin A. Knapp, presiding Judge United States Commerce Court, on "Transportation and Combination"; and the following papers: "Constitutional Amendment in Virginia," by Fred Harper of Lynchburg; "Some Observations on the American Doctrine of Judicial Review," by James E. Heath of Norfolk; "Is Virginia Entitled to Compensation for the Cession of the Northwest Territory to the National Government?" by E. Hilton Jackson, of Washington, D. C.

The Proceedings of the thirty-sixth annual meeting of the Illinois State Bar Association contains the discussions of reform of procedure, recall of judges, and recall of judicial decisions which took place at the sessions in Chicago last April. The meeting was opened by an able address by the President, Horace Kent Tenney, and representatives of bar associations of many other states were present in response to an invitation and expressed their views.

The Proceedings of the twenty-ninth annual meeting of the Missouri Bar Association at Kansas City on September 22 and 23, 1911, contain the President's address and several other interesting papers, among them, "The Artificiality of Our Law of Evidence," by Simeon E. Baldwin.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Age of Consent. "The Age of Consent and its Significance." By Anna Garlin Spencer. *Forum*, v. 49, p. 406 (Apr.).

The article deals with the close relation between a low age of consent and the employment of young girls in prostitution. The majority of the states of the country have raised the age of consent, though not always to the age of eighteen, which is necessary for full protection. But many states having "nominally high age limits have actually law protection" on account of lack of penalties and confusion between old and new laws.

Anticipatory Breach. See Contracts.

Biography. "The Remarks of the Attorney-General and the Response of Mr. Judah P. Benjamin, at the Dinner in the Inner Temple Hall, London, June 30th, 1883." 1 *Georgetown Law Journal* 146 (Mar.).

The farewell of Mr. Benjamin to the English bar.

Commerce Court. "The Commerce Court Question." By Samuel O. Dunn. *American Economic Review*, v. 3, p. 20 (Mar.).

"The foregoing discussion has led to several definite conclusions regarding the points involved in the Commerce Court controversy. These are that as the law now stands: First, the cost of maintaining the Commerce Court is not a needless expense. Second, expedition in the hearing of rate cases is desirable, and has been increased under the Commerce Court act. Third, the present jurisdiction of the courts over questions of law and over mixed questions of law and fact involved in rate cases is such that expert knowledge on the part of the judges that decide them and uniformity in their decisions are highly desirable. Fourth, the Commerce Court has not manifested a greater tendency to interfere with the work of the commission than other federal courts have or probably would, but has upheld it in a larger proportion of cases than the circuit courts or the Supreme Court. Fifth, the court has not manifested a bias in favor of the railways, for it has decided a larger proportion of cases against them than either the circuit courts or the Supreme Court. Sixth, the Commerce Court, by holding that shippers might appeal from the commission to it, did assume a wider jurisdiction than the law gives it, but its decisions in the important cases in which it has overruled the commission have apparently followed closely precedents established by the Supreme Court. The case for the court's abolition has not been established; not, at least, on the grounds assigned.

"All these things may be true, and yet the present system of federal regulation may be defective because of faults in the statutes which created the Interstate Commerce Commission and the Commerce Court, and under which they work. It may be that the law should make clear that the courts are not to review the commission on issues of fact at all. This unquestionably would reduce the importance of having a special court to review the commission's decisions."

"The Commerce Court." By Assistant to the Attorney-General James A. Fowler. *North American Review*, v. 197, p. 464 (Apr.).

"It is true that out of twelve cases decided by the Supreme Court on appeal from the Commerce Court ten have been reversed, but as they were the first cases heard by the Court and there were seven reversals out of eleven appeals from the circuit courts, this but demonstrates that this branch of the law is an intricate one, and shows the advantage in having the cases heard by a court familiar with its principles. The court will, of course, at once adapt itself to the views of the Supreme Court, and if permitted to continue criticism of its action will doubtless soon cease."

Conflict of Laws. "When will the English Courts Follow a Foreign Grant of Probate or Administration?" By E. Leslie Burgin. 29 *Law Quarterly Review* 38 (Jan.).

"Summarizing the decisions, it may be said that unless a very strong case of inconvenience is brought to the notice of the English courts, the appointment made by the courts of the domicile will be given effect to in this country."

"The Extraterritorial Force of Personal Statutes." By F. Granville Munson. 13 *Columbia Law Review* 314 (Apr.).

"If the idea of a statute personal, therefore, is referred to as from the civil law, it should be understood that the writer is speaking of the civil law as it once existed rather than as it exists today and merely to use a convenient term in contrasting the idea of a personal law with a law depending on territoriality."

"*Locus Regit Actum* and Wills of Foreigners in France. By P. Gide. 29 *Law Quarterly Review* 42 (Jan.).

Conservation of Natural Resources. See Water Power.

Consular Officers. "Rights of Consular Officers to Letters of Administration under Treaties with Foreign Nations." By Frederic R. Coudert. 13 *Columbia Law Review* 181 (Mar.).

"From the standpoint of international relations and the position of the United States, as a leader in the cause of amicable relations between the nations, it is hoped that the Supreme Court will take a broad view of these questions unaffected by any doctrine of state rights which, where international considerations are concerned, should not be allowed to play a role which may cripple the efficiency of our National Government and tend to isolate us in the family of nations."

Contingent Remainders. See Perpetuities.

Contracts. "The Rescission of Executory Contracts for Partial Failure in Performance, II." By C. B. Morison. 29 *Law Quarterly Review* 61 (Jan.).

Continued from 28 *L. Q. Rev.* 398 (see 24 *Green Bag* 562).

"An absolute refusal to perform is no more than an offer to rescind, though is it sometimes called 'anticipatory breach.' If the offer to rescind is accepted, the contract is rescinded. In cases of repudiation the intention of the defaulting contractor is all-important. In cases of actual breach of sufficient importance to justify rescission, the intention of the party in default is quite immaterial, as the question is: Does the breach amount to a sufficient failure of consideration to justify rescission? It may be that an actual breach sufficient to warrant rescission is not only involuntary, but has occurred in spite of every effort of the party committing it to fulfil his promise."

"The Doctrine of Consideration." By Clarence D. Ashley. 26 *Harvard Law Review* 429 (Mar.).

"After all these years of discussion and adjudication, well-trained lawyers are still in doubt as to fundamental questions concerning consideration. There is not even a full agreement as to what it is. I believe that an able judge might, by an authoritative statement, overrule the entire doctrine, and declare that the common-law rule of consideration is not now enforced."

See Legal History.

Courts. See Commerce Court, Social Legislation.

Criminal Law. See Legal History.

Direct Government. "'People's Rule' on Trial — The Oregon Election, November 5, 1912." By G. H. Haynes. *Political Science Quarterly*, v. 28, p. 18 (Mar.).

"The data clearly indicate that the greater the number of measures upon the ballot, the smaller the proportion that will be approved. This probably results both from the relatively slight importance of some of the measures and from the increasing fatigue and decreasing attention of the voter. An initiative measure stands little chance of enactment unless it is a very brief proposal of a single, simple change in existing law. The voters are showing a canny wariness as to involved schemes for the radical 'reform' of their system of government, submitted for their yes or no."

"A Teutonic Institution Revived." By John D. Shafer. 22 *Yale Law Journal* 398 (Mar.).

"Let the people resume the privilege of determining directly and in their own persons what they will do or have done, as their ancestors did long ago. The referendum is therefore not a transitory invention of doctrinaires, but a practical, long tried institution, about to be brought back to us on the tide of time."

Election Laws. "The Rotten Boroughs of New England." By Chester Lloyd Jones. *North American Review*, v. 197, p. 488 (Apr.).

It will surprise many to learn that anything like the rotten borough system of British parliamentary representation exists in this country. Yet a competent expert in political science can point out these conditions: —

"Suppose an undeveloped state, such as Illinois was in 1850, had guaranteed to every town or county a fixed representation in the legislature and suppose that these towns, jealous of their rights, refused to give up their 'sacred constitutional right of representation.' If this had been done perhaps some little frontier settlement which has since been left on one side as a piece of driftwood, untouched by the inflow of population, would now outvote Chicago. That would be un-American, but cases of that nature are not unknown in America.

"Nine states are today bound by constitutions which protect just such a situation as this. The worst examples are in New England, where with the exception of Massachusetts not a single commonwealth is established on a true popular basis of representation. Except in Massachusetts, every New England state bases its representation in some degree on localities instead of voting strength. The districts to which representatives have been allotted have changed in population, but the constitutions have not changed. The governments have lost their democratic character and have become in some cases extreme examples of governments by the few — little twentieth-century oligarchies.

"The result is not explained by any growth of bossism. This oligarchy is one established by the constitutions, not by parties. How does it all come about?"

Evidence. "Declarations in the Course of Duty — Herein of Refreshing Recollection." By A. N. Whitlock. 11 *Michigan Law Review* 376 (Mar.).

The doctrine of declarations in the course of duty receives a logical exposition and Dean Wigmore's extension of that doctrine and of the doctrine of refreshing recollection is cited with approval.

Extraterritoriality. See Conflict of Laws.

Federal and State Powers. "The Exercise of Federal Authority over Interstate Commerce as a Police Power." By William C. Woodward. 1 *Georgetown Law Journal* 129 (Mar.).

"By the Constitution the states divided only the field within which authority over commerce might be exercised, not the ends and aims which its exercise might be intended to accomplish. And the exercise of control by the federal government with that portion of the field conveyed to it, whether in the interest of health, fair trade, morals, or the general welfare, is not an infringement on state rights, but in aid thereof."

"The Constitutional Right of Secession." By Judge Eugene B. Gary, South Carolina Supreme Court. 76 *Central Law Journal* 165 (Mar. 7).

A lengthy argument reviving the theory of "state's rights."

Government. "The Need for a Constitutional Convention in Illinois." By W. F. Dodd. 7 *Illinois Law Review* 496 (Mar.).

The present difficulty of amending the constitution is analyzed; while the writer recognizes that many constitutional changes of importance are urged, he does not champion any specific measures.

"The Parliament Act and the British Constitution." By Edward Jenks. 13 *Columbia Law Review* 232 (Mar.).

In reply to Sir William Anson, Mr. Jenks defends some of the views he expressed in 12 *Columbia Law Review* 32 (See 25 *Green Bag* 83).

See Direct Government, Election Laws, Federal and State Powers, Separation of Powers, Social Legislation.

History. "The Hayes-Tilden Controversy for the Presidency." By Henry Watterson. *Century*, v. 86, p. 3 (May).

An interesting "inside history" of the great contest, written by one who had a personal share in it and has deep appreciation for the character of Tilden.

International Arbitration. "International Arbitration of Justiciable Disputes." By William W. Thayer. 26 *Harvard Law Review* 416 (Mar.).

"If the growing tendency to confine the object of international arbitration to the 'settlement of disputes between states . . . on the basis of respect for law' is to prevail, then non-justiciable disputes will have to be excluded either implicitly or expressly from arbitration treaties. The scope of international arbitration would then correspond exactly to the scope of municipal law as administered by the courts. Non-justiciable disputes which diplomacy had failed to adjust could be settled by mediation more properly than by arbitration. . . .

"The preceding remarks may seem somewhat reactionary to pacifists who hope for and ultimately expect a world treaty for the arbitration of all international disputes without reservations. On the other hand, it may well be that the desired result can better be attained by treaties like those proposed by President Taft than by those of the Central American type: first, because they will meet with less opposition from opponents of the international peace movement in that they do not appear to be so extreme; and secondly, because the test of justiciableness, like the principles of municipal law, can be readily expanded to keep pace with the development of international civilization and the requirements of international opinion."

Interstate Commerce. See Commerce Court, Federal and State Powers.

Irrigation. See Water Power.

Legal History. "Procedure in the Feudal Curia Regis." By George Burton Adams. 13 *Columbia Law Review* 277 (Apr.).

A striking article, evidencing an enormous amount of work in the investigation and comparison of sources. The trial of the Bishop of Durham for treason, at the beginning of the reign of William Rufus, is the subject of a careful study.

"From the cases which I have been able to bring together in text and notes, it does not seem to me possible to say that any definite procedure, or order of procedure, was required in the great Curia Regis as formally necessary. We can only say that certain forms or rules were so common, or in the case of some of them perhaps so universal, that there is a presumption that they were formal and required, of the nature of fixed rules.

"There should be a formal opening in which the case of the plaintiff or appellant is stated; to this the defendant, or the accused, should make a formal answer, *contradicere*, or formally abandon his case. In the trial there might be much set argument and explanation addressed to the court by the parties, or their representatives, apparently under no very formal regulations, and evidence oral or written might be produced, and members of the court were free to interrupt by question or objection. Probably both parties, certainly the accused, or the defendant, had the right to retire from the court and take counsel with his own men, but he could not have such counsel from the members of the court: they were his judges. The court rendered judgment from time to time, as the suit went on, upon such questions as arose, probably in the absence of the accused, and might even turn a judgment upon a special point into a final judgment upon the case as a whole. We get no evidence of any formal process by which a judgment was reached, by vote or otherwise. The majority opinion of the court plainly made the judgment, but what the opinion of the majority was seems to have been ascertained by free discussion and indicated often by the more or less disorderly outcries of the members of the court. When it was known, the party who had gone out was recalled and the decision formally announced to him, either by the moderator or by some member of the court designated for the purpose. The part taken by the King, or by the moderator of the court, in the ongoing of an ordinary case, and the amount of indirect influence which he might have on the

making of the final decision are left somewhat in doubt. It seems reasonably clear that when the King was a party in the case he took no part, or almost no part in the proceedings.

"When we have, however, taken everything into account which seems to be at all formal, it must still be said that in judicial proceedings before the great Curia Regis there was much informality and much of the freedom of discussion of a deliberative body. This is only what we should naturally expect at a time when no sharp line was drawn, either in action or in theory, between the legislative and judicial functions of the Curia."

"The Original Drafts of the Statute of Frauds and their Authors." By Prof. Crawford D. Hening. 61 *Univ. of Pa. Law Review* 283 (Mar.).

With Dean Costigan's recent article on the authorship of the Statute of Frauds (see 25 *Green Bag* 192) this paper unites in offering scholarly results in the investigation of original documentary sources. Professor Hening has gone deeply into the subject of the original drafts, copies of which are produced.

"Indictments for Adultery and Incest before 1650." By Arthur Cleveland. 29 *Law Quarterly Review* 57 (Jan.).

Disproving the statement frequently made by legal historians that there was no common law jurisdiction of adultery for three centuries previous to the Commonwealth Act of 1650, and that this offense together with that of incest was cognizable only in the ecclesiastical courts.

"Debt, Assumpsit, and Consideration." By Prof. W. S. Holdsworth. 11 *Michigan Law Review* 347 (Mar.).

The distinguished writer attempts to state in his own way some of the results of the work of Ames, Pollock and Street.

Martial Law. "Martial Law." By Col. H. C. Carbaugh, U. S. A. 7 *Illinois Law Review* 479 (Mar.).

An exposition of the general subject, *Ex parte Milligan* and other federal cases being dealt with; there is a passing reference to the recent West Virginia cases of *Nance* and *Mays*. See p. 238 *infra*.

Municipal Ownership. "Municipal Ownership of Public Utilities, I." By Carman F. Randolph. 22 *Yale Law Journal* 355 (Mar.).

The first part of an extended opinion on the legal aspects of municipal ownership.

Patents. "The New Equity Rules as they Affect Patent Infringement Suits." By Otto Raymond Barnett. 7 *Ill. Law Rev.* 465 (Mar.).

"While the new rules should automatically obtain in all cases unless otherwise ordered by the court, nevertheless the court should have authority, in the sound judgment of the court and with the consent of counsel, to order that in specific cases the testimony may be taken and the case presented for hearing under the practice which has obtained for the past fifty years. Such modification of the new rules would, on the one hand, render impossible the abuses which often arose under the old rules, and, on the other hand, would avoid the embarrassment limitations and complications which in certain cases will be inevitable under the new rules."

"The Oldfield Bill." By Otto Raymond Barnett. 22 *Yale Law Journal* 383 (Mar.).

"If it be urged that evils exist in our patent system, and that this article merely criticizes the Oldfield Bill without suggesting anything better, the reply is that in so far as there are faults in our patent system, they relate to matters of procedure rather than to matters of substance. The theory and principles of our patent system are absolutely sound."

"Burden of Proof in a Suit for Profits in Infringement of a Patent." By Needham C. Collier. 76 *Central Law Journal* 39 (Jan. 17).

Discussing *Westinghouse Electric Mfg. Co.* v. *Wagner Electric & Mfg. Co.*, 173 Fed. 361, 97 C. C. A. 621; same case on appeal in Supreme Court, 32 Sup. Ct. Rep. 691.

Perpetuities. "*Whitby* v. *Mitchell* Once More." By John Chipman Gray. 29 *Law Quarterly Review* 26 (Jan.).

Professor Gray now pays fuller attention in this article to the views of Mr. Charles Sweet, who defended a year ago the doctrine of *Whitby* v. *Mitchell* in 12 *Columbia Law Review* 199 and elsewhere. See 24 *Green Bag* 262.

Procedure. "Legal Efficiency." By Henry W. Jessup. 4 *Bench and Bar* (N. S.) 55 (Mar.).

An application of the principles of "efficiency engineering" to the subject of the law. An interesting passage deals with punctuality as a judicial virtue.

"It so happens that I have tried cases in almost every Judicial Department of the state. I have gone into the trial of a case in the Adirondack regions at nine a.m., with a half hour off at noon and an hour off at six and an evening session until ten p.m., getting in from ten to eleven hours a day and disposed of a case in three days that would have taken three weeks in New York County, convening at the fictitious hour of ten-thirty a.m., adjourning at one, reconvening at two o'clock sharp (the word 'sharp' is a euphemism), and adjourning promptly at four. That is, a possible four and one-half hours which really means three and three-quarters hours' actual work done. Everybody knows this is true. Somebody ought to say it. And yet, from time to time, in order to keep up the spotlessness of the judicial ermine, when some poor devil of a lawyer pleads for delay or asks to be passed for the day when our interesting system of calling the calendar finds him unprepared in a particular case in one of these one hundred courts, there promptly appears an article in the paper attributing the law's delay to the lawyers, and containing some expressions of his views by the presiding judge, stating that he was ready to try and had called a cer-

tain number of cases in which appeal for delay had been made by unready lawyers."

See Legal History, Patents.

Public Service Corporations. See Municipal Ownership.

Quebec. "The Legal System of Quebec." By F. P. Walton. 13 *Columbia Law Review* 213 (Mar.).

The somewhat complicated legal system of the Province of Quebec is here described by a member of the Montreal bar.

Railway Rates. See Commerce Court.

Real Property. "Power of Life Tenant to Dispose of the Fee." By Prof. Albert M. Kales. 7 *Illinois Law Review* 504 (Mar.).

The subject is treated from the standpoint of Illinois law.

See Perpetuities.

Roman Law. "The Vocation of America for the Science of Roman Law." By Rudolf Leonhard, University of Breslau. 26 *Harvard Law Review* 389 (Mar.).

"Roman law has a value for all nations, for two reasons. In the first place, the Roman jurists worked out a technical method of applying law which has furnished models for every other law, even for wholly different legal systems. Secondly, Rome developed certain fundamental principles of private law which are characteristic of the special civilization of Europe. For both reasons America above all other nations has a vocation to foster Roman jurisprudence. First, because there is in America an excellent national technique of jurisprudence which may be compared with the Roman counterpart in order to shape an ideal theory of a perfect exercise of the art of judicial decision of civil causes. Secondly, because the United States is the only country in which the different national cultures of Europe have been united in a new culture. Moreover, Munroe Smith has shown clearly that there are many legal analogies between ancient Rome and the United States arising from their common republican constitution. (18 *Columbia Law Review*, 1904, p. 523 ff.) Therefore the duty of commenting upon and expounding the common interests and the common ideas of right and law of the greater-European civilization has devolved primarily upon New Europe."

Separation of Powers. "Separation of Powers: Administrative Exercise of Legislative and Judicial Power, II." By Thomas Reed Powell. *Political Science Quarterly*, v. 28, p. 34 (Mar.).

The second installment of a paper referred to in 24 *Green Bag*, p. 400. The point of view is in no sense controversial, attention being centered on an analysis of judicial decisions respecting the exercise of administrative functions.

Social Legislation (Constitutionality). "Social Legislation and the Courts." By W. F. Dodd. *Political Science Quarterly*, v. 28, p. 1 (Mar.).

"There are under this clause ['due process of law'] no fixed or definite standards for determining what laws are constitutional and what are unconstitutional." Judges are "policy-determining officers" whose political philosophy "is a matter of vital importance. . . . Judges are thus exercising political functions, without corresponding political responsibility; and inasmuch as such functions are being exercised in a manner opposed to public sentiment, popular criticism of the courts is a necessary consequence. . . .

"Except for the rather unfortunate lapse in the New York bake-shop case (*Lochner* v. *New York*, 198 U. S. 45) the Supreme Court of the United States has in the main taken a liberal attitude toward legislation aimed to meet new social and industrial needs." The writer also points out a distinct liberalizing tendency in the Supreme Courts of Wisconsin, Kansas, Michigan, and Illinois, *inter alia*.

"In solving the problems which arise from the unduly conservative attitude of state courts on constitutional questions, the following steps may be necessary or desirable: —

"(1) Amend section 237 of the federal Judicial Code so as to permit a wider appeal from state courts to the United States Supreme Court in cases involving federal constitutional questions.

"(2) Introduce an easier method of amending state constitutions, in those states whose constitutions are now difficult to amend.

"(3) Remove 'due process of law,' 'equal protection of the laws,' and other clauses of a similar character from state constitutions, where those clauses merely duplicate limitations upon state action contained in the federal Constitution.

"(4) Require that no statute be declared unconstitutional unless the decision of the court is concurred in by more than a bare majority of the judges."

See Municipal Ownership.

"The Progressiveness of the United States Supreme Court." By Charles Warren. 13 *Columbia Law Review* 294 (Apr.).

An interesting summary, compiled with much care, of the progressive state social legislation the constitutionality of which has been upheld by the Supreme Court.

Statute of Frauds. See Legal History.

Tariff. "Schedule K." By N. L. Stone, formerly Chief Statistician of the Tariff Board. *Century*, v. 86, p. 111 (May).

Full of information regarding the particular effects of the existing high tariff on the wool-grower, the manufacturer, the workman, and the consumer.

Trade-Marks. "The Ingenuity of the Infringer and the Courts." By Edward S. Rogers. 11 *Michigan Law Review* 358 (Mar.).

The principles which should govern the protection of trade-marks are clearly developed, with copious citations of cases.

"Registration of Trade-marks." By J. Nota McGill. 1 *Georgetown Law Journal* 152 (Mar.).

Uniformity of Laws. "The Effect of the Uniform Warehouse Receipts Act." By Barry Mohun. 13 *Columbia Law Review* 202 (Mar.).

"Those who have taken an active interest in the Uniform Warehouse Receipts Act have hoped that its passage by the several states would accomplish a real public service. The progress thus far made seems to justify a realization of that hope."

Water Power. A number of able articles on this subject are published in 19 *Case and Comment*, March, 1913. They include: "Who Owns the Water Powers?" by Rome G. Brown; "Governmental Diversion of Nontidal Waters," by George J. Couch; "Percolating Water and the Common Law," by Henry P. Farnham; "Correlative Rights in Percolating Waters," by L. A. Wilder; "The Law of Irrigation in the Far West," by Hon. John B. Clayberg; "Early History of the Doctrine of Appropriation," by Joseph R. Long; and "The Reclamation of the Arid West," by Hon. Stanley E. Bowdle.

Wills and Administration. See Conflict of Laws, Consular Officers, Real Property.

Workmen's Compensation. "The Law of Procedure under the Illinois Workmen's Compensation Act." By Samuel A. Harper. 7 *Illinois Law Review* 474 (Mar.).

The author seeks to refute the objections (1) that the arbitration provisions illegally oust the courts of their jurisdiction, and (2) that the injured employee cannot enforce collection of the compensation due him under the act.

Latest Important Cases

Banking. *Bank Guaranty Law — Discrimination by State against National Banks.* U. S.

The Supreme Court of the United States upheld the constitutionality of the Kansas Bank Guaranty Deposit Act of 1909 in *Abilene National Bank* v. *Dolley*, decided Mar. 17 (L. ed. adv. sheets, no. 10, p. 409). The act was held constitutional about two years ago after objection by state banks, but the national banks of Kansas still persisted in their fight against the law.

The opinion of the Court (Holmes, J.) was brief, in view of the previous decision upholding the act in *Assaria State Bank* v. *Dolley*, 219 U. S. 121. The Court said in part: —

"The ground peculiar to this case is an alleged discrimination against national banks. . . . A good deal of the argument seems to be that the statute will make state banks so attractive to the public that the national banks will suffer. It is replied that experience has not justified the prophecy. But even if it had, there is nothing to hinder the states from permitting a competing business and doing what Kansas has done with intent to make it popular and safe. The national banks are free to come into the scheme. The suggestion that they could not come in and remain national banks is simply a statement of the situation of all competitors. They cannot retain the advantages of their adverse situation and share those of the parties with whom they contend. The statutes of the United States when they do not attempt to prohibit competition with national banks do not forbid competitors to succeed."

Illegitimacy. See Marriage and Divorce.

Juvenile Delinquency. *Commitment to Reformatory During Minority for Petty Larceny — Equal Protection of the Laws — Habeas Corpus.* Ga.

In *Taylor* v. *Means*, 77 S. E. 374, the Supreme Court of Georgia rendered a decision, March 1, refusing to grant a writ of habeas corpus for the release of a thirteen-year-old boy from the Fulton County Industrial Farm, a reformatory institution to which he had been committed three years before for a small misdemeanor.

The petitioner brought habeas corpus proceedings, setting up that he was entitled to the possession and services of his son, and the respondent, who was the superintendent of the Industrial Farm, answered that the son was a minor who had been convicted of a misdemeanor, which it appeared was the theft of a five-cent bottle of "Coca Cola" from a soda fountain, and who had been sentenced to the institution in accordance with the provisions of section 1271 of the Penal Code of 1910, which provides for the sentencing of minors convicted of misdemeanors to an industrial farm or similar reformatory institution, for a term ending with the minor's attainment of his majority, commit-

ment being subject to parol or discharge before majority if the minor shall have sufficiently reformed to justify such a step.

The Court (Beck, J.) unanimously held that the sentence was legally imposed and that habeas corpus would not lie. The provisions of the Penal Code in question were held not to violate the guaranty in the Fourteenth Amendment of equal protection of the laws, merely because the sentence to the reformatory was for a term much longer than sentences of other persons to the county jail and hard labor for similar offenses. It was also decided that the conviction would not be held void because of the trivial value of the chattel stolen.

The facts of the case have evidently been grossly exaggerated in the public press. During his three years in the reformatory the boy had "learned to read a passable letter," and something of the treatment to whch he had been subjected may be gathered from the fact that he had been allowed to return to his home for a month's stay shortly before the habeas corpus proceedings were instituted.

Marriage and Divorce. *Illegitimate Issue of Slave Marriages.* Mass.

The *Dred Scott* decision was recalled in the decision of the Supreme Judicial Court of Massachusetts March 14, which ordered a new trial in the case of Frederick H. Merrick and others, who sought to secure rights in property occupied by George F. Betts. The property involved, which was in Cambridge, was left by Frederick Merrick to his heirs upon the termination of certain life estates. Merrick, the testator, who was once a slave, died in Cambridge in 1888. The Land Court, and later the Superior Court, found for those seeking an interest in the property, for $4080. It was contended by the tenant that there was no legal right in the demandants to the property, because they were offspring of invalid marriages. This contention was overruled by Judge Morton in the lower court and the case taken to the Supreme Court on exceptions.

The Court (Sheldon, J.) said in part: —

"The Justice at the trial overruled as a matter of law the tenant's contention that slaves held as such in slave states before the war could not marry, and ruled that under proper conditions they could marry and have legitimate issue. He explained his meaning as to this by his statement to the tenant's counsel, that the marriage between the father and mother of Fred Merrick was a lawful marriage. . . .

"Looking at the decisions in other courts, under the common law, the great weight of authority appears to be that slaves, while held as such, were incapable of contracting a valid marriage and of having legitimate offspring. The Supreme Court of the United States has declared it to be 'an inflexible rule of the law of African slavery, that the slave was incapable of entering into any contract, not excepting the contract of marriage.'

"The wretched condition of slaves (even of free negroes) and their utter deprivation of all civil rights were described in the opinion of Taney, C. J., in the *Dred Scott* case, and however the authority of that decision may have been shaken by later events, the accuracy of his statements as to negro slaves has not been disputed."

Martial Law. *Power of State Governor to Declare State of War.* W. Va.

In an opinion handed down by the West Virginia Supreme Court of Appeals, March 21, the right of the Governor not only to declare martial law, but to appoint a military commission, is reaffirmed. The opinion was rendered in the case of "Mother" Mary Jones, Charles H. Boswell, Paul J. Paulson and Charles Bartley, against Governor Hatfield and members of the Military Commission, asking for a writ of habeas corpus to compel the Governor and military authorities to turn the petitioners over to the civil authorities. The petition denied the right of the Governor and the Military Commission to try persons apprehended outside the military zone of the Eanawha County coal fields.

The opinion stated that the Governor has the right to arrest out of the military district all persons who shall willfully give aid, support or information to persons within the zone who break the laws. It further states that the Governor and Military Commission has the right to detain or imprison persons apprehended outside the martial law section. The court does not consider that the declaration of martial law or the creation of a Military Commission are in contravention of the constitutions either of the state or of the United States.

A similar opinion was rendered Dec. 19 by Judge Poffenbarger in the habeas corpus cases decided by the same court. We quote from the syllabus (*State ex rel. Mays* v. *Brown*, 77 S. E. 243): —

"The Governor of this state has power to declare a state of war in any town, city, district or county of the state, in the event of an invasion thereof by a hostile military force or an

insurrection, rebellion or riot therein, and, in such a case, to place such town, city, district or county under martial law.

"The constitutional guaranties of subordination of the military to the civil power, trial of citizens for offenses cognizable by the civil courts in such courts only and maintenance of the writ of habeas corpus are to be read and interpreted so as to harmonize with other provisions of the Constitution authorizing the maintenance of a military organization and its use by the executive to repel invasion and suppress rebellion and insurrection, and the presumption against intent on the part of the people, in the formulation and adoption of the Constitution, to abolish a generally recognized incident of sovereignty, the power of self-preservation in the state by the use of its military power in cases of invasion, insurrection and riot.

"It is within the exclusive province of the executive and legislative departments of the Government to say whether a state of war exists and neither their declaration thereof, nor executive acts under the same, are reviewable by the courts, while the military occupation continues."

(See editorial in *New York Law Journal*, Mar. 26, 1913.)

Self-Incrimination. *Statutory Immunity — Prosecution for Conspiracy.* U. S.

An important decision, concerning the liability of an officer of a corporation to prosecution for conspiracy to commit an offense against the United States, was rendered by the United States Supreme Court in *Heike* v. *United States*, 227 U. S. 131 (L. ed. adv. sheets no. 7, p. 226), decided Jan. 27.

An officer of a sugar refining company, whose testimony before a federal grand jury engaged in investigating alleged violations by the corporation of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), consisted chiefly of documentary evidence drawn from the corporation's books and papers, and produced by him in obedience to a subpoena, cannot defeat a prosecution for a conspiracy to commit an offense against the United States by effecting entries of raw sugars at less than their true weights, by a claim of immunity founded on the proviso to the act of February 25, 1903 (32 Stat. at L. 904, chap. 755, U. S. Comp. Stat. Supp. 1911, p. 1314), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under the interstate commerce and anti-trust acts, where the evidence given in the former proceeding does not concern the present one in any substantial way, and has no such tendency to incriminate him as to have afforded a ground for refusing to give it, even apart from the statute and the fact that it came from the corporation's books.

The Court, speaking through Mr. Justice Holmes, held in part: —

"The petitioner contended that as soon as he had testified upon a matter under the Sherman act he had an amnesty by the statute from liability for any and every offense that was connected with that matter in any degree; or, at least, every offense towards the discovery of which his testimony led up, even if it had no actual effect in bringing the discovery about. At times the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play. . . .

"Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment 5. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, chap. 83, 27 Stat. at L. 443, U. S. Comp. Stat. 1901, p. 3173, which read: 'No person shall be excused from attending and testifying,' etc. 'But no person shall be prosecuted,' etc., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, 'was not co-extensive with the constitutional privilege.' *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 611, 55 L. ed. 873, 878, 31 Sup. Ct. Rep. 676. Compare act of February 19, 1903, chap. 708, § 3, 32 Stat. at L. 848, U. S. Comp. Stat. Supp. 1911, p. 1312. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Ev. § 2261."

The Editor's Bag

THE PROPOSED NEW YORK COURTHOUSE

THE proposed new courthouse for the county of New York, for the construction of which Mr. Guy Lowell has been appointed architect, promises to be of an impressive and distinctive character. A courthouse of circular form is a novelty, yet what is likely to be the largest courthouse in the world, and may well be dignified by a style of architecture differentiating it from the other massive structures of a modern city, falls so naturally into the round mould that one may quickly lose sight of the unconventionality of Mr. Lowell's design in one's admiration of its reasonableness. A huge building was called for, with more than sixty court rooms and ample provision for justices' chambers, jury rooms, and other appurtenances besides. The bulk of the structure alone would go a long way toward giving it an imposing appearance, and perhaps would indicate a relatively plain exterior as certain to prove most effective. The circular form seems to meet the requirements of beauty with as much success as those of utility. This is largely because of the immensity of the structure, which will cover the area of four city blocks, with a diameter of five hundred feet, and rise to a height of more than ten stories. While neighboring skyscrapers will tower above it, it will be so set off by the open spaces of the new civic centre that it will loom up impressively at a distance, being seen through the vistas that the new arrangement of buildings will permit, and will offer the same stately and beautiful façade from whatever direction it is viewed.

We can readily believe that the published drawings fail to give an adequate notion of the beauty of the structure, because they isolate it from the surroundings which the architect must have had in mind in forming his design and fail to indicate the harmonious effect likely to be attained, and also because the texture of the materials and play of light and shade on columns and balustrades will set the finer features of the design into sharper relief. Probably the effectiveness of the great colonnade that will surround the building at the height of several stories above the street level will not fully be appreciated until the courthouse has reached an advanced stage of construction.

Mr. Lowell sought his inspiration in the simplicity of an adaptation of the Roman and Greek styles, and the design has the strength which is derived from these perennial sources of artistic stimulation. The work he has already done in the simpler styles well fits him to accomplish this great undertaking without producing a building of disagreeably severe lines. The rigidity of the circular form will be relieved by the four large porticoes. While it has been said that a circular building never yet made a straight-lined portico a part of itself,

this building will be of such vast circumference that we believe the rectangular features of the exterior will fit with remarkable harmony into the general conception.

A PROPOSED CONSTITUTIONAL AMENDMENT

THE pending constitutional amendment in New York State relating to employers' liability and workmen's compensation, while not exemplifying the evil of the recall of judicial decisions in its worst aspect, is plainly an attempt to set the courts right on the exercise and interpretation of the police power and to overcome the reactionary judical attitude apparent in the *Ives* case.

The proposed amendment (Senate Bill No. 118, Assembly Bill No. 409) is as follows:—

Section 19. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized shall be held to be a proper charge in the cost of operating the business of the employer.

The elective workmen's compensation act which was set aside in the *Ives* decision is widely recognized not to have been free from defects, but the Court of Appeals could have declared it unconstitutional as class legislation, without basing its finding on ultra-conservative interpretations of the scope of the police power and the meaning of the guaranty against the taking of property without due process of law. If courts are disposed to take a reactionary view of the meaning of the constitution, it is but a natural remedy to amend it, so that it will clearly express the wider meanings desired and make narrow construction impossible. A constitutional amendment of that kind will incidently operate as the recall of a judicial decision, but is something more than that, and it is this broader purpose of clarifying the constitution, rather than merely of overturning a judicial decision, which dignifies such an amendment and renders it legitimate. If on the other hand the amendment is adopted not as a piece of well-considered constitutional legislation, but substantially as a re-enactment of the defeated statute in constitutional form, it illustrates all those evils which we commonly associate with the proposed recall of decisions. It is bound to reflect the effort to meet some special and temporary exigency, rather than the purpose of strengthening the permanent foundations of law, and to result in burdening the constitution with matters properly statutory and in bringing confusion and disorder into the laws by the piecemeal mode of procedure employed. When such a decision as that in the *Ives* case is pronounced, the primary need is to elucidate the constitution so that there can in future be no mistake

about the meaning of the police power and due process of law; the need of correcting the specific application of these principles of the constitution is secondary. The scope of the police power, rather than the form of a workmen's compensation statute, is an appropriate subject for a constitutional amendment. The police power needs to be so clearly defined that there can be no doubt that it embraces the imposition of liability without fault, when such liability is conducive to the health, safety, and welfare of the public, and that there can be no doubt that the interests of employees are conserved as effectually as those of any other social class. If an amendment setting forth only general principles, and ignoring the special subject of workmen's compensation, were adopted, we believe that the fate of future workmen's compensation acts could safely be intrusted to the discretion of a court sure to feel bound by the clearer enunciation of constitutional guaranties. The public should at least be willing to take the chance, and risk having the coveted measure set aside by an unreceptive and recalcitrant court.

For these reasons we are not able to approve wholly of the proposed amendment pending in the New York legislature, though not for the reasons given by the eminent committee of the New York County Lawyers' Association. Yet our objections relate more to the form of the amendment, as needlessly specific and invading the field of statute law, than to its substance, for the constitution of New York obviously needs to be changed, and the amendment is sufficiently concerned with the police power in its broader aspects and sufficiently harmonious with the existing constitution, to offer no obstacles to consistent and logical constitutional construction in future and to be entitled to consideration as something better than clumsy legal patchwork. Mr. Burlingham, in his dissenting report, preferred the form of amendment proposed by the Association of the Bar of the City of New York, as more satisfactory than the form which the legislature has already passed, but put aside his personal preferences in view of the importance of giving the legislature power to change the existing system of employers' liability. The amendment, while not ideal, seems free from the danger of which fears have been expressed, and perhaps if it is adopted the constitutional convention likely to assemble some time within the next two years can eliminate some of its statutory provisions and throw it into more suitable form.

A PROVINCIAL SCOT

HOW little the change that has come over the legal profession in Scotland may be divined from the following characterization of Lord Cockburn, from an article by W. G. Scott-Moncrieff in the *Juridical Review*[1]: —

> Cockburn was a Scotsman of a type which no longer exists. In his rank of life, through constant intercourse with the greater world of England, not to speak of the Continent, men have necessarily become much more cosmopolitan than they were in days when the only link between the Edinburgh Courts and parliamentary life in London was the Lord Advocate for the time being, who traveled between the two cities in coaches, public or private, and made the weary journey, we may well suppose, as seldom as possible. Cockburn could hardly have conceived the day when quite a body of advocates would spend their nights in sleeping carriages, and divide their business hours between Edinburgh and Westminster; nor could he have imagined that the time would come when a greater judicial prize than the Lord Presidentship would attract the ambition of Scottish legal talent. He does not seem to have had that educational connection with the Continent which our older generation of lawyers enjoyed.

[1] 24 *Juridical Review* 302 (Jan.)

There is no evidence that he ever crossed the Channel.

FOR THE PROMOTION OF JUSTICE

EVERY man, woman and child cries for justice. It appears to be the crying need of all time. As private and public justice outside of ethics and easy principles of morals is administered through court and lawyer, whatever the profession will discuss during this year will be of interest.

For the first time in the history of national organizations, the American Bar Association is going to set a national precedent when the thirty-sixth annual meeting of the association is held outside of the United States, in Montreal, Sept. 2 to 4. Former Premier Laurier of Canada gave the assurance that scarcely a nobler ideal would be the union of the two countries. The chief topics for discussion at this meeting of the bar will be practically the same as in state bar associations. Former President William H. Taft may probably deliver the annual address; and there is a possibility that he may be the next president of the association.

The twenty-eighth conference of the International Law Association, on invitation of the Spanish government, will be held at Madrid, beginning on Sept. 22. The president of this association was the lamented prime minister of Spain, Canalejas, who was assassinated. The Marquis of Alhucemas, late minister of foreign affairs, has been chosen to succeed to the presidency of the association. The proceedings in this international body of lawyers and jurists are governed largely by what the different countries of the world deem most important to justice. Committees will report on evidence, foreign judgments, aviation, divorce jurisdiction, etc.

Justice has been said to be the insurance which we have on our lives and property; to which may be added, and obedience is the premium which we pay for it.

A BUSINESS JUDGE

MANY stories are told of a certain well-known and highly respected judge in Missouri, who wastes no time in vexatious delays.

Some time ago he was called to St. Louis to try a case. After hearing evidence all day, he adjourned the court until eight o'clock in the morning.

"Eight o'clock, your honor!" said one of the St. Louis attorneys. "Why, in the city our judges never begin to hold court until ten o'clock."

"Well," said the judge, "if you must have country judges, you must bear with country ways. Court will meet at eight o'clock while I am on the bench." And the court did.

On another occasion he granted a change of venue from St. Louis to Cooper County. The defendant's counsel, an ex-Governor, had looked up the regular terms of court in the Cooper County circuit, and found that there was no regular term for some months. As he was anxious for delay, the lawyer was much surprised when, after granting the change of venue, the judge said, "I will set this case for a week from next Monday."

"But, your honor, there is no term of court in Boonville for several months."

"You are mistaken, Governor," said the judge. "I live in Boonville, and hold court at any time. Moreover, the Constitution guarantees a speedy trial, and I am sworn to support the Constitution."

But a speedy trial was just what the Governor did not want for his client, and so he continued:

"I can't be in Boonville during that month. That will be my regular vacation."

"You hear what your lawyer says," remarked the Judge to the prisoner. "Your trial will begin at the time stated, and if the Governor cannot be present you would better arrange to have some one else to represent you."

The trial was held as stated, and the lawyer was on hand.

CONSTITUTIONAL SABOTAGE

A CORRESPONDENT who shall be nameless wrote to the *Green Bag* as follows:—

the Peoria Illinois Star of January 18th and 20th 1911 prints that an Aunt of Mine left 40 acres coal land Ise written to Officials from Secretary Knox to the County Clerk to find out when it was She died and Who it was got what She left. I've taken the clippings to Lawyers and They tell me that They cannot get an answer to Their inquiries I went to the Legalaid Association and get the same Answer from Them. it is too much trouble for the County Clerk to tell me when it was that She died and the Probate Clerks answer is no such names on the records well it looks to Me like one gang is trying to blame the other and one will not tell and the other das.nt and I guess each think if I can stand it They can and it is great fun while I hold the Bag if that is not Constitutional Sabotage what is it. She had no children

THE HABIT OF WORDY ARGUMENT

More than one judge of late has attributed the increasing length of trials to the growing habit of repetition at the Bar. It is not a new complaint. "He was careful to keep down repetition to which the counsel, one after another are very propense; and, in speaking to the jury on the same matter over and over again, the waste of time would be so great that, if the judge gave way to it, there would scarce be an end, for most of the talk was not so much for the causes as for their own sakes, to get credit in the county for notable talkers"——thus it is written in the biography of Lord Chief Justice North. A certain amount of repetition (says the *Globe*) is, of course, necessary for emphasis, to say nothing of comprehension. Lord Parker, in a humorous speech he made at a law students' dinner a day or two before his elevation to the House of Lords, remarked that when he was at the Bar he made it a practice to repeat each argument at least twice. And the new Lord of Appeal's practice never required him to address a jury! —*The 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.

USELESS BUT ENTERTAINING

"I'm certain, William," she began,
"When Johnny grows to be a man,
And his mind's bias finds expression.
He'll choose the medical profession.
Last night I noticed at the table
How thoughtfully he cautioned Mabel
About the hurtfulness of pie."
"His talents," William answered, "lie,
Judging from what I heard and saw,
Rather along the lines of law:
Though all he told her might be true,
He ate his pie and Mabel's too."

—*Lippincott's.*

A Milwaukee lawyer tells this story: "It was in one of the rock-ribbed Democratic districts of Mississippi. During a Congressional election, someone asked an old "colonel" if they had no Republicans in the district. The old timer replied that some years before a Republican had been a candidate for Congress, had received two votes and was promptly arrested for repeating." —*Exchange.*

"Prisoner at the bar," said the judge, "is there anything you wish to say before sentence is passed upon you?"

"No, my lord, there is nothin' I care to say; but if you'll clear away the tables and chairs for me to thrash my lawyer, you can give me a year or two extra." —*Tit-Bits.*

Shortly before his death the late Chief Justice Fuller presided at a church conference.

During the progress of a heated debate a member arose and began a tirade against universities and education, thanking God he had never been corrupted by contact with a college.

"Do I understand the speaker thanks God for his ignorance?" in terrupted the Chief Justice.

"Well, yes," was the answer; "you can put it that way if you want to."

"All I have to say then," said the Chief Justice, in his sweetest musical tone, "is that the member has a good deal to thank God for." — *Pathfinder.*

The Legal World

Monthly Analysis of Leading Legal Events

President Wilson, by delivering his first message before Congress in person, by announcing his plan to consult with members of both houses with a view to perfecting the details of important legislation, and by the keen interest he is showing in the tariff bill, makes it clear that the Administration will assume its full share of responsibility in matters of legislation. The legislative machinery of the nation is likely to move with greater speed and sureness in consequence of this policy. A perfect tariff bill is an impossibility, for experience alone can show where a reduced tariff succeeds in equitable adjustment of the many conflicting interests affected and where it fails as a broad statesmanlike measure. It is impossible to determine positively at this time that the tariff bill evolved by the co-operative action of the Executive and Congress will certainly prove superior to such a bill as Congress might enact without advice or "interference" from the White House. Yet Mr. Wilson's intelligent watchfulness, and his occupancy of a lofty position which serves to focus public opinion of every shade, are likely to count for something, and if the aims of the President are realized the Executive may be able to exert a steadying and salutary effect on the legislation of the next four years. The enthusiasm of an idealistic President is likely to be curbed somewhat by the magnitude of the practical problems facing the nation, and the outlook for sound, carefully drawn currency reform and anti-trust legislation, after the tariff has been disposed of, cannot be said to be distinctly unfavorable. The attitude of the President as a definite factor in legislation may give the country a more efficient legislative machinery than it has had for some time, with beneficial effects on the laws of the land. But it is too early to predict the probable course of the new Administration.

The reform of judicial procedure has made few gains during the past month. The most hopeful sign comes from Illinois, where the state bar association, by its unanimity of action in support of a carefully framed proposed practice act, has brought very powerful pressure to bear upon the legislature of Illinois.

A measure is before the Massachusetts legislature on which there is some hope of securing favorable action. It is designed to lessen the frequency of new trials by permitting the framing of separate issues and taking of special verdicts, to enable the appellate court to correct errors of the trial court without sending back the case for a second trial.

Some encouragement may be found in the fact that trials of civil actions in the Superior Courts of Massachusetts have been expedited during the past few months by the action of the justices in

insisting that attorneys shall be ready for trial when their cases are reached. Fewer motions for a continuance are allowed and fewer excuses for postponements are offered now than at any time within the memory of the present members of the Superior Court.

Reform of procedure continues to enlist active discussion in New York, but there is nothing definitely accomplished to report.

Reform in the method of impaneling juries in New Jersey, taking this function from the sheriffs, has reached a deadlock in the legislature, but there is a prospect of President Wilson and Acting Governor Fielder securing a satisfactory enactment by such methods of persuasion as brought about the passage of Mr. Wilson's seven anti-trust bills.

The prompt enactment of a law adding a new judge to each of the five courts of Common Pleas of Philadelphia promises that relief for congested conditions which the Law Association of Philadelphia lately decided to be immediately required. Governor Tener cannot be said to have added to his popularity by signing a measure which many citizens evidently consider to endanger the prospects of the proposed Municipal Court, and the constitutionality of the law is likely to be attacked. A special committee of the Law Association went into the question of constitutionality carefully in a report presented last December, reaching favorable conclusions. There are indications that efforts will be made to bring about passage of a municipal court bill without a constitutional amendment, so the project of the Law Association to move toward a municipal court by securing a constitutional amendment may be blocked. The situation in Philadelphia illustrates the drawbacks of that rigid system which results from the insertion of statutory provisions in the Constitution, and obstacles in the path of reform are likely to hinder greatly the establishment in the Quaker City of an inferior court system modeled on that of Chicago.

The proposed improvement of Boston's system of inferior courts still awaits the pleasure of a slow-moving legislature.

Meeting of the Illinois Bar Association

A strong sentiment in favor of the reform of practice, procedure, and pleading was shown by the two hundred delegates who attended the thirty-seventh annual meeting of the Illinois State Bar Association, held at Springfield, Ill., April 8–9. After a discussion which lasted several hours, the association unanimously went on record as favoring as much expedition as possible in the trial of cases and numerous changes in the practice act which will tend to simplify practice in the courts of the state. Two bills were discussed. One was framed by the committee appointed by the association, senate bill 193. The committee had been working on amendments to the bill for the past four years. The other was senate bill 325, which is very similar to the English Judicature Act. The association decided to appoint a steering committee of seven to work in the interest of senate bill 193 and urge its adoption by the state legislature.

The delegates, while differing in opinion slightly as to details, all favored and admitted the need of simplification of procedure. In the state courts there are five or six codes of procedure, including the common law code, the municipal code of Cook county, the probate and chancery codes and some statutory cases that have a code all their own.

Judge Harry Higbee of Pittsfield, in

his opening address as president of the organization, made a clear and concise statement of the situation in Illinois with respect to practice. He advocated a number of reforms and favored the change from unanimous verdicts in civil suits to a two-thirds verdict. He urged limitation of the right of appeal, to bring about the determination in the trial court of all suits involving small property rights and no questions of law of general importance.

Edgar B. Tolman, chairman of the Committee of Law Reform, said that it is essential that something be done to lessen delay, something to make more certain the final result of a trial, and something to lessen the expense of litigation.

Edward C. Kramer of East St. Louis in discussing the proposed reforms maintained that it is not proper that judges should be mixed in politics, and urged the non-partisan election of judges.

Herbert Harley of Manistee, Mich., who spoke on "The Courts of Ontario," advocated life tenure of judges and showed how the Canadian courts avoid the delays incident to the Illinois system. Albert M. Kales described "The English Judicature Act" in an informing paper. These two papers contrasted the certain and speedy methods of English and Canadian courts with those prevailing in Illinois.

William E. Higgins, Professor of Pleading and Practice in the Kansas University school of law, who is investigating methods of procedure in other states on behalf of the state of Kansas, with a view to further improvements in the system of that state, made an address on "The Popular Dissatisfaction with the Administration of Justice," in which he pointed out what might be done to reduce the delays and expense of litigation.

The banquet which ended the meeting was successful. Following are the officers elected for the ensuing year: president, Robert McMurdy, Chicago; vice-presidents, Edward C. Kramer, East St. Louis; James M. Sheehan, Chicago; William F. Bundy, Centralia; secretary-treasurer, John F. Voigt, Mattoon.

Mr. McMurdy, the new president, who was vice-president last year, is a native of Kentucky and the son of a clergyman. He was educated in Chicago and received his law degree at the University of Michigan in 1880. He has held many public or semi-public positions, including those of lecturer on Medical Jurisprudence at Hahnemann Medical College, member of the Illinois legislature, president of the Chicago Alumni Association of the University of Michigan, president of the Chicago Law Institute, member of the Illinois Practice Commission, lecturer on Legal Ethics in the John Marshall Law School, and in 1904, one of the Roosevelt Presidential electors. He also wrote a legal novel called "The Upas Tree," which has attracted much attention.

Illinois Society of the American Institute of Criminal Law and Criminology

Justice William N. Gemmill of the Municipal Court of Chicago, in an address delivered April 8 at the second annual meeting of the Illinois State Society of the American Institute of Criminal Law and Criminology, criticised the administration of the criminal law. In Cook county during the past year, Judge Gemmill said, 21 per cent of all criminal cases in the Municipal Court were nolle-prossed before trial, and 14 per cent of the quasi-criminal cases were non-suited. To remedy this practice of the prosecuting attorneys, Judge Gemmill urged legislation that

non-suits should be taken and cases nolle-prossed only with the consent of the court. The speaker recommended the abolition of the grand jury system, holding that many criminals guilty of felonies are liberated because of failure of the grand jury to return indictments. He recommended immediate trial of criminal cases on information filed. The practice of escaping punishment on the part of convicted criminals by appealing was criticised. He said one way to remedy this in Cook county was to have the court of appeals in continuous session. The indiscriminate release of prisoners on parole was also criticised. The practice of releasing professional criminals on *habeas corpus* was deplored by the speaker, who stated that in Cook county last year 152 prisoners convicted, were thus released, and of this number 69 were professional crooks.

Miss Lucy Page Gaston, anti-cigarette worker, called attention to the Lyon-Magill anti-cigarette bill pending in the legislature, and discussed the cigarette as a vice and crime breeder. Judge Gemmill referred to prosecutions in the Municipal Court of Chicago and said: "There is no more demoralizing agency than the cigarette. In 25,000 people I have had before me on criminal charges 75 per cent have been cigarette smokers."

Dr. William Healy, director of the Juvenile Psychopathic Institute of Winnetka, delivered the principal address on the second day. By studying the individual you can predict his career, was his opinion. The speaker quoted an able professional criminal as saying, "The first step towards understanding or the scientific handling of at least professional criminality in America lies in the establishment of a central bureau of identification, and a natural facing of several aspects of the problem."

"Through a summarized estimation of certain factors," said the speaker, "we may best give, not only the general diagnosis of the individual make-up, but also the eminently practical outlook or prognosis under various possible environmental conditions."

"A Working Program for an Adequate System of Collecting Criminal Statistics in Illinois" was discussed by several speakers. A large number of other papers and reports were received.

The officers who served during the past year were re-elected. They are: president, Justice William N. Gemmill, of the Municipal Court, Chicago; vice-president, E. A. Shively of Springfield; secretary, C. G. Vernier, University of Illinois; treasurer, W. W. Cook, University of Chicago.

Personal

Henry A. Wise, recently United States Attorney for the southern district of New York, whose term expired on April 8, has formed a law partnership with Ernest A. Bigelow, and they will practise at 15 William street, New York City, as the firm of Bigelow & Wise.

Professor Bruce Wyman, whose attainments as an expert in the powers and obligations of public service corporations have of late years brought him a consultative practice, has been appointed consulting counsel of the New England Railroad Lines in matters affecting interstate commerce.

Richard E. Sloan, formerly Associate Justice of the Arizona territorial Supreme Court and lately United States District Judge for Arizona, William M. Seabury, for over ten years a member of the New York City bar as well as of the California and Arizona bars, and James Westervelt of the New York and New Jersey bars, have formed the firm of Sloan,

Seabury & Westervelt, with offices in Fleming Block, Phoenix, Ariz.

Rt. Hon. Ignatius J. O'Brien, K.C., has been appointed Lord Chancellor of Ireland to succeed Rt. Hon. Redmond Barry, K.C., who has retired because of ill health. The new Lord Chancellor is a native of Cork, and obtained his education at the Catholic University. A brilliant career at the bar, especially in the Chancery and Bankruptcy courts, led to his advancement in 1911 and 1912 to the posts of Solicitor-General and Attorney-General for Ireland.

Albert R. Savage of Auburn, Me., who succeeds William Penn Whitehouse of Augusta as Chief Justice of the Supreme Judicial Court of Maine, was formerly county attorney, probate judge, and speaker of the Maine House of Representatives, and has been Associate Justice of the court since 1897. Justice Whitehouse retires on half pay on account of age. He will rest for a while, and perhaps visit Europe in the course of the year. He is a lover of nature, a good hunter and an enthusiastic fisherman.

Sir Robert John Parker, one of the Justices of the Chancery Division of the English High Court, succeeds the late Lord Macnaghten as Lord of Appeal in Ordinary, taking the title of Lord Parker of Warrington. Lord Parker's elevation is unprecedented, no other puisne judge having became a Lord of Appeal without first serving as a Lord Justice. As a Chancery judge he had occasion to deal with many patent cases and he is skilled in that branch of the law, and the *Law Journal* speaks highly of "his fine judicial spirit, his strong inclination to disregard mere technicality, and his urbane air of scholarship." Mr. Justice Sargant receives the vacant place in the Chancery Division.

Miscellaneous

A woman suffrage constitutional amendment was defeated in Michigan in a special election held April 7. Initiative and referendum and recall, the pensioning of firemen, municipal ownership, and liquor license local option were all adopted.

Miss Emily Southmayd of New York City has presented Yale with $125,000 to found a chair of equity jurisprudence in the Yale Law school in memory of her brother, the late Charles F. Southmayd, who was a law partner of Joseph H. Choate and William M. Evarts.

The last case to be decided by the Hague Permanent Court was of no great importance, but illustrative of the orderly method of settling international disputes. During the Tripolitan war Italian warships seized two French steamers plying between Marseilles and Tunis. They were captured because they had on board an aeroplane and members of the Turkish Red Crescent, whom the Italians thought did not belong to the order, but were surreptitiously taking in the aeroplane to use in the war. The French Government complained of the seizure as a violation of the laws of war regarding neutrals. Italy promptly released the ships and asked for the reference of the question to the Hague Court, to which the French Government agreed. The court sustained the French contention and decreed that Italy should pay $400 as damages.

Obituary

Babbitt, Charles Jacob, who practised law in Columbia, S. C., and later in New York City, died in Boston, April 4.

He engaged in library work and received an offer from Japan to found a public library there on American lines. He did much literary work, his books including "Law Applied to Motor Vehicles" and "Hand-List of American Statute Law."

Bischoff, Henry, one of the most learned and capable Justices of the New York Supreme Court, was killed by a fall in an elevator well, March 28. Justice Bischoff, who was born in New York in 1852 and educated in the New York public schools and at the Columbia Law School, was the oldest Justice of the Supreme Court in New York County in point of service. He was elected to the bench of the Court of Common Pleas in 1890, which court was merged in the Supreme Court in 1894. He was a man of high character and ideals, a judge of highest standing in his profession, and known as a hard worker, who used to say that he had not taken a vacation for over twenty years.

Black, Frank S., Governor of New York from 1897 to 1899, died at his farm at Freedom, N. H., Mar. 22. A native of Maine, he obtained his education at Dartmouth College, from which he was graduated in 1875, and followed journalism while he studied law. As a lawyer and politician he was distinguished by natural quickness of wit, by a mental equipment developed by assiduous training and preparation, and by a rugged integrity which made him always true to his convictions and courageous in defending them.

Brown, Addison, for twenty years Judge of the United States District Court for the Southern District of New York, died in New York City, Apr. 9, in his eighty-fourth year. He was born in Massachusetts, of an old Puritan stock, and was graduated at Harvard College in 1852, and at Harvard Law School in 1855. After several years' practice of his profession in New York City he received the federal judgeship in 1881, and became a recognized authority on admiralty law, his opinions in upwards of two thousand cases brought before him during his judicial service constituting a remarkable monument to his erudition. He was also a serious student of botany and astronomy. His observations on the corona in the solar eclipse of 1878 were published by the Smithsonian Institution, and he was one of the authors of Britton and Brown's "Illustrated Flora of the United States and Canada."

Heiskell, Gen. *Joseph Brown*, last but one of the surviving members of the Confederate Congress, member of the Tennessee constitutional convention of 1870, and Attorney-General of Tennessee from 1870 to 1878, died near Memphis Mar. 7, in his ninetieth year.

Lewis, George H., first dean of the Drake Law School of Des Moines, Iowa, financier and pioneer resident of that city, died Mar. 16.

Pearsall, Thomas E., one of Brooklyn's most successful and active lawyers in his time, and a former law partner of Supreme Court Justice Isaac M. Kapper, died April 5. He owned what was said to be one of the most complete law libraries in New York County.

Spruance, William C., appointed in 1897 Associate Judge of Delaware, under the new constitution of that year, died in Wilmington Mar. 12, at the age of eighty-two. He retired on the expiration of his twelve-year term in 1909.

Warwick, Charles F., a Philadelphia lawyer of remarkable professional and literary attainments, and formerly District Attorney, City Solicitor, and Mayor of Philadelphia, died April 5.

HON. WILLIAM PENN LYON
OF WISCONSIN

By Courtesy of the Milwaukee Free Press

The Green Bag

Volume XXV June, 1913 Number 6

The Late Ex-Chief Justice William Penn Lyon of Wisconsin

By Duane Mowry

THE announcement of the death at San Jose, California, on the 4th of last April, of the Hon. William Penn Lyon, a former Justice and Chief Justice of the Supreme Court of Wisconsin, brings to mind the public career of one of Wisconsin's eminent citizens and worthy public servants.

Justice Lyon ceased to be a member of the Supreme Court of Wisconsin on January 1, 1894, after having served as one of its members for twenty-three years, the last two years of which period he was its Chief Justice *ex officio*. Prior to his appointment to the bench of the Supreme Court in 1871, Justice Lyon was one of the judges of the Circuit Court, having served in that capacity for five years, his home town being Racine. After his retirement from the Supreme Court, Justice Lyon was one of the members of the State Board of Control, which had under its immediate care and charge the several penal and charitable institutions of the state. Recently Mr. Lyon had been living at the home of a daughter, Mrs. J. O. Hayes, at San Jose.

The subject of this notice was born in Chatham, Columbia County, New York, October 28, 1822. He was, therefore, at the time of his death, in his ninety-first year. His early education was obtained in the country schools of New York and in his father's store. This was supplemented by a year's training in select schools. In 1841, with his father, he came to Wisconsin. He began the study of law in 1844, and was admitted to the bar in 1846. He moved to Racine, Wis., in 1855, and lived there until the breaking out of the Civil War. He was district attorney of his county and a member of the state legislature in 1859 and 1860, in the latter session being elected speaker of the assembly.

Mr. Lyon's ancestors were Quakers, a faith to which he always clung. Regardless of his religious faith, however, when Fort Sumter was fired upon, he raised a company and went to the front as a part of the Eighth Regiment, the famous Eagle regiment. Later he was promoted to the colonelcy of the Thirteenth regiment of Wisconsin volunteer infantry, serving with bravery and distinction, and was brevetted a brigadier-general at the close of the war.

Justice Lyon's record on the bench of the highest court in Wisconsin was above

reproach and highly honorable, if not pre-eminent. It is quite possible that that record was, by comparison, somewhat dimmed by reason of the greater ability, not to say brilliancy, of some of his associates, particularly Chief Justices Dixon, Ryan and Orton. Nevertheless his judicial career was characterized by industry, integrity and a firm and steadfast purpose to administer legal justice in accordance with law and the rules of the court. He was an exceptionally conscientious judge and his opinions are absolutely free from the external influence which sometimes influence courts.

One of the notable opinions which Justice Lyon wrote for the Court is reported in the 76 Wis. 177, and is entitled, *State ex rel. Weiss et al.* v. *District Board of School District, etc.* The opinion discusses the question of the reading of the Bible in the common schools of the state; holds that such reading, though unaccompanied by any comment, has a tendency to inculcate sectarian ideas, and is, therefore, sectarian instruction within the meaning of the constitutional provision, which prohibits such instruction. The opinion is exhaustive, was, evidently, prepared with great care, and seems to have had the effect to settle, for all time, the very interesting and delicate questions there considered. There are those who believe that Justice Lyon, in writing this opinion, delivered the views of the Court when his own sympathies were very much the other way. Be that as it may, his death marks the passing of a noble character, a kind altogether too rare both on the bench and off of it.

A Warranty Deed

By Guy Blue

A NOTARY dreamed of the woodland,
Of blue grass, of meadow and glade;
Of the stream that watered the valley;
Of the cottage deep set in the shade.

He drafted a deed to the landscape,
No Section or Range did he state;
The jurat was minus the county,
The deed bore never a date.

The record was not what he'd have it,
For a dreamer must sometime awake;
And clients may possibly tumble
To a thing that is wholly a fake.

But a deed from these grantors and grantee
To the buyer next making the call
Sends mistakes to vanish in thin air,
For *error is nothing at all.*

Our Grotesque Inheritance Laws

By Henry Winthrop Ballantine

Dean of the Law School

University of Montana

"INHERITANCE Laws" I use in the popular sense to cover all laws relating to the privilege of succeeding to the property of a deceased owner, and of making *post mortem* dispositions by will. If any part of our law is to come in for well-merited criticism, this part may well claim the palm as being the most unreasonable, antique, purblind, misdirected and anti-social of the entire system.

What must we say of that law which admits the possibility of a father's disinheriting his children and leaving them without support, even though they be infants of tender years, or be utterly helpless and afflicted; a law, which in spite of needs which beg for fatherly justice and pity, grants him the power to give all to strangers who are happily circumstanced, and to leave his offspring objects of public charity, a charge upon public alms? (See *Meier* v. *Buchter*, 197 Mo. 68; note in 6 L. R. A. (n.s.) 202.)

As Sir Henry Maine says in his "Village Communities": "The power of free testamentary disposition implies the greatest latitude ever given in the history of the world to the volition or caprice of the individual."

Compulsory portions of the personal property were formerly prescribed by the common law in favor of the widow and children, who were assured of their "reasonable parts" or shares of the goods, but the power of disposition was extended and made absolute, until the testator could, as now, make a will entirely unjust, unreasonable or even cruel, disinheriting his family and diverting his estate from every relative or dependent to utter strangers. The only restraints upon disinheritance are the wife's right of dower, and the community property system which takes its place in some of the western states, the provisions for homesteads, and the temporary support of the family. This almost unlimited power of disposition in English and American law, in derogation of the claims of a man's own immediate family, goes farther than the law of any other civilized nation.

Under English and American law, there is, as a rule, no necessity for leav-

ing a child a shilling, or even mentioning him at all, in order to disinherit him effectually. By some American statutes pretermitted children and their issue are allowed to take the same share as if the testator had died intestate. This does not limit the disposing power or compel the testator to provide for any child, but merely protects the child against omission by reason of forgetfulness and oversight, which may arise in sickness and old age.

By the German Civil Code a testator must appoint his issue or spouse as successors to at least one-half of the natural and certain portion reserved to them as heirs-at-law, or disinherit them on some recognized ground of disinheritance. It is recognized that as the family of a man have claims upon him while living so that he may be compelled to provide his wife and children with the necessaries of life, so these natural obligations do not cease with his death, and his power to disinherit his widow and surviving children is accordingly limited.

The demerit or lack of claim of a man's kin are no more observed than their needs by our law of inheritance. As if to demonstrate how little of merit or public policy enters into the title of the heir, it is held by most of our courts that they cannot disregard the course of descent and distribution prescribed by statute to divert the succession, even from those unworthy heirs who have murdered their ancestors. Thus, it is held that a son who murders his father for the inheritance may take both a legal and beneficial interest by descent, and will be presented by the law with the fruits of his crime. (*Carpenters' Estate*, 170 Pa. State 203; *McAlister* v. *Fair*, 72 Kan. 533; see also Note 3 L. R. A. (n. s.) 726.) A few states, however, by recent statutes, debar the heir who unlawfully causes the death of his ancestor from all share in his estate, and some courts have reached this result by judicial legislation.

Under the German Code, the heir-at-law or testamentary heir may be subjected to forfeiture by judicial declaration of unworthiness, if by wilful or unlawful act he has caused or attempted to cause the death of the deceased; if by fraud or threats he has prevented his making or revoking, or compelled him to make or revoke a will, or if he has forged any will. Under such circumstances, his right of inheritance is treated as if he had pre-deceased the testator. (Schuster, Principles of German Civil Law.)

It is evident from these illustrations how backward our law is as compared with that of other civilized countries.

It is worth while to pause for a moment and ask ourselves why the state should at all recognize the transmission of property on death, testate or intestate, and what purposes our inheritance laws should aim to subserve.

We are accustomed to conceive that ownership is permanent and perpetual, and that the privilege of inheritance and testamentary disposition is part of the law of nature. You say to yourself, "I have a right of course to dispose as I see fit of what is mine, without consulting any one else."

Yet, as Blackstone points out, the idea of absolute property forever in any one individual is a fiction. We are apt to mistake for a natural inherent right what we find established by law or inveterate custom, and what may perhaps be handed down to us from a selfish, rude and semi-barbaric society. It is recognized by practically all courts that the privilege of inheritance or of making wills is not a vested right which the state is compelled by the Constitu-

tion to leave inviolate. The Supreme Court of Wisconsin seems to be the only court which asserts that the right to give or take property by will or by inheritance is a natural right incident to ownership which is protected by the Constitution, and which cannot be taken away or substantially impaired by the legislature. The Wisconsin court, in a grandiloquent opinion, has held that the legislature cannot abolish inheritance or wills, and that if the power of disposition were confined to the life of the owner, this would "turn every fee simple title into a mere estate for life, and thus, in effect, confiscate the property of the people once every generation." (*Nunnemacher* v. *State* (1906) 129 Wis. 190; 9 L. R. A. (n.s.) 121, note; see also *Minot* v. *Winthrop*, 162 Mass. 113; 26 L. R. A. 259.) The point of view of the Wisconsin court is that government is formed primarily to preserve the property of individuals and the dignity of individual possessions, rather than to assert the rights and welfare of the whole people.

It may be admitted that there is a natural right in children to inherit the property of their parents to some extent, and that all legal and moral claims against the deceased should be a charge on his estate. But it is well recognized that, aside from these exceptions, the transmission of property after death is a mere matter of grace, subject at any time to be modified or taken away if not found wise or beneficial. Of the Wisconsin case it has been said: "Not a single other case can be found to support it, and it is opposed to the views of all historians of the law and of all economic writers." (9 L. R. A. (n.s.) 121, note.)

The wife and children are entitled to a reasonable portion of the estate, but it by no means follows that they are entitled to the whole. Dependents should not be left in poverty, but neither justice to the deceased, nor the good of the state, nor the good of the heirs requires that they be left in idleness and luxury. It has been suggested that $50,000.00 or $100,000.00 would be a sufficient provision, even for the son of a millionaire. Parents might well succeed to a certain percentage at least, of the estate as an indemnity and reward for the expense of rearing and educating their children. Brothers and grandparents and collateral relatives, like uncles and aunts, nephews and nieces and cousins, would ordinarily have no claim to support from the deceased and no just title as heirs to his estate.

There is no reason but tradition why collateral relatives, not dependent on the deceased, who may live in a different country from him, who probably never expected anything from the dead man, never did anything for him and who would not have felt called upon to assist him in any way, should take from him at all by inheritance. In such cases, even the most conservative lawyer will admit, the state should be recognized as the successor best entitled.

Gifts by will should be valid only to a limited amount to secure a reasonable indulgence of the wishes of the owner, and a protection against ingratitude and disrespect toward old age in its infirmity, and at the same time, the rights of the wife and children and the interests of the state should be fully recognized and protected.

Our system is absolutely inconsistent on its face, and by its history, with any natural or inherent rights to dispose or succeed on death. For a long period in English history there was no right to dispose of land by will. If, however, the testator has a right to dispose of

land by will, the heir has no very strong right of inheritance, and if the heir has any just claim to inherit, the testator has no right to dispose freely by will. If a remote relative has any right to inherit, he should not be entirely excluded by one who stands in closer relationship.

Natural right would suggest that accumulations of property, little of which the deceased can have produced himself, should on his death go to the common benefit of society, except so far as needed to satisfy the legal and moral obligations of the owner, who has perforce abandoned them. Unless some claimant can come forward and show a valid and meritorious title, the estate should become vested in the commonwealth as *bona vacantia*.

The most serious indictment of our inheritance laws is their utter failure to recognize what jurists and economists alike assert should be the most fundamental purpose of the law regulating succession to property on the death of the owner; namely, the paramount policy of promoting the just distribution of wealth. (Jas. Morton, Jr., Theory of Inheritance, 8 *Harv. Law Rev.* 161; Prof. Ely, 153 *N. Am. Rev.* 54; Mill, Principles Pol. Econ. Bk. 2, Ch. 2, Sec. 3.) Inheritance taxes are an incipient recognition of the true policy, being not so much in the nature of taxes as of a succession *pro tanto* by the state. But for the most part, our spendthrift law squanders perhaps its greatest opportunity to advance economic and social justice, in order to make royal presents to unworthy favorites of fortune, or to indulge to the uttermost the selfish individualism of the testator.

If the owner does not exercise his caprice and make a will, the law provides that his whole estate shall be divided among his relatives, no matter how remote, how rich, or how undeserving they may be. Property is allowed to revert or escheat to the state only by accident or as a last resort to prevent a scramble when all other possible or impossible claimants have been exhausted. It is scarcely surprising that certain portions of our legal fabric, like the laws of inheritance, which we have derived so largely from an age when the functions of the state were little developed, and when government itself was a private matter, should seem almost to ignore the existence of public interests or the rights of the state and the community at large. The time has come to put social justice in the first place.

Our scheme of dealing with property on the death of the owner never arose from philosophic or scientific considerations of public policy nor from refined speculations as to whether it was a desirable social and economic institution; it simply grew up empirically from selfish individual instincts, and the customs of a rude society, in which powerful families sought to perpetuate their position and wealth for themselves.

The privilege of transmitting property rights to one's heirs or nominees by will, no doubt appeals powerfully to the cupidity of property owners and their families, and would be reluctantly parted with. In feudal times inheritance well subserved the policy of the law to build up family prestige and perpetuate a powerful landed aristocracy. But whether in its present form it tends to make men more useful citizens and members of society or subserves our theoretical policy of affording equal opportunity to all by rewarding persons for their efforts rather than for the accident of birth, seems more than doubtful. Why should we allow

a Morgan or a Rockefeller to hand down his vast accumulations and economic power to possibly unworthy and irresponsible hands, any more than we longer permit political power to pass by devise or descent to the eldest sons of our Presidents and Governors?

The present scheme stimulates the hoarding of wealth; the oppression of the public after all personal need is oversupplied, in order to leave millions behind to a few degenerate and spendthrift heirs; and it is indeed the incompetence, the gambling and debauchery of these degenerates of the second generation upon which we depend for a safety-valve against the evils which are the natural consequence of the too great accumulation of wealth, a thing particularly obnoxious in a democratic country.

A great fortune is like a snowball at the top of a hill; it gathers momentum and grows as it rolls downward. It may well be that a reform of our inheritance laws will not by itself suffice to check the absorptive and centripetal whirl of wealth, which, with its interest and dividends and rents, constitutes an ever-increasing mortgage on the labor of present and future generations. It may be that we shall have to resort to an annihilative taxation of incomes, taking over all incomes above $100,000, for example, for the public treasury, and rewarding captains of industry by keeping an honor roll of those who have contributed most to the resources of the state as a permanent monument to public service. These accumulations of industry would not be taken out of reproductive business channels. They might be used, in part, as a public loan fund to counteract the undue concentration of credit, which ought to be a public matter, into a few powerful hands; or to secure representation for the national government on the boards of directors of our great trusts so as to regulate them in part from within, as well as from without; or to enable the government to become the proprietor of great public utilities, or to promote other objects of public usefulness instead of over-enriching the few with enormous fortunes. It may be that the taxation of the unearned increment of land values, the most unjust form of property, will have to play its part. (F. C. Howe, Privilege and Democracy; Mill, Pol. Econ. Bk. 2, Chap. II, Sec. 6.) But whatever other measures may be needed to promote a wide and just distribution of wealth, the state should no longer trust to the capriciousness or ill-judged generosity of testators, nor to the dispersive activities of degenerates and spendthrifts, but should exercise some intelligent direction over the disposition of decedents' estates, instead of allowing rich men to be a legislature to frame and promulgate rules of descent, fix the destiny of millions of property, and decide questions which concern only the lives of their survivors.

"MEN of judgment have expressed to me the opinion that were a vote to be taken on the proposition that all estates over $100,000 revert to the state upon the death of the owner, — the $100,000 being exempt — it would be carried two to one." — *Vice-President Marshall.*

The House of Lords First Criminal Appeal Case

REX v. *BARNES* [1]

By Lee M. Friedman

of the Boston Bar

BEFORE 1907 there was no appeal in England in criminal cases. Points of law which arose in the course of a criminal trial, in the discretion of the trial judge, were reserved for the consideration of an appellate tribunal, but that was the only method to secure correction of erroneous convictions. The Criminal Appeal Act of 1907 [2] allowed a defendant an appeal to a newly created Court of Criminal Appeal and, under limitations, a further appeal to the House of Lords. That act now gives an appeal either against a decision of the judge upon a matter of law, or from the decision or verdict of the jury upon the facts of the case, or upon the propriety of the sentence. Where the appeal involves only a question of law, the defendant may appeal without leave from any court. Where the appeal involves a question of fact alone, or a mixed question of law and fact, leave of Court is required.[3]

In December of 1911 after almost five years of actual operation of the Court of Criminal Appeal, the first appeal was taken from a decision of that Court to the House of Lords.

William Ball and Edith Ball, brother and sister, were indicted for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution as to the acts complained of, at the times specified in the indictment. The prosecution then tendered evidence of previous acts of the defendants with the view of showing what were the relations between them. This evidence was objected to, but was admitted. The jury found the defendants guilty, and the trial judge certified to the Court of Criminal Appeal, that the case was a fit one for its consideration, stating the question raised was as to the admissibility on a trial for acts of incest on specified days in 1910 of evidence of previous relations between the parties from 1907, including acts of sexual intercourse resulting in the birth of a child in 1908.

The defendants were convicted October 14, 1910. The appeal was argued on October 31st, and the Court of Criminal Appeal rendered their judgment, allowing the appeal and quashing the conviction November 8th. The Director of Public Prosecutions at the time the judgment was delivered raised a question as to what disposition was to be made of the prisoners pending an appeal to the House of Lords. The Court asked the Lord Chief Justice to join it, and then and there proceeded to decide upon the question presented. Until the Attorney General issued his fiat that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it was desirable in the public interest that a further appeal should be brought, nothing could be done to

[1] (1911) A. C. 47.

[2] 7 Edw. 7, c. 23.

[3] Criminal Appeal Act, § 3.

go forward with the proceedings.[4] In the meantime what was to be done with the defendants whose conviction the Court had just pronounced wrongful? Were they kept in prison, held to bail, or allowed to go at large? Without any delay the Court announced its decision that the defendants were to be released, holding that after having declared the defendants to be unconvicted persons, the Court had no power to hold them to bail and still less to keep them imprisoned.[5]

There were no rules of the House of Lords regarding criminal appeals, so that after obtaining the Attorney General's certificate the Director of Public Prosecutions appeared before the Law Lords to take their direction as to the procedure to be adopted. The Lord Chancellor, with the concurrence of all the judges, announced as the decision of the Court: "We will say December 15th next for the hearing. In regard to the papers, I imagine what we want is the materials which were before the Court of Criminal Appeal, and we need not put the parties to the expense and trouble of printing." [6]

On December 15th the case was argued and without any adjournment the opinion of the Court was pronounced and its judgment entered. The order of the Court of Criminal Appeal was reversed and the case remitted back to that Court "to do therein as shall be just and consistent with this judgment." That Court thereupon (December 19th) directed that the conviction be restored, and entered an order that the record be amended in accordance with the decision of the House of Lords and ordered a warrant to issue for one of the defendants who had not surrendered.[7]

This case settled the question of the jurisdiction of the House of Lords in criminal appeals. Up to this time there had been two views. The first, that the object of conferring this jurisdiction was only to enable the highest tribunal to give an opinion on the practice for guidance in future cases and its opinion was not to affect the conviction or acquittal of the particular person charged. The other was that the House of Lords could not only pronounce a decision of law, but also restore or set aside a conviction.[8]

To an American mind accustomed to the delays and technicalities of criminal appeals the course of this English case is enlightening. Within ninety days of the commission of the acts complained of, the defendants were put upon their trial. Within sixty days of the trial two appeals had been heard and decided.[9] Simplicity, directness and

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[4] Sect. 1, Sub-section 6 of the Criminal Appeal Act, 1907: "If in any case the director of public prosecutions or the prosecutor or defendant obtains the certificate of the Attorney General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, to subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to any other court."

[5] *Ball*, 5 Cr. App. R. 238, 254.

[6] (1911) A. C. at 62. The following is the list of documents filed and deemed sufficient in these appeals: — (1) Printed petition of appeal to the House of Lords, embodying the order appealed from, and the certificate of the Attorney-General; (2) copy of depositions; (3) copy of exhibits; (4) list of exhibits; (5) the indictments; (6) transcript of proceedings, incuding the evidence and the argument at the trial before Scrutton J.; (7) notice of appeal; (8) certificate of Scrutton, J., and (9) transcript of the judgment of the Court of Criminal Appeal. All were typewritten except the first.

[7] (1911) A. C., at 76; See also same case, 6 Cr. App. R. 31.

[8] (1911) A. C. at 69.

[9] Since the Barnes case a second criminal appeal has been before the House of Lords. *Leach* v. *Rex.* (1912) A. C. 305, where the defendant was tried and sentenced November 25, 1911. Case was heard and decided in the Court of Criminal Appeal

dispatch convey the idea of efficiency at each stage of the proceedings. Indeed as you examine the pages of the seven volumes of reports which record the decisions of the five years of the Court of Criminal Appeal you cannot help being impressed by the contrast with our criminal appeals. There is an entire absence of points of the nice technicalities of criminal pleadings and procedure. The argument of counsel in the reports discloses a refreshing frankness and directness in dealing with the merits of the case at issue. The judges freely express opinions and make comments and suggestions as the argument of counsel proceeds. In its running argument and questioning the court shows a familiarity with the record and a desire to cover all points presented. The issue on appeal is not narrowly whether the trial judge made any error, but whether any error in the proceedings had so far prejudiced the defendant that he should not have been convicted. The aim is to do justice to the particular defendant. The statute gives the appellate court the widest power to deal with a case, expressly providing that notwithstanding that the point raised on appeal might be decided in favor of the appellant the appeal may be dismissed if the court consider that no substantial miscarriage of justice has actually occurred.[10] While there is a due regard for past precedents and a realization that each decision is to some extent a precedent for the future, there is an entire absence of the spirit that makes of precedents a fetish. You get the impression of elasticity in the proceedings. The judgments of the court are generally given orally at the close of the argument by one of the three judges who sit; there is seldom any elaborate discussion of general principles, and few authorities are cited. The opinions read as if they presupposed an entire familiarity with the criminal law, and as if the court was a sort of executive department of government exercising its discretion to approve or disapprove of the work of subordinates in accordance with elastic and practical department precedents.

The Court of Criminal Appeal has the right to call for and hear additional or new evidence. They may not only affirm, reverse, or quash the order of the trial court, but they may modify the sentence. It is not uncommon to read such a judgment as "The Court reduced the sentence to four years' penal servitude with the remark that appellant must not expect much leniency if he got into trouble again." [11]

With us, the realization of our ambition to create the most humane criminal law of the world has resulted in a system of criminal jurisprudence that has overprotected the individual against the state. As a leading jurist has said, our problem is no longer the protection of the innocent man against wrongful conviction, but how to bring about the punishment of the guilty. Many of our appellate courts, in dealing with criminal appeal, lose sight that the main public concern in a criminal trial is whether the defendant is guilty or innocent. "The sole consideration of this court necessarily has been to determine whether the defendant was convicted in compliance with the laws of the state. The crime charged is one of the most heinous known to our criminal jurisprudence. If guilty the defendant should be punished, but it is the high and solemn duty of this Court, from which it shall not shrink, to require

December 18 and 19 and a final decision rendered in the House of Lords February 26, 1912.

[10] Section 4.

[11] Hudson, 5 Cr. App. R. 278.

and exact that, *however guilty he may be, he shall be punished only* after having been accorded every right and guaranty which the organic and statute law of the State secures to him." [12]

It has been commonly said that as one examines the record in a criminal case before an appellate court, it is not the criminal but the trial magistrate who is on trial. It is like a school examination where to succeed the judge must have passed a perfect test. If there has been any single error, there must be a new trial. Of course this is not true of all American jurisdictions, but in extreme instances it leads to absurdities that echo throughout a state, or even throughout the nation, and stirs up popular distrust of our judicial machinery.

Contrast with this English case a Texas case which we must confess is extreme even for American courts. In 1904, Oates and Vann were indicted for murder committed during a robbery. Vann was promptly tried, found guilty, and hanged. Oates was tried and found guilty, but in April, 1905, the conviction was reversed [13] by a divided court in part on the ground that in the selection of the jury the usual number of veniremen and talismen had not been given the defendant, and in part because a slight and not very material error had been made in charging the jury concerning the evidence of an alleged accomplice. A second time he was tried and found guilty, and in May, 1906, the case was reversed a second time by a divided court. It was held that the same error had been committed again by the trial judge in charging the jury with reference to testimony of the accomplice; and also that the question whether the wife of the deceased in attempting to defend her husband could not accidentally have shot him should also have been left to the jury.[14]

Convicted a third time the Texas Court of Criminal Appeals a third time set aside the conviction on the grounds that the judge erred in not having given the jury a form of verdict for murder in a minor as well as in the first degree, and in so doing may have impressed them with the idea that there was no sort of verdict to be rendered except murder in the first degree.[15]

Tried and convicted again for the fourth time, the case was again reversed by a divided court. One judge based his decision on the ground that the jury had considered the verdict in the Vann case and been influenced by it in arriving at this conviction. Another judge disregarded this, but held that the Governor, who had appointed a special magistrate to try the case, had no authority to do so under the Constitution, and that therefore this presiding magistrate had no authority to act as such.[16]

A fifth trial has resulted in a fifth conviction. An appeal is now pending and as yet undecided.

Thus after five convictions for murder, almost eight years after the crime, what one of the appellate judges was facetiously pleased to call "probably a very guilty negro" is still in jail awaiting the testing of his last judge before the Court of Appeals.

The humor of such a situation is lost entirely in its very serious aspects. America is crying out for law reform. Do not the methods and workings of the English system of criminal appeals point a guiding finger in the direction in which to move?

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[12] *State* v. *Faulkner*, 175 Mo. at 618.

[13] *Oates* v. *State*, 48 Texas Cr. App. 131.

[14] *Oates* v. *State*, 50 Texas Cr. App. 39.

[15] *Oates* v. *State*, 51 Texas Cr. App. 449.

[16] *Oates* v. *State*, 56 Texas Cr. App. 571.

The Essentials of the Constitution

TWO able lectures were given by Senator Elihu Root at Princeton University April 15 and 16, on "The Essentials of the Constitution," the lectures being delivered on the Stafford Little foundation.

The need of organization for the purpose of effecting the purpose of society was pointed out. "The first consideration is that free government is impossible except through prescribed and established governmental institutions, which work out the ends of government through many separate human agents, each doing his part in obedience to law. Popular will cannot execute itself directly except through a mob.

"We should, therefore, reject every proposal which involves the idea that the people can rule merely by voting, or merely by voting and having one man or group of men to execute their will."

After emphasizing that due regard must be had for the natural limitations on what it is possible for government to accomplish, and that government must not attempt too many things, Senator Root said:

"A fourth consideration is that in the nature of things all government must be imperfect, because men are imperfect. Every system has its shortcomings and inconveniences, and these are seen and felt as they exist in the system under which we live, while the shortcomings and inconveniences of other systems are forgotten or ignored.

"A fifth consideration is that whatever changes in government are to be made we should follow the method which undertakes as one of its cardinal points to hold fast that which is good."

Mr. Root thought it unnecessary to pay much attention to direct nominations, instructions to delegates, and kindred extra-constitutional contrivances, as they all relate to "forms of voluntary action outside the proper field of governmental institutions" and are the result of efforts of the rank and file of voluntary parties to avoid being controlled by organized minorities possessing the support of organized capital. But the initiative and the compulsory referendum do not come within this class, as they relate to the actual structure of government. At this point Senator Root offered wise counsel:

"In this field the weakness, both of the initiative and of the compulsory referendum, is that they are based upon a radical error as to what constitutes the true difficulty of wise legislation. The difficulty is not to determine what ought to be accomplished, but to determine how to accomplish it. The affairs with which statutes have to deal as a rule involve the working of a great number and variety of motives incident to human nature, and the working of those motives depends upon complicated and often obscure facts of production, trade, social life, with which men generally are not familiar, and which require study and investigation to understand.

"In ordinary cases the voters will not and cannot possibly bring to the consideration of proposed statutes the time, attention, and knowledge required to determine whether such statutes will accomplish what they are intended to accomplish; and the vote usually will turn upon the avowed intention of such proposals rather than upon

their adequacy to give effect to the intention."

The lecturer then referred to evils resulting from the failure of the people to select their legislative representatives carefully. From their distrust of the legislatures have resulted not only the proposed expedients of initiative and compulsory referendum, which if adopted will be injurious to the character of legislative bodies, but also the "great variety of minute limitations upon legislative power" with which modern state constitutions are encumbered.

Senator Root said that legislation under the system of initiative and referendum would be subject to momentary impulses, passions or prejudices. "If there be no general rules which control particular action," he remarked, "general principles are obscured by the impulses of the occasion. If governmental authority is to be controlled by rules of action, it cannot be relied upon to impose those rules upon itself at the time of action, but must have them prescribed beforehand."

Senator Root then defended the right of the courts to review laws, because it is only in the courts that their actual workings as regards the individual can be ascertained. If the constitutional rights of an individual are menaced under a statute that statute cannot stand unchallenged. The courts, the speaker asserted, do not render decisions like imperial rescripts, declaring laws valid or invalid. They merely render judgment on the rights of litigants in particular cases, and in so doing they refuse to give effect to statutes, which they find are not made in pursuance to the Constitution.

In conclusion, Senator Root observed that the recall of judicial decisions is not necessary in order to obtain popular reforms which may appear unconstitutional, because there is already a method prescribed for amending the Constitution.

"The difference between the proposed practice of over-riding the Constitution by a vote and amending it by a vote is vital," he asserted. "It is the difference between breaking a rule and making a rule; between acting without any rule in a particular case and determining what ought to be the rule of action applicable to all cases."

Reviews of Books

A GUIDE TO FOREIGN LEGAL BIBLIOGRAPHY

The Bibliography of International Law and Continental Law. By Edwin M. Borchard, Law Librarian of the Library of Congress. Published by the Library of Congress; for sale by the Superintendent of Documents, Government Printing Office. Pp. 93 (index). (15 cts., paper.)

THE skill with which Mr. Borchard's first compilation, "A Guide to the Law and Legal Literature of Germany," was prepared has already been noted in these pages (24 *Green Bag* 305). The newer publication reveals an equally comprehensive labor on the part of the author, and will be prized for its completeness and critical discernment. We have often wondered how one might best keep abreast of the latest important developments in contemporary foreign legal literature. This guide solves the question. The development of bibliography has advanced on the Continent with the development of the technical literature itself; the voluminousness of

the purely bibliographical literature of Germany is surprising. One must have a very broad knowledge of it to be able to determine where to look for the tool best suited for a given purpose. Anyone interested in any particular phase of Continental law will receive invaluable help from the useful information supplied to the investigator.

"To place the literature of this vast field both in its history and in its modern development more systematically before the investigator," says Mr. Borchard, "this guide to the first necessary step in scientific study, the mastery of bibliography, has been prepared." The reader is directed not only to bibliographic treatises, but to the bibliographic sections of other treatises and of periodical literature. International law and Continental law in general are first dealt with, and Continental law is then treated by countries, under thirteen heads. The space allotted to each ranges from ten pages in the case of Germany and seven in that of France to only half a page in that of Portugal. Within these moderate limits a great amount of succinct information is presented.

The prefatory remarks of the author on the awakening of interest in Continental legal literature in this country repay reading. With the Continental Legal History Series and other recent publications in mind, he says: "For the first time the Anglo-American lawyer is enabled to examine the whole tree of legal knowledge — its roots in Roman and Germanic law, its growth before independent branches (like the Anglo-Saxon) left the main trunk, and the relation of the various branches to one another. The study of our present problems of superfluous technicalities in procedure, and of the application of mechanical rules and outworn conceptions to changing social conditions, will, in the light of a past history in which the same phenomena have occurred, offer experience and give promise for their satisfactory solution in the future." The writer emphasizes the need of a knowledge of foreign law not only for the practical lawyer, in response to the demand first felt in the field of commerce and other relations of intercourse with European countries, but also for the lawyer, the legislator, and the scholar as part of a well-rounded equipment.

ENGLISH LAW REPORTERS

A Handbook of English Law Reports, from the last quarter of the eighteenth century to the year 1865, with biographical notes of judges and reporters. By J. C. Fox, a Master of the Supreme Court, Chancery Division. Part I, House of Lords, Privy Council, and Chancery Reports. Butterworth & Co., London. Pp. 107.

IT IS interesting to read in Mr. Fox's informing introduction, that a judge remarked at the beginning of the eighteenth century that when he was a student he could carry a complete library of law books in a wheelbarrow, whereas they could not then be drawn in a wagon. In Wallace on Reporters the American author puts the number of reports in 1776, the year with which the volume ends, at about 150 volumes. In 1895 the English reports extended, according to the estimate of Sir Frederick Pollock, to 1825 volumes, or 2120 including the Irish reports.

In the light of these facts it is easy to understand why the period from 1776 to 1865 was selected. Wallace has treated the earlier period from the Year Books downwards "in a form which provides not only solid instruction but also excellent reading." In 1865 the Law Reports came into existence, and supplanted all of the authorized reports; they now hold the field in company with the *Law Journal*, *Law Times*, and *Times*

Law Reports. In the intervening space with which this book deals there are many official and unofficial, authorized and unauthorized reports which make up a rather bewildering aggregation of books. Hence the field for a hand-book designed on a chronological plan, containing short biographical notices of the several reporters, and also brief critical comment on the quality of their work.

Mr. Fox's treatment is highly satisfactory in form, neither too copious nor too condensed. With the companion volume to follow, which will include common law and miscellaneous reports, it will constitute a desirable adjunct to the library of the American lawyer who acknowledges the debt of his profession to the early nineteenth century reporters.

OPPENHEIM'S PANAMA CANAL CONFLICT

The Panama Canal Conflict between Great Britain and the United States of America. A Study. By L. Oppenheim, M.A., LL.D., Whewell Professor of International Law in the University of Cambridge, etc. 2d edition. Cambridge University Press. Pp. 57. (2*s.* 6*d. net.*)

THE author speaks of this work as a modest production and would be the last person to claim any great value for it. It was written at the earliest stage of the controversy, before the recent diplomatic correspondence, and prepared, we are told, *sine ira et studio*, without being based on any further information than could be gained from the treaties and state papers directly bearing on the affair. The treatment is more popular than academic, and the essay is perhaps not 10,000 words in length, dealing only with the larger aspects of the controversy. The question, if not yet distinctly a moot question, may eventually become one, and the learned author seems to have done well to waste no more attention upon it.

The status of the controversy is stated with simplicity and impartiality, and has not been substantially altered by the negotiations between our Government and the English Foreign Office. Needless to say, no copious citation of authorities would be necessary to substantiate the almost self-evident propositions advanced. The book may be recommended as a clear *résumé* of principles of international law that have been more comprehensively but not more helpfully treated elsewhere.

WESTERVELT'S PURE FOOD LAW

American Pure Food and Drug Laws; comprising the statutes of the United States and of the several states of the Union on the subject of food and drugs, their manufacture, sale and distribution, whether in interstate or foreign commerce; the administrative rules and regulations of the federal and state departments and commissioners, and the standards of purity, etc. By James Westervelt, M.A., of the New York and New Jersey bars. Vernon Law Book Co., Kansas City, Mo. Pp. 1450 + appendix and index 85. ($7.50.)

THE object of the compiler of this work was to produce a volume of practical use to laymen as well as to lawyers, and this is indicated by the sifting of judicial decisions and the inclusion of many sound practical suggestions for the manufacturer of food products. A standard scheme was prepared for the treatment of the subject under seventy-five numbered headings, and this scheme, which serves to index the voluminous contents, is applied first to the analysis of the federal law, and afterward to the states one by one in alphabetical order — "the key-number" system. The treatment does not follow the plan of a digest, but is discursive, the object being to set forth the law not only by extended quotation but also by a careful weighing of every important feature of the statutes and regulations. The work is likely to meet admirably the purpose aimed at. It reveals a conscientious effort to achieve not only

accuracy but the greatest possible practical serviceableness in every respect.

NOTES

The National Committee for Mental Hygiene, with offices at 50 Union square, New York City, has issued a compilation of Summaries of Laws Relating to the Commitment and Care of the Insane in the United States. The book is a digest of the important features of the legislation of the forty-eight states on the subject, and will, as the committee says, serve as a basis for comparative study and the improvement of the systems of the more backward states. The committee finds a great diversity among the several states and criticises the patchwork method by which many of the laws have evolved into their present form. (Pp. 297, $1, paper.)

Regular readers of the *Green Bag* will observe that the announcement of G. P. Putnam's Sons, Publishers, is the same in this issue as the last. The interest, they explain, evinced by *Green Bag* readers in the first offer of their "Special Remainder List" has been more than enough to warrant its repetition. There must be others, they feel, who will want to take advantage of the very reduced prices proposed on lines of books very infrequently offered for sale at less than list. It is for their benefit that the second opportunity is given.

BOOKS RECEIVED

American Syndicalism: The I. W. W. By John Graham Brooks, author of "As Others See Us," "The Social Unrest," etc. Macmillan Company, New York. Pp. 256 + 8 (index). ($1.25 *net.*)

Social Environment and Moral Progress. By Dr. Alfred Russel Wallace, O.M., D.C.L. Oxon., F. R. S., etc., author of "The Malay Archipelago," "Darwinism," "Man's Place in the Universe," "The World of Life," etc. Cassell and Company, New York. Pp. 174 + 7 (index). ($1.25 *net.*)

Matrimonial Jurisdiction in Ontario and Quebec. By George Smith Holmested, one of His Majesty's Counsel for Ontario. Arthur Poole & Co., Toronto. Pp. 54 + 7 (index).

Lectures on Legal History and Miscellanous Legal Essays. By James Barr Ames. With a Memoir. Harvard University Press, Cambridge. Pp. 482 + 30 (table of cases discussed) + 28 (table of other authorities cited) + 15 (index).

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Actions. See Legal History.

Adjudication. "Equity and the Common Law." By Frank Tudsbery. 29 *Law Quarterly Review* 154 (Apr.).

The relations between the common law and equity, using the latter word in its broader sense, are discussed, in their historical aspect and in their bearing on the problem of administering an ideal justice. "If precedents might be disregarded according as each judge thought equity demanded it, the variable doctrine resulting therefrom would become the only guide for the courts, and paradoxically speaking no decision would ever be decisive. Such a state in the process of the law has been contemplated by Mr. Justice Story in his work upon Equity Jurisprudence, and is there characterized as despotic."

Banking and Currency. "The Money Trust." By Alexander D. Noyes. *Atlantic* v. 111, p. 653 (May).

"Restrictions may be necessitated on the purchase of one fiduciary institution by another, to the extent at least of requiring the approval of responsible public officers. There is plausible argument for the regulation of banking and corporation directorates, so that the same man or group of men shall not be allowed to sit on the boards of competing institutions."

See Interlocking Directorates.

Codification. See Common Law.

Common Law. "Stonore Said." By Margaret Center Klingelsmith. 61 *Univ. of Pa. Law Review* 381 (Apr.).

Stonore said in 1345, *ley est resoun*, "law is reason," and after showing how this saying has been misinterpreted, the author makes it the keynote of a paper which urges the superiority of a "living common law" to a crystallized code. Even the German Civil Code comes in for some criticism.

See Legal History.

Consideration. "Is the Doctrine of Consideration Senseless and Illogical?" By Dean Henry Winthrop Ballantine. 11 *Michigan Law Review* 423 (Apr.).

An able paper which goes a long way toward correcting what an eminent reviewer has lately called the "wide flights of speculation" of Professor Ashley (F. P., in 29 *Law Quarterly Review*, 223). The article is a criticism of Professor

Ashley, a later chapter in the debate between them (see 25 *Green Bag* 233).

"When the law of consideration is broadened so as to recognize not only bargain, but also all other just grounds for the enforcement of a promise, and gives up the foolish attempt to measure the sufficiency of what is promised in exchange by a mechanical formula, then there will be no occasion for its abolition by the courts or by the legislature."

"Consideration and Motive as Essentials to a Binding Agreement." By R. H. Gwynne. 47 *American Law Review* 220 (Mar.–Apr.).

"Intent to incur an obligation, taken in connection with motive constitutes the mainspring of a contract. All else is subordinate to this, and dependent upon it. The doctrine of consideration, properly considered, is simply a form of manifesting the intent."

Constitutionality of Statutes. "The Constitution and the Courts." By John G. Palfrey. 26 *Harvard Law Review* 507 (Apr.).

Considerable attention is given to the proposed recall of judicial decisions, and the author elaborates what he considers a more satisfactory remedy:

"Let there be established, by constitutional amendment if necessary, a tribunal composed of experts trained in matters of government and sociology, which shall perform for the courts a service analogous to that performed for the legislature of Wisconsin by Dr. McCarthy's legislative bureau, but which shall have in addition certain mixed functions, in part judicial and in part legislative.

"To this new body the courts may refer the question whether an act passed by the legislature for a proper purpose is arbitrary in its effect upon individual rights. Not only the individual, but all other persons interested, may present evidence and be heard, the attorney-general shall represent the commonwealth, and the tribunal may consider all manner of evidence and make further investigation on its own initiative.

"The decision of the new body, certified to the court, will furnish the basis of decision for the particular case, and, if against the law, will suspend it for a certain length of time, or in any event until further action by the legislature.

"The new body will also be required to report its findings to the legislature, together with any recommendations which it may see fit to make; and, if any act reported to be arbitrary shall thereafter be reaffirmed without change by the legislative authority, it shall take effect as law.

"To this same tribunal I suggest referring, as to a jury, the public fact in the first class of cases above referred to, whether an act passed by the legislature is for a public purpose; and the tribunal will in like manner report to the court, as a basis for the decision of the particular case, and to the legislature.

"The tribunal thus created, as has been already intimated, would act in a dual capacity.

"In its quasi-judicial capacity it would aid the courts in the decision of the particular case in its first aspect — that of settling the controversy between the parties. It would do so by weighing the public facts and conclusions of fact necessary to the decision; it would be, in effect, a tribunal of public facts.

"In its quasi-legislative capacity it would aid in the decision of the case in its second aspect — that of determining the status, as to validity, of the law in question in its future effect upon the whole public, and the effect of the decision in this second aspect would no longer be left to inference. A finding that a law was arbitrary, or did not serve a public purpose, would of itself suspend the operation of the law; and at the same time the tribunal would be in a position to recommend to the legislature further legislation on the same subject.

"Whether by this road the act is ultimately referred to the people will be a simple question of direct legislation, and will depend upon the general law in force in the state in question in regard to initiative and referendum. In whatever form, however, the final legislative action takes place, the measure will first have been presented and debated before a body of experts, and the facts will have been investigated in an authentic manner."

"Legislative and Judicial Attacks on the Supreme Court of the United States — A History of the Twenty-fifth Section of the Judiciary Act, II." By Charles Warren. 47 *American Law Review* 161 (Mar.–Apr.).

For the first part of this paper see 25 *Green Bag* 189. The history of the various efforts to change the relation of the states to the Supreme Court makes a longer story than one might expect. The latest attempt before the current proposals started was in 1882.

See Statistics.

Contracts. See Consideration, Equitable Conversion, Escrows, Roman Law, Sales.

Conveyances. See Escrows.

Corporations. "Holding Companies in Illinois Law." By William B. Hale. 7 *Illinois Law Review* 529 (Apr.).

No case involving the legality of holding companies has yet reached the highest court of the state; this article is based on the decisions of lower courts.

"Pooling Agreements among Stockholders." By Thomas C. Coffin. 76 *Central Law Journal* 245 (Apr. 4).

"The most feasible plan for creating the desired voting trust is by means of a common law joint stock company." After describing his plan, the author says: "The feasibility of the above plan appeals to me as it seems to be open to none of the faults which have caused so many other plans to fail."

"Declaring Dividends for Future Stockholders." By Stewart Chaplin. 13 *Columbia Law Review* 401 (May).

"Apart from the possible effect of provisions in charters or by-laws, or of other special facts, a board of directors has no power, in actually declaring a dividend, to make it payable to those only who shall be the stockholders at a later date."

See Banking and Currency, Interlocking Directorates.

Criminal Procedure. "Criminal Procedure in Scotland (*concluded*)." By Edwin R. Keedy. 3 *Journal of Criminal Law and Criminology* 834 (Mar.).

Continued from 3 *Journal of Crim. Law* 728 (25 *Green Bag* 136).

Criminology. "The Recidivist." By Guy G. Fernald, A.M., M.D. 3 *Journal of Criminal Law and Criminology* 866 (Mar.).

"The question is, should not delinquents be classified as fully responsible and reformable on the one hand; or as of limited responsibility and in need of special treatment on the other hand? The contention is that treatment on the basis of such classification would contribute very largely and directly to the diminution of criminality. . .

"The confirmed recidivist is the product of the continual irritative demoralizing action of our ordinary, though highly specialized life on a congenitally inadequate organization. Those observers who have made catamnestic studies of juvenile defective delinquents find that defective subjects become recidivists; and it is a statement as true as it is trite that the anamnesis of every recidivist shows that he began his criminal career in his youth. So, in the absence of statistics, it is a fair inference that the recidivist in most cases is none other than the juvenile delinquent in adult life, and that every defective delinquent is a potential recidivist."

A number of tests for recidivism are suggested.

See Insanity, Suicide, Police Methods.

Direct Government. See Constitutionality of Statutes, Recall of Judicial Decisions.

Disbarment. See Professional Ethics.

Easements. "Extinguishment of Easements by Impossibility of User." By Edwin H. Abbot, Jr. 13 *Columbia Law Review* 409 (May).

The writer lays down four definite propositions, but the fifth cannot be framed in positive language, *i.e.*, "If the owner of the servient tenement should wrongfully destroy such tenement, the extent to which equity will lend its aid to compel him to restore the tenement and thereby revive the easement is still uncertain upon the authorities and must be decided in the light of general principles and upon the particular circumstances of each case."

Equitable Conversion. "Equitable Conversion by Contract." By Harlan F. Stone. 13 *Columbia Law Review* 369 (May).

"It has been said that the decisions in the cases relating to equitable conversion cannot be reconciled with any consistent principle, and 'the result is that the student is faced with the necessity of committing to memory a long series of complicated rules which are merely arbitrary' (24 *Law Quarterly Rev.* 411). A survey of the whole subject in the case of equitable conversion by contract, however, hardly justifies this statement. The decisions are harmonious when considered in the light of fundamental equitable principles, except upon the question of 'burden of loss,' on which point the authorities are divided."

Equity. See Adjudication.

Escrows. "Conditional Deliveries of Deeds of Land." By Harry A. Bigelow. 26 *Harvard Law Review* 565 (May).

"Suppose, independently of any question of escrow, that A. contracts with B. to sell and B. to buy a piece of land. B. pays or tenders the price; A. refuses to convey. B. can go into equity and obtain a decree compelling A. to execute a deed in due form. As has just been mentioned, the fact that A. at the moment when he was delivering the deed in pursuance of the decree was in a state of internal rebellion and in fact did not intend the instrument as his deed would make no difference. It would have all the earmarks of a deed, and B.'s title acquired under the deed would be unimpeachable. Now consider the situation when there is in fact this escrow which A. has agreed shall become his deed upon the payment by B. of the purchase price. B. has paid, but A. has refused his consent that it shall become his deed. Here already at hand is a document which bears all the earmarks of A.'s deed; B.'s equitable right is clear to compel performance by A. of his part of the contract, but such a deed when executed by A. will, so far as outward appearance goes, be no more A.'s deed than the one now in existence. Under such a state of facts it is not to be wondered at that a court should simply make a short cut, ignore the non-existence of A.'s intent and declare the present document to be binding at law as his deed. The court may say that A.'s intent in this kind of case is immaterial, or it may put the doctrine in the form of a fiction and say that his intent is 'irrevocably given' or is 'conclusively presumed to continue.' The important fact is, that in a case where there would be relief in equity the courts have seized on the existence of the escrow to work out the same relief under a legal formula."

Federal Equity Rules. "The New Federal Equity Rules." By Robert E. Bunker. 11 *Michigan Law Review* 435 (Apr.).

The writer gives some helpful observations on the authority for making the rules, the occasion of their making, the manner in which the work was done, and the changes wrought by them in the equity procedure of the federal courts. He has little to say, however, about the comparative merits of the new and old rules.

"The New Federal General Equity Rules." By Judge Frank S. Dietrich. 76 *Central Law Journal* 281 (Apr. 18).

"On the whole I am confident that after a brief experience with the new rules in actual operation there will be a general concurrence of judgment that they will effect a more economical, expeditious, and rational administration of justice."

"The New Equity Rules." By Frank Hagerman. 47 *American Law Review* 230 (Mar.–Apr.).

"All codes of procedure should be abolished and the Supreme Courts, federal and state, as the highest judicial authority, authorized, without legislative interference, to make, for the territorial limits over which their jurisdiction extends, every rule necessary for the dispensation of justice in trial and appellate courts."

Federal Jurisdiction. "Jurisdiction of the Federal Equity Courts as affected by State Statutes." By Benjamin F. Keller. 47 *American Law Review* 190 (Mar.–Apr.).

"The choice of the federal court sometimes involves the necessity of recasting the pleadings, and occasionally the necessity of a suit at law and one in equity to accomplish what might be done in the state court in one suit."

Government. See Constitutionality of Statutes, Recall of Judicial Decisions.

Insanity. "Insanity and Criminal Responsibility, I." By Edwin R. Keedy. (Report of Committee B of the Institute). 3 *Journal of Criminal Law and Criminology* 890 (Mar.).

The first part of the report is a compilation of the statutory provisions of the several states with respect to the determination of insanity, commitment and discharge of the criminal insane, etc.

"Some Anomalies and Shortcomings of Lunacy Law." By T. H. Holt-Hughes and William H. Gattie. 29 *Law Quarterly Review* 179 (Apr.).

Dealing with five chief topics in the English law: the reception order, the urgency order, the evidence of lunatics, criminal lunacy, and "specially appointed" Justices.

Intent. See Consideration.

Interlocking Directorates. "Interlocking Directorates, the Problem and its Solution." By Max Pam. 26 *Harvard Law Review* 467 (Apr.).

"No director is true to his obligation of trust who permits his action as a director to be controlled by influences and forces whose interests do or may, or allows his personal interest to, conflict with those of his corporation. Lack of publicity and lack of vigilance must be charged largely with the responsibility for the violations of the fiduciary relation of directors. To preserve a wholesome respect and a high regard for the trust reposed in those who have the charge and the management of trust property, there must be sustained public vigilance. The vigorous pursuit of the remedies already afforded in the law; the inhibition of dual or interlocking directorships; the enforced publicity of corporate actions and transactions in which directors are interested either directly or representatively; vigilance by the proper authorities in state and nation; the vigorous prosecution of corporate abuses — can and will end the recreancy and improper practices developed in the last decade, establish a proper appreciation of the obligations resting upon those occupying fiduciary positions, stimulate a proper regard for the trust and confidence reposed in a trustee, bring a higher standard of business practice, and win back — what is now lacking — the confidence of our people in the integrity and reliability of our men of affairs."

See Banking and Currency, Corporations.

Juvenile Delinquency. See Criminology.

Labor Laws. "Trade Unions under English and American Law." By M. F. B. Kenney. 49 *Canada Law Journal* 241 (Apr. 15).

A rather desultory exposition of English law; the West Virginia case of *Hitchman Coal & Coke Co.* v. *Mitchell*, decided by the federal District Court Jan. 18, 1913, is the only American decision which receives much attention.

Legal Aid. "A Poor Man's Lawyer in Scotland." (Anon.) *Westminster Review*, v. 179, p. 423 (Apr.).

"Landladies who wanted defaulting lodgers written to were legion. The amount poor women lose through lodgers going away without paying, is scandalous, and most of such claims are practically irrecoverable. A difficulty that constantly meets the lawyer for the poor is, that questions which crop up simply every day among them never get decided; the amounts involved are too small for these to reach the supreme court, and no authoritative decision is given. These lodger cases illustrate this."

Legal History. "Judicial Records." By Sir Frederick Pollock. 29 *Law Quarterly Review* 206 (Apr.).

"Lines of technical distinction are in law, as in other sciences, more clearly and sharply drawn in later than in earlier days; and so we need not be surprised when we find that in the middle of the thirteenth century the Westminster record may tell us a good deal of what the case was really about, but in the middle of the eighteenth century it will, oftener than not, tell us nothing. The mediaeval fashion may be conveniently seen in Maitland's edition of Bracton's Note Book, and that of our great-grandfathers in the forms printed by way of appendix in the older and genuine editions of Blackstone's Commentaries: forms which ought to be studied, as well as the untouched text of the author himself, by every one who desires to understand the history of modern English law. In Chancery proceedings, on the other hand, all the facts relied on had to be asserted in the course of pleading, and therefore we have the story,

though in a form which became more and more cumbrous and involved as the Court of Chancery developed a fixed procedure, and was reduced to rational order and dimensions only in the middle of the nineteenth century. Neither in common law nor in equitable procedure were the reasons for the ultimate decision apparent on the record itself, though in many cases a competent lawyer with the pleadings before him could form a pretty safe guess as to the points or points on which is turned. This, I think, may safely be said to be characteristic of the English judicial system."

There is an entertaining imaginary dialogue between Henry of Bratton and a twentieth century lawyer, which throws much light on the changes in pleading and forms of procedure since the thirteenth century.

"Legal Development in England after the Restoration." By Francis R. Y. Radcliffe, K.C. 61 *Univ. of Pa. Law Review* 353 (Apr.).

A study of the forms of action disclosed in the King's Bench Reports from the Restoration to the end of the reign of William and Mary.

"The action of *assumpsit* should, naturally, have been developed either from the old action of *covenant* or the old action of *debt*. It is quite easy to understand why it was not affiliated to *debt*, because in most actions of *debt* the defendant could wage his law. In *covenant* the defendant could not wage his law, but there were probably technical rules about the production of the document sued upon which rendered it inapplicable to an oral agreement. However this may be, in fact the action of *assumpsit* was developed from the action of *trespass*, through the medium of the action of *trespass on the case*. There is a good example of this in the pleadings in the case of *Horton* v. *Coggs*, *supra* [3 Lev. 295]. The defendant is 'attached to answer Edward Horton of a plea of *trespass on the case*.' Then the declaration goes on to allege a cause of action in *assumpsit*, and the plea is *non assumpsit*."

See Adjudication, Common Law, Medical Jurisprudence, Roman Law.

Literature. "Law from Lay Classics, III — On the Multitude of Laws and Decisions." By Michael de Montaigne. 7 *Illinois Law Review* 572 (Apr.).

"In sowing and retailing of questions, they make the world to fructify and increase in uncertainties and disputes; as the earth is made fertile by being crumbled and moved about deep. *Difficultatem facit doctrina*. "We doubted upon Ulpian, and are now still more perplexed with Bartolus and Baldus. We should efface the trace of this innumerable diversity of opinions, and not stuff ourselves with it, and stupefy posterity with it."

"Lawyers' Merriments." By Courtney Kenny. 29 *Law Quarterly Review* 200 (Apr.).

A review of the book by David Murray, LL.D. (Glasgow: James MacLehose & Sons, 1912).

"Happily Dr. Murray has not devoted his pages to the superfluous task of telling over again the hackneyed tales of the witticisms of witnesses and barristers and judges, the quaint customs of manors, and the unintentional absurdities that have slipped into statutory enactments. He has undertaken, and has well discharged, a much more novel task: that of enumerating the many ways in which lawyers, refusing to sink the shop when office hours were over, have made Law a means of amusement for their leisure."

Marriage and Divorce. "The Presumption of Divorce." By Ellis S. Chesbrough. 7 *Illinois Law Review* 540 (Apr.).

"In various states a line of decision under which divorce is presumed has tended to nullify all laws imposing civil penalties upon bigamists and bigamy. When so monstrous a doctrine is promulgated by respectable courts, using ostensibly syllogistic reasoning, common sense cries out that there must be something wrong with the premises. It is the purpose of this article (1) to point out the fallacy, (2) to note the cause and history of the origin of the doctrine, and (3) to illustrate its practical working by a plunge into the maze of conflicting decisions which it has engendered."

Medical Jurisprudence. "A Note on the History of Forensic Medicine of the Middle Ages." By Charles Greene Cumston, M.D. 3 *Journal of Criminal Law and Criminology* 855 (Mar.).

"The end of the 13th century must be reached before one finds a trace of an organization of medical jurisprudence having some evidence of being official. The letters patent of Philippe le Hardi, dated May, 1278, offer proof of the existence of sworn surgeons for medico-legal expert work."

Negotiable Instruments. "Some Necessary Amendments of the Negotiable Instruments Law." By J. D. Brannan. 26 *Harvard Law Review* 493 (Apr.), 588 (May).

"It is not intended in this article to suggest all the amendments which might be made for the improvement of the Negotiable Instruments Law or for the correction of mistakes in the act, but only to discuss such changes as seem to be most necessary."

Penology. See Criminology, Insanity.

Police Methods. "The Scientific Police." By Salvatore Ottolenghi. 3 *Journal of Criminal Law and Criminology* 876 (Mar.).

"Italy is the only country with an official school of scientific police for all the departments connected with the police. My course on the scientific police, given at the University of Sienna from 1896 to 1901, was, by order of the Secretary of the Interior, given in Rome after 1902 for superior officers of the police. . . . A more elementary course of scientific police is given to pupils of the school of carabinieri. The

police school has a laboratory for research work and demonstrations and a criminal museum. The laboratory, besides being used for school purposes, serves for investigations by the judicial police."

"The School of Scientific Police in Rome." By Victor von Borosini. 3 *Journal of Criminal Law and Criminology* 881 (Mar.).

"The relations between Professor Ottolenghi and the students were quite unique. He commands their respect; he has infused in them an immense interest in the science he represents and they would do anything for him. They are exceedingly proud that an authority of international fame is their teacher. The reforming influence of the school on the Italian police is already noticeable. The progress is, the world over, undoubtedly along the lines of the Italian method, which enables commanding officers by the particular instruction, which they receive in Rome, to do more efficient, preventive work. Prevention is far cheaper to society and far more ethical and moral than repression."

Procedure. "The Judicial Code of the United States, with some Incidental Observations on its Application to Hawaii." By Robert W. Breckons. 22 *Yale Law Journal* 453 (Apr.).

"Although the code has been in operation but a short time, its workings [in Hawaii, where the author is United States Attorney] appear to be satisfactory."

See Criminal Procedure, Federal Equity Rules, Legal History.

Professional Ethics. "Disbarment for Questioning the Integrity of the Court." By Charles A. Boston. 76 *Central Law Journal* 299 (Apr. 25).

"Let us hope that the time will come when no just man will be disbarred or censured for taking issue with a judge on the propriety of his conduct; and in closing I venture to suggest that the courts do not need to exercise this arbitrary authority in order to sustain their dignity, their power or the confidence of the people in the justice of their judgments or the incorruptibility of the incumbents of judicial position."

"The Lawyer." By Justice John W. Goff. 22 *Yale Law Journal* 433 (Apr.).

An address delivered at Yale Law School, treating of a wide range of topics connected with legal practice, professional ethics and legal education, full of sound practical advice.

Public Ownership. "Municipal Ownership of Public Utilities (*concluded*)." By Carmon F. Randolph. 22 *Yale Law Journal* 461 (Apr.).

"At present the propaganda for municipal operation shows signs of abatement. Here the cost of acquiring private works has far exceeded expectations; there a debt limit has blocked the way. But, quite apart from these local checks, the propaganda, as a business proposition, seems to have lost ground generally. I think it has lost ground as an adjunct to municipal home rule, for, whatever the just claims of a community to self-government, it is perceived that a commonwealth cannot safely give its cities a free rein in business adventures.

"I am inclined to think the movement will more and more reflect political theories of a socialistic type."

Railway Rates. "Federal and State Co-operation on Rates." By Charles E. Leland. 76 *Central Law Journal* 317 (May 2).

Proposing conferences between the Interstate Commerce Commission and the state boards, held under concurrent federal and state legislation, the findings arrived at in such conferences being made binding upon the boards represented, and certain matters of litigation involving both interstate and intra-state rates being dealt with by the joint conference. The author has carefully worked out the details of his project.

Real Property. See Escrows, Torrens System.

Recall of Judicial Decisions. "A Legislative Curb on the Judiciary." By A. W. Richter. 21 *Journal of Political Economy* 281 (Apr.).

"Legislative bodies may create courts and may destroy courts, but they cannot stop half-way and create as courts nondescript bodies which, because they lack some of the essentials of judicial power, are not courts. So the legislature may give or take away jurisdiction, but if it gives jurisdiction of a certain subject-matter, for instance, old-age pensions, employers' liability, or the like, it cannot deny sufficient judicial power to the courts so that they can give due process of law to parties before them, properly protect the rights of parties, and give force to judgments. One of the essentials of judicial power under the American system of judicial administration is the right to refuse to administer unconstitutional laws. There is little doubt but that the courts will refuse to give it up."

See Constitutionality of Statutes.

Roman Law. "The Recent Controversy about *Nexum*." By F. de Zulueta. 29 *Law Quarterly Review* 137 (Apr.).

An erudite article of considerable importance for the student of origins of contractual obligations in the Roman law.

Sales. "Sales of Goods Statutes in New York." By Francis M. Burdick. 13 *Columbia Law Review* 389 (May).

This article directs the reader's attention to many important changes wrought by the New York statutes.

Social Reform Legislation. "Dissatisfaction with our Judges." By C. A. Kent. 11 *Michigan Law Review* 452 (Apr.).

An article of sound temper, dealing, however in rather commonplace reflections.

See Constitutionality of Statutes.

Statistics. "The Need of Social Statistics as an Aid to the Courts." By Walter F. Willcox. 47 *American Law Review* 259 (Mar.–Apr.).

"Our methods of ascertaining social fact are on the whole less developed than in any other great industrial country; more and more our courts are finding it necessary to decide such questions of fact; our national attitude towards the courts is apparently changing from one of perhaps extravagant laudation to one of perhaps excessive criticism. These facts seem to me to be interdependent."

Suicide. "*Felo de Se.*" By Wilbur Larremore. 47 *American Law Review* 210 (Mar.–Apr.).

An exceedingly readable essay on various aspects of euthanasia and suicide, written in a literary rather than a legal vein.

Titles. See Torrens System.

Torrens System. The April number of *Case and Comment* (v. 19, no. 11) contains several articles on this topic, viz.: "The Torrens Laws — Their Practical Operation," by Charles L. Batcheller; "The Conclusiveness of Torrens Certificates of Title," by William C. Niblack; "The Ownership of Property in the United States by the Federal Government — Whether as Proprietor or Sovereign," by Hon. Russell L. Dunn; "Impracticability of the Torrens Laws," by Vincent D. Wyman; "Torrens Land Title Registration in the State of New York," by Gilbert Ray Hawes; "Abstracts of Title," by John D. Chamberlain; "Marketable Titles," by Almond G. Shepard, and "Let the Purchaser Take Care," by Edward W. Faith.

Water Powers. "The Conservation of Water Powers." By Rome G. Brown. 26 *Harvard Law Review* 601 (May).

"The policy of conservation, as applied to water-powers, should be recognized as the policy of promoting, as rapidly and as extensively as possible, within the law, the utilization of the perpetual and inexhaustible resources afforded by every water-power in this country, the development of which is, or can be made, economically feasible."

Latest Important Cases

Admiralty. *Death Claims Growing out of "Titanic" Disaster.* U. S.

Judge Holt in the United States District Court for the Southern District of New York, dismissed April 21 the petition of the Oceanic Steam Navigation Company, Limited (the White Star Line) for the limitation according to the American law of its liability for losses resulting from the sinking of the *Titanic* on April 15, 1912. The British law, he held, must be applied to the case, fixing the liabilitity at about $3,000,000, rather than about $96,000. *The Titanic*, reported in *N. Y. Law Jour.* May 5.

The Court said: —

"Laying out of view the authorities in the case, it seems to me that three great fundamental principles of law relied on are decisive. The rule that the law of no nation has any extraterritorial effect is universal. The rule that a ship on the high seas is a part of the country to which she belongs is universal. The rule that liability for a tort is governed by the *lex loci delicti* is universal. If the owners of the *Titanic* under these circumstances can obtain a limitation of their liability in this court, they could have obtained it if she had foundered in the harbor of Southampton, immediately after she started on her voyage, and while still undoubtedly within the territorial jurisdiction of England. If they are entitled to limitation of liability in this country, they are entitled to limit their liability in all countries, according to the law of each country in which the proceeding is brought. There were undoubtedly upon the *Titanic* citizens of many countries and property belonging to citizens of many countries. Is the liability of the owners of the *Titanic* to be determined by the laws of each country in which suits happen to be brought no matter how much those laws differ? Is one claim to be determined by the law of France, of the suit is brought in France, and another by the law of Germany, or Italy, or Brazil, or Japan, merely because the suits are brought there? It seems to me that such results could not have been within the intention of Congress in passing the statute, and that the rule laid down by the Supreme Court in the case of *The Scotland* that when a collision occurs in the high seas between two vessels of the same country. the liability of their owners is to be determined

by the law of the country to which the vessel belongs, applies in this case."

Corporations. *Liability for Debts of Prior Insolvent Corporation after Reorganization.* U. S.

In a decision of momentous importance, especially as to railroads, the United States Supreme Court laid down the general principle that a creditor of a corporation not a party to its organization may hold its successor for his debt. In this specific case the court, 5 to 4, in a decision which Mr. Justice Lurton, who dissented, declared "was alarming," held the Northern Pacific Railway Company responsible for a $125,000 judgment against the Northern Pacific Railroad Company, which it succeeded, despite the fact that the court expressly stated that no moral wrong-doing was to be found in the reorganization. *Northern Pacific Ry. Co.* v. *Boyd*, L. ed. adv. sheets no. 13, p. 554, decided April 28.

Mr. Justice Lamar, who delivered the majority opinion, said:

"Corporations insolvent or financially embarrased often find it necessary to scale their debts and re-adjust stock issues with an agreement to conduct the same business with the same property under a reorganization. . . . But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him, the sale is void in equity, regardless of the motive with which it was made. For, if such contract reorganization was consummated in good faith and ignorance of the existence of the creditor, yet, when he appeared and established his debts, the subordinate interest of the old stockholder would still be subject to his claim in the hands of the reorganized company. There is no difference in principle if the reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

Mr. Justice Lurton said in his dissenting opinion:

"It is not a case of the transfer by stockholders of one company to themselves as stockholders of another. The railroad company was hopelessly insolvent. Its annual deficit was about five million dollars. Its general creditors, represented by the general creditors' bill, and its mortgage creditors, represented in the mortgage foreclosure proceeding, were endeavoring to prevent a disintegration, and to bring the property to sale. The stockholders, represented by the company, were resisting. The receivership had already lasted for several years and the situation was growing steadily worse. The lien creditors, to save themselves, devised a plan for the sale and purchase of the property by a new company which should assume their claims, so far as possible, and put the new company in shape to meet its obligations. A large sum of actual money was necessary, and also the consent of the stockholders, to bring about a speedy sale. . . . . The very basis of the plan to receive any large sum upon stock sales was believed to depend upon making a market among the stockholders of the old company. . . . The price fixed turned out to be little below what the stock actually sold for on the open market for the year following the operation of the property by the purchasers. The subscription price to the shareholders, as the situation then appeared, was deemed fair, full, and just by the very court which had approved the plan and decreed the sale, as is shown by the opinion of Judge Jenkins in the *Paton* case, 85 Fed. 838."

The Chief Justice, Mr. Justice Holmes, and Mr. Justice Van Devanter concurred in the dissent.

Labor Unions. *Closed Shop Conspiracy — Liability of Union for Non-Union Man's Loss of Employment.* Conn.

Closed shop agreements, which make it impossible for non-union men to obtain work in a given community, were held to be illegal conspiracies in a decision handed down April 18 by the Supreme Court of Errors of Connecticut. The decision holds that a non-union craftsman thus debarred from work has the right to maintain a suit for damages against the union which procures his discharge from a closed shop and prevents his employment in other closed shops.

The decision ordered a new trial of a suit for damages brought by Dominick Connors of Yonkers against Patrick Connolly and other officers of the Danbury (Conn.) local of the United Hatters of North America. Conners sued for the difference between his wages as a common laborer at Yonkers and those as a skilled hat finisher at Danbury from Sept. 21, 1909. when he was discharged at the union's demand from a factory at Danbury.

The Court (Prentice, C. J.) said in part: "It needs no argument to demonstrate that any combination between employers and employed which creates a condition in a community such as has been hereinbefore described, is a serious menace to the craftsman or workingman who, in the exercise of his free right of choice, does

not wish to join a union. It is calculated to place upon his freedom of choice and action a coercion which no longer leaves him wholly free. Its tendency is to expose him to the tyranny of the will of others, and to bring about a monopoly which will exclude what he has to dispose of and other people need from the open market, or perhaps from any market."

Procedure on Appeal. *New Trials — Right of Trial by Jury under Seventh Amendment.* U. S.

In *Slocum* v. *New York Life Ins. Co.*, 33 Sup. Ct. Rep. 523, L. ed. adv. sheets no. 13, p. 524, the United States Supreme Court decided, April 21, that a Circuit Court of Appeals, when reversing a judgment of the Circuit Court entered on a general verdict in favor of plaintiff because of error in refusing to instruct the jury that the evidence was insufficient to sustain a verdict for plaintiff, cannot direct, although in accordance with the state practice as defined in Pa. Laws 1905, chap. 198, that judgment on the evidence be entered contrary to the verdict, but must award a new trial, in order to conform to the provisions of United States Constitution, Seventh Amendment, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The opinion of the Court was delivered by Mr. Justice Van Devanter. Four of the Justices dissented, Mr. Justice Hughes writing the dissenting opinion, and Justices Holmes, Lurton and Pitney concurring in his dissent.

The decision is discussed editorially by the *New York Law Journal* in its issue of May 26, which declares that the minority "advance the more convincing arguments" in this "really great dissenting opinion."

We prefer to quote from the dissenting opinion, inasmuch as Mr. Everett P. Wheeler of New York, on behalf of a committee of the American Bar Association, has asked the Supreme Court to reconsider its decision, because of its "great importance to the whole country," declaring the granting of new trials in cases where upon the first trial it was decided as a matter of law that either party had the right to judgment is "one of the greatest abuses in the administration of justice."

Mr. Justice Hughes said:

'Of course, in any case where there are questions of fact for the jury, the court cannot undertake to decide them unless a jury trial is waived. But it would seem to be an entire misapprehension to say that trial by jury, in its constitutional aspect, requires the submission to the jury of evidence which presents no question for their decision; and that, although there be no facts for the jury to pass upon, still the judgment which follows as matter of law can be arrived at only through a verdict. This is to create a constitutional right out of the practice of taking verdicts by direction. The ancient method of challenging the sufficiency of the evidence by demurrer, and thereupon either discharging the jury altogether or assessing the damages conditionally to await the decision of the demurrer (*Darrose* v. *Newbott*, Cro. Car. 143,) reveals the function of court and jury in a clearer light, and shows that the idea that the jury upon a trial where there is no evidence to sustain a finding by the jury can be reached only through a verdict could not have been entertained at the time the Constitution was adopted.

"To repeat and conclude: All that has been done in the present case could, in substance, have been done at common law, albeit by a more cumbrous method. There has been no invasion of the province of the jury. That conclusively appears from the fact that this court holds that there was no basis for a finding by the jury in favor of the plaintiff. We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record. I submit, with deference, that in now condemning this practice, long followed in the courts below, this court is departing from, instead of applying, the principles of the common law, and is extending rather than enforcing the constitutional provision."

Pure Food and Drugs Act. *Attempt of a State to Burden Interstate Commerce — Conflicting State and Federal Regulations.* U. S.

That the states, in enacting pure food and drug laws, must take care not to trespass upon the field of interstate commerce to which the federal pure food and drug act applies, was made clear by the decision of the United States Supreme Court in *McDermott* v. *Wisconsin*, 228 U. S. 115, decided Apr. 7. The Court (Day. J.) held the Wisconsin law which permitted the sale of articles subject to the regulations of interstste commerce, only upon conditions that they contain the exclusive labels required by the state statute, to be in excess of the state's power and invalid.

The Editor's Bag

MR. CROLY'S GODKIN LECTURES

ACCORDING to Mr. Herbert Croly, who delivered the Godkin Lectures at Harvard University this year, "the Supreme Court has acted as the most important policy-making branch of the government," and "the monarchy of the law, re-enforced by the aristocracy of the robe," has involved "certain penalties of which the friends of a judicial aristocracy seem scarcely conscious."

Mr. Croly seems to fall into the common error of confusing the Supreme Court and the Constitution. Underlying his criticism is the assumption that the judges have the power to unmake the Constitution, to act according to their own sense of social justice, hence the failure of the law to reflect popular demands is the result not of the Constitution but of the temperament of the judges, who have shown an "aristocratic" tendency. Of course not every judge of the Supreme Court has possessed ideal qualifications for his office, and not every decision of the Court has been perfect. Yet the Supreme Court has shown a remarkable liberalizing tendency, as has been pointed out many times, especially by Mr. Charles Warren in his recent analysis of the numerous decisions of the Court on the validity of social reform legislation. Theory requires a sound foundation of fact. All the failings of state judges must not be imputed to the judges of the Supreme Court, nor must the restraints imposed on the exercise of judicial power be ignored. If the decisions of the Supreme Court have shown an "aristocratic" tendency, it can only be because the Constitution itself is a bulwark of aristocracy. With clear thinking Mr. Croly's criticism becomes simply a criticism of the Constitution itself; what he says of the Court is mere surplusage.

How about the Constitution? Mr. Croly said in one of his five lectures: "The machinery of amendment provided by the Constitution did more than anything else to emancipate that instrument from popular control. The Constitution was really king. . . . Government by law was monarchical." He speaks of "our royal Constitution." It "was framed in order to escape popular control and to substitute the safe sovereignty of the law for a theoretically irresponsible and capricious popular despotism." It was thus the outgrowth of a legalism hostile to democracy, in league, we are to suppose, with the dominant economic interests of American society.

Here we find the assumption that the federal Constitution, though amendable only by means of a complicated machinery, cannot be changed when the people really desire it, without the need of conquering greater obstacles than those confronting the recently adopted amendments providing for the income tax and direct election of Senators. We find also the assumption that the people

cannot dominate their representatives in Congress, but are necessarily ruled by a political oligarchy not of their own choosing but forced upon them. The two assumptions are of course not tenable. The United States has been a democratic nation in theory and in practice; its Constitution is the resultant of the natural forces at work in a democratic society, showing, it may be conceded, traces of the inevitable social inequality and class cleavage of an impure democracy, but possessing no defects which a purer democracy might not remedy; it is an instrument which can be modified and re-adjusted to meet every social demand, not an invincible superhuman agency. Mr. Croly's theory is visionary and superficial.

Mr. Croly maintains that constructive social reform and more direct popular control of the machinery of government go together, that the union of the two is "not the work of irresponsible agitators," but "the reflection of an actual and inevitable alteration in the traditional balance between political and economic power in the United States." We should perhaps refrain from criticising this, because we cannot understand it. Political and economic power tend to unite, and the current movement of radical democracy is the direct result of the improved economic status of the laboring classes. Doubtless we are moving toward a readjustment of the balance between the political power of the few and that of the many, on the basis of a changed economic relationship between capital and labor. And this new social adjustment will undoubtedly achieve expression in the fundamental law. It does not follow, however, that there is an "essential connection" between direct control of the operations of government by the people and a workable program of social amelioration. On the contrary the people have need of the services of experts, and of a complex governmental machinery, to realize fully what this program of social improvement seeks to accomplish. That they are unable to appreciate the advantages of the existing machinery over one more clumsily constructed, and that they are demanding a system which they find it easier to understand and apply, are considerations which fail to vindicate the conception of popular intelligence and capacity so dearly prized by visionary students of our political institutions.

THE LATE PROFESSOR WESTLAKE

PROFESSOR JOHN WESTLAKE, the eminent English jurist, died at his residence at Chelsea Embankment, near London, on April 12, aged eighty-five. How Mr. Westlake came to acquire an interest in international law is narrated in the following bit of autobiography: "I had been trained by my father to take an interest in foreign countries and affairs, and always did so; but my attention was first drawn to international law by Christie, the eminent conveyancer, of whom I was a pupil. He and John Venn Prior, the equity draftsman, were the counsel in whose chambers I read in my student days. Christie suggested to me to write a book on private international law, or the conflict of laws: what was wanted, as he described it, was 'to make Story readable.' I took the advice, but found that something more than he had expressed was required, and the result was my 'Treatise on Private International Law.'" (1858).

Westlake did much more than merely to make Story readable, that is not to be denied. His book was a landmark in the history of international law and a fifth edition appeared in 1912. At the

same time while unexcelled in breadth of learning and lucidity of statement, he has no doubt been surpassed in attractiveness of presentation by some other writers upon international law.

After his studies with Christie, Mr. Westlake, who had been graduated from Trinity College, University of Cambridge, was called to the bar at Lincoln's Inn in 1854. He was made a Q. C. in 1874 and enjoyed a considerable practice about that time before the Judicial Committee of the Privy Council, particularly in appeals from Canada.

For twenty years, from 1888 to 1908, he held the chair of Whewell Professor of International Law at Cambridge. He was one of the founders of the Institute of International Law and its honorary president at the time of his death. He was a member of the Hague Permanent Court of Arbitration from 1900 to 1906.

The death of Professor Westlake deprives England of one of the most illustrious members of a small group of jurists of remarkable scholarship and world-wide distinction. He took a deep interest in the promotion of international arbitration, and his influence will doubtless be felt in the United States for a very long time, by reason of the rich legacy he left to the literature of international law.

BAR EXAMINATIONS IN NEW YORK

IT is to be hoped that the action of the Court of Appeals, in directing a new policy upon the part of the State Board of Bar Examiners of New York, will improve the character of all the examinations held henceforth. The direction issued by the Court April 28 makes sufficiently evident the faults of the system against which criticism had been directed by the Judiciary Committee of the Association of the Bar of the City of New York, and by the Association itself in approving the committee report and in expressing by resolution its disapproval of the methods of the board: —

> The State Board of Law Examiners is instructed so to frame the questions propounded to candidates for admission to practice as to permit of a reasoned answer to a question. The board is instructed in that respect to formulate questions, whether based upon decided cases or upon statutes, so as to ascertain the ability of the candidate to apply his knowledge of legal principles and statutory rules and to explain the method of their application by him, rather than to elicit answers the correctness of which will rest upon the candidate's power of memorization.

It is astonishing indeed to find that there has been a situation thus described by the committee: "These questions are avowedly based wholly upon actual decisions of the Court of Appeals or the Appellate Divisions or the former General Terms, and briefly state the facts set forth in the reports of the cases. The candidate is then asked to give a brief answer as to the point of law presented, the question being put for instance thus: 'All the above facts appear on the trial, judgment for whom and why?' The test of the correctness of the applicant's answer seems to be whether it is in accordance with the decision of the court in the particular case from which the question was derived."

There is something strangely primitive and sophomoric about such a method of examination. No skill would be required to prepare examination papers on this plan; any clerk capable of extracting the salient facts underlying a decision could frame the questions, and the method suggests the absence of any careful effort to determine the can-

didate's grasp of fundamental legal principles. It takes something besides a retentive memory to make a good lawyer; desirable as an accurate memory is, overemphasis on this requirement cannot help setting a false standard, and admitting to practice many who have not the rudiments of a legal education.

It is not to be denied that candidates for the bar should be familiar with the law of the state in which they intend to practice, and that they should be examined largely if not chiefly with a view to testing their knowledge in this respect. But it is equally important that they should have a general knowledge of the common law and its historical development and modification in the particular state, and of the legal principles underlying decisions of state courts which lead to rulings in particular cases and may not be completely expressed in the final disposition of controversies.

The action of the New York City Bar Association may well serve as an example to other bar associations, which should give heed to the quality of the examinations held in their respective states, and endeavor, by direct or indirect pressure, to raise the standards for admission to the bar by every means within their power.

HAPPENINGS IN COURT

A MOTION for an injunction and receiver was being resisted before Judge Adelor Petit of the Circuit Court, in Chicago, a judge that has acquired quite a reputation because of continual newspaper attacks upon him.

"This is simply a political intrigue to kill my client's hopes as aldermanic candidate of the 7th Ward!" exclaimed his political attorney, handing a newspaper clipping to the judge. "Just look at that article about him."

The judge glanced at the long article, pushed it aside, and with a smile said, "Ah, that is nothing, nothing. It isn't a hundredth part as bad as they say about me every once in a while. He will get used to that."

The lawyer withdrew with his client from the court room after a very bitterly contested motion for temporary alimony. In the hall he turned to his client and asked: —

"Say, you heard your husband in there make some very serious charges against you and threaten to file a cross-bill. Can he prove anything like that?"

"Well, I should say not! Every word of it was a lie."

Then after a few moments of silence, she added, meekly, "Say, how many witnesses would he have to have?"

The military court had been more or less interrupted in their session, and all the officers on it had become more or or less irritated. Finally the Judge Advocate asked for a short recess until a certain witness for the prosecution would arrive, as otherwise there would be a break in the chain of evidence.

"Don't you think," interrupted one of the officers on the court, rather sarcastically, "that the intelligence of this court is sufficient to supply that link in the testimony if it is introduced later?"

The Judge Advocate reddened; he hesitated, and then sputtered out, "Perhaps — perhaps, sir — it is possible, sir."

The accused was on trial before a military court and was seated near his counsel, when a witness was brought in and asked the formal question: —

"Do you know the accused? If so, state who he is."

The witness looked at the prisoner, and then at his counsel, hesitated a

moment, and stuttered, "Which one, sir?"

In one of the southern states a colored gentleman had succeeded in getting elected Justice of the Peace. One day when he was holding court, he discovered he had no Bible to swear the witnesses by. After looking all over the room, in his despair he spied the colored parson, and his face instantly glowed with a smile.

"Reverend Dr. Johnson," he courtesied, "I sure have lost my Bible, and I can't swear my witnesses without one. The statute says I must swear the witnesses by having them place their right hand on the Bible, but another section says that I must follow the spirit rather than the letter of the law, and if you wouldn't mind coming up here and letting the witnesses put their right hand on your brow, I know the statute will be complied with, for you sure's got the Bible in your head."

AN ILLINOIS SENTENCE

YEARS ago in a "back district" of Illinois there flourished a judge who was no mean politician, as will appear herefrom. He took particular care so to conduct himself on the bench that he would offend no one, and thus secure a re-election at the expiration of his term. In one section of his county lived a numerous family named Green. "Green's Ridge" was famous on account of the fact that every voter was related to the Greens, even if he did not actually bear the same name. These folks were extremely clannish, and always voted together. In contests where everything else was equal, it was found that the vote of Green's Ridge was decisive. It follows that the person who was so unfortunate as to incur the displeasure of any one person of the "Ridge," was sure to find the entire population lined up against him. Officeholders were satisfied to overlook many shortcomings of the Green family in order not to incur their enmity.

One year Bill Green, the most notorious of the family, killed a man. It was a case of cold-blooded murder, and, although the "Ridge" attended the trial *en masse*, the jury was not to be overawed, and rendered a verdict of guilty. Seeing the numerous Greens in attendance, and not wishing to offend any of them, the Judge was very lenient in his rulings, favoring the counsel for the defense and overriding the law and the prosecuting attorney unblushingly. His charge to the jury was a model of inoffensiveness and favorable to the prisoner. It was apparently painful to him when the verdict was pronounced.

Bill Green went back to jail and remained there until the prosecuting attorney had insisted several times that sentence must be pronounced. The relatives from the "Ridge" were still around, and when it became noised about that the Judge had sent the sheriff to bring Bill Green into court to receive sentence, they all filed into the courtroom and awaited developments. When the prisoner had been brought in the Judge glanced about the room, and began nervously:

"Mr. Green, by the way, as you are no doubt aware, the recent trial ended in a manner rather unfortunate for yourself. That, you will take notice, Mr. Green, was not the fault of the court. The court, Mr. Green, you of course observed, had nothing to do with the making or rendering of the verdict. That was entirely a matter outside the jurisdiction of the court, and wholly with the jury, Mr. Green. The jury was not of the court's choosing, Mr. Green.

In fact, the court could have no choice in the matter of a jury, and in this case the court had no idea as to who would compose the jury, and had no part in its deliberations or conclusions. The court, Mr. Green, contented itself simply and solely with the law, and I hope you and your family, Mr. Green, have observed that the court kept strictly within its own proper sphere."

The judge glanced around and noticed that he had not yet given offense to the "Ridge," and proceeded:

"You no doubt observed, Mr. Green, that the jury — not the court, mind — returned a verdict. That verdict was — ah — was somewhat prejudicial to your interests, Mr. Green. It was, in fact, against you, Mr. Green. In fact, Mr. Green, the jury found you guilty of — of murder, Mr. Green."

Again the Judge glanced around the room. This time the "Ridge" was frowning, and the Judge added hastily:

"You understand, Mr. Green, that it was the jury, as I said before, and not the court, that returned that verdict."

Then the Judge hesitated for some time. The prosecuting attorney hinted that sentence must be pronounced.

"Ah, yes," continued the Judge. "You see, Mr. Green, the law makes it obligatory upon the court — and I wish you and your family to remember that the court did not make the law — to pronounce sentence upon you, without regard to what the feelings of the court may be. The sentence, Mr. Green, which the law provides — and with which the court had no part in the making — is that you — in fact, Mr. Green, the law says, as you are no doubt aware, that you must — must — hang. Now, Mr. Green, the court desires to make this ceremony as comfortable and convenient for you as possible, and the court would like to know whether you have any preference as to the time. What day, Mr. Green, would you prefer?"

"Friday is as good as any day," answered Green, stolidly.

"Ah, very good; it shall be as you desire, Mr. Greeen; and the court fixes Friday."

He bowed to Green and smiled at the "Ridge." The attorney said the exact Friday must be named.

"Oh, yes," answered the Judge. "Mr. Green, the law says that the date, which means the day of the month as well as the day of the week, must be appointed. Now, Mr. Green, what day of the month do you think would best meet your convenience? There are five Fridays in the next month — the 2d, the 9th, the 16th, the 23d and the 30th."

"The last one's good enough for me," said Green.

"Very well, very well, Mr. Green. We will say Friday, the 30th. That will be the date, Mr. Green, if agreeable to you. I hope you and your family will observe that it is the law and not the court that specifies that these exercises must occur."

"There is a form prescribed by the statutes," insisted the attorney, "that must be complied with in pronouncing a sentence, and the prisoner must stand while it is delivered." Green had been sitting sullenly in front of the judge.

"Ah, yes," said the Judge, "I believe there is. A mere formality. Now, Mr. Green, if you will rise, the court will read to you the form from the statute which the law says must be used in such cases as these. 'It is the sentence of the court,' that is the wording of the law, Mr. Green, 'that you, William Green, shall be taken from this place of confinement, and on Friday the 30th day of June, you shall be taken thence to a place prepared and hanged by the neck' — the words of the law, Mr. Green —

'until you are dead. And may God have mercy on your soul.' That, Mr. Green, concludes the duty of the court; and I trust that you and your family will observe that in all these proceedings the court is compelled by the law to act to perform this function, and that the court itself is in nowise responsible for the law, or for the action of the jury which resulted in this painful — painful to the court — proceeding. And now, Mr. Green, the court wishes you a very good afternoon."

A STATEMENT OF CLAIM

TO those that have difficulty in preparing more specific statements of claim, especially in the Municipal Court of Chicago, the following article may give a cue to the situation: —

"An artist who was employed to renovate and retouch the great oil paintings in an old church in Belgium, rendered a bill of $67.30 for his services. The church wardens, however, required an itemized bill, and the following was duly presented, audited and paid: —

"For correcting the Ten Commandments	$5.12
" Renewing Heaven and adjusting stars	7.14
" Touching up Purgatory and restoring lost souls	3.06
" Brightening up the flames of Hell, putting new tail on the Devil, and doing odd jobs for the damned	7.17
" Putting new stone in David's sling, enlarging head of Goliath	6.13
" Mending shirt of Prodigal Son and cleaning his ear	3.39
" Embellishing Pontius Pilate and putting new ribbon on his bonnet	3.02
" Putting new tail and comb on St. Peter's rooster	2.20
" Re-pluming and re-gilding left wing of the Guardian Angel	5.18
" Washing the servant of High Priest and putting carmine on his cheek	5.02
" Taking the spots off the son of Tobias	10.30
" Putting earrings in Sarah's ears	5.26
" Decorating Noah's ark and new head on Shem	4.31
"Total	$67.30"

— *English Weekly.*

A FATAL ANSWER

A REPRESENTATIVE in Congress tells of an experience when, as an attorney for the defendant, he was examining the complainant in a certain case.

His client, one Wheelock, had got into a quarrel with a certain McDonald, during their negotiations for the trade of horses. The quarrel had gone so far that McDonald had made application to a magistrate to have Wheelock bound over to keep the peace, alleging that he had threatened to do him, McDonald, bodily injury.

When the case was called, McDonald testified to the circumstances under which Wheelock had threatened him. The cross-examination began.

"Now, Mr. McDonald," the lawyer said, "you declare that you are under the fear of bodily harm?"

"I am, sir."

"You are even afraid for your life?"

"I am, sir."

"Then you freely admit that Wheelock can whip you, Pat McDonald?"

The question aroused McDonald's "Irish" instantly.

"Bill Wheelock whip me? Never!" he shouted. "I can whip him and any half dozen like him!"

"That will do, Mr. McDonald," said the attorney. The court was already in a roar, and the lawyer rested the case without further testimony or argument. The case was dismissed, for it was evident that McDonald could not be under serious bodily fear of a man whom, in his own opinion, he had only to use one-seventh of his strength to whip.

USELESS BUT ENTERTAINING

THE LAWYER'S BRIEF TO HIS LOVE

Priscilla, it is more than wrong,
To keep me in suspense so long!
(See Bigelow's "Torts" and Wharton's "Crimes,"
And *Callahan* v. *Grimes!*)

Now, while the year is at the May,
You ought the happy "yes" to say,
Conforming to the well-known rule.
("*Ex parte* James O'Toole!")

Too long I've been at call and beck
(*Smith* v. *Jones*, page 9, *et seq.*),
I tell you, dear, it isn't right!
(See *Gibbons* v. *White!*)

Should you refuse to grant my prayer,
I'll have to find a girl elsewhere;
Relying on the well-known case
Of *Simpkins* v. *Chase!*

But I'm assured that when you've read
The cases cited just ahead
You'll recognize, with mind profound,
That my opinion's sound;

Which done, you'll enter, blithe and free,
A large "*nolo contendere!*"
And marry me to save, to boot,
The further costs of suit!

— *Chicago Inter-Ocean.*

Few lawyers in Wisconsin enjoyed deeper respect of the public than did the late Chief Justice Edward G. Ryan, Wisconsin Supreme Court. Yet, he was a man of violent temper and, naturally, most decided likes and dislikes. In his "Story of a Great Court," a history of the Wisconsin Supreme Court, the present Chief Justice, John B. Winslow, tells a story that illustrates this characteristic of the great lawyer.

"While in partnership with Senator Carpenter," Justice Winslow writes, "there was employed in the office a clerk, against whom Mr. Ryan had taken a violent and uncontrollable dislike, so extreme that he could not even abide his presence in the same room.

"At one time, while Mr. Carpenter was attending court in Beloit, this clerk came into Mr. Ryan's room and asked him if he had any instructions to give him as to the office work.

" 'Yes, sir, I have,' said Ryan, and turning to his desk, hastily wrote a few lines, handed it to the clerk and directed him to take it to Mr. Carpenter, as soon as he could. The clerk, impressed with the importance of the message, rushed to the station, just succeeded in catching the train, and on his arrival in Beloit made equal speed in taking the note to Mr. Carpenter. Tearing it open Mr. Carpenter read:

" 'Matt. H. Carpenter. Dear Sir: I want you to keep your lackey out of my office.

"Yours respectfully,

" 'E. G. RYAN.' "

This must date from 1901 and upwards unless it comes down from the One Hoss Shay period: —

Client rushes into his lawyer's office: "I don't believe we can collect that judgment you recovered for me. I find the man has nothing but an automobile."

"Well," said his counsel, stroking his chin thoughtfully, "Perhaps *I* could use that."

Assistant District Attorney Clark was conducting a case in the Criminal Court. A large, rough-shouldered negro was in the witness-chair.

"An' then," said the witness, "we all went down in the alley, an' shot a few craps."

"Ah," said Mr. Clark, swinging his eye-glass impressively. "Now, sir, I want you to address the jury and tell them just how you deal craps."

"Wass that?" asked the witness, rolling his eyes.

"Address the jury, sir," thundered Mr. Clark, "and tell them just how you deal craps."

"Lemme outen heah," said the witness, uneasily. "Firs' thing I know this gemman gwine ask me how to drink a sandwich."

— *San Francisco Argonaut.*

One dull day in a law office in a small Kansas town, the lawyer and his assistants were much surprised to see entering the door a man with a badly swollen face tied up with a big handkerchief. Before saying anything he sank wearily into a chair. Scenting an assault and battery case, and perhaps a damage suit, the lawyer briskly inquired what he could do for the weary one and the answer he received was:

"Say is this the place where you pull teeth?"

"No," replied the lawyer. "We sometimes help people to cut their teeth, but we never pull them." — *Chicago Legal News.*

Remarkable as it may seem, some of the biggest legal mistakes in drafting wills have been made by lawyers. Judge Bacon, whose property was valued at £118,403, wrote his legacies on a sheet of court paper, but, though he was an expert in law, he forgot to sign his own alterations to his will. An affidavit from a solicitor and an official of the Bloomsbury Court was necessary before matters were set right. Lord St. Helier and Lord Grimthorpe both failed to make proper wills. The latter's will was a document of over 11,000 words, but in the matter of lengthy wills this was beaten by Edward Bush, a Gloucester engineer, who required 26,000 words before he was satisfied with his provisions. He had an estate of £114,813. At the other end of the scale is the 12-line will of Lord Russell of Killowen, who in that space set his seal on £150,000. Lord Brampton took 400 words to dispose of £142,000, while Lord Mansfield used only half a sheet of note paper, and a good second was Alphonse Henry Strauss, who bequeathed £296,221 in 43 words.

— *Dundee Advertiser.*

The Legal World

Monthly Analysis of Leading Legal Events

There seem to have been few important developments lately in the field of procedure, or the administration of justice generally, though these matters figure prominently in discussion and enlist the attention of legislatures. Thus far we have learned of little legislation of importance, directly affecting the courts and the bar, which has been enacted in the legislative sessions of 1913.

Social legislation has occupied a large share of the attention of the state legislatures this year. The number of state workmen's compensation acts has been raised to almost a score. Many of the new systems are pseudo-elective, election being presumed in default of written rejection, this principle being applied in the statutes of West Virginia, Oregon and New York. Ohio has provided for a compulsory state insurance fund to perfect its elective law. According to late reports other statutes were at the point of passing in Arkansas, Iowa, Minnesota, Nebraska and Texas.

Widows' and mothers' pensions are perhaps the most important subject of social betterment legislation before the state legislatures. Ohio has enacted a pension law by which mothers without husbands to support them will draw $15 a month, with an additional $7 for each child more than one. Pension laws are now on the statute books in Wisconsin, New Jersey and several other states, and Massachusetts has been seriously considering the project.

A bill regulating marriage along health lines has been re-introduced in a modified form into the New York legislature and has the active support of many organizations. "That it should be possible to introduce such a bill," says the *Medical Record* (New York), "is a healthy sign. Even if many of the schemes brought forward are unworkable, at least they show that steps are being taken to endeavor to save the race from deterioration, and with the aid of those best qualified to grapple successfully with the problem some practical plan may possibly be evolved."

Aside from social legislation, mention may be made of a number of "blue sky" laws passed in Ohio and other states, ostensibly for the protection of investors, of the passage of the jury reform measure in New Jersey so persistently

advocated by President Wilson, and of the approval by the Wisconsin legislature of the proposed constitutional amendment providing for the initiative and referendum.

The Foley bill incorporating the Rockefeller Foundation, "to promote the well-being of mankind throughout the world," has been signed by Governor Sulzer of New York. Among the incorporators are John D. Rockefeller, John D. Rockefeller, Jr., Simon Flexner and Starr J. Murphy.

Personal

Frank L. Randall, lately superintendent of the Minnesota State Reformatory at St. Cloud, has been appointed chairman of the Massachusetts Board of Prison Commissioners. He was selected by Governor Foss because of his excellent record and achievements as a progressive penologist.

Supreme Court Justices Eugene A. Philbin and Bartow S. Weeks, who were designated by Governor Sulzer to fill until Jan. 1 next the vacancies created by the resignation of Justice McCall and by the death of Justice Bischoff, took their seats on the bench April 28. Both appointments are regarded by the bar with great satisfaction, because of the high professional attainments and moral character of both men.

Professor Melville M. Bigelow was the guest of honor of the Alumni Association of Boston University Law School at a banquet tendered him on April 12. Nearly a hundred members of the Association and their guests, including many leaders of the bench and bar of Massachusetts, paid their tribute to Professor Bigelow, who has been a member of the faculty of the school for forty-two years, has lectured to every class which it has graduated since its inception, and was its dean from 1902 until 1911.

Bar Associations

American Bar Association. — The annual meeting of the American Bar Association will be held in Montreal, Canada, Sept. 1, 2, and 3 (Monday, Tuesday and Wednesday). The opening address will be delivered by President Frank B. Kellogg of Minnesota. Rt. Hon. Richard Burdon Haldane, Viscount of Cloan, Lord High Chancellor of England, will deliver the annual address on Monday afternoon in the Princess Theatre. He will be introduced by Chief Justice White of the United States Supreme Court. Hon. Charles J. Doherty, Minister of Justice and Attorney-General for Canada, will tender on behalf of the Dominion Government a reception to the Lord High Chancellor and the president and members of the Association. There will be a symposium on "The Struggle for Simplification of Legal Procedure" on Tuesday evening, the subject being considered under three sub-topics: (*a*) Some Causes," by Hon. William C. Hook of Kansas, Judge of the Federal Circuit Court of Appeals, Eighth Circuit; (*b*). "Legal Procedure and Social Unrest," by Hon. N. Charles Burke, Judge of the Maryland Court of Appeals; (*c*) "The Goal and its Attainment," by Hon. William A. Blount of Florida. Hon. William Howard Taft will present a paper on Wednesday at 10 a.m., in the Royal Victoria College. The annual banquet of the Association will be given on Wednesday at 7 p.m., in the Rose Room of the Windsor Hotel. Hon. Elihu Root will preside. Maître Labori, Bâtonnier of the Bar of the City of Paris, France, will respond to one of the toasts. The Commissioners on Uniform State Laws will convene on Tuesday, Aug. 26, at 10 a.m. The Association

of American Law Schools will have its first session on Sept. 2, at 3 p.m. The Comparative Law Bureau will hold its annual meeting Sept. 2, at 3 p.m. The American Institute of Criminal Law and Criminology will convene Sept. 3, at 2.30 p.m., in the New Banquet Room of the Windsor Hotel.

Louisiana. — The annual meeting of the Louisiana Bar Association was held at New Orleans April 11–12, President Joseph W. Carroll delivering the opening address. Judge Robert H. Marr dealt with negro suffrage and the ease of constitutional amendment in "A Historical Review of the Constitution of Louisiana." "Each successive state Constitution provides an easier and speedier means of amendment than did its predecessor, until at last we have almost a referendum. Since the adoption of the Constitution of 1898 ninety-six amendments have been proposed and more than half of them adopted." The constitutional convention of 1898, said the speaker, was concerned chiefly with the elimination of the negro as a voter; as the two amendments to the federal Constitution were never legally passed there was no reason why they should not be violated. Various phases of the law of the state with regard to corporations were discussed in papers presented by John H. Overton of Alexandria, Paul H. Kramer of Franklin, Bernard Titche of New Orleans, E. H. Randolph of Shreveport, and Johnston Armstrong. John Dymond urged codification of the corporation laws. On the next day W. A. Blount of Pensacola made an eloquent address deploring popular dissatisfaction with and unfounded criticism of the courts, and opposing radical projects such as the recall of judges. The committee which had investigated the notarial system reported in favor of abolition of statutory limitations on the number of notaries. In the report of the committee on uniform state laws some attention was given to the subject of sterilization of confirmed criminals and degenerates. A successful banquet closed the meeting. The officers elected are: Benjamin W. Kernan, president; Charles McCoy of Lake Charles, David M. Evans of Madison Parish, E. T. Weeks of New Iberia, and Purnell M. Milner of New Orleans, vice-presidents; and Charles A. Duchamp, secretary-treasurer (re-elected).

Utah. — The Utah Bar Association held its annual social session in Salt Lake City April 19. Judge J. E. Booth of Provo gave an interesting talk on the practice of law in the territorial days. W. S. Dalton of Salt Lake told a number of stories about criminal procedure in the police court of Salt Lake City. Herbert MacMillan, chairman of the executive committee, gave a short talk and Judge T. D. Lewis and Judge M. L. Ritchie of Salt Lake spoke.

American Society of International Law

The seventh annual meeting of the American Society of International Law was held at Washington, D. C., April 24–26. The meeting was opened by Senator Elihu Root's presidential address, read in his absence by Dr. James Brown Scott, secretary of the Society. This paper dealt with Francis Lieber and his achievements in the field of international law.

Many addresses were made at the sessions dealing with the Panama Canal controversy, but it was noticeable that few speakers of note took the ground that the Hay-Pauncefote treaty was not violated or that the dispute was not arbitrable.

Crammond Kennedy of the bar of the

District of Columbia urged strict compliance with the letter and spirit of the Hay-Pauncefote treaty, and professed his belief in the feasibility of an impartial arbitration of the question. Chandler P. Anderson, former counselor of the State Department, who has been succeeded by Prof. John Bassett Moore, prepared a paper which aimed to state the issues rather than to take a share in the controversy.

Rear-Admiral Charles H. Stockton, U. S. N., president of George Washington University, spoke in somewhat the same tenor as Mr. Kennedy.

The contrary view regarding the question of tolls, however, was taken by Lewis Nixon of New York and by Richard Olney of Boston. Mr. Olney, former Secretary of State, declared that an impartial arbitration was not to be had in the Hague Permanent Court, and took the position that the United States as national proprietor of the Panama Canal does not have to charge its own shipping the same tolls as others. He made the point that "this is an artificial waterway, and it is a clear principle of international law that the owner of artificial waterways may 'annex such conditions to its use as it may please.' "

Other speakers were Gregers W. W. Gram, Minister of State of Norway, Professor Eugene Wambaugh of Harvard Law School, and Talcott Williams, all of whom favored the "equal treatment" policy. In the evening Professor Emory R. Johnson submitted voluminous statistical tables, and argued that political prudence and sound finance alike made it advisable to require all the traffic using the canal to bear its share of operating expenses and capital charges.

At the closing session, Dr. Hannis Taylor made an earnest plea for the repeal of the objectionable tolls provision of the Panama Canal Act, and Professor Amos S. Hershey of the University of Indiana took a similar position.

An interesting question was raised by the slightly divergent opinions expressed by Professor John Westlake and Thomas Raeburn White of Philadelphia, regarding a minor point. Mr. White, urging arbitration, hoped the State Department would "embrace the opportunity of creating a precedent sustaining the proposition that it is not necessary in international law that injury should actually be suffered before a justiciable action arises." In a letter of similar tenor, the late Professor Westlake maintained that it was necessary "that an injury be actually sustained before a justiciable action arises."

Professor James W. Garner of the University of Illinois answered in the negative the question, "Has the United States the right to exclude from the use of the Panama Canal any class of foreign vessels, such as railway-owned vessels?" He said that the exclusion of railroad and trust owned vessels is nothing less than a penalty for violation of a law of the United States which has nothing to do with the protection or conduct of the canal, and is inconsistent with the treaty.

At the annual banquet, Frederic R. Coudert of New York presiding as toastmaster, Jonkheer J. Loudon, Minister of the Netherlands, referred to the opening next September of the "Peace Palace" at the Hague, donated by Andrew Carnegie. The Interparliamentary Union will meet at The Hague at the same time, rendering the occasion auspicious for the promotion of the movement for judicial settlement of international disputes. Minister Loudon proposed that there be established in the Peace Palace an Academy of

International Law, where students may be given an opportunity to study international law from masters of the subject. An endowment of over a million for such an academy, he said, has been promised by Mr. Carnegie if the first session the coming summer is a success. Other speakers at the banquet were Minister of State Gram of Norway, Professor Albert Bushnell Hart of Harvard, and Representative James L. Slayden of Texas.

The officers elected for the ensuing year are: President, Senator Elihu Root of New York; vice-presidents, Chief Justice White, Justice William R. Day, Philander C. Knox, Andrew Carnegie, Joseph H. Choate, John W. Foster, George Gray, William H. Taft, William W. Morrow, Richard Olney, Horace Porter, Oscar S. Straus, Jacob M. Dickinson and William J. Bryan. James Brown Scott was re-elected secretary and Chandler P. Anderson, treasurer.

Obituary

Clopton, William H., former United States Attorney for the Eastern district of Missouri, a Confederate veteran, died at St. Louis April 17.

Connoly, Theodore, for many years first assistant corporation counsel in the law department of New York City, died May 6. He was born in New Orleans and educated in France. After his admission to the bar in 1872 he edited "The New York Citations," "The New York Criminal Reports" and "Connoly's Surrogate Reports." He was the first editor of the *New York Law Journal.*

Draper, Andrew Sloan, State Commissioner of Education of New York, who died April 27, was graduated from the Albany Law School in 1871, practised law for five years, served as a member of the New York Assembly in 1881, and in 1886 was elected State Superintendent of Public Instruction.

Dye, John T., termed by Benjamin Harrison the "greatest lawyer west of the Alleghenies," died at Castleton, Ind., April 24. He was born in Kentucky in 1835. He was general counsel for the "Big Four" Railroad from 1889 to 1905.

Elliott, Byron K., former Justice of the Indiana Supreme Court, author of several authoritative law books, and one of the foremost lawyers in his state, died at his home in Indianapolis April 19, at the age of 78.

Fuller, Col. *Charles W.*, who died April 28 in Bayonne, N. J., served as attorney for the Standard Oil Company and the Central Railroad of New Jersey, State Superintendent of Public Instruction, member of the State Board of Education and member of the state legislature.

Gorell, Lord (*John Gorell Barnes*), former President of the Probate, Divorce and Admiralty Division of the English High Court, and since his retirement in 1909 intrusted with judicial duties in the House of Lords and Judicial Committee, died at Mentone, April 22, aged 64. He was the son of a Liverpool shipowner, was educated at Peterhouse, Cambridge, being graduated with mathematical honors, was called to the bar at the Inner Temple in 1876. He acquired a considerable practice on the Northern Circuit and later in the commercial work of the London Courts, being made a Q.C. in 1888, and engaged in all the large mercantile and admiralty cases. About four years later Lord Halsbury made him a judge of the Probate, Divorce and Admiralty Division. His recent labors as chairman of the Divorce Commission undoubtedly affected his health. The *Law Journal* attributed to him "the true spirit of the law re-

former," and says: "He had a keen intellect that never leaned to technicality, a dignity and courtesy that no untoward incident could disturb and a readiness to listen that was all the more noteworthy because of his own economy in words."

Hallett, Judge *Moses*, died April 25, in Denver in his seventy-ninth year. He was born in Galena, Ill., and was admitted to the bar in Chicago in 1858. He went to Colorado in 1860 and was a member of the Territorial Council, 1863-65; Chief Justice, 1866-76, and District Judge, 1877–1906.

Henderson, John Brooks, formerly United States Senator from Missouri, and author of the Thirteenth Amendment to the Constitution of the United States, died at Washington, April 12, aged 86. Born in Virginia, he went to Missouri as a boy, became a school teacher and studied for the bar. After his admission he was elected to the state legislature and originated many of the Missouri railroad and banking laws. He was one of the Republican Senators voting for the acquittal of President Andrew Johnson. A few months later the Missouri legislature refused to re-elect him to the Senate.

Keener, William Albert, LL.D., formerly Justice of the New York Supreme Court, Story Professor of Law at Harvard, and later Dean and Kent Professor in Columbia Law School, died in New York, April 22, aged 57. He was born at Augusta, Ga., and was graduated from Harvard Law School in 1887. At Columbia he lectured chiefly on equity and corporations. He was the author of a "Treatise on Quasi-Contracts" and editor of "Cases on Contracts," "Cases on Quasi-Contracts," "Cases on Corporations" and "Cases on Equity Jurisdiction." He was active in the practice of law at 115 Broadway.

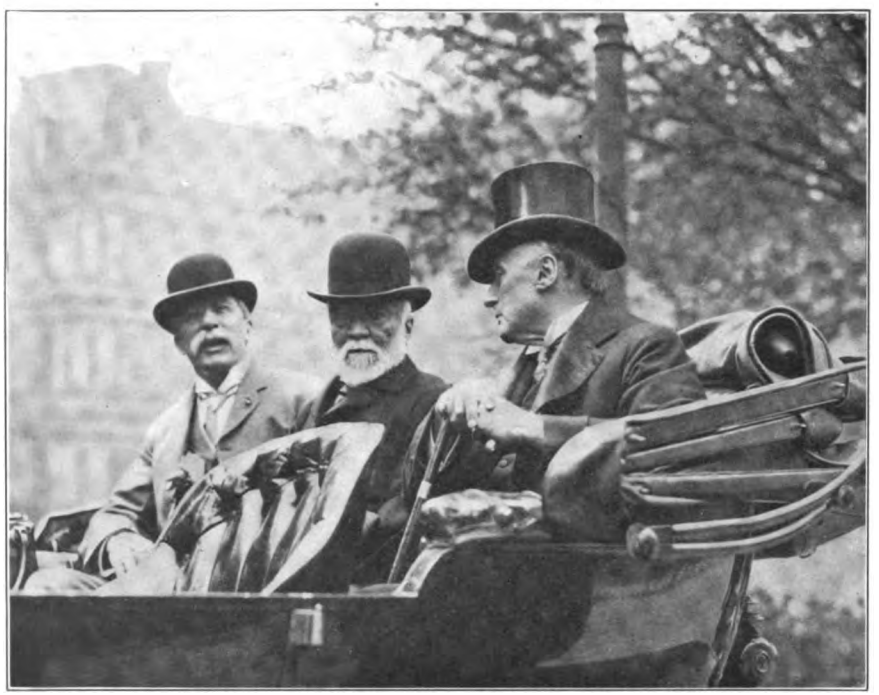
Llandaff, Lord (*Henry Matthews*), who acquired a commanding position in the English courts as an alert and eloquent advocate, before he joined Lord Salisbury's administration as Home Secretary in 1886, died in London, Apr. 3. He was born in Ceylon in 1826, educated in France and at the University of London, and called to the bar at Lincoln's Inn in 1850. He took silk in 1868 and entered Parliament in the same year. As a barrister he appeared in many *causes célèbres*, including the Tichborne civil trial. He was a man of rare social and conversational gifts, and of extensive knowledge of foreign systems of law.

Magill, Edward W., Judge of Common Pleas Court No. 1, in Philadelphia, died Apr. 20, at the age of 55. He received his legal education at the University of Pennsylvania law school, and had no political backing in his candidacy for the bench, receiving the appointment on his merits as a lawyer.

McWhorter, Henry C., for eighteen years Justice of the Supreme Court of Appeals of West Virginia, and long Chief Justice of that Court, died at Charleston, W. Va., Apr. 15.

Read, John R., member of the Pennsylvania Constitutional convention of 1872, and former United States Attorney and Collector of the Port of Philadelphia, died May 2 at the age of 70. He was known as one of the leading Democrats of Pennsylvania and had taken a prominent part in national conventions of the party.

Tuck, William Henry, former Chief Justice of the Supreme Court of New Brunswick, died Apr. 8 at St. John, aged 83.



ANDREW CARNEGIE AND LORD WEARDALE, CHAIRMAN OF THE BRITISH PEACE DELEGATION

TAKEN IN CONNECTION WITH THE RECENT CONFERENCE IN NEW YORK REGARDING THE COMING GHENT PEACE CELEBRATION

Bain News Service

The Green Bag

Volume XXV July, 1913 Number 7

The Present Administration and International Justice

ENSE petit placidam sub libertate quietem, the motto of the Commonwealth of Massachusetts, expresses the dominant sentiment of a large part of the world's population. Only by powerful armaments is the unruffled peace of free institutions to be maintained. That sentiment may be expressed by the paradoxical but significant phrase *the peace of the sword*. It recalls the age of private war, when the military prowess of the feudal lord was the only guarantee of the security of his tenants — the age which preceded the establishment of the King's peace and the substitution of the strong arm of the law for the sharp edge of the sword. Private war of individuals has disappeared, private war of nations survives as a singular anachronism, for all war is private war, and there can be no such thing as war where courts possess other means than wager of battle for settling disputes. Every civilized state has passed the age of baronial license and substituted the peace of the law for the peace of the sword. The peace of the law is a fair goal, whether the peace of the state, in the terminology of modern indictments, or the peace of nations, yet there may be some insincerity in this use of the word peace, for there can be no peace between those who keep and those who break the law, and we have grown, in our modern life, to think of the law not so much as a means of protection against the oppressor as a mode of exacting restitution from the wrongdoer. There is an element of chicanery in the assertion that the powerful nations sincerely desire peace with the weaker, for they desire above everything the preservation of their national rights at whatever cost to those who infringe them. The weaker nations may with greater sincerity plead for the peace of nations, as it is they which have most to fear the coercion of the powerful nations. The King's peace, however, was a broad term, signifying vindication of the rights both of the strong and of the weak, and the peace of nations means nothing more nor less than the security of national rights, both of the weak and of the powerful. The movement aiming at international conciliation and the expansion of international law ought therefore not to be regarded as essentially a peace movement, though peace may be one of its fruits, but as a movement seeking the security of effective administration of international justice. Instead of the peace of the sword or the peace of sentimentalism it strives above all for the security of justice, the peace not of the King but of that obscure abstraction the international sovereign.

Dr. Lyman Abbott at the recent Mohonk Lake conference supported this idea of peace maintained at the point of the sword, saying: "There are two

ways of promoting peace — one by making our nation so weak that it cannot fight, the other by making it so strong that it need not fight." The futility of this "panacea," as it was well termed, has been exposed by Mr. Carnegie. As Mr. Carnegie says, we are a peaceful nation, and have been one so long that we have not an enemy in the world of whose attacking us there is any likelihood; if we were attacked no nation or conceivable combination could entertain the hope of successful invasion, in view of the defensive strength of our standing army and militia. But to this it should be added that it is the moral position of the United States, the strength of its record written on the pages of the history of enlightened civilization, and not its military defenses, which affords the most certain guaranty of its future peace. And Mr. Carnegie took pains to assert that the true panacea for ending war lies in the growing belief in the brotherhood of man.

Are we, in the light of recent events, drawing nearer to this goal of a humanity more closely united by the sentiment of solidarity and sense of international justice? This question is to be considered with respect to the course of Mr. Wilson's new Administration and other significant developments of the past few weeks.

The first serious difficulty in our foreign relations affording the present Administration an opportunity for friendly offices arose in the dispute with Japan concerning the anti-alien legislation of California. The Administration, too young to have studied our relations with Asiatic nations and to have formulated a policy in regard to them, found itself suddenly confronted by a situation which had to be promptly met and as to which the plea that time be taken for deliberation could not prevail. This situation may be described as that resulting from the exercise by California, following the example of other states, of a power closely related to the treaty-making power of the United States.

In *De Geofroy* v. *Riggs*, 133 U. S. 258, the Supreme Court said: —

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiations and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement.

The rights of aliens thus being an appropriate subject for formulation by treaty, and also being a subject as to which the pride of foreign nations is sensitive and which therefore it would be politic to leave wholly to federal negotiation with foreign governments, a wise Administration would use every means to dissuade the states from passing laws in any way abridging the rights of aliens, even though such laws may not definitely set at defiance existing treaties. The mere fact that our treaty with Japan is silent on the subject of acquisition by aliens of farming lands in this country, while it would seem to offer no legal barrier to the passage of a drastic state law prohibiting alien ownership of agricultural lands, nevertheless does not afford any moral justification for legislation obnoxious to sister nation and embarrassing to our Department

of State. That our states should feel free to deal with matters not expressly covered by treaties, yet to be amicably settled only through the usual diplomatic channels, is in the highest degree impolitic, even though the states are not exceeding their constitutional powers.

Moreover, apart from considerations of policy, the United States owes certain obligations to the immigrant whom its laws do not exclude from this country, and to the nation from which he comes. The admitted alien, once he has settled in this country — and the right of immigration implies the right to acquire a permanent residence — is a member of our community and under the protection of its laws, and is not the less responsible to the community of which he is a part for the fulfillment of certain duties because the law regards him as still an alien. His obligation to obey the laws of the United States arises as soon as he enters the country. While it may not be true that naturalization, under the existing state of the law, affects solely his political status and not his civil rights, that would seem to be the ideal meaning of naturalization. There are reasons why an alien should not be compelled to expatriate himself or to render himself liable to military service until he chooses to alter his political status, and why he should not become eligible for the franchise as soon as he enters the country, but there are no reasons why he should immediately not acquire purely civil rights and liabilities in accordance with a wider application of the principle of equal protection of the laws than was made in the San Francisco laundry case.[1] While he resides in the country he is a natural citizen, even though under political disability, and the fuller citizenship which in course of time he may acquire by naturalization, while it may confer a new political status, ought not to confer a new civil status. The mere fact that an alien is admitted to the country ought to carry with it the recognition of his right to the usual incidents of residence, including the rights to acquire and possess real and personal property. If for any reason there is need of withholding these rights, he is not the type of alien who should have been admitted, and the remedy should be found in a change of the immigration laws. If the naturalization laws exclude from naturalization certain aliens whom the immigration laws deem eligible for residence in this country, there is an injustice founded on inconsistency, and surely no ground is afforded for the argument that the rights of the alien ineligible for naturalization should be curtailed. Morally the admitted alien is equally entitled to certain primary rights, whether he is eligible for naturalization or not, for his eligibility for naturalization does not affect those rights but is a right of a different kind.

The question of the equity of our naturalization laws is involved in the dispute with Japan, notwithstanding the effort to keep it in the background. We still have an antiquated naturalization law which is likely to lead to much dissension in future with Asiatic countries. The decision of the Supreme Court holding a Hindu eligible for naturalization, within the clause "free white persons," is a step in the right direction of liberalizing the law, but has already created a new problem, that of Hindu immigration, for this Government. We do not desire a stream of Asiatic immigration to this country, but it is possible for us to impose restrictions on immigration without wounding the sensibilities of Asiatic countries, by

[1] *Yick Wo* v. *Hopkins*, 118 U. S. 356.

representations that the United States does not desire a more rapid influx of population than we could hope to assimilate successfully. Such restrictions could take the form of an educational or property qualification, of a test of familiarity with our language and institutions, or of an age or other requirement, and our immigration laws could without great difficulty be remodeled in such a way as not to afford Japan or any other power reasonable ground for complaint. The way to exclude Asiatics is by making the immigration laws more stringent, and not by maintaining a rigid naturalization law and discriminating against aliens ineligible for naturalization.

Admiral Mahan, in a recent letter to the London *Times*, says: "There cannot, of course, be naturalization without immigration, while immigration without the concession of naturalization, though conceivable and possible, is contrary to the genius of American institutions, which as a general proposition do not favor inhabitancy without the right of citizenship."

Everything cannot be changed at once, and a system in harmony with ideal justice can only gradually be achieved. The most prudent course to adopt, in the Japanese difficulty, would perhaps be to leave the iniquity of the naturalization law to correct itself in course of time, either by actual amendment or liberalizing judicial construction, and to wait until the opportunity is ripe for the negotiation of a new treaty with Japan, conceding to all Japanese hereafter admitted to this country the same rights as those enjoyed by aliens of any other nation. International comity calls for a provision no less liberal, and even a far-sighted selfishness would demand it, because the United States needs on the part of Japan a hospitable attitude toward American capital and commercial undertakings in that country. If a new treaty of this kind were ever negotiated the question would be squarely presented to Congress whether the immigration laws should not be revised to provide for a reasonable and just restriction on Asiatic immigration.

Under the actual circumstances we do not see how President Wilson and his Secretary of State could have done more than they have done to maintain good feeling between the two countries. The President made it entirely plain that the Administration would deeply regret the passage of the Webb law even though the treaty were not violated, and thought such legislation most inexpedient even if its validity could not be questioned. The occasion was not an opportune one for proposing that a more liberal treaty be negotiated if possible or that a revision of the immigration and naturalization laws be urged upon the attention of Congress. Japan thinks that the United States ought to challenge the Webb law in its own courts, instead of leaving the initiation of a test case to Japan, but our Government, for obvious reasons, could not seriously consider such a proposal. The only ground on which the validity of the law could be contested would be that of violation of the treaty, and the Government would stultify itself by taking up so extremely dubious a position. The course pursued a few years ago with reference to the school question, when the federal Government did bring a test case, would not be available because in this instance the nation cannot logically appear as the complainant. Even if the President had wished to do more than he did to appease the pride of Japan, there was nothing more for him to do.

The California anti-alien law bespeaks a short-sighted nationalism which

does not look beyond our own borders in seeking that on which the welfare of a nation rests, and makes the mistake of over-emphasizing the need of protecting our domestic labor from a competition which, kept within bounds, could not fail to be wholesome. The most regrettable feature of the affair is the appearance of participation, on the part of the Government, in a policy which subordinates the interests of international goodwill and of the economic efficiency of our own population to the supposed interests of domestic labor. There would be less ground for such a suspicion of implication in this mistaken policy adopted by the great state of California, were it not for the many utterances of the President on the need of securing by tariff reductions healthful foreign competition for the development of our own industrial efficiency, utterances in which privileged wealth receives much attention, but in which no reference is made to the paternalistic protection afforded to American workmen by restrictions on the entrance of foreign labor into domestic markets. The Secretary of State in the past has at times shown himself an overzealous partisan of labor. The party now in power is predisposed to err by leaning as much to one side as the opposite party did to the other. "Dollar diplomacy" has received a rebuff from the present Administration through the withdrawal from the six-Power Chinese loan, but Full Dinner Pail diplomacy offers quite as serious a menace to the peace of the world as Dollar diplomacy, for commercial greed is equally active in the promotion of discord, whether it seeks undue advantage for American capital or for American labor.

While an accusation of this kind against the Administration is easily brought and easily believed to be true, it illustrates the natural tendency to give free play to processes of mental association, identifying with the motive of a certain act all the temperamental defects with which the person accused is known to be affected, and to connect with his intention matters that may not have been in his mind at any time while it was being made up. A common-sense view of the matter would be that no ground whatever is afforded by the Japanese affair for the fear that weakness of a certain kind is to be anticipated in the policy which the Administration will employ in adjusting delicate questions arising between this country and foreign powers. The Japanese incident should not be allowed to prejudice a judgment on the wisdom of the foreign policy upon which the Administration is entering, and its record thus far seems to have been irreproachable so far as the Japanese question is concerned.

The Japanese affair would probably not have been settled far differently by one of the preceding Republican administrations of Mr. Taft or Colonel Roosevelt, and certainly there has been nothing which can be construed as making a break in our traditional friendship for Japan. It is even possible that the Administration is stronger in this respect that its predecessor, and would not stand idly by if Congress were to do anything again needlessly offensive to Japan, like the Delagoa Bay resolution. To judge from the reported attitude of the President and his Secretary of State on the Panama Canal question alone, the Administration is less likely to offend than Congress in the settlement of controversies in which there is a supposed conflict between domestic policy and the rights of other nations. That the Administration in this respect is of somewhat different temper from its predecessor is evident from its prompt

recognition of the Chinese republic, a recognition that may be considered premature, by its withdrawal from the Chinese loan on account of the conditions annexed to participation in it, and by Secretary Bryan's striking proposal of a plan for peace.

Were the Administration later to feel itself compelled to take a strong anti-Japanese attitude on the question of immigration or of naturalization, if such a question should be forced to the front, it would be yielding to influences at home which imperil a friendly understanding with Japan, but we are reluctant to think that it would participate in such a movement except with great reluctance, as the result of conditions fixing upon it only a small share of the responsibility for such a course. Mr. Wilson and Mr. Bryan are friends of labor, but they are also friends of humanity, and that humanitarian idealism which loves the freedom of wide spaces is not likely to be content with the lesser to the exclusion of the greater good when there appears to be any conflict between the interests of labor and those of humanity. To take the case of China, there can be no question that the action of the Administration in prematurely recognizing the Chinese republic and in withdrawing from the Chinese loan was inspired by a spirit of pure generosity and was absolutely disinterested. Such an action was the *reductio ad absurdum* of the McKinley-Hay idea of non-participation in a European protectorate of China based on the claims of indemnity for the Boxer rebellion, and of a progressive China awaking by commercial intercourse with the rest of the world to a sense of the rights of foreign nations. Our impetuous eagerness to display our friendship for China has placed us in a position in which we can be of slight assistance to her in lightening the load of the Boxer indemnity and in developing her commerce by financing her railways by a method as little burdensome to her as possible. If the republic is not to be permanent our faith is misplaced and we are in a position to lose far more than we could ever gain. This faith is purely a matter of idealism, and reveals the absence of any calculating foresight — it in no way masks a design to secure any kind of concession from China. The repeal of the Chinese exclusion act would be a necessary consequence of that faith carried to a logical extreme. It is not to be supposed that the Government was thinking of the Chinese exclusion act as a possible source of future diplomatic friction and desingenuously playing the part of the wolf in sheep's clothing. Such a view is too fanciful to take seriously. That the temper of the present Administration is to be gauged by this visionary course with regard to China is evident. It shows what must be the real attitude of the Administration toward Japan or any other Asiatic country. Whatever differences may arise between the Administration and foreign nations, it is hard, in the light of these facts, to suppose that they will be due to any over-assertion of our own selfish interests, they are more likely to be due to forces with which the Administration may not be able to cope successfully, as in the instances of Japan, the Panama Canal, and Mexico.

The Secretary of State is thus able, with complete good faith, to propose to the Powers that they enter into an arrangement designed to secure the peace of the world. The plan outlined contemplates the agreement to arbitrate all controversies, not even excepting those involving national honor and vital interests. That the time is not ripe for such a proposal, however desir-

able it may be that the principle be adopted, goes without saying. It is a visionary project. The fact that there will be some controversies which one of the parties will hold not to be arbitrable is, however, recognized. How such a decision can be reached by a party which has pledged itself to arbitrate all disputes is not explained, and the plan could be strengthened by giving it more logical consistency. The Commission of Inquiry idea, taken from The Hague conventions, is not a new one, and it has received strong indorsement. In the *Dogger Bank* case, arising from the seizure by Russia of British ships in the Russo-Japanese war, the Commission of Inquiry was the means of securing a prompt payment of indemnity without recourse to arbitration. Many disputes can be conceived of such a nature that after impartial investigation and report, restitution would voluntarily be tendered by the party at fault. That Mr. Bryan's plan, for which the Administration stands sponsor, would tend to avert war is indisputable; that it would entirely prevent war is not to be supposed. There is more of the doctrinaire than of the practical statesman in the proposal of this scheme as a panacea for war, yet through this fact alone it may kindle a moral enthusiasm which a soberer project could not arouse. At all events it springs from a temperamental tendency which justifies high expectations of the future of the present Administration.

Thus the Administration approaches the coming observance of the centenary at Ghent under favorable auspices, with a clean record. If the deeper significance of the occasion is appreciated, and the greater nations join in the celebration not as an Anglo-American observance solely but as a world event, only then will the Ghent celebration fully express the spirit of international justice which seems to animate the Administration, rather than the spirit of an exclusive Anglo-Saxon justice maintained by costly imperial armaments in derogation of the rights of other countries. If all the nations are to co-operate for the maintenance of world peace, the relative size of their armaments is an insignificant consideration, for their peace must be the peace of the law, not the peace of the sword. If the Anglo-American side of the celebration is not given undue prominence the nations will be the better able to prepare themselves for earnest, equal co-operation in the labors of the third Hague Conference, and more may be accomplished if the Ghent celebration leaves pleasant memories in the minds of all the nations, great and small, on which it depends for its success.

A Sixteenth Century Jury

By Ezra Ripley Thayer

Dean of Harvard Law School

ONE night in May, 1546, at ten o'clock, John Boldy returned to his house in Spaxton. History does not say how he had passed the evening, but it is of record that he was minded to go to bed "without any candle light or any other lyght." And when he "felt with his hand one lying uppon the same bed" it is not surprising that he was "astoned" and "abasshed," for his nocturnal visitor had seen fit to lock the house door on the inside before making himself so much at home. So Boldy "went forthe secretly out of his house ageyn for company" and brought back Simon Logg the tithing man and other neighbors with him.

The sleeping occupant of Boldy's bed then turned out to be John Wynscott of the nearby village of Enmore, whom they forthwith awaked "and examyned hym of his comyng thether, whereunto the seid John Wynscott made little answer in effect." Presently Boldy announced that a purse containing 20 shillings, two silver rings, and a signet, was missing from his chest, and suspicion naturally fell on Wynscott. So he was arrested and removed to another house, and the constable of the hundred was sent for. That official had regard for his night's sleep, and made haste so deliberately that it was seven o'clock the next morning before he put in an appearance. In the meantime Wynscott had been taking thought for himself. He began by soliciting "one Anthony Frenche to convey away certen money from hym, who refused that to doo, declaryng that if he shuld convey away any of the same money from hym that then therby he shuld be in as evyll case as the seid Wynscott was." But Frenche's scruples spent themselves in this refusal, and neither moved him to inform on Wynscott nor to decline the office of emissary to Walter Credelond, whom Wynscott next desired to see. "The said Credelond beyng then in his bedd about two of the clok of the seyd nyght dyd," unlike the constable, forthwith "ryse out of his bedd and cam to the seid Wynscott and there communed with him secretly bytwene them two, but wherof their comunycacon was" the captors could not tell.

In due time came the constable and began proceedings by searching Wynscott. The search disclosed but 2*s.* 3*d.*, "wheruppon they that had kept hym all the nyght before perceivyng that he had ben oftentymys that same nyght resortyng about certen peaces of tymber whiche dyd lye in the same house wher he was kept that nyght past mystrustyd and supposed that he had hyd the same purse and money with the other thynges in the same purse conteyned amonges the seid tymber and so they declared to the seid counstable, whereuppon they serched the seid peces of tymber and their found the seid purse and the seid 2 rynges and the seid sygnett therin conteyned but their was no money in the purse."

The constable now had something to work on, and before long he had secured from the culprit a confession that he had hidden the purse and had handed the missing money to Credelond. But

Credelond was of less pliant material, and his persistent denial remained an obstacle to official progress. So the constable, firm in his purpose "to fynd some mean that the seid Boldey mought be restored to his money ageyn," turned his attention once more to Wynscott, and intimated that the latter would do well to help him "to that entent that their mought ensewe from thensforth the less trouble." This hint, upon the sincerity of which Wynscott soon had occasion to reflect, did its work; for presently "one of the seid Walter Credelond is frendes" produced the required sum and Boldy was paid.

The whole matter was then laid before Mighell Mallett, Esquire, the local Justice of the Peace. This functionary summoned into his presence the constable, Frenche, and Credelond. The two former confirmed all that had been told of them; but Credelond remained obdurate and the Justice, receiving no confession from him, in lieu thereof took a recognizance with sureties for his appearance before the next Assizes.

This was the story which was told a few months later to the two justices of assize for the county of Somerset and a jury, upon Wynscott's trial for burglary. It came from the lips of Boldy, John Bowe and John Leve, two of the neighbors, and "Mayster Mallett," the Justice of the Peace, who repeated to the jury all that had been told to him. No other witnesses seem to have been called for the Crown, and there were probably none at all for Wynscott. He was incompetent to testify himself, as he would have been in England at any time down to 1898; and had he sought to call other witnesses on his behalf, his request might have been denied as summarily as was Sir Nicholas Throckmorton's request for a like favor a year or two later on his trial for high treason.[1] Of course at this time he could have no counsel.

In the face of this uncontradicted testimony the verdict was Not Guilty. This so disturbed the justices of assize, as an "evyll example" to others, that they forthwith brought the matter before the Court of Star Chamber for the punishment of the jurors — then a familiar head of that court's jurisdiction.[2]

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[1] This was what took place at Throckmorton's trial: —

"*Throckmorton.* I did see John Fitzwilliams here even now who can testify . . . I pray you, my lords, let him be called to depose in this matter what he can.

"*Attorney [General].* I pray you, my lords, suffer him not to be sworn, neither to speak; we have nothing to do with him.

"*Throckmorton.* Why should he not be suffered to tell truth? And why be ye not so well contented to hear truth for me, as untruth against me?

"*Hare [Master of the Rolls].* Who called you hither, Fitzwilliams, or commanded you to speak? You are a very busy officer.

"*Throckmorton.* I called him, and do humbly desire that he may speak and be heard as well as Vaughan, or else I am not indifferently used; especially seeing master Attorney doth so press this matter against me.

"*Southwell [Privy Councillor].* Go your ways, Fitzwilliams, the court hath nothing to do with you; peradventure you would not be so ready in a good cause.

"Then John Fitzwilliams departed the court, and was not suffered to speak."

[2] The Star Chamber assumed jurisdiction where the peace was threatened; and sometimes the theory was stretched a good way to sustain the jurisdiction. It is invoked, for example, in a mere controversy over a piece of land because of the "ragious and riotous demeanour" of the defendant. On finding his stepmother "at dyner within an honest man is house" he "sodenly plucked out his sworde havyng these wordes to her 'ah thow stepdame by goddes blodde y care not though y thrust my swerde thorowe the.'" And he commented thus on the absence of his clerical half brother, who on seeing the defendant and his friends had "avoydid from ther presens before ther seid comyng yn at a backe syde of the seid house & so departid owte of ther daunger": "Where is that hore is sonne the prest, yf y hadde hym y wolde hew hym yn smale gobettes to sell hym at the market." By reason of this conduct the oratrix suffered "suche drede & agonye that she was & hath byn syns yn perell of her body & lyeff and euer shall be the wors whyle she lyveth." But if jurors were to be punished at all for wrong verdicts it was not much of a stretch for the court to claim jurisdiction

Associations with Stuart tyranny have so indelibly stained the Star Chamber's name that it is easy to forget its services in earlier days. A strong arm was needed to restore civil order after the Wars of the Roses, and for many years the Star Chamber did excellent work in curbing the turbulent nobles who were too powerful for the ordinary courts — the Capulets and Montagues of the day, against whose retainers were aimed the stringent laws against the wearing of liveries. The reality of the evil which brought about these laws is often to be seen in the Star Chamber records; and the danger was not from secular offenders only. In Bath, for example, the scene of a fierce contest between the Prior and a local magnate, we are told that "the seid priour commonly rideth with xviii horses or thereaboute and his servauntes all in one lyverey or clothyng." The attempt to serve on this dignitary a subpoena from the Star Chamber was met by the threat from two of his retainers that if the messenger "wolde serve eny wrytt upon the sayd Pryor, ther master, they wolde cutt off bothe his eyres." And a century-old dispute between the Dean of Wells and the Abbot of Glastonbury brings out the retainers of each in war-like fashion, the Abbot's men "araied in maner of warre, that is to say, with bowes billes and other wepyns . . . abidyng at the seid walle with their bowes bent & arowes in them redy to haue shot at the tenauntes" of the Dean, and the Dean's followers "openly proclayming in the paroche churche of Wedmore aforesaid that if the tenauntes of the said abbot, callyng them chorles, breke downe the bank or stakes eny more they sholde be betyn & slayne and fryed in their own grese."

To this high court the jury which acquitted Wynscott was reported for discipline. The jurymen made a stout and shrewd defense. They knew Wynscott as one "accustomyd to be dronke and yet contynually taken for a true man," and to them Boldy's story "was but a feyned tale" contrived bewteen him and Frenche "to trowble the seid Wynscote for dyspleasure." The Crown's whole case depended on Boldy and Frenche; and the jury knew that the very house with which Wynscott had just made so free had once been his own, and that ever since Boldy had "goten the seid house of his handes" there had been "variance" between them. This led them to discredit Boldy's testimony. French's credibility was impaired by his tale of helping Wynscott at the first and concealing from the authorities the damaging facts which he later asserted, and by the contrast with his subsequent zeal for the prosecution. The jury thought that "yf the seyd Wynscott had desyred Frenche to convey the money from hym, Frenche wolde have made the seyd tythingmen and the resydue pryvey to yt immedyatly, so that the money myght have been found apon the seyd Wynscote." The evidence of Bowe and Leve impressed them not at all, because "they could not by any reason haue knowledge of the same mattir onles they had byn present." These two witnesses "gave evydence precysely as of ther owne knowledge" to Wynscott's opening the door with a counterfeit key, breaking open the chest, and abstracting the purse, and to Boldy's return and discovery of the sleeping intruder, and how "abasshed" he was thereat. This much offended the jury, not only because "yt aperyd by theyr owne evydence that nyether of them knew eny thyng in the seid matter untyll they were callyd by the seyd tythyngman,"

over such cases, for the miscarriage might well be due to corruption or intimidation by some great man.

but furthermore, because even "yf they had ben present there, as they were not" they still "toke upon them more knolege then yt was possyble that they could have" in undertaking to describe Boldy's mental state. The testimony of "Mayster Mallett" likewise they "estemyd not to be of any efficacye" because he knew nothing except by the report of the neighbors, and "the seyd neyghbors knew not the same but by Boldy's report." Wynscott's confession was thus the merest hearsay, given by Mallett from the constable's report; and the constable's conduct discredited his story. The jury "could gyve no creditt therto, for that that the seyd constable was present at the assyse and gave not the evydence hymself, and also the seyd constable had told the seyd Segnence [one of the jury] a lyttle before the assisez that Wnyscote never confessed to hym the takyn of the seyd money, but he sayed he dyd threten to send hym to the gaole onles the money were delyveryd ageyn and also sayed yf it were restored then there schold be no ferther trouble aboute yt, and thereafter by thadvertisement of the seyd constable he sayed he wold gyve hym so moche money rather than suffer further trouble therin." The jury must have noticed, too, that this use of promises to extort a confession was acknowledged by the prosecution. What other meaning had the constable's bland intimation to Wynscott that if he confessed "their mought ensewe from thensforth the lesse trouble therin?"

Two of the jury, moreover, Geffrey Segnence and William Gover, were among the neighbors whom Boldy called in at the first. They had arrived on the spot as soon as Bowe, and much sooner than Leve, and since "they knewe of theyr owne knoledge as moch as all the resydue dyd," saving only Boldy himself, they were not disposed to credit the evidence of others, "but leyned more to their owne knowlege." These two "enformed the resydue of theyr seyd compeny of the jury of all the matterz," and they had much to tell that was interesting. On their first coming they found Wynscott "slepyng apon the seyd Boldey's bed, and then pulled him and styred him and with that he sate up, starynge aboute the house, and he was so dronke that they could not gett a redy answer in half an houre of hym" (we begin to see why he "made little answer in effect") "and then he axed of them where he was, and then they axed hym how he cam in to the seyd house, and he sayd with the key of the church howse of Enmer," his own village. This was giving a pretty respectable character to the "countfett key" which he was charged with using so "burgularly," and one wishes he knew more about Boldy's lock and the lock of the Enmore "church house." It was not until Wynscott at last found himself willing and able to go forth that Boldy suggested a search to see if he lacked anything; and when "wythin a lyttle whyle he sayd that he lackyd his purs, then the tythyngman and the compeny serched" Wynscott "and stryppyd hym, but they could fynd nothyng apon him." "Wherapon they, consideryng the case they found hym in, and that they could not find anythyng apon hym at the seyd serche, and that the seyd Segnence and Gover knew the seyd Wynscote to be accustomed to be dronke and yet taken contynually as a true man, and that he dyd there remayne and slepe, they could not fynde in their conscyence that the seyd Wynscote had that money." Rather they "thought in their conscyence that the matter was apon malyce, and therapon dyd acquyte the seyd Wynscote of the seyd felony."

How the jury fared we know not. Few decrees of the court of the Star Chamber have been preserved. Its records were always carelessly kept; and "when the court was abolished in 1641 its name was so universally odious, that its records were not likely to be reverently handled." All that remains of the present case is the complaint and the jury's answer. These were lately published by the Somerset Record Society [3] with the proceedings in other Somerset Star Chamber cases of the reign of Henry VII and Henry VIII — treasure from the vast mine of English records which are gradually being brought to the light. But simple as the story is, and broken off in the middle, it has features that repay a second glance.

The reader's eye is first caught by the flagrant departures from the rules of evidence as we know them. Bowe and Leve dealt freely in hearsay, and the Crown's chief witness, the justice of the peace, knew no single fact of his own knowledge. Wynscott's confession, too, was admitted without question, although extorted by the most barefaced promises. So far as the law of evidence is concerned, it might as well be the Dreyfus trial. Such a state of affairs might well astonish one who cherished a belief in some golden age when "the original strict rules of evidence," as a great Chancellor once called them, had not yet been "broken in upon" by qualifications or exceptions. This myth is curiously persistent; indeed we find the learned editor of these very Somerset records commenting on the "extraordinary laxity in the admission of evidence" in taking certain testimony under commission, and conjecturing that this was "probably due to the fact that the commissioners were laymen and not lawyers." But the simple fact is that the law of evidence is a relatively modern affair, and had no more than a rudimentary existence in the sixteenth century. There could be no better proof of this than Wynscott's trial. Not only did the jury listen without surprise to all this hearsay, but the character of the presiding judge is a guarantee that the law was not violated. Sir James Hales, then a King's Serjeant, was soon afterwards a judge of the Common Pleas, and no judge in English history has left a brighter record of fidelity to conscience and to the law. The rights of any prisoner who came before him were secure; and the mere fact that he admitted the evidence is enough to show that it was admissible. But listening to the hearsay was one thing and believing it another; and the jury's sturdy denial of its "efficacye" shows the temper of a race which was before long to mark by a rigid rule of law its insistence on getting its facts at first hand.

Another oddity of the trial from a modern standpoint is the position of the jury. First they sit to hear evidence in the presence of the court, judging the testimony as a jury might today; then they retire to their juryroom and beyond the reach of judge and counsel hear from two of their own number facts which lead them to disregard everything they heard in open court. This marks a point midway in the evolution of the jury. Only a century or two before it had been a body of witnesses chosen for its knowledge of the facts; in little more than another century it was to be a body of judges permitted only to pass on the testimony of others. The attempt in the transition stage to fuse these opposite functions meant odd and incongruous situations, and one of these

[3] The volume contains a very interesting introduction by the editor, Miss Gladys Bradford, Fellow of Newnham College.

confronted Serjeant Hales in the Wynscott case. Judged by what he saw, the proceedings justified the indignation which expressed itself in his complaint to the Star Chamber. The discovery of the purse in the heap of timber, the reported confession of the defendant, and its confirmation by the restitution of the money, seemed to make a plain case. But in truth it was but half the trial, and that the poorer half, in which the judge took part. He heard only the prosecutor and his two supporters, and the second-hand recital of the local magistrate. The Sheriff of Somerset, too, who sat as the other judge of assize, may have done his share in pressing the official theory of the case. Could Serjeant Hales have shared with the jury what they knew he would not have been left with so pale and partial a picture. The spendthrift whose lands had slipped away from him; the thrifty rival who had prospered as the other had sunk; the night alarm; the excitement in the village; the discovery that the dread intrusion was only the old owner's drunken homing; the explosion of rustic mirth at Boldy's expense; the temptation to justify himself by a false charge and reclaim the situation from the farce into which it had fallen; his own capacity for so knavish a piece of work — had the judge known as much of all this as was known in the juryroom the story might have taken on another color. It is safe to guess that with a hearing for both sides and the opportunities given by a modern trial to get at the facts, the truth between Boldy and Wynscott would not have been hard to find. And the trial would have been not only more effective, but more dramatic as well. Jury trial under the old system must have been a tame affair. It is no accident that in all his wealth of legal allusions Shakespeare's references to the jury are so few and so slight. It would be different with a nineteenth century Shakespeare.

But the point in the case which holds the imagination is no detail of procedure, but its human significance. Here were twelve English countrymen passing on the life[4] of one of their neighbors. He was a fellow of little enough account — a common drunkard, who had wasted his substance and passed on to another village. The magistrates were convinced of his guilt and bent on his conviction — judges who were ready to make this complaint to the Star Chamber must have made plain enough to the jury during the trial the dangers of an acquittal. Punishment of jurors was a familiar occurrence: witness the long imprisonment and heavy fines which were imposed on the men who were so bold as to acquit Throckmorton of high treason, and the savage treatment of William Penn's jury by the Recorder a hundred years later. Sometimes, no doubt, if the defendant enjoyed the favor of some great man, the jury found themselves between the devil and the deep sea; but poor John Wynscott had no such advantage, and nothing stood in the way of a conviction but their oaths and their consciences. Here were obstacles, no doubt. The questions presented themselves, why a burglar should go to sleep on the bed of the man whom he had just robbed, and prepare for slumber by locking himself in — or why if he had secured a friendly accessory to remove a part of his booty he should

[4] There was benefit of clergy, indeed; but to be sure what this meant to Wynscott we should need to know whether this was his first collision with the criminal law, and whether his literary attainments were sufficient for his "neckverse." Also we should need some light on his matrimonial career, and even on Mrs. Wynscott's; for it was not until a year later that clergy was allowed to "bigamus" — that seemingly respectable person who "hath married two wives or one widow."

so obligingly have retained the rest to furnish evidence for his captors — or how his possession of any part of it was to be accounted for after the stripping and search when he was first awakened? Against all this there was little except Boldy's word. If he were capable of manufacturing the story of his loss and afterward hiding the purse in the timber, everything was explained; and the jury may have known him well enough to estimate the chances of this, and even to follow his nice calculation, reminiscent of Kipling's "Gemini," of the exact amount which should be named as missing from the purse.

But it was one thing to weigh the opposing considerations with a free mind, as a jury might do today, and another to stand where Wynscott's jury stood, with a choice between his safety and their own. An acquittal very likely meant imprisonment and ruin for them; and these they chose to face rather than compromise with their consciences.

The Englishman's stubbornness in defense of his rights is proverbial. Even when no more than his selfish interest is involved it has received tribute from high quarters.[5] And in its nobler manifestations, when it was a question of standing for the truth and the rights of others, the same trait is to be seen on many pages of our legal history. Sir James Hales was soon to write one of these pages. Though he had risked his life by standing out alone among the judges against disinheriting the Princess Mary, he was marked for punishment on her accession to the throne, for he had been no less loyal to the law in enforcing the statutes concerning religious worship. This is the dialogue which took place when he was called to account for his judicial conduct by Gardiner, now become Lord Chancellor: —

Chan. Master Hales, ye shall understand that like as the queen's highness hath heretofore conceived good opinion of you, especially for that you stood both faithfully and lawfully in her cause of just succession, refusing to set your hand to the book among others that were against her grace in that behalf; so now, through your own late deserts against certain her highness's doings, ye stand not well in her grace's favour; and therefore before ye take any oath, it shall be necessary for you to make your purgation.

Hales. I pray you, my lord, what is the cause?

Chan. Information is given, that ye have indicted certain priests in Kent for saying mass.

Hales. My lord, it is not so, I indicted none; but indeed certain indictments of like matter were brought before me at the last assizes there holden, and I gave order therein as the law required. For I have professed the law, against which in cases of justice I will never, God will-

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[5] A famous passage from Ihering's "Struggle for Law" (Lalor's Translation, pp. 61, 94), is worth quoting once more: "The best proof of this is afforded by the English people. Their wealth has caused no detriment to their feeling of legal right; and what energy it still possesses, even in pure questions of property, we, on the Continent, have frequently proof enough of, in the typical figure of the traveling Englishman who resists being duped by inn-keepers and hackmen, with a manfulness which would induce one to think he was defending the law of Old England — who, in case of need, postpones his departure, remains days in the place and spends ten times the amount he refuses to pay. The people laugh at him, and do not understand him. It were better if they did understand him. For, in the few shillings which the man here defends, Old England lives. At home, in his own country, everyone understands him, and no one lightly ventures to overreach him. Place an Austrian of the same social position and the same means in the place of the Englishman — how would he act? If I can trust my own experience in this matter, not one in ten would follow the example of the Englishman. Others shun the disagreeableness of the controversy, the making of a sensation, the possibility of a misunderstanding to which they might expose themselves, a misunderstanding which the Englishman in England need not at all fear, and which he quietly takes into the bargain; that is, they pay. But, in the few pieces of silver which the Englishman refuses and which the Austrian pays, there lies concealed more than one would think, of England and Austria; there lie concealed centuries of their political development and of their social life. . . . In the shilling for which he stubbornly struggles the political development of England lives. No one will dare to wrest from a people who, in the very smallest matters, bravely assert their rights, the highest of their possessions."

ing, proceed, nor in any wise dissemble, but with the same shew forth my conscience, and if it were to do again, I would do no less than I did.

Chan. Yea, master Hales, your conscience is known well enough, I know you lack no conscience.

Hales. My lord, you do may well to search your own conscience; for mine is better known to myself than to you: and to be plain, I did as well use justice in your said mass case by my conscience, as by law, wherein I am fully bent to stand in trial to the uttermost that can be objected. And if I have therein done any injury or wrong, let me be judged by the law; for I will seek no better defence, considering chiefly that it is my profession. . . . I am not so perfect but I may err for lack of knowledge. But both in conscience, and such knowledge of the law as God hath given me, I will do nothing but I will maintain it, and abide in it: and if my goods and all that I have be not able to counterpoise the case, my body shall be ready to serve the turn.

The spirit behind these words was proved by months of imprisonment, borne under conditions which at last broke Hales's spirit and ended with his suicide.[6] It was the same spirit which a year later led eight of Throckmorton's jurors to scorn release by "confessing their fault" as the other four had done, and after suffering imprisonment for over six months to affirm that "they had done all things in that matter according to their knowledge and with good consciences, even as they should answer before God at the day of judgment, and Lucar said openly before all the lords that they had done in the matter like honest men and true and faithful subjects" — a declaration which cost him a fine of £2000, while his fellows were fined sums ranging from £200 upward. It showed itself again in the quiet determination of Edward Bushell, the foreman of Penn's jury, in the face of the Recorder's threats to "set a mark upon him," and to "cut his nose," and "to have him carted about the city as in Edward III's time." And it was men of the same temper who faced the displeasure of the Lords in Council rather than convict John Wynscott when "they could not fynde in their conscyence" that he was guilty.

Criticism and ridicule of the jury system are common, especially among those who imperfectly understand it. No doubt it is an expensive system, in the waste of time and otherwise. But whether it is not worth all it costs is another question. At least its critics must take into account much in its history that has endeared it to men of English blood, and consider whether some things of the same sort might be seen today if the observer had the right perspective.

[6] After the coroner's inquest had brought him in *felo de se*, the Crown insisted on a forfeiture of an estate held by him and his wife jointly, and it was among the subtleties by which Lady Hales's counsel struggled to protect her that the gravedigger in Hamlet found his "crowner's quest law."

Origin of the "Hearsay Rule"—Was it the Jury System?

By Charles S. Lobingier

Judge of Court of First Instance, Manila, P. I.

THE late Professor Thayer was fond of saying that the rules of exclusion arose out of the necessity of preventing the jury from listening to improper evidence and the implication, at least, that but for the jury system these rules would not now exist.

The greatest and most remarkable offshoot of the jury, (he says)[1] was that body of excluding rules which chiefly constitute the English Law of Evidence. If we imagine what would have happened if the petit jury had kept up the older methods of procedure, as the grand jury in criminal cases did, and does at the present day — if, instead of hearing witnesses publicly, under the eye of the judge, it had heard them privately and without any judicial supervision, it is easy to see that our law of evidence never would have taken shape; we should still be summing it all up, as Henry Finch did at the beginning of the seventeenth century, *L'evidence al jurie est quecunque chose que serve le partie a prover l'issue pur luy.* This it is — this judicial oversight and control of the process of introducing evidence to the jury, that gave our system birth; and he who would understand it must keep this fact constantly in mind.

Some researches into the history of the Civil Law lead toward the conclusion that, so far as the "hearsay rule" is concerned this claim will not altogether hold, but that said rule finds its origin independently of the jury system.

Hearsay evidence was generally excluded even in the classical Roman Law.[2] The rule was especially applicable to self-serving statements, though there were the same exceptions as in our modern English law concerning ancient facts[3] and dying declarations.[4] Yet there was no jury in Rome.

The ancient Visigothic compilation, variously known under the names of *Forum Judicum* or *Fuero Juzgo*, and published about the middle of the seventh century of our era, reveals no trace of anything approaching a jury system, but we find therein the hearsay rule explicitly announced as follows: —

Witnesses shall not give testimony by letter, but present, in person, they shall be required to tell the truth, as far as lies in their knowledge. Nor shall they testify concerning foreign matters,

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[1] Thayer, Preliminary Treatise on Evidence, 180, 181. *Cf.* 534. "In Scotland, and most of the continental states, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." Mansfield, C. J., in *Berkeley Peerage* case, 4 Campb. 401, 416; Thayer's Cases on Evidence, 373, 375.

[2] Hunter, Roman Law (3d ed.) 1055.

[3] *Id.*; Digest, Lib. XXII, Tit. III, 28.

[4] Mascardus, *De Probationibus*, Concl. 1080. Professor Thayer recognizes the antiquity of this rule but not, apparently, its Roman origin. He says: —

"The use of such declarations in cases of homicide is very ancient, long antedating our law of evidence, and running back into the very beginnings of trial by jury in criminal cases. Probably it is even far older than that. In 1202, 1 Sel. Pl. Cr. (Seld. Soc.) 11, 27, in an appeal of slaying, we read that "the king's serjeant and the two knights who made view of the wounded man (who lived four weeks and a half after the wounding) testify that Robert said that Godard and Humphrey thus wounded him, and that, should he get well, he would deraign this against them, and, should he not, then he wished that his death might be imputed to them."

but only concerning those which they know to have taken place under their own eyes.[5]

But it is in the famous mediæval Spanish Code known as *Las Siete Partidas* that we find the most elaborate expression of the hearsay doctrine. A considerable portion of the third *Partida* is devoted to the subject of "*Prueva*" (proof) and a careful study of its contents will afford a revelation to those who assume that the law on that subject is mostly modern. Among its provisions are the following: —

When a witness is questioned why and how he knows what he testifies to; if he answer, that he knows it, because he was present when the contract was entered into, or the thing done, and that he saw it done, his testimony will be valid. But if he says he heard it from another, it will be of no effect; unless to prove contracts, entered into in such a manner that the witness may testify as to what he heard, as if he should say: "I saw and heard such a one make such a contract or agreement." But if he were only to declare "that he heard another say, that such and such persons had entered into such an agreement in such manner, or that one man had killed another"; his testimony would not be legal, because the witness spoke from hearsay only. But if he were to say, "I heard such a one make such a contract" as the law permits to be heard. We also say that the witnesses ought to be interrogated as to the time, the year, month, day and place, when and where the fact took place of which they speak. For if they disagree among themselves, the one saying it took place in one place, and the other in another; their testimony will be without effect. It was by that means the prophet Daniel destroyed the testimony of the witnesses produced against Susanna; they having disagreed as to the place in which the fact occurred. They ought also to be asked what other persons were present when the occurrence took place; and no other questions should be put to witnesses of unsuspected character. But if they were base, suspected persons, equivocating in their testimony, the judge may put to them other questions to contradict them by their own words: as by asking them what kind of weather it was, when the fact took place? was it cloudy or did the sun shine? how long had they known the persons of whom they speak? what clothes they wore at the time? For by the answers they make, and the expression of their countenances, the judge may infer whether he should believe them or not.[6]

Men sometimes complain of the damage done to their estates or houses, by water conducted thither by means of ancient artificial works, which they pray the judge may be taken away or destroyed. And as it often happens, that the works are so old, that no one living has seen them erected; the ancient sages of the law have thought proper in such cases to admit hearsay testimony, on the witness deposing as follows: "I declare that the water which runs from such a place to such a place, and which causes the damage, is conducted upon works erected by the hands of man." And if he be asked how he knows it, and he answer, that he had heard it from others who saw the works erected, or who had seen those who saw them erected, and that such was the common report; such proof will be sufficient for the plaintiff. We also say, that if the defendant's witnesses declare that they had not seen the works erected, nor had ever heard it said they were erected by the hands of man, and that there was no one living who had heard it so said; but that it was the common report, that they were natural and not artificial works, such testimony will suffice for the defendant. But in other causes, hearsay testimony cannot he heard, unless in the manner before explained. We moreover say, that the testimony of a witness, who does not explain how he knows what he declares, but only says he believes it, shall be of no effect.[7]

It would be difficult to find the rule stated more elaborately and at the same time concretely, in a modern textbook, and the fullness of statement indicates that here, as often elsewhere, the authors of the *Partidas* borrowed copiously from Roman sources.

It is true that hearsay evidence is now received in the courts of Spain[8] in common with other civil law countries.[9]

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[5] *Forum Judicum* (Scott's Translation) Bk. II, Tit. IV (V).

[6] Third Partida, Moreau & Carleton's Transl., Tit. XVI, Ley 28.

[7] *Id.*, Ley 29.

[8] *U. S.* v. *Tan Juanco*, 1 Phil. 374.

[9] Ricci, Tratado de las Pruebas (Ed. of Buylla y Posada) 397. "Under the methods based on the

But these, too, now have the jury in some form. It would be interesting to trace the process by which this important change in the rules of evidence was brought about. But it is more significant for our present inquiry that this process, apparently, has not been checked or affected by the introduction of the jury from England. This, added to the established fact that in the same jurisdictions the hearsay rule existed in full vigor before the jury was thought of there, shows that we must seek some other explanation for the origin of that rule.

Civil Law anything which may have a tendency to convict, even the most absurd and unreliable hearsay, is admissible." Scott, Spanish Criminal Law, etc., Bulletin of Comp. Law Bureau (1910), p. 75.

"There is not an appeal from the neighboring kingdom of Scottland in which you will not find a great deal of hearsay evidence upon every fact brought into dispute." Lord Mansfield, in *Berkeley Peerage* case, 4 Campb. 401, Thayer's Cases on Evidence, 373.

The Insufficiency of Arbitration

By Alfred Hayes, Jr.

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CHANGE is one of the few indisputable facts of history, but the realization, at a given moment, that existing institutions and arrangements are mutable is not easy. Any world scheme which leaves out of account the fact that in internal organization and international relations there must be advance is hopelessly defective. The elimination of war is impossible on any basis not admitting of the progress of civilization in the world. Races and nations grow in strength or decay as a result of changes in population, commercial power, military vigor, political institutions, moral stamina and countless other influences, seen and unseen. There must be some method, therefore, by which the fit shall expand in power and territorial possessions. Persia must always yield to Macedonia; no intellectual heritage can save decadent Greece from virile Rome; no law of nations nor supercilious disdain of barbarians can safeguard the Roman Empire against the strong men of the North.

The claim of a nation to unqualified control of territory no longer passes unchallenged. Professor Reinsch of the University of Wisconsin writes: —

> The positive ideal of the world today is undoubtedly that the whole earth shall become a field of action open to every man, and that all the advantages which may be secured by the action of humanity throughout the world must be guaranteed to the citizens of each national sovereignty.

It is true that nationalism is the dominant force in the world, but any nationalism which hopes to keep a portion of the earth for the exclusive enjoyment of a favored part of the human race can maintain its position only so long as it has power. The fundamental difficulty with the substitution of arbitral decisions for war is not the existence of passion or greed in men, the presence of standing armies or the power of military monarchs, but the fact that international law necessarily proceeds upon the assumption of the justice of the existing status. No legal system

divorced from an adequate legislative corrective can meet the situation. A legal system must change to meet changing conditions and it is impossible for judges, with all their large law-making functions, to make international law which shall meet the need of legislation as to international policies. Professor Reinsch says in his address on "The Codification of International Law":—

> Principles must be taken out of politics to be made law. Any policy which still proves to be of vital importance in that great struggle for independence, authority and influence, which we call politics, cannot truly be a part of international law.

This is an extreme statement, but there is enough truth in it to justify the position that a few judges sitting at The Hague will not be able to control the current of world politics. That mere rules admit of little room for change is illustrated by a statement made by President Butler in his recent address at the Lake Mohonk conference: —

> It is as inconsistent with the international mind to attempt to steal some other nation's territory as it would be inconsistent with the principles of ordinary morality to attempt to steal some other individual's purse.

That no such concept is practically operative is shown in the seizure by great powers of territory in South Africa, the Chinese ports, the Philippines, Panama, Korea, Morocco, Bosnia, Persia and Tripoli. The large fact is that above all nations is humanity; all of the inhabitants of the earth are equally entitled to all of its territory, and national title is not absolute but is based on might or social advantage. Great Britain became the great colonizing power of the world because she deserved to be. If, now, the German nation steps into her place as the greatest and most efficient world-power, no preemption of the surface of the globe can permanently deny such people the right either to trade or colonize, any more than the descendants of favored courtiers can permanently retain immense ducal estates to the detriment of others. Within the nation real democracy will work out the problem of social justice. So there must be an adequate organ to prevent international stagnation. Any scheme proposed to preclude the internal development of a country, as the recent suggestion that to safeguard the interests of American investment the United States must intervene in Mexico to prevent the adoption of Socialism, must follow the fate of the Holy Alliance which similarly attempted in behalf of despotism to dam back the tide of democracy. The deadening power of a military league cannot keep the European races in the possession of chosen portions of the earth either because of internal dissension in such a league, or because of the growing power of these not within the league. Selfishness has been more offensive in international action than in any other human relation.

The difficulties of the backward nations are largely due to the rapacity of the enlightened. China has reason to fear the disinterested benevolence of the European powers. The spirit of the Holy Alliance still stalks in the chancellories of Europe. When the powers of Europe lay down the principle that they shall determine where political equality shall exist for European and Asiatic peoples, the principle is operative only so long as the white race has big enough guns to coerce the black and yellow races of the world.

As in national life governing oligarchies have exploited the governed classes, so an international oligarchy does not promise to be the ultimate organ of international justice. Perhaps any international harmony is a distinct

step in advance as compared with the unrestrained action of single powers and is temporarily serviceable. There is pressing need for some form of legislative and executive organ as well as an arbitral tribunal for the world. The tendency of the times is toward the treatment of international problems by a large number of governments, and such treatment should not be prevented by the fiction of the equality of nations and the sanctity of national sovereignty so as to interfere with an insistence on humanitarian practices and some approximation to justice on the whole surface of the globe. The final temple of peace, however, cannot be founded on an oligarchy of the nations, but upon a real democracy of all men, free from national or race prejudice.

Reviews of Books

A LAWYER'S NOVEL

The Upas Tree. By Robert McMurdy. F. J. Schulte & Co., Chicago. Pp. 324. ($1.35 *net.*)

A LAWYER'S novel is a rare thing. Novelists are wont to make considerable use of legal incidents, as law, particularly when it immediately concerns the individual, is a vital and dramatic element of life, but a layman's ignorance of its mysteries usually serves their purpose and does not prevent them from gliding swiftly over unsafe topics and hiding the imperfections of their realism. Mr. McMurdy, on the contrary, can write of the drama of a criminal prosecution with the ripe knowledge gleaned by a long experience as a practitioner at the Illinois bar. When a lawyer turns his hand to writing a story with a legal plot, the legal side of the story ought at least to be good reading, whatever the story may be in other respects. So whether Mr. McMurdy is describing the way in which the grip of the law tightened round the neck of the unfortunate Beckwith Miller, in a prosecution for murder brought on slender but incriminating circumstantial evidence, or the virtues and frailties of the various lawyers who play prominent parts in the drama, including the client himself, he sketches vividly and realistically, and gives the reader the impression that here is a record which, like a revelation of professional secrets, is charged with factual and vital import.

There are official reports of murder trials which make good reading, and Mr. McMurdy has built up his story upon a similar foundation, minutely dissecting every fact and circumstance which might be reviewed by a jury, and ignoring no significant detail in the working out of the plot, which turns on an administration of digitalin causing death. This manner of treatment is stimulating. It has yielded a remarkable description of the actual proceedings in the trial court, and a narrative which from first to last is as dramatic as an eloquent advocate's summing up of the evidence in a sensational homicide case. To round out the story there is a superadded element that comes from the viewing of the case against the prisoner from other vantage-points, such as those of the prisoner's home and the office of his lawyer. There is good portraiture in the character of this veteran of the bar, who takes up the defense of his client from the most disinterested motive of unselfish loyalty to the pro-

fession. The efforts resorted to to bring about a reversal, and the tactics rather shamelessly pursued to aid the client by postponements, are treated as of course no one but a lawyer could write of them.

No review of this book would be complete without some reference to the subject of capital punishment, for it was written with the purpose of illustrating the wrongfulness of this. The suspect, after his melodramatic escape from the gallows solely in consequence of an eleventh hour confession by the real culprit, does not leave the stage, but reappears in a long epilogue or "confession," which is nothing less than an earnest argument for the abolition of capital punishment. The question is to be treated as a scientific problem, with the impartiality of the open-minded criminologist, so the concluding section impresses us merely as a piece of able advocacy. Undoubtedly, however, both the events of the story and the points of Miller's argument that it serves to illustrate tend to bring out forcibly the evil of capital punishment at least in cases where there is not direct evidence establishing the prisoner's guilt.

JONES'S STATUTE LAW MAKING

Statute Law Making in the United States. By Chester Lloyd Jones, Associate Professor of Political Science in the University of Wisconsin. Boston Book Co., Boston. Pp. 308 + 19 (index). ($2.)

MR. JONES wrote this short treatise on the technics of legislation primarily with the purpose of offering an orderly presentation of the principles which should govern the drafting of bills, and it is a book which may profitably be studied by those engaged in the actual business of legislation, which will no doubt be found of practical use in this respect, and which will encourage the cultivation of higher standards of draftsmanship. But it deserves to be prized for something more than this. It is no merely perfunctory performance, but an intelligent criticism of the shortcomings of American legislative methods, and it has highly suggestive observations for the publicist and higher type of legislator. The chapter on "Defective Organization of the Legislature" contains pregnant matter, and the situation that it reveals is surely one to arouse misgivings. Reading it, one discovers at once the chief causes of the popular distrust of legislatures and of the agitation for the initiative and referendum as the easiest if not the best way of circumventing legislative inefficiency.

Some of the chief evidences of the political incapacity of the American people are to be found in the attitude which our citizens have maintained toward the serious and intricate business of legislation. One can see in Mr. Jones's pages how much harm has come from the steady underrating of the personal element in law-making. The incompetence of the American state legislature is the result of the failure to apply sensible remedies for legislative inefficiency; of the feeling that changes in the fundamental law can be relied on to cure evils that nothing short of the full assumption of civic responsibility can overcome. Where legislators have shown themselves inefficient, the people instead of filling their places with competent representatives have so burdened the inefficient legislative body with constitutional prohibitions and restrictions that it has become practically no more than an agency of delegated powers like the government of a city. Unreasoning fear of a responsible law-making power has not only cut down the scope of legislative action, but has also led to constitutional

limitations on the length and frequency of sessions, which have resulted in more hasty and slipshod law-making than one would look for under a system of annual sessions of indeterminate length. Terms of office are frequently limited to a single session, forcing the incumbent to devote a disproportionate share of his energy to his campaign for election, and filling the legislatures with novices whose services will be dispensed with as soon as they have acquired a brief training. Salaries have been fixed at a low level. With legislatures thus constituted it is surely no wonder that our statute law has not been of better quality as regards both form and substance.

These defects are known to all dispassionate critics of our institutions, but happily the Wisconsin idea of a competent bill-drafting agency is sure to make headway, and many of the states have traditions of sound procedure and organization which are maintained in a manner that affords comfort and assurance. We need not go to England for models but have them here at home, and Mr. Jones's book should help to bring about the introduction in all the states of approved practices tried and tested by the experience of the more fortunate of them.

BOOKS RECEIVED

Some Influences in Modern Philosophic Thought: Being the fifth series of John Calvin McNair Lectures before the University of North Carolina, delivered at Chapel Hill, April 19, 20 and 21, 1912. By Arthur Twining Hadley, President of Yale University. Yale University Press, New Haven. Pp. 142 + 4 (index). ($1 *net.*)

Justice and the Modern Law. By Everett V. Abbot, of the bar of the City of New York. Houghton Mifflin Company, Boston. Pp. 285 + (table of cases) + 9 (index). ($1.60 *net.*)

Certainty and Justice: Studies of the Conflict between Precedent and Progress in the Development of the Law. By Frederic R. Coudert. D. Appleton & Company, New York and London. Pp. 320. ($1.50 *net.*)

Malingering and Feigned Sickness. By Sir John Collie, M.D., J.P., Medical Examiner London County Council; Chief Medical Examiner Metropolitan Water Board, Consulting Medical Examiner to the Shipping Federation, etc.; assisted by Arthur H. Spicer, M.B., B.S. Lond., D.P.H. Illustrated. Longmans, Green & Co. New York. Pp. 321 + 19 (index). ($3 *net.*)

The Supreme Court and Unconstitutional Legislation. By Blaine Free Moore, Ph. D., Assistant Professor of Political Science, George Washington University, sometime Curtis Fellow in Columbia University. (Studies in History, Economics and Public Law, v. 54, no. 2, whole no. 133.) Columbia University, New York; Longmans, Green & Co., agents. Pp. 127 and appendices 30. ($1 paper.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administration of Justice. "A Land of Law and Laxity." [Anon.] *Blackwood's*, v. 193, p. 666 (May).

"America's common law is practically the same as the English or the Canadian law. Contrasted, in respect of convictions, with North-west Canada, a new country much alike in social conditions and requirements to the less advanced portions of the United States, what do we find? While in the North-west Canadian courts the convictions run to eighty per cent, in the like-conditioned territories of the states they do not average one-half that figure, and in many places they do not reach even twenty-five per cent.

"Besides the shortcomings in the administration of justice, the law itself wants overhauling."

Biography. "Lord Mansfield." By H. H. Hagan. 1 *Georgetown Law Journal* 207 (May).

"In the field of biography he is represented only by the antiquated and stilted life by Holliday, a contemporary, and Lord Campbell's sketch in the Lives of the Chief Justices — a work open to the same objections though in a lesser degree. A readable modern biography of Mansfield has yet to be written."

"Confederate Portraits: Judah P. Benjamin." By Gamaliel Bradford, Jr. *Atlantic*, v. 111, p. 795 (June).

A character study of the Louisianian who achieved brilliant success at the English bar.

"With Benjamin the impression prevails that he was a man of remarkable ability, an adventurer of genius, but of little character. This view was strong upon me when I began to study him. Now I am forced to the opposite conclusion, that his character was respectable, if not unexceptionable, but his ability mediocre. . . . In short he was an average, honorable, and, in politics, rather ineffectual gentleman."

Canada. "The Relation Between the Legislative and Executive Branches of the Canadian Government." By Adam Shortt. 7 *American Political Science Review* 181 (May).

The control exerted by the executive branch, as represented by the Prime Minister and his Cabinet, over the legislative branch is not one of dictation: "It is simply one of leadership wherein the followers have the latent power to desert or depose their leaders." The writer points out the strong features of the Canadian system of party government.

"Canada: Colony to Kingdom." By John S. Ewart. 7 *American Journal of International Law* 268 (Apr.).

Matters of an international nature, such as British treaty power and declarations of war, are treated, but the article mainly deals with the relations between Canada and the Empire.

Commercial Law. See Legal History, Uniformity of Law.

Constitutional Amendment. "Amending the Constitution of the United States." By James B. McDonough. 76 *Central Law Journal* 335 (May 9).

"The undoubted power exists in Congress in providing the mode of ratification, to require instant conventions or extra sessions of the legislature to ratify or reject any proposed amendment.

"This is an important power. By its exercise, the people, through the agency of Congress, in a time of great national peril, or times without peril, may in two or three months or less time, ratify any amendment. When the Supreme Court, which is nothing but an agency of the people, acting under the sanction of their oaths and the Constitution as written, declares an act of Congress void, the people may at once amend the Constitution, thus making it what they now wish it to be."

Contracts. "Freedom of Contract." By R. L. Marshall, M. A. 38 *Law Magazine and Review* 278 (May).

The history of the development of the law of contract out of the law of tort, in English law, is traced, and some attention is paid to the subject of consideration, the notion of which originated in the Canon Law. The author points out that present law with regard to consideration is the composite result of several interesting historical factors. The title of the article is mis'eading at least to the American lawyer.

"Discharge of Contracts." By Arthur L. Corbin. 22 *Yale Law Journal* 513 (May).

"In the law of contracts there is a great deal of misunderstanding or lack of understanding in regard to certain topics connected with the subject of discharge. Some of this is due to the fact that few men use such terms as condition and warranty in the same sense. The rest is due to faulty reasoning concerning matters that are admittedly difficult." The article will aid clear reasoning and is a notable contribution.

Criminal Procedure. "Reform of Criminal Procedure, with Reference Particularly to the Indictment." By L. Pearson Scott. 61 *Univ. of Penn. Law Review* 458 (May).

"It is submitted that a new code prescribing the rules governing indictments should be drawn without regard to these five standards which the common law has set up. The formal accusation under the reformed code should contain only so much matter as is necessary to insure a fair trial in the ordinary case."

Criminology. See Insanity, Juvenile Delinquency, Psychology.

Easements. "Way of Necessity: How Acquired and Lost." By William M. Rockel. 76 *Central Law Journal* 371 (May 23).

Setting forth the doctrines of American leading cases on this subject.

Equity Jurisdiction. See Public Nuisances.

Evidence. See Psychology.

Executive Powers. "Executive Commissions of Inquiry." By W. Harrison Moore. 13 *Columbia Law Review* 500 (June).

A thorough examination is made of some recent cases in Australia and New Zealand which "have brought into prominence the question of the power of the Executive Government to carry on investigations involving the examination of witnesses, with a view to some further action to be determined by the results of this investigation."

Extradition. "Is it Lawful to Bring a Man Back to Pennsylvania by Extradition on the Charge of Desertion under the Act of March 13, 1903, for the Purpose of Proceeding against him under the Act of April 13, 1867?" By William H. Baldwin. 4 *Journal of Criminal Law and Criminology* 20 (May).

"If a man is extradited under the act of 1903, the prosecution should be carried on under that act, and it is not lawful to drop it and punish him instead under the act of 1867. If it be held that imprisonment under the act of 1867 may be continued indefinitely, . . . the man might in this way suffer more severely for something which is not a crime than he could be made to for the alleged crime for which he was extradited, and for which the imprisonment cannot be longer than a year, with a fine of not more than $100."

General Jurisprudence. "Positive Right." By George del Vecchio, Professor at the University of Bologna. 38 *Law Magazine and Review* 293 (May).

Reserved for later notice.

Government. "Constitutional and Extra-Constitutional Restraints." By Robert P. Reeder. 61 *Univ. of Penn. Law. Rev.* 441 (May).

"The statements concerning inalienable rights [in certain decisions of the United States Supreme Court] to which we have referred follow the language of a broad assertion of general principle which is made at the outset of the Declaration of Independence. . . . As to all such statements it is sufficient to say that the premises upon which they are based have been abandoned by thoughtful men for over a century, that those statements are against the vast weight of direct authority, and that the court has not attempted to support them by any discussion of principle."

"Compulsory Service in Office." By Gordon Stoner. 11 *Michigan Law Review* 478 (May).

"Is this principle of the common law, that the administration of an office is a duty which may be required of every citizen and which the citizen or subject cannot refuse and escape without the consent of the sovereign power, a part of the common law which was not adopted in this country because it was not in accord with American conditions and institutions? It should not be so considered. . . . The principle of compulsory service in office is not in any measure discordant with our institutions and the general principles of the republican form of government."

The principle is recognized and applied in a majority of those jurisdictions which have considered the question, and the author professes an earliest belief in the advantages of a uniform rule of this sort, which would tend to maintain higher standards in the government service.

See Canada, Constitutional Amendment, Executive Powers, International Law, and Judiciary Organization.

History. "Another View of the 'Hayes-Tilden Contest.'" By Ex-Senator George F. Edmunds. *Century*, v. 86, p. 193 (June).

Ex-Senator Edmunds is the only surviving member of the Electoral Commission, and his reply to Col. Watterson's article in the May *Century* (25 *Green Bag* 234) is worthy of perusal.

Husband and Wife. "Estates by Entirety — *Beihl* v. *Martin*." By Harry Shapiro. 61 *Univ. of Penn. Law Review* 476 (May).

"It is submitted that from these authorities there is much to be said in favor of the view that since the passage of the married women's act, the unity of husband and wife no longer exists, and that, if tenancies by the entirety are not abolished, at least the creation of such an estate has become dependent upon the intention of the parties."

International Arbitration. "Restrictive Clauses in International Arbitration Treaties." By Dr. Hans Wehberg. 7 *American Journal of International Law* 301 (Apr.).

A valuable and important article.

"At present we still find eight different kinds of exceptions in arbitration treaties, namely those dealing with the constitution, national honor, vital interests, independence, integrity of territory, autonomy, sovereignty, and rights of third states. Even now, according to my judgment, the states might agree, in case they should not prefer a still more limited formula, to confine themselves in their treaties to the stipulations of 'national honor and vital interests.'"

The author shows by a tabular arrangement the restrictive provisions of existing treaties. He looks forward to a world treaty without restriction, though the first stage of the world treaty has not yet arrived. Though "a world treaty would be preferable to the many special treaties, still the development of the special treaties is of great value to the judicial organization of the world."

"Contractual Claims in International Law." By Edwin M. Borchard. 13 *Columbia Law Review* 457 (June).

"These various defects of the system as it still exists with its possibilities of injustice either to the debtor state or the unpaid creditor or both, lend much weight to the proposal advanced with greatest emphasis in Germany, that an international court be created by international agreement for the adjustment of these essentially legal claims. The individual should be given the right to bring suit against the debtor nation before this international tribunal, as has been done in the convention for the establishment of an international prize court and in the treaty of Washington for the establishment of a Central-American Court of Arbitration."

"The Necessity for an International Code of Arbitral Procedure." By William Cullen Dennis. 7 *American Journal of International Law* 285 (Apr.).

The writer believes the subject of elementary rules ripe for codification. He discusses some of those elementary matters, ignoring the more serious and more contentious matters of procedure as to which the Hague conventions are silent.

"Settlement of International Disputes by and between the English Speaking Nations." By Hon. William Renwick Riddell. 22 *Yale Law Journal* 545 (May).

A brief history of the disputes settled by arbitration up to the present time.

See International Law.

International Law. "International Law and Political Science." By Alpheus Henry Snow. 7 *American Journal of International Law* 315 (Apr.).

Students who seek to apply political science

to the structure and working of the whole human society "are confronted by a prevalent idea that beyond the limits of nations, or at least beyond the limits of political organisms like the British Empire, there is political chaos." The value of Mr. Snow's paper is found in the force with which this firmly rooted conception is combated, and the new conception of an international community is put in its place as essentially within the scope of political science. The article should help to correct a distorted view and to fortify any needed readjustment of political theory.

"The New Moroccan Protectorate." By Norman Dwight Harris. 7 *American Journal of International Law* 245 (Apr.).

An interesting study which covers the ground both of the internal politics of Morocco and its relations with France and other powers.

See Extradition, International Arbitration, Monroe Doctrine, Naturalization, Panama Canal.

Insanity. "Insanity and Criminal Responsibility." (Report of Committee B of the Institute, *concluded.*) By Edwin R. Keedy. 4 *Journal of Criminal Law and Criminology* 67 (May).

The report is a compilation of the statutes of the several states with respect to the determination of insanity, commitment and discharge of the criminal insane, etc.

See Psychology.

Japanese Problem. See Naturalization.

Judicial Recall. See Legal History.

Judiciary Organization. "The French Judicial System: Part I, Civil." By C. A. Herreshoff Bartlett. 38 *Law Magazine and Review* 257 (May).

"The French civil judicial system in many respects has its advantage over that of England and the United States, as, for example, in the rapidity in which commercial disputes can be settled and the comparative small expense entailed; in the production of evidence; in the absence of those technical questions on the admission of testimony that fill our law reports, and in pleadings that, although regulated by and confined to well-established rules, are not subject to those interminable controversies with which the English and American lawyer is so familiar. In many other ways, however, such as pressing a judgment debtor, and enforcing a judgment when obtained, French procedure lacks those vigorous methods of pursuit peculiar to Anglo-Saxon procedure, and consequently too often enables an adroit, unprincipled debtor, although capable of liquidating his debt, to easily escape and go scot-free; and in the non-admissibility in many instances of witnesses, thoroughly familiar with the facts, on the ground of self-interest — that antiquated theory that once prevailed in England and the United States, but which has long since been discarded as unsuitable to the proper administration of justice."

See Legal History.

Juvenile Delinquency. "A Study of One Hundred Juvenile-Adult Offenders in the Cook County Jail, Chicago, Illinois." By A. P. Drucker. 4 *Journal of Criminal Law and Criminology* 47 (May).

"The juvenile-adults are placed without any classification at all. This makes it possible for one accused of murder to become cell-mate to another held for disorderly conduct merely. . . . The prisoners as a whole, and especially the juvenile-adults, are kept altogether too long in the county jail, some being held as long as six months, though this is against the law. This circumstance is due to the following reasons: (1) the attitude of unscrupulous lawyers, who have learned by experience that they can extract more money from their clients by delaying the case; (2) the lack of influence or friends on the part of many young persons; (3) the fact that the grand jury is often unable to complete its work in one month; (4) a paucity of criminal judges."

"Mental Types of Juvenile Delinquents, Considered in Relation to Treatment." By Clara Harrison Town. 4 *Journal of Criminal Law and Criminology* 83 (May).

"When it is determined to which group the child belongs, the broad lines of treatment are thereby determined. If he proves to be feeble-minded, an institution alone will do; if he is backward or suspected of moral imbecility a protracted observation of his case under favorable pedagogical and environmental conditions must be made, and this must be followed by a life under normal conditions or in an institution according to final diagnosis; if he is normal, a change of environment and a chance to develop under favorable conditions must be presented. Within these lines the methods must be adapted to the needs of the individual child."

See Penology.

Legal History. "The Tenure of English Judges." By C. H. McIlwain, Harvard University. 7 *American Political Science Review* 217 (May).

The analogue of the English removal of judges on joint address of the houses of Parliament is not our recall of judges, but more nearly the bill of attainder. The author tries to correct some inaccuracies of legal historians, and shows that English judges held office during good behavior at an earlier date than is frequently asserted. The procedure of removal by joint address has "proved to be very unsatisfactory in operation," and has been actually applied only once, as far back as 1830.

"Notes on the History of Commerce and Commercial Law: I, Antiquity." By Layton B. Register. 61 *Univ. of Penn. Law Review* 431 (May).

"Before Rome the Mediterranean commerce had reached a high state of development, especially at the hands of the Phœnicians. However, no law has come down to us until the period of

the Greeks. The Rhodians developed a maritime law of which we have indirect knowledge and which is the source of modern admiralty."

"Norse Law in the Hebrides." By D. F. *Westminster Review*, v. 179, p. 526 (May).

"Murder, seduction, incest (marriage was forbidden between relations to the fifth degree), and, in certain circumstances, perjury, were punished with death; theft, robbery, arson, and adulteration of food with outlawry or imprisonment, but a humane provision acquitted of all punishment the man who stole food to sustain his own or his family's exsitence. Blood and family feuds, so frequent a source of disturbance among all primitive peoples, while admitted, were not encouraged, and the law generally enforced their settlement by payment of *weregild*, or compensation to the aggrieved party."

See Contracts, Scandalum Magnatum, Public Nuisances, Visigothic Code.

Marriage and Divorce. "Divorce in England, the United States and Canada." By F. P. Walton. 22 *Yale Law Journal* 531 (May).

"Nothing appears more clearly from the evidence presented to the Royal Commission in England than the fact that in that country a very large number of people dispense with divorce simply because they cannot afford it. . . In the United States this is not the case to anything like the same extent. Questions were submitted to a large number of American lawyers in different states. From the replies it appears that in Alabama a poor person can obtain a divorce for about forty dollars, in Connecticut for fifty dollars, in Georgia for twenty-five to fifty dollars, in Illinois for about thirty-five dollars, in Indiana for two dollars — a price possibly too tempting — in Louisiana for five dollars, and so on. Without laying undue stress upon the precise figure there is every reason to believe that in most of the states divorce is within the reach of the mass of the people."

The report of the Royal Commission receives much attention and the author also refers to opinions of sociologists on the divorce problem.

"The Bases of Divorce." By John Lisle. 4 *Journal of Criminal Law and Criminology* 30 (May).

A searching examination of the problem of divorce, largely from an ethical point of view; the writer makes several quotations from Miraglia.

Minimum Wage. "Judicial Interpretation of the Minimum Wage in Australia." By M. B. Hammond. *American Economic Review*, v. 3, p. 259 (June).

"Once having established his point that a living wage is to constitute the irreducible minimum — 'a thing sacrosanct, beyond the reach of bargaining' — below which wages of average employees may not be allowed to fall, Mr. Justice Higgins [president of the Commonwealth Arbitration Court] is, however, quite willing to allow that the prosperity of an industry will have to be considered in fixing the wages of the higher grade workmen."

"A Star Chamber Tariff." By W. J. Ghent. *Metropolitan*, v. 38, p. 64 (June).

"The bill of Senator Chilton of West Virginia, for a minimum wage for women whose products enter into interstate commerce, is generally regarded as defective in many respects; but it is at least a beginning, and will no doubt be followed by other bills more carefully drawn. . . . Judicial decisions, as Mr. Dooley long ago pointed out, follow the election returns; and it seems quite likely the Supreme Court may acknowledge the power of Congress to prohibit interstate commerce in products not made under certain prescribed conditions regarding the wages and hours of women and children."

Monopolies. "Amendment of the Sherman Anti-Trust Law." By J. Newton Baker. 1 *Georgetown Law Journal* 218 (May).

"We believe the 'rule of reason' is a correct statement of the law and the application as made by the Supreme Court conforms with the intention of the originators and is fully adequate to reach and invalidate combinations, trusts, or monopolies operating in restraint of trade; that to amend the statute in such manner that 'undue,' 'indirect,' 'unreasonable,' and 'rule of reason' be eradicated is most difficult, and it is difficult to perceive the wisdom of such measure could it be accomplished."

Monroe Doctrine. "The Monroe Doctrine: An Obsolete Shibboleth." By Professor Hiram Bingham, Yale University. *Atlantic*, v. 111, p. 721 (June).

An able study of Pan-American politics by a writer singularly well informed regarding conditions in Latin America.

"Germany is getting around the Monroe Doctrine, and is actually making a peaceful conquest of South America which will injure us just as much as if we had allowed her to make a military conquest of the Southern republics. She is winning South American friendship. She has planted colonies, one of which, in Southern Brazil, has three hundred and fifty thousand people in it, as large a population as that of Vermont, and nearly as large as that of Montana. . . . Laughing in her sleeve at the Monroe Doctrine as an antiquated policy, which only makes it easier for her to do a safe business, Germany is engaged in the peaceful conquest of Spanish America."

"Easy Money on the East Coast." By Granville Fortescue. *Metropolitan*, v. 38, p. 46 (June).

"The Monroe Doctrine is an anomaly. It overrides vital principles of international law. It implies a superiority vested in the United States. . . . We are about to enter upon a new era in the relations with our Latin-American neighbors, and it behooves the people of this country to take mental inventory of their knowledge of South America problems; for South American problems will produce North American crises in the not far distant future."

Mortgage. See Real Property.

Natural Law. See Government.

Naturalization. "Are the Japanese Mongolian?" By William Elliot Griffis. *North American Review*, v. 197, p. 721 (June).

"The Japanese are not 'Mongolian.' They justly refuse to be classed as such. It is the disgrace of the United States that the Japanese cannot as yet obtain citizenship. They are as likely as any other stock, when naturalized, to become in time as patriotic as most other peoples among us more or less assimilated. This is true, largely because real Christianity is certain in time to transform as much American as any other human nature that masks its brutishness, injustice, and hypocrisy under high-sounding names. In treaty-keeping, the Japanese have already proved themselves the 'whiter' of the two parties. In the end, both deserving and winning success, they will gain social as they have already won political equality with Occidentals, and the world will be the better for it."

Negligence. See Psychology.

Panama Canal. "The Panama Canal: The Rule of Treaty Construction Known as *Rebus Sic Stantibus*." By Hon. Hannis Taylor. 1 *Georgetown Law Journal* 193 (May).

"It seems to me that a radical breach of the tacit condition, *rebus sic stantibus*, occurred when in November, 1903, the Canal Zone became, by purchase, the domestic territory of the United States. . . . The existence of the rule, *rebus sic stantibus*, as applied to the construction of treaties, has never been denied, so far as I know, and it is not at all likely that Great Britain will deny its existence in the present instance."

"Exemption from Panama Canal Tolls: A Discussion Based upon the Law of Public Callings." By Prof. Eugene Wambaugh. 7 *American Journal of International Law* 233 (Apr.).

This is a revision of an article which appeared in the *Boston Evening Transcript* of Feb. 8, 1913, and in the *Congressional Record* of Feb. 26, 1913 (p. 4223). See 25 *Green Bag* 197.

Penology. "Crime and Punishment." By A. M. Brice. *Contemporary Review*, v. 103, p. 679 (May).

"Twenty-one girls, all eligible for treatment as juvenile adults under the Borstal system, were sent to prison for the first time. During the following twelve months these twenty-one girls committed offenses for which they were sent to prison seventy-two times. Only one was committed once; the rest were committed from two to seven times each during the year.

"It is to help such cases that the 'Modified,' as opposed to the 'Full' Borstal system, is now being applied. Under this system offenders who are under short sentences receive that personal care and individualization which form the underlying principles of the 'Full' Borstal plan, and experience shows that this is also having good results. It is to the credit of the prison officials that this modified system, which takes into its net thousands who are not qualified for the 'Full' system, is not the child of the Legislature, but merely an administrative re-arrangement of prison methods, adapted to offenders of a particular age. Nor, in taking leave of this most promising and already productive system, must the afterwork of the Borstal Committees and Association be forgotten. In seeking to prevent the complete or the continuous demoralization of the young offender, they are not merely reforming the criminal, but also protecting society — two ideas which are sometimes regarded as if they were alternatives."

See Psychology.

Police Power. See Teachers' Pensions.

Procedure. See Criminal Procedure, International Arbitration.

Psychology and the Law. "The Association Method in Criminal Procedure." By Paul Menzerath. 4 *Journal of Criminal Law and Criminology* 58 (May).

A translation of a highly technical article of obvious importance for psychologists. The association method of psychoanalysis is carefully examined, and is found not to be available at the present time for practical application. Theoretical questions need to be cleared up, and investigators still have much to learn from experiments on criminals themselves.

A number of papers on the subject of psychology applied to the law were published in *Case and Comment* (v. 19, no. 12) for May, 1913. The general topic is discussed by Professor Josiah Morse ("The Value of Psychology to the Lawyer," p. 795), who gives copious illustrations of the importance of psychological facts in daily life, and expresses his belief in the value of psychology to the laywer. He thinks, however, that the service of psychology to the law is indirect, and is sceptical as to its availability for practical application in the court room. Prof. Erwin W. Runkle ("Application of Psychology to Law," p. 835) likewise maintains that psychology has a general rather than specific application, but sees a growing use for psychology in the criminological laboratory.

The application of psychology in the criminological laboratory is also advocated in an able paper by Professor Robert H. Gault ("Sufficient Motives in Human Behavior and a Corollary," p. 813). Dr. Charles Gilbert Davis ("The Psychology of Crimes and Criminals," p. 820) restates with approval Lombroso's theories of the born criminal and the physical signs of degeneration, and advocates humane penological measures.

Most of the papers treat of the psychology of testimony. Professor R. S. Woodworth writes of this subject with some vigor of analysis ("The Preponderance of Evidence," p. 827), and discusses the psychology of error, as affording a test of the reliability of witnesses. Edwin A. Kirkpatrick ("The Psychology of the Common Law Requirement that Testimony Shall be Objective and Specific," p. 837) considers that "It is wise in the light of psychology to insist that testimony shall concern specific facts," yet our memories may often be more accurate

as to general facts, and it may be questioned whether courts of law do not attach too much importance to specific memories." An interesting communication from Professor E. B. Delabarre ("Retrotractive Amnesia and Confessions of 'Self-Robbery,'" p. 839) tells of several cases of obliteration of the memory of recent events by sand-bagging and other accidents. Albert S. Osborn, in an article which will interest lawyers who have anything to do with questioned documents and forgery cases ("Form Blindness," p. 800), writes of the widely divergent abilities of different observers, and presents several graphic diagrams.

The uses of psychology in the law of negligence are suggested by a paper contributed by Christian Doerfler ("A Psycho-Legal Discovery," p. 808). This article describes the psychological principle underlying the decision of the Wisconsin Supreme Court in *Kazcmarek* v. *Geuder Paeschke & Frey Co.* 148 Wis. 46, where the employee was allowed to recover for injuries he had received during his operation of a machine which required a rapid sequence of automatic movements of the hand undirected by the will. (See 24 *Green Bag* 152.)

Another writer takes up a psychiatric phase of the subject (Shepherd I. Franz, "The Mental Status of Some Cranks," p. 832) and urges the importance of early recognition of such types of paranoia as those instanced, whether of the responsible or "*demi-responsable*" variety.

Judge George W. Atkinson ("Psychology and the Law," p. 817) maintains the metaphysical principle of free-will. "The fundamental aim of jurisprudence is to realize external freedom by removing the hindrances imposed on each other's free action through the interferences of other wills."

Public Nuisances. "Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances." By Prof. Henry Schofield. 8 *Illinois Law Review* 19 (May).

"When the Illinois Supreme Court [*Stead* v. *Fortner*, 255 Ill. 468] says such legislation is but declaratory of an existing jurisdiction to shut up and close illegal saloons as public nuisances by the writ of injunction against the saloon-keeper, reaching back to the days of Elizabeth, the court is simply going against the whole current of English and American judiciary law. It always has been universally understood and declared by judges, lawyers and text-writers alike, that these modern prohibitory liquor statutes in several of the states authorizing and requiring the courts to issue the writ of injunction against saloon-keepers, are innovating statutes, introducing new doctrine on the point of the adequacy of the remedy at law to shut up and close illegal saloons as public nuisances simply because they are illegal."

Questioned Documents. See Psychology.

Real Property. "The Lien Theory of the Mortgage — Two Crucial Problems." 11 *Michigan Law Review* 495 (May).

The writer in a former article (10 *Mich. L. Rev.* 587, see 24 *Green Bag* 400) concluded that the interest of the mortgagor, in states adopting the lien or equitable theory of the mortgage, is a legal interest in the land as distinguished from an equitable interest, a right *in rem* as distinguished from a right *in personam*, a right which in the terminology of jurisprudence would be a "hypothecation" (Holland, Jurisprudence, 10th ed., pp. 183–225). This later article is written to obtain confirmation of a conclusion which seems remote, though its premises are found in our case law. After examining the two specified problems in the light of judicial opinions the author maintains that a logically consistent theory of real property requires acceptance of the principle of a legal interest in the land.

See Husband and Wife.

Scandalum Magnatum. "*Scandalum Magnatum* in Upper Canada." By Hon. William Renwick Riddell. 4 *Journal of Criminal Law and Criminology* 12 (May).

This action became obsolete in England, no instance of its use being found later than 1710. One attempt, and only one, was made over a century ago to bring the action into force in Upper Canada, by Mr. Justice Thorpe.

Social Legislation. See Minimum Wage, Teachers' Pensions, Workmen's Compensation.

Teachers' Pensions. "Constitutionality of Teachers' Pensions Legislation: I, Pension Laws in General." By H. L. Wilgus. 11 *Michigan Law Review* 451 (May).

A detailed analysis of the principles which have been established by the courts in dealing with this subject. This exposition will appeal to those who are interested in studying the broadening scope of the police power along the line of Professor Goodnow's treatment. (See 24 *Green Bag* 483.)

In the second part the author will later discuss the constitutionality of a bill pending in Michigan.

Uniformity of Law. "Needed: A Uniform Law Merchant." By C. A. Douglas. 1 *Georgetown Law Journal* 202 (May).

The writer favors an amendment to the federal Constitution granting the necessary power to Congress to pass a Law Merchant for the entire commerce, intra-state as well as inter-state, of the United States.

Visigothic Code. "The *Forum Judicum* (*Fuero Juzgo*). A Study in the Early Spanish Law." By Charles Sumner Lobingier. 8 *Illinois Law Review* 1 (May).

References are to Scott's "Visigothic Code." An exposition of the system of law in general outline, with some incidental historical discussion.

Witnesses. See Psychology.

Workmen's Compensation. "Workmen's Compensation Acts as Thus Far Considered in

American Cases." By N. C. Collier. 76 *Central Law Journal* 354 (May 16).

"It may be thought, therefore, that there is no very great assurance that a compulsory workmen's compensation act would be upheld under the due process of law clause of the federal Constitution, and if such legislation of a permissive character may embody all or practically all of the features that a compulsory act should contain and thus escape all assaults upon its constitutionality, it would be a sort of bigotry to insist upon the compulsory idea. It is undoubtedly true that five of the six courts, which have spoken, would sustain an optional law, and it is not certain that more than two of them would have sustained a compulsory law. Indeed, two of them sustaining an optional law have strongly intimated they would not."

Women. "Women and the Legal Profession." By Holford Knight. *Contemporary Review*, v. 103, p. 689 (May).

"My general answer, therefore, to this series of objections is, that the alleged physical disabilities are exaggerated, also negatived by the experience of daily life; that the defects of temperament and mind will either be corrected by training and education, or prevent the receipt of legal work (as men in like case have found); and that the fears as to an interference with the course of justice will dissolve as experience of woman in her new sphere is gained."

Latest Important Cases

Bankruptcy. *Life Insurance Policies of Bankrupt — Trustee Entitled only to Cash Surrender Value.* U. S.

In a number of recent cases, the United States Supreme Court has held that under sub-division 5 of section 70*a* of the Bankruptcy Act, the trustee is entitled only to the cash surrender value of the bankrupt's policies of insurance at the date of the filing of the petition. Hence, if a bankrupt dies any time after the petition is filed, the trustee has no interest in the proceeds of the policy beyond its surrender value at the date of the filing of the petition. *Burlingham* v. *Crouse*, Oct. term no. 184 (L. ed. adv. sheets no 13, p. 564), *Everett* v. *Judson*, Oct. term no. 595 (L. ed. adv. sheets no. 13, p. 568), *Andrews* v. *Partridge*, Oct. term no. 496 (L. ed. adv. sheets no. 13, p. 570).

Contempt. *Procedure to Punish for Contempt — Excessive Punishment.* D. C.

In *In re Gompers*, decided May 5, the Court of Appeals of the District of Columbia reversed the sentences imposed upon the appellants by the Supreme Court of the District of Columbia, holding them excessive, and sentenced the respondent Gompers to thirty days in jail and the respondents Mitchell and Morrison to pay a fine of $500 each. (*Washington Law Reporter*, May 9.)

The Court (Van Orsdel, J.) reviewed the controversy from its inception in 1907 in an extended opinion, and concluded: —

"The differences which necessitated the injunction have been settled. The sole purpose of punishment, therefore, is to give reasonable assurance that respondents will in the future respect the authority of the courts. While the injunction was issued to restrain the most subtle and far-reaching conspiracy to boycott that has come to our attention, the boycott had ceased and the necessity for the injunction no longer existed at the time this case was tried below. A penalty, therefore, which would have been justifiable to prevent further defiance of the order of the court but for the settlement, would now be needless and excessive. Had the court below imposed penalties not greatly in excess of those which we now deem adequate, we would not feel justified in holding that there had been an abuse of discretion. Since, however, the penalties imposed are so unreasonably excessive, and we are called upon to modify the judgments, we prefer to err, if at all, on the side of moderation. No one, however, can read this record without being convinced that respondent Gompers has been the chief factor in this contempt; hence, a severer punishment is merited in his case than in the cases of the other respondents."

The only error in the record was found to relate to the excessive punishment imposed.

Corporations. *Meaning of "Engaged in Business" — Federal Corporation Tax Law.* U. S.

In *McCoach* v. *Minehill & Schuylkill Haven R. Co.*, 228 U. S. 295, decided Apr. 7, the United States Supreme Court held that a railroad company which has leased its entire railroad to a company which agrees to operate it and keep it in repair, is not "engaged in business" within the meaning of the federal corporation tax law of 1909, imposing an excise tax on corporations

doing business in any state. Mr. Justice Pitney delivered the opinion of the court.

A dissenting opinion was delivered by Mr. Justice Day, Justices Hughes and Lamar also dissenting.

Criminal Law. *Conviction through Decoy.* U. S.

In *United States* v. *Healy*, in the United States District Court, D. Montana (February, 1913, 202 Fed. Rep. 349), a conviction of crime was set aside on the trial court's own motion because it had been procured through a decoy or trap. The Court said: —

"In this case the Court, of its own motion, vacates the sentence and judgment, sets aside the verdict and discharges the defendant. The conviction was for a felony, an unlawful sale of intoxicating liquor to an Indian, contrary to Act Jan. 30, 1897, c. 109, 29 Stat. 506." The Court referred to the fact that the evidence had been obtained by a purchaser acting as a decoy, there being nothing in his appearance to betray the fact that he was an Indian, and continued: —

"Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the Government's instrument to that end ignorance of fact stamps the act as involuntary, and excuses, or at least estops the Government from a conviction. . . .

"In the case at bar the act is innocent but for the status of the solicitor, and because he is a decoy of concealed disability the act is blameless, and there is estoppel against conviction. Were it otherwise honest men could easily be made felons. Many of the Government's Indian wards are not distinguishable from Caucasians." (Discussed in *New York Law Journal*, Apr. 4.)

Evidence. *Hearsay Rule — Extrajudicial Confession of Third Person Incompetent.* U. S.

The extrajudicial confession of a third person, since deceased, that he had committed a murder with which the accused was charged, was held to be inadmissible in evidence in behalf of the accused, in *Donnelly* v. *U. S.*, 228 U. S. 243, 33 Sup. Ct. Rep. 451, decided Apr. 7. The opinion of the Court was delivered by Mr. Justice Pitney, Holmes, Lurton, and Hughes, JJ., dissenting. The *New York Law Journal*, discussing the decision editorially (May 9, 1913), speaks of the tendency to restrict dying declarations, and believes the majority to have taken the correct view, notwithstanding the arguments given by Mr. Justice Holmes and the reasoning of Professor Wigmore (Wigmore on Evidence, secs. 1476, 1477). "Under present conditions we believe the average criminal, although not expecting to live, if he elected to speak at all, would not hesitate falsely to accuse an enemy or to take upon himself the responsibility for an independent crime in order to exonerate a friend. This species of evidence should be excluded, either against or in favor of a criminal defendant."

Wills. *The "End" of a Will.* N. Y., Mass.

What is the "end" of a will was under consideration by Surrogate Fowler in *Matter of Peiser*, reported and discussed in the *New York Law Journal* of March 11. The New York statute requires that a will shall be signed at its end. The maker had taken an ordinary two-sheet foolscap, consisting of a single sheet of paper folded so as to make four pages. He began to write his will on one of the outside pages and continued it on the other outside page, and then went back to the inside of the first page, where he finished it, and signed his name, and had it attested by witnesses, in accordance with the law.

The will was held to be valid, notwithstanding the fact that the middle part of it was on the back of the second sheet, and the beginning and ending part of the will were on the obverse and reverse of the first sheet. (Discussed in *National Corporation Reporter*, Apr. 24, p. 397).

A similar result was reached by the Massachusetts Supreme Judicial Court Apr. 8. The question whether the will of the late Charles H. Pratt was properly executed was submitted to the jury, which decided it to have been properly signed. The testator had executed the will by signing it in the margin of the next to the last page, or the last page of the will proper. He had previously signed the margins of the other pages for identification. Three witnesses signed their names at the bottom of the will on the fifth page, witnessing testator's signature in the margin. A few moments after they had retired, they were recalled. They saw Pratt sign the will again in the usual place at the end. But they did not legally witness this signature by again signing their own signatures.

The Editor's Bag

THE QUASI-LEGISLATIVE FUNCTION OF AN INTERNATIONAL COURT

THE view expressed in Professor Hayes' suggestive paper, elsewhere printed in this issue, is that the growth and decay of nations involve changes in their political power and territorial possessions, whence it follows that a satisfactory system of international law must be flexible rather than rigid, and must not rest on the assumed justice of the existing status. Professor Hayes believes that judicial arbitration, unaided by the corrective of legislation, leads to a rigidity of law which undermines the security of this method of adjusting disputes, that it results in overemphasis on the principle of the sanctity of national sovereignty, and that it sets up an international oligarchy precariously maintained by the favored powers, notwithstanding the fiction of equality of nations. A stagnant, undemocratic condition of international law will not serve to prevent violation of the rights of weaker nations by the seizure of great portions of their territory, nor will such a system of law prove adequate to uphold the justice of expansion of territory when it is in the interest of civilization. Thus there is pressing need for some form of legislative and executive organ of the democracy of nations, if international arbitration is to keep pace with evolution and satisfy the needs of the human race.

We believe that this view magnifies the importance of questions of territorial sovereignty and colonial expansion as a bone of contention among the nations in future. One high authority says: "The more the status of the territory of the states tends to become permanent, and especially as the earth becomes more completely partitioned among the nations, the fewer will be the colonial questions which make up at the present time such a large number of the questions affecting vital interests." [1] There is no noticeable sentiment among the American people at the present time in favor of the acquisition of new territory in the Western hemisphere. The tendency of republican institutions in all parts of the world is adverse to territorial expansion from which the private citizen will receive no benefit. Economic expansion has taken the place of military conquest, and economic expansion is a world rather than a national development, and instead of leading necessarily to political expansion tends to the removal of political impediments to international intercourse. The principle of the "open door" and maintenance of equal commercial opportunity in such countries as China is to be reckoned with.

Yet even if we grant that questions of territory will continue to agitate the great powers, does it follow that a flexible system of international arbitration

[1] Dr. Hans Wehberg, 7 *American Journal of International Law*, p. 312.

cannot be devised by which such disputes can be properly adjusted? On this question there is a difference of opinion. Many of the leading pacifists, Zorn and Wehberg for example, are agreed that the submission of all questions affecting the vital interests of states to an arbitral court cannot in the present state of affairs be made compulsory. Other jurists maintain that all causes of dispute may be so submitted. The latter view seems to be approximately that of Professor Reinsch: —

> If we are to deprive war more completely of its *raison d'être*, it will be necessary that there be found methods of developing international law so as to make it correspond to the vital needs of mankind and to render recurrence to violent means of vindicating rights less and less excusable. The great international conferences are the beginning of a legislative body, but as yet they are much hampered by diplomatic considerations. A world-legislation decreeing laws by majority of votes is still in the distant future and would involve a total departure from our present system of autonomous nations. Is there an agency by which international law could be developed gradually but on the basis of principles that would in themselves make possible, and in fact import, recognition also by a world conference with legislative attributes? We believe that for the time being definiteness in international law principles could be achieved best, if they were hammered out in such important litigation as would come before high courts of international judicature. Growing from precedent to precedent, adapting itself always more perfectly to the needs of the world, resting on principles of human reason tested in action, international law could grow strong in importance and authority. For by judicial interpretation conflicting points of view are dissolved, the better reason is gradually allowed to establish itself, new implications are seen in older and accepted principles, which in turn will be a guidance in the just settlement of controversies as they arise. Thus the law is conceived of as a growing, living organism not subject to artificial construction by wrong-headed caprice no matter how strongly endowed with temporary power.[2]

[2] "American Love of Peace and European Skepticism," International Conciliation Publications, no. 68.

So far as Professor Reinsch implies that every new and complicated question of international policy may be settled by legal arbitration, we are unable to accept his position. The forces of precedent tend to crystalize any system of law and to prevent its twisting to meet novel situations, and even though the international court takes to itself, more and more, the functions of a court of equity it must be governed to a large extent by fixed principles of international law and equity. It does not follow, however, that another arbitral agency is not available for the determination of disputes affecting vital interests, without need of resorting to diplomatic mediation. We have previously urged that a complete system of arbitration calls for the establishment of two tribunals, one of mandatory jurisdiction, for the settlement of purely legal controversies, composed of professionals, the other of voluntary jurisdiction, dealing with semi-political controversies, partly including non-professional statesmen among the arbitrators.[3] The latter tribunal would thus be in a position, where the parties consented to its jurisdiction, to dispose of controversies involving the application of some new principle of justice not found among settled rules, yet such a court would be of such competence in international law that its decision would not be extra-legal, but would constitute as authoritative a precedent as the decision of a court of purely legal jurisdiction. In this way international law would freely expand by the creation of new principles, and an organ of judicial legislation would be provided answering to the requisites of a purely legislative body. In this way Professor Reinsch's ideal of a growing organism of judicial precedent would the

[3] 25 *Green Bag* 177.

more readily be fulfilled, and what we have to offer is, broadly speaking, a confirmation rather than a criticism of his view.

The idea that international arbitration cannot achieve its hopes till the far distant day when an international legislature is established is surely a mistaken one. It suggests, however, the all-important point that the quasi-legislative function is essential to the vitality of the international court, and must not be disregarded as a consequence of that spirit of legalism which overreaches itself in the effort to take the law out of international politics.

THE RIGHT OF TESTACY

VICE-PRESIDENT MARSHALL'S recent assertions regarding the right of testamentary disposition attracted considerable attention. He said that "the right to inherit and the right to devise are neither inherent nor constitutional, but upon the contrary they are simply privileges given by the state to its citizens."

The right of a man to dispose of his property by will is of the same nature as his right of ownership in the property itself. If his right to own property is absolute it is but a corollary that he may not only control the disposition of his property while he lives, but may also choose who shall succeed him after he is dead in the title he enjoys. But if his right of property is a limited right it may obviously be limited either with respect to the distribution he may make of his possessions while he lives or with respect to any posthumous distribution of his wealth.

From the point of view of so-called "natural" law, there is no such thing as an absolute right of private property. Property is, to be sure, an attribute which distinguishes man from brutes. Miraglia says: "An animal can join itself to an object by a physical bond and can grieve for it if he is deprived of it, but he is not able to create the moral bond which distinguishes property from possession." Property, while it is one of the things governed by law, must not be misconceived as distinctly a legal institution. Property is the creature of economic forces of distribution, and a positive economic life, positive in the sense that there is a visible physical embodiment of economic purpose, is a distinctive attribute of mankind. Property, as thus used in a general sense, may signify not individual but collective property. Sociologists are wont to lay stress on the collectivistic aspects of primitive society. In ancient Rome and Greece there was a tradition of a Golden Age in which private property was non-existent. Property is frequently asserted to have gone through a collective stage before the egoistic one was attained. It is unnecessary for our purpose to show that there was ever a time in which there was not a trace of private property, for if private property existed in the slightest degree it was so different from private property as we now know it that the relative and limited character of the right in the earliest times is self-evident. In the course of evolution, as society progressed, property became more and more individualized as a consequence of economic development, and a changing economic system and a changing natural justice gradually built up the right of private property as we know it, without however making of it an absolute right which the community could not regulate and restrict.

There is a parallel development in the progress from intestacy to testacy. At first the collective idea, as represented by the family, prevailed, the property

of the deceased being distributed among the surviving members of his family; the right of disposition by will arose as an incident of individual ownership to which the rights of kinsmen were subordinate. Usually the right of testamentary disposition has been limited in the interest of survivors, and even the Anglo-American system, while remarkable for its liberality in subjecting the power of the testator to few limitations, by no means concedes an absolute right of testamentary disposition, as the rule against perpetuities shows.

It is therefore impossible to uphold the view taken by Surrogate Fowler of New York in a recent case, that "the right to dispose of property after death is a natural and inherent right of mankind which cannot be taken away by the state." This is quite as extreme a statement as the assertion that this right is merely a legal grant by the state resting upon no deeper foundation than that of privilege. The right is one neither fixed nor absolute, which has its roots in the actual life of the community and which like everything human is subject to change, though not necessarily to radical transformation. Gareis says that the modern effort to restrict inheritance by will endangers civilization, and any drastic proposal to confiscate large inheritances may properly excite misgivings. It does not follow, however, that well-considered modifications of our inheritance law may not be along the line of progress, if they are made with due recognition of the danger which Gareis perceives and in an earnest endeavor to avoid it.

A LOYAL SPOUSE

A HANDWRITING expert, so we are told, frequently runs across interesting as well as entertaining specimens of literary effort. Mr. Webster A. Melcher of Philadelphia kindly sends the *Green Bag* the following extract from a letter which passed through his hands. He has of course changed the names.

From Mrs. Jones' letter to Mrs. Black: —

"Give my love to Mr. Black. I don't care if you don't like it. You can send your love to that man of mine; wish I did not own him; he will never die."

Our readers can decide for themselves, comments our correspondent, "whether the writer of the letter from which this was taken was a suffragette or some other kind of an 'ette.' "

WOULD NOT STATE HIS BEST POINTS FIRST

A GOOD story is told of the late Lord Ashbourne, who was at one time Lord Chancellor of Ireland. Occasionally, says the *Law Times*, in the Court of Appeal, Lord Ashbourne would make up his mind to bring a case to an end before the rising of the court, and it was highly instructive to watch the proceeding.

A junior, who was not conscious of his humor, stood up to open what appeared to be a short interlocutory appeal. Lord Ashbourne, after a sentence or two had been spoken, interjected, "Now, Mr.—— why should we reverse the King's Bench on a point like this?"

"My Lord," rejoined counsel, "there are six reasons why the order should be reversed."

"Then," said the president of the court, "suppose we commence with your three best."

"No, my Lord," said counsel, "I could not consent to that, because I have frequently succeeded in this court upon my bad points."

Lord Ashbourne collapsed, and for once was unable to have his own way in the Court of Appeal.

A PERMANENT JOB

A bookkeeper, Charles Goldberg, was recently freed from indictment for theft of $2,200 on condition that he keep his position and repay the debt at the rate of $10 per month.—*News item.*

CHARLES GOLDBERG is a foxy man
As all men will allow.
He has a very simple plan
Whereby, no matter how
His enemies may try, —
They can't divorce him from his job.
This is the reason why, —
He has to pay ten dollars
Each month of every year,
And so, of course, it follers
By reasoning most clear
That to clean up the score,
He must hold his position
Some twenty years or more.
If he'd pay compound int'rest
'Twould make a handsome sum
And make his job eternal, —
Charles G.'s a shark, by gum!

SIRIUS SINNICUS.

The Legal World

Monthly Analysis of Leading Legal Events

There is still partisan agitation in Philadelphia over the recent enlargement of the Court of Common Pleas, the *North American* denouncing the scheme as "tainted by political intrigue" and as an attempt to restore the Penrose influence. The plan is evidently a sound one, however, which will relieve congestion in the inferior courts, and the appointees to the new judicial positions seem to be of respectable if not remarkable professional qualifications. The stirring up of so much controversy over the matter illustrates the difficulty of securing sympathetic public recognition of the needs of the courts, when any question of additional judges or larger expenditure on the courts presents itself.

This unfortunate tendency is likewise apparent in the indifference of the Legislature toward the Philadelphia Law Association's Municipal Court plan. Up to this writing, the Senate has also failed to take favorable action on Senate bills 137, 138 and 141, entitled respectively "An act regulating trial by jury in civil cases in courts of record," "An act providing that no judgment be set aside or reversed or new trial granted unless the error complained of has injuriously affected the substantial rights of the parties," and "An act to authorize the Supreme Court from time to time to adopt and promulgate general rules of practice."

The Law Reform Committee of the Association of the Bar of the City of New York is hopeful that any law reform desired by this body and the State Bar Association in active co-operation can ultimately be accomplished. In the report of the committee presented May 13, a large number of important bills enacted by the Legislature this year are described, including the law (ch. 713, L. of 1913) continuing the Board of Statutory Consolidation and directing them to prepare a practice act and simplification of procedure, and that (ch. 471, L. of 1913) providing for a codification of the practice and procedure of the Municipal Court of New York City. Yet of fifteen bills introduced to carry out recommendations approved by the Association only two became laws.

Address by Judge Morrow on Professional Ethics

Judge W. W. Morrow of San Francisco, of the United States Circuit Court of Appeals for the ninth circuit, addressed

a number of applicants for admission to the federal bar at Phoenix, Ariz., in May on the subject of professional ethics. He referred to an article in the *Outlook* in which Colonel Roosevelt had expressed his distaste for legalism, and his objection to the *caveat emptor* side of the law. In this connection Judge Morrow said: —

"I need not tell you that the maxim of *caveat emptor* is a legal maxim, and expresses the rule of the common law that the purchaser of property buys at his own risk, as to title and quality, unless the seller gives a warranty, or the law implies one. The buyer is presumed to know what he wants, but if he is not competent to judge of title or quality he requires a warranty. Had Colonel Roosevelt extended his studies into the civil law, he would have found a similar maxim with respect to the seller. The maxim there is *caveat venditor*, "let the seller beware." This maxim requires the seller to protect himself from future responsibility by an agreement with the purchaser.

"The rule of *caveat emptor* prevails in England and in this country. The rule of *caveat venditor* prevails on the Continent of Europe. In actual practice there is but little difference between the two. The results in trade, in commerce and in all the affairs of business are about the same. The underlying principle in both cases is common honesty, and, to my mind, the legalism of *caveat emptor* or *caveat venditor* is of small consequence. The real question is not so much the protection of the buyer or the seller by the use of maxims of law, but to secure common honesty in all business transactions; and where there is a departure from this requirement, the penalty should fall upon the transgressor, whether he be the buyer or the seller; and this is, in fact, the law of the land. It is this law you are called upon to uphold, and I am sure that will be your purpose in your professional life."

Personal

Professor Roscoe Pound of Harvard Law School gave an address at the annual meeting of the Berkshire Bar Association at Pittsfield, Mass., May 19, on "Democracy and the Common Law."

Robert McMurdy's name has been sent to the state senate by Governor Dunne of Illinois for the office of minority member of the Court of Claims. Mr. McMurdy, who is president of the Illinois State Bar Association, succeeds A. G. Kennedy.

Henry L. Stimson, former Secretary of War, delivered the annual address before the Law Academy of Philadelphia May 27. His subject was, "Initiative and Responsibility: a Remedy for Inefficient Legislation." The closer participation of the Executive in legislation was advocated. It was proposed that the President be given power to prepare the budget and to introduce it into Congress, and to introduce other bills, and that members of the Cabinet have the right to appear on the floor and discuss any bills affecting their departments.

Judge George Hutchins Bingham of Manchester, N. H., who succeeds former Judge Colt, now United States Senator from Rhode Island, on the bench of the United States Circuit Court of Appeals, first circuit, is forty-eight years of age, a graduate of Dartmouth and Harvard Law School, and has been a judge of the Supreme Court of New Hampshire for the last ten years. His father, George A. Bingham, was a member of that

court and his maternal grandfather, Andrew S. Woods, was the Chief Justice of the court at one time. Judge Bingham is the first United States Circuit Judge New Hampshire has ever had.

Administration of Prisons in New York

The administration of Sing Sing Prison is severely arraigned in a report made to Governor Sulzer of New York by George W. Blake, the Governor's special investigator of prisons and reformatories. Mr. Blake revives the story of the prison ring that controls a traffic in pardons and commutations of sentence. The report opens with a bitter attack on Warden Kennedy and on Col. Joseph F. Scott, who was removed as Superintendent of State Prisons by Governor Sulzer. Colonel Scott was appointed after a successful administration, covering more than ten years, of the affairs of the Elmira Reformatory. He was considered one of the foremost penologists in the country. The report says in part: —

"Warden Kennedy has violated the law, he has permitted the creation and continuance of unbusinesslike methods and has caused the state to lose thousands of dollars in a way that points directly to graft. He has made no attempt to protect the inmates from disease and vice, nor any effort to produce better conditions in this prison. During his administration scandals of the prison management have become rife in every section of the state.

"I do not wish to bear too heavily upon Warden Kennedy, because I am strongly of the opinion that the facts set forth in this statement are due directly to Joseph F. Scott, who was for nearly two years Superintendent of Prisons. I have dug into the sterile soil of prison management to discover, if possible, one redeeming trait in the management of prisons of this state during the period in which Colonel Scott was in control, but I have not found one sign to show that he was either competent, conscientious, or industrious."

Philadelphia Law Association

The Law Association of Philadelphia, at a meeting held June 3, unanimously adopted the following resolution opposing the recall: —

"*Resolved*, That we are unalterably opposed to any change in the Constitution of this state, or of the United States, by which, by a vote of the people, the terms of office of duly elected or appointed judges may be shortened, or their judicial decisions be vacated or set aside."

A resolution in favor of the passage of a similar resolution by the state bar association was also unanimously adopted.

George Wentworth Carr explained why the committee charged with the introduction of a Municipal Court bill in the legislature had been unable to get a Senator to propose the form of constitutional amendment agreed upon, looking to the establishment of a Municipal Court. This was due to the preference of members of the Senate for a different sort of Municipal Court, which would not abolish the magistrates and make a constitutional amendment necessary. Therefore the plan of the Law Association would have to wait until the pending bill had been disposed of.

The Committee on Legislation presented a report in which objections to House Bill 1789, regulating civil pleading and practice, were stated. The committee, however, admitted that the bill contained a number of admirable

features, some of which ought to be enacted into a statute and others left for rules of court.

Obituary

Ashbourne, Lord (*Edward Gibson*), who died May 22, was Lord Chancellor for Ireland in Lord Salisbury's first administration and for many years took an active part in the Irish policy of the Government.

Briggs, Frank O., former United States Senator from New Jersey, died May 8 in Trenton. He had been Mayor of Trenton, member of the State Board of Education, and State Treasurer. He was chosen to take the place of Senator John F. Dryden in 1907; his health gave way last year and he was succeeded by William Hughes of Patterson.

Crocker, George C., former president of the Massachusetts Senate, lawyer and author, died May 26. He was for twenty years a member of the Boston Transit Commission, and had previously been chairman of the State Railroad Commission.

Jackson, Gen. *Joseph Cooke*, who for many years practised law in New York, being at one time an assistant federal attorney, died May 22.

Leake, General *Joseph B.*, one of the oldest practitioners at the Chicago bar, died on June 1. He was appointed United States District Attorney for the Northern District of Illinois in 1879, a position which he filled with marked ability for four and one-half years. In 1887 he was elected attorney for the Board of Education of the City of Chicago.

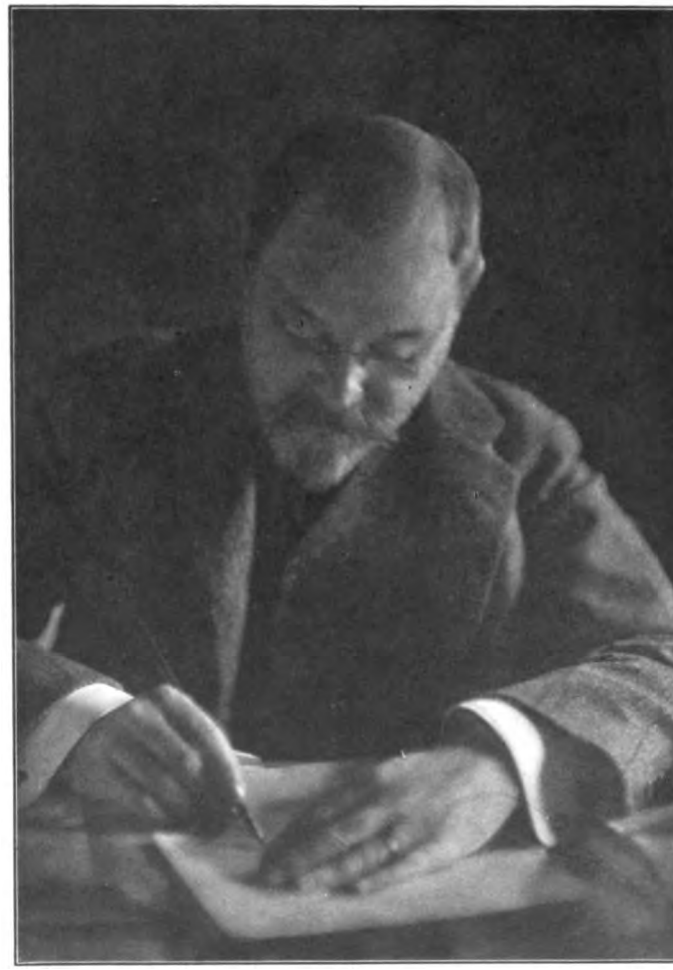
McLennan, Peter B., of Syracuse, Presiding Justice of the Fourth Department, Appellate Division, tripped while going downstairs and died May 8, aged 62. He was elected Supreme Court Justice in 1892, being re-elected in 1896. He was designated to the Appellate Division in 1898 and became Presiding Justice on Jan. 1, 1904.

Soper, Pliny L., former United States Attorney for Indian Territory, died in Kansas City Apr. 26. He was active in the movement for the admission of Indian and Oklahoma territories as a state.

Stone, Frederick Peter, president of the law publishing house of Bancroft-Whitney Company, died in San Francisco May 7. He was born in New Hampshire in 1841, and served in the Civil War. In September, 1865, he sailed for California, and entered the law department of H. H. Bancroft & Company. In 1886 the law book house of Bancroft-Whitney Company, was formed and Mr. Stone was first vice-president and later president. He retired from active work in 1909, but retained the title of president of the corporation.

Swift, Theodore H., formerly presiding Judge of the New York Court of Claims, died at Potsdam, N. Y., June 9, aged 63. He served in that court from 1902 until 1911, until the court was superseded by the present Board of Claims.

Wise, John Sergeant, a brother of former United States Attorney Henry A. Wise of New York, died at the home of his son in Maryland May 12, aged 67. He served in the Confederate cause, later being graduated from the law school of the University of Virginia. He held the offices of United States Attorney for the eastern district of Virginia and Member of Congress. Afterward he practised law in New York City until 1911, when he retired because of ill health.



HON. HAMPTON L. CARSON

RECENTLY ELECTED PRESIDENT OF THE
PENNSYLVANIA BAR ASSOCIATION

The Green Bag

Volume XXV August, 1913 Number 8

The Meeting of the Pennsylvania Bar Association

THE nineteenth annual meeting of the Pennsylvania Bar Association held at Cape May, N. J., June 24–26, showed that body to be discharging its public functions in a creditable if not remarkable manner, with recognition of the duty of responsible leadership and initiative appropriate to a great state bar association. It is evident that the Pennsylvania Bar Association is progressive to the extent of pressing necessary reforms for the improvement of legal procedure and the reorganization of inferior courts, and of supporting beneficent penal legislation looking to the employment of prisoners. It is animated by such a sense of professional propriety as may be readily aroused by the reported existence of glaring and obvious evils like that of jury-fixing, but is less finely sensitive to the need of conciliating and overcoming differences of ethical conception with respect to such a matter as the practice of taking contingent fees. It is somewhat too conservative, perhaps, in hesitating to approve the Legislative Committee device through which many bar associations do effective work, in taking the attitude that issues of partisan politics should never be discussed by the Association, and in treating subjects political rather than legal, like the initiative, referendum and recall, as lying definitely outside its province. It is unable to make effective use of the expert committee device to settle questions of a purely technical nature such as may be presented by proposed local government legislation.

The most inspiring feature of the meeting, to our minds, was the annual address, delivered by Robert C. Smith, K.C., of Montreal. Discussing the present and probable future position of the bar, Mr. Smith advocated high professional standards of independence, intelligence, and integrity, and said: —

"The bar has its faults, but it occupies a position in the world today of which its members should be proud. In the administration of justice between individuals, it has worked out, and is working out, reforms from day to day and principally such reforms as will aid the poorer and the weaker members of society. Expenses are being reduced, delays are being shortened — in fact, the bar is working to the end that the constitutional rights shall be the actual rights of the humblest citizen in the land.

"Notwithstanding all the criticisms to which it is subjected, the profession of the law still stands as a great necessity of society. In the very conditions which are largely responsible for these criticisms is evident the necessity for a learned and a wise profession in which the people may have confidence. The more intense modern life becomes, the more essential is it that the rapid movements of the day shall be in harmony with principles that have stood the test

of time. We may sing pæans of liberty, but we shall enjoy liberty only as righteous laws are wisely administered."

At a time when there is a great deal of denial of the fitness of the lawyer to act as the wise counsellor of his fellow men, — and the denial is not wholly without foundation, — it is a pleasure to find so emphatic a declaration of the larger duty of the bar, and of its position as a "great necessity of society."

What the speaker said about the need of superseding trial by jury as "cumbersome and expensive," and habitually resulting in "disregard of the elementary principles of righteousness," was highly suggestive, though naturally not commanding general endorsement.

John G. Johnson of Philadelphia, who has been called the Nestor of the Pennsylvania bar, presented an entertaining reminiscent and anecdotal paper on deceased leaders of bench and bar, who flourished between the middle of the last century and ten or twelve years ago. The speaker regarded short terms for judges and the judical recall to be signs of evil omen, and wondered whether the common sense of the American people would prove sufficient to steer the country past the rocks towards which it is driving into a safe anchorage.

The address of Judge Orlady of the Superior Court, the retiring president, commanded interested attention. The point was incidentally made that voting, like education, should be made compulsory.

In an address on "The Need for a Science of Law," Judge Edward Lindsey expressed the view that the multiplicity of new laws pouring from state and federal legislatures was the result of an heterogeneous population. Multiplicity made conformity to the law difficult, and evasion easy. Homogeneity, the judge argued, makes for the enforcement of law. Because of the heterogeneous conditions in the United States, the judge contended, the enforcement of law was often a hard thing to accomplish.

Obviously the Legislature of Pennsylvania, and not the Association, is responsible for blocking the reforms of procedure desired by the American Bar Association. William U. Hensel, as chairman of the Committee on Law Reform, reported that it had induced the Pennsylvania legislature to pass an act regarding pleas and responsive answers in equity, abolishing the rule that the averments of an answer must be overcome by the testimony of two witnesses or by the testimony of one witness with corroborating circumstance equivalent to another witness. But the committee regretted that an act similar to that of California, prohibiting judgments from being set aside or new trials granted unless the error complained of had injuriously affected the substantial rights of the parties, could not be regarded as likely to pass the present legislature. On this point the committee said: "In view of the prevailing popular and 'progressive' tendency to severely criticise the bench and bar for delays in litigation by purely technical obstructions, it is especially regrettable that legislative bodies, zealous for reform, should not give some consideration to such salutary measures."

The committee discussed a number of other acts which it had prepared, tending to simplicity and the avoidance of delay, but in view of the difficulty of securing their consideration by the present legislature it was recommended that they be not pressed until the legislative session of 1915.

No affirmative action was called for on this report, nor on that of the Committee on Uniform State Laws.

The committee having the matter of a Municipal Court for Philadelphia in charge was compelled to announce that there had been too much opposition to the proposed constitutional amendment for it to have any chance of being passed upon by the present legislature. While the "Five Judges Bill," adding one judge to each of the Common Pleas courts, had been enacted, the constitutional amendment proposition had been so vigorously opposed by the magistrates of Philadelphia that it was found impossible to have the proposal introduced in the legislature or to have it receive any consideration at the hands of that body.

The Association is supporting proposed legislation providing for the employment in useful labor of all inmates of state penal institutions. Such employment is regarded as necessary to their health and sanity, and the greatest opposition to it comes from organized labor. The special Committee on Revision and Amendment of the Penal Laws desires the legislature to create a commission to investigate the whole subject. A bill for such a commission has already passed the House, and the committee believed that Governor Tener would sign the bill. To carry out the reform, all portions of the criminal code which relate to "separate and solitary confinement" must be amended.

The contingent fee question proved a stumbling-block, as it frequently does when bar associations debate issues of professional ethics. In the report that attracted most attention and led to the most animated debate of the meeting, the Committee on Contingent Fees recommended the passage of two acts, one "giving the courts power to fix the compensation to be paid to counsel under agreements for contingent fees, giving to counsel, under such agreements when filed of record, an enforceable lien for fees, and providing that under certain circumstances the court may refuse any fee in spite of such agreement"; the other an act "avoiding releases executed by persons suffering personal injuries when the release is executed within thirty days of the injury." While one well-known member of the Association, Alexander Simpson, Jr., of Philadelphia, claimed that the proposition did not go far enough, and suggested an amendment making all agreements for contingent fees obtained by solicitation of the client or without his voluntary action invalid, the opinion of many of the speakers was that the contingent fee is a godsend to the poor client and that the fixing of such fees could not in fairness to the lawyer be left to the court. In consequence of this sentiment both proposed acts were referred back to the committee for further consideration, with a request that the committee report on the advisability of having the contingent fee system controlled through the local bar associations rather than by act of the legislature.

One speaker, J. R. Jones of Scranton, recommended that the General Assembly should enact a law providing for the punishment for "jury fixing" with from four to seven years in the penitentiary. It was voted that this abuse, which Mr. Jones asserted to prevail in some parts of the state, be investigated by the Committee on Law Reform, the committee to determine for itself whether legislative action should be asked for.

The similar attitude of Senator Root toward the initiative and referendum, in his two recent Princeton lectures, is recalled by the majority report of the Special Committee on the Initiative, Referendum and Recall. The majority

report contended that these subjects were political rather than legal and were not within the purposes of the Association. The minority report, on the other hand, strongly supported these policies. The majority report was approved.

The Association clearly showed itself in doubt as to the need of a proposed Legislative Committee. The proposal that such a committee be appointed was sent to the Committee on Law Reform. The idea of the proponent, Edwin M. Abbott of Philadelphia, was that such a committee would be of value in presenting acts recommended by the Association. Alexander Simpson, Jr., said that a similar proposal, made about ten years ago, was voted down by the Association on the ground that the work of such a committee would have the semblance of a lobby.

An attempt to modify the policy of the Association slightly, so that matters of partisan politics directly affecting the profession might be debated at the meetings, met with failure. It was proposed to amend the by-laws by substituting for the words "nor shall it take any partisan political action," the following: "but unless the matter be of special or peculiar interest to lawyers in their professional capacity, it, the Association, shall not consider or pass upon anything then the subject of political or factional controversy, or any other public or private matter." The suggested new language would, if adopted, have permitted the Association to consider political matters which were of special or peculiar interest to lawyers in their professional capacity.

A local government question gave rise to some perplexity, and the outcome was not such as to express unqualified confidence in the soundness of the plan proposed by the Special Committee on Reform in Township Law. This committee recommended a proposed act by which the powers of townships would be vested in a board of three supervisors, upon whom would be conferred the power to lay out roads, now vested in the Court of Quarter Sessions, to pass ordinances, regulate markets, establish a police and transact other local business subject to the general supervision of a town meeting of the electors. The proposed act greatly increases the powers of townships, and introduces a system somewhat analogous to that of the New England town meeting. Among other things, the act provides that an ordinance passed by the supervisors shall be subject to rejection or ratification by the town meeting. Criticism of this plan was based on the feeling that such a direct transplanting of the New England system was not necessary, that the town meeting might not be adapted to the more populous townships, and that while the powers of the townships of the second class might well be enlarged it was questionable whether by the contemplated abolition of the distinction between first and second classes the townships would not be given too much power. As a result the subject was referred for further consideration to a special committee to be appointed by the incoming President.

The following officers were elected: President, Hampton L. Carson, Philadelphia; vice-presidents, William D. Porter, Allegheny; James S. Moorehead, Westmoreland; Charles I. Landis, Lancaster; Isaac E. Hiester, Berks; William E. Rice, Warren; secretary, William H. Staake, Philadelphia; treasurer, Samuel E. Bashore, Cumberland.

The new President elected, Hon. Hampton L. Carson, former Attorney-General of Pennsylvania, and author of the monumental and scholarly "His-

tory of the Supreme Court of the United States," was referred to by Mr. W. U. Hensel in his nominating speech as one of the most "splendid ornaments of the bar." His high attainments and the work he has already done for the advancement of professional standards render his selection highly gratifying.

Little Tin Pan

BY DAN C. RULE, JR.

THEY knew him not in Greenville, and so no welcoming hand
Met his in friendly greeting; the local cornet band
Appeared not at the station to voice in martial bars
A general rejoicing as he stepped from off the cars;
But now, were he to leave them and later come again,
So close would he be crowded by laughing, cheering men,
That guards would have to follow and heralds cry before,
"Make way, make way for Lucius Tiberius Penselgore!"

Although he came unnoted upon that fateful day,
'Twas not to be expected 'twould be any other way,
For the truth must be admitted though we like it or do not,
That personal appearance is a thing that counts a lot.
They would have looked with favor on some portly man of war.
Or gazed with admiration at a dreadnought of the bar,
But loiterers in Greenville took but passing interest in
This chubby little gentleman with dimpled cheeks and chin
Who was gaited like a robin and whose manners were so mild
He seemed almost as gentle as a stageland angel-child.
If a cherub's wings were hidden by a business suit it wore,
It would bear a strong resemblance to L. T. Penselgore.

The little staff of workers upon the *Greenville Blade*
Took one long look at Lucius and turned away dismayed,
And each one asked his neighbor in tones of plumbless grief
What the owner meant by hiring such an editor-in-chief.
For Lucius entered mildly on his initial day,
Shaking hands with his assistants in a gently bashful way,
(So young he seemed and boyish that the foreman printer's said
To have yielded to an impulse to pat him on the head),
Then softly sought his sanctum, laid aside his hat and coat,
And for less than forty minutes with amazing speed, he wrote;
Then turning from his labors, as though on pleasure bent
Disappeared behind a volume labeled "Commentaries, Kent."

But when, upon the morrow, staid Greenville read its *Blade*,
Each subscriber's lukewarm interest leaped to ninety in the shade.
Watching Lucius' daily fireworks, readers gasped, "Jerusalem!
This screed on 'Greater Greenville' is a white-hot, flashing, gem;
And this on 'Broad Street Paving,' with a half ironic squint,
Is the finest editorial I have ever seen in print.
One might think old Horace Greeley of the *Tribune* had come back
Though this young man has Horace beaten twice around the track!"
And the *Blade's* complacent owner swore his rustic oath, "By gum,
That cherubic little genius is worth his weight in radium!"

As when a mighty gong is struck a blow with naked steel,
Its bellowing detonations make the startled senses reel,
So Lucius' soul responded to the words and deeds of men
With instantaneous clamor — but only through his pen.
He seemed incapable of speech, and yet for far around
Appeared to fill the atmosphere with deafening bursts of sound.
By owning such a vocal pen and keeping it in hand
Our Lucius soon was locally a power in the land;
Likewise, since little Greenville a rustic peace enjoys,
He soon surpassed all rivals as the town's most strident noise,
And enterprising newsboys that had the *Blade* to sell
Learned to advertise the paper by one long, piercing yell.

The over-modest Lucius had one small vanity,
Signing 'neath all his effusions his intials, L. T. P.,
And these some wag expanded into a telling phrase
Descriptive of their owners' editorially clamorous ways;
And so it was that Lucius Tiberius Penselgore
Received as odd a nickname as ever mortal bore.
Thenceforth, when any stranger on a visit to the town
Cross-trailed a full-blown genius in a business suit of brown,
He was urged by pointing loungers, in eager tones of pride,
"There, stranger! See that fellow upon the other side?
You now have had your optics on Greenville's greatest man,
Our illustrious fellow-citizen, Little Tin Pan."

Some people play the jewsharp, and others love to draw,
Still other individuals prefer to study law,
And numbered with the ardent among this latter clan
Was the printer's ink Napoleon, Little Tin Pan.
For while the circulation of his paper rose and soared,
He hurried through his labors with an air extremely bored,
And spent his leisure dreaming how very high and far
A certain editor might go as a member of the bar.
It is absurd and curious, *outré*, bizarre, and queer
How few men are contented in their predestined sphere,

Though oft the prized fulfillment of a wrong ambition spells
Nought but a suit of motley with dangling cap and bells.

When Ingalls wrote his sonnet, he grandly counseled all
To welcome Opportunity when she is pleased to call.
Though this advice is excellent, it should be understood
There are two other visitors really "just as good."
The One is gentle Cupid, the wise undo the lock
And warmly bid him enter when he consents to knock;
The Other raps in thund'rous and quite uncivil way,
But many a man has reason to bless the lucky day
When Nemesis called to see him and administered one quick,
Extremely efficacious and well-directed kick.
All three, in prompt succession, sought out a little man
Who bore the sounding nickname of Little Tin Pan.
The gifted bard of Avon once said that though we hew
Our ends with reckless roughness, nearly chopping them in two,
Calm destiny restrains us, and invariably reserves
The right to add the final decisive lines and curves.
It must have been no other than Destiny in person
That introduced young Lucius to Katharyn McPherson;
She flashed on his horizon like a pinwheel spitting glory
And changed his placid day-dreams into quite another story.
To describe her is not easy (also not necessary),
But like to other heroines, she was good looking (very!),
And so prosperous was her father that she was always told
That her vermillion coiffure was the shade of beaten gold.

Did Lucius really love her? The most convincing way
To prove the point in question is to show Exhibit A,
The which is a quotation from the columns of the *Blade*
Wherein the following leader is soberly displayed:
"We state with greatest pleasure that as we go to press
We have a contribution from a gifted poetess
Whose lyric verse is destined ere long to make her name
Throughout the realm of poesy a synonym for fame.
With spirit awed and reverent we make this prompt insertion
Of a madrigal called *Birdie*, by Miss Katharyn McPherson:

" 'Birdie that in storms the bitterest
Sittest on the bough and twitterest,
What is that which thou wouldst tell us?
Is thy little bosom jealous
Of our snug warm home today?
Tell us, Birdie; say, O say!'

"No, dear maiden, though the weather's
Bitter cold, my downy feathers

Shield me from the icy blast;
And though dark skies frown and lower,
Still, with all my heart and power,
On the perch or on the wing,
I bravely sing — and sing — and sing."

By all the friends below us and by all the saints above,
Printing Katharyn's little *Birdie* was evidence of love!
A reading of her verses also leads one to deduce
That Lucius loved a handsome, red-headed little goose.
Not so. Wise folk and canny oft yield to a desire,
Without a mite of training, to strum the lyric lyre.
And usually the poet, self-deceived self-worshiper,
Thanks one time less than once the heroic editor.
But Katharyn was different: meeting Lucius on the street,
She paid him with a smile that was so maddening-sweet,
It seemed (in terms poetic) instantaneously to refine
A dollar's worth of sugar into pure saccharine.

She smiled. And so, with Lucius, Cupid had his way;
Also, in homely phrase, the devil was to pay.
For he who once had inked a pen almost inspired,
Now, drunk with love, made readers sigh in tired,
Disgusted boredom. Side by side and hand in glove
Go senseless frenzy and the storm called love,
And no man lives that can, with heartstrings all athrob
With cardiac passion, concentrate upon his job.
As on a summer night swift falls a shimmering star,
So Lucius fell, though not, of course, so far;
And while, with foot half-raised, grim Nemesis lay in wait,
He penned his platitudes — and dreamed of law, and Kate.

And she, the dreamed of, dawned upon his waking sight
In one brief interview replete with blissful fright;
And at its close he faintly gasped "I'll do it!"
While she — again the smile — replied "I knew it!"
And that is why one more quotation's briefly made
From the now gemless columns of the Greenville *Daily Blade:*

" COMING
Local Talent Presentation of
Shakespeare's
The Merchant of Venice
With following cast of characters:

The Duke of Venice .....J. Powhatan Smith
Antonio, a merchant of Venice ....R. Don Overware

Bassanio, his friend .....L. T. Penselgore
Shylock, a rich Jew .....Solomon Fihrsahl
Portia, a rich heiress .....Katharyn McPherson
Nerissa, her waiting maid .....Marcella Ballantyn
Jessica, daughter to Shylock .....Jessie Spacer

Grandees of Venice, Officers of the Court, Gaolers, Attendants and others. Music by Rahnmaker's Orchestra.—Adv.

Is knighthood dead? Is chivalry extinct? Ah, no!
Lucius has given consent to play Bassanio.
Wreaths of green laurel, emblem of honor floral,
Should deck his pallid brow. That fearsome contract oral
Requires that he, the speechless one, shall foam and rage
In generous frenzy, whilst before the lighted stage
All Greenville whispers back of hand or fluttering fan,
"Bassanio's punk! The hook, the hook for Little Tin Pan!"
These things foreseeing, he, to please the Red-Haired Maid,
With equatorial brow and arctic feet, essayed
To play the part or perish. Mere words can never tell
How much he loathed the cursed cue *"Enter Bassanio, L."*
Rehearsals followed. Forecasted shadows of impending terrors
Made poor Bassanio score a perfect string of errors,
Till even partial Portia from violet eyes looked sad,
While oily-sleek Antonio in his jealous heart was glad.
With *him* in view for contrast, sweet Portia soon shall know
All foibles, faults, and failings of her friend, Bassanio.
Were all the years in vain that R. Don Overware
Dispensed his fancy drygoods and strove to charm the fair?
No, no! With ringing phrases, about the stage he swept
While Lucius stalled and mumbled, and Katharyn softly wept.
And nearer drew the hour (as hours have always done)
At which the curtain rises upon Act I, Scene 1.

It came. And with the rolling, bold swagger of a mouse,
Lucius joined the gay procession that sought the Opera House—
Then paused; his limbs were trembling; a strident, squeaky tune
Proceeded from the portals of the Crystal Cave Saloon;
He gasped—resolved—and entered; he leaned against the bar
And with a hurried order left the mixer's mouth ajar:
"Bartender, place four goblets before me in a row,
And with your oldest whiskey make each one overflow.
Thanks. Here's luck: One — two — three — four!
Ah-h-h, that's better: now show me to the door."
Erect, firm-stepping, confident, and jubilantly gay,
The man of printed clamor went whistling on his way.

But whither? Why not, without delay, go home and seek his bed?
The thought of some engagement spun dimly through his head.
Let's see. I think I promised — Oh now, indeed, I know;
I'm due in twenty minutes to play Bassanio
In that fool drama Katharyn wrote. But stay, it
Wasn't Kate; 'twas Shakespeare. Very well, I'll play it.
I wouldn't, had she wrote it, because her kind of verse
Would make the angel Israfel throw down his harp and curse.
Who says I cannot talk? By William Jennings Thor,
I'll show these Greenville people what vocal cords are for!
And some day, mark me, some day, these folk will hang in awe
Upon my slightest utterance in the forums of the law —"

In silken hose and trappings, in doublet slashed and gored,
In plumed and rakish bonnet, and girt with glittering sword,
He spoke his lines so nobly, so effectively withal,
That sighs of admiration were heard throughout the hall;
And oft, as cues recalled him, there was a moment's pause
Of wondering, spellbound silence — then torrents of applause.
And Portia, flushed and happy, she worshiped from afar
This bolt from out the azure, this new dramatic star;
And Lucius, loosing powers no man can twice reveal,
For him, in all its phases, the passing show was real.
Perhaps, in all the ages, neither profligate nor monk
Was e'er so sweetly, grandly, smoothly, super-excellently drunk.

Three glorious Acts as hitchless ran their appointed course
As e'er was staged in Reno an action for divorce;
And 'mid handclaps and stamping like nearby breakers' roar,
Arose the painted curtain upon Scene 1, Act IV.
Therein grim Shylock at the ducal judgment-seat,
Presses his legal claim to one even pound of meat
The which — here follows the contract's startling part —
He with a knife shall sever near Antonio's generous heart.
The Duke refuses judgment and hedges for delay,
Then turns the problem over to a youth from Padua.
So, mid a thrilling uproar of trumpets and of drums,
To render final judgment the beauteous Portia comes.

She came. And Lucius, with a now whirring head,
Gave heed with rapt attention to what each witness said.
His own part in the drama had wholly left his mind,
And in its stead was interest of the purely legal kind.
Beside Antonio standing, he weighed each separate clause
Of Shylock's bloody contract, while Portia judged the cause.
Into his brain came flooding a wave of legal light:
"By all the laws of contracts, the plaintiff's in the right!"

No unit of the audience in gallery or parquet
Now watched with more absorption the progress of the play,
And none but knew as fully as did "Bassanio"
The outcome of the action, *Shylock* v. *Antonio.*

Shylock has lost the case. The Court of Last Review
Now heaps its hot invectives on the defeated Jew,
Who wing-ward sidles, cringes, slinks, — but hold!
Bassanio's voice comes booming in protest stern and bold:
" 'O wise and upright Judge,' one moment wait, I pray,
Nor let this aged Jew, your plaintiff, slink away
Thus beaten, from the bar. Was his case here presented
By proper counsel? No; no lawyer has consented
To guaranteee to Shylock, wronged mark for public fury,
His double right: an advocate, and civil trial by jury.
Now, by Your Honor's leave, I soon shall prove to you
That justice, in this matter, lies mainly with the Jew."

"Antonio's pact with Shylock is simply, in effect,
'I'll pay three thousand ducats; which failing, I expect,
And hereby authorize Shylock, with a poniard to reduce
My weight a dozen ounces.' How can this Court deduce
That Shylock in the cutting may shed no drop of gore,
And take one pound exact, not one small hair's-heft more?
Of all our legal maxims this is the weightiest one:
'The law compels no man to do what can't be done':
Then how require of Shylock, poor cheated, harried Jew
A thing no Jew or Gentile by any chance could do?
Besides, 'O upright Judge,' it's not to be denied
Where contracts call for carving, some blood's of course impl—"

He paused. Swift as the bursting of some grim cannon's shell
Came sobered realization. He staggered, nearly fell,
Then, for one awful moment, his face one carmine blush,
Stood staring at the audience whose slightest whispers hush;
He gazed upon the players; and then, as one that yields
To sudden, headlong panic on bloody battlefields,
In silken hose and trappings, in doublet slashed and gored,
In plumed and rakish bonnet, and girt with shining sword,
He fled the glittering stage, he thundered to the doors, —
And on the stair those footfalls are L. T. Penselgore's.
And so the huge drop-curtain too soon came rolling down
On the Local Talent Drama in astonished Greenville town.

Some freak of fancy led him, all trembling, spent, dismayed,
To flee straight to his sanctum in the office of the *Blade.*
He stumbled through the doorway, turned on the shaded light,
And there, upon his table, piled lawbooks met his sight;
He turned away in sorrow, in swift heartsickness; then

His eyes fell on a faithful and long-tired friend — his pen.
And while false dreams and phantoms fell back into the past,
Lucius, the heaven-born writer, now found himself at last.
He saw himself as having one single goal in sight,
And all his future called him: "Take up your pen, and write."
One single goal? Ah, no; they worse than sadly err
Who strive to play the god but not the worshiper.
The old, old, mighty force that spins the world around
Now makes him start and tremble at the silken, rustling sound
Of garments trailed. With hands outheld, and eyelids wet,
Beside him "Portia" stands. He, turning, sees, and yet
Can scarce believe. Perhaps 'twas Heaven's own plan
That she should whisper low, "Little Tin Pan!"

Clyde, O.

Reviews of Books

SCOTTISH CRIMINAL JUSTICE

The Case of Oscar Slater. By Sir Arthur Conan Doyle. George H. Doran Co., New York. Pp. 103. (50 cts. *net.*)

THE author of "Sherlock Holmes" might to good advantage have placed upon the title-page of his chivalrous attempt to aid the proper administration of justice the following passage quoted in the book from the commission which investigated the notorious *Beck* case (the commission consisted of Lord Collins, Sir Spencer Walpole, and Sir John Edge): —

> Evidence of identity upon personal impression, however *bona fide*, is of all classes of evidence the least to be relied upon, and unless supported by other evidence an unsafe basis for the verdict of a jury.

To such a proposition any one versed in the criminal law will readily assent, and language of that sort employed by any appellate court would not excite surprise.

We hope the *Slater* case is not typical of Scottish criminal courts. So plain a miscarriage of justice, turning on vague and conflicting evidence of personal identity, would not often be possible, we believe, through the stupidity of a Scottish jury, in spite of the inordinate zeal of any prosecuting officer, and it would be quite unlikely to occur in England or the United States owing to the requirement of unanimous verdicts. In this instance the verdict was nine for "guilty," five for "non-proven," and one for "not guilty," surely an iniquitous combination on which to sentence a man to death for murder.

Sir Arthur states and carefully reviews the evidence as if he were counsel for the defense, but his fairness and impartiality are visible at every turn. The police are criticized for losing their interest in the case and neglecting to look for the real criminal after the arrest of the suspect. The book offers an object-lesson not only of conviction on insufficient evidence but of slipshod police investigation. The convicted man's sentence has been commuted to

life imprisonment, but how long will the penal system of Scotland keep him at Peterhead prison?

"The Lord-Advocate spoke, as I understand, without notes, a procedure which may well add to eloquence while subtracting from accuracy." The evil of inaccurate summings-up of the evidence to juries is obviously one difficult to remedy in any system of criminal procedure, but one rarely hears of its having such disastrous consequences.

MAGEE ON BANKS AND BANKING

A Treatise on the Law of National and State Banks, including the clearing house and trust companies. With an appendix containing the National Bank Act as amended, and instructions relative to the organization of national banks. 2d ed., revised and enlarged. By H. W. Magee, B.L., member of the Los Angeles bar, and formerly one of the Board of Bank Commissioners of the State of California. Matthew Bender & Co., Albany. Pp. lvii., 688 + appendix 278 + index 73. ($7.50 delivered.)

WHILE the first edition of Magee on Banks and Banking appeared as recently as 1906, there has been a considerable development of the law, both state and federal, since then. Banking has more and more come under the control of public regulations based on the conception of it as a public employment. While the question whether the legislature can prohibit private banking has never been presented to the Supreme Court of the United States, the Court has held, in *Assaria State Bank* v. *Dolley* (1911, 219 U. S. 121), that incorporation may be imposed "as a police regulation and as a measure of safety." In consequence of this decision many of the states have seen fit to enact safety laws, and the author uniformly maintains that the nature of the business of a bank place it within the class of public utility institutions. This is the proper attitude, which brings the treatise into harmonious relation with contemporary tendencies destined to influence still further the legislation of the near future.

The value of Mr. Magee's work was recognized on the appearance of the first edition, and it is a well-grouped text, convenient for reference, exhaustively treating of the subject in the light of copious judicial decisions. Bank officers and directors will find it useful, defining as it does the extent of their powers, duties, and liabilities, and the bank attorney will find it invaluable.

TALMUDIC LAW

Mishnah: A Digest of the Basic Principles of the Early Jewish Jurisprudence. Baba Meziah (Middle Gate), Order IV, Treatise II. Translated and annotated by Hyman E. Goldin, LL.B., of the New York bar. G. P. Putnam's Sons, New York. Pp. 193 + 5 (appendix) + 7 (index).

THE book of Talmudic law chosen by Mr. Goldin for the first of his series of translations deals with the acquisition and transfer of title to personal property and is deemed by scholars versed in the Talmud, says the translator, "to be the key to the entire Order" of legal treatises. The treatise in question, while not unlike a code of numbered sections, is really a digest of a division of the rabbinical system of law, and this was something besides a mere extension or elaboration of the Mosaic law, so that there is plenty of opportunity for the work of the learned commentator. Mr. Goldin has taken pains with his annotations, which set the law before the reader in terms that he can understand, but one might prefer that the task of the editor had been taken up less from the standpoint of the specialist and with more attention to problems of comparative jurisprudence and universal legal history. We have some doubts of the prudence of the attempt to render the old Jewish law in the terminology of our own common law. Mr. Goldin, however,

shows himself possessed of exceptional qualifications for his laudable undertaking, and it is to be hoped that he will carry it through to success.

CLEPHANE ON BUSINESS CORPORATIONS

The Organization and Management of Business Corporations. By Walter C. Clephane, LL.M., of the bar of the Supreme Court of the United States, Professor of the Law of the Organization and Management of Corporations in the George Washington University of Washington, D. C. 2d ed. Vernon Law Book Co., Kansas City, Mo. Pp. xx, 372 + 107 (appendices and index). ($5 delivered.)

THIS is the second edition of a work originally published eight years ago as the outgrowth of an elementary course of lectures on corporation law at George Washington University, intended to be of aid to students, laymen, and practitioners not requiring the more extended treatises. The appearance of a new edition so soon affords evidence of utility of the work for the purpose intended, and the revision is a careful and thorough one, the book having been largely rewritten in view of the rapid growth of case-law, and having been elaborated in certain sections, notably in that dealing with voting trusts. Citations have been multiplied and the practical value of the treatise is perceptibly enhanced by its new form.

THE LAW OF CLUBS

Wertheimer's Law Relating to Clubs. 4th ed. By A. W. Chaster, of the University of London, LL.B., and of the Middle Temple, Barrister-at-law, author of The Law Relating to Public Opinion. Stevens & Haynes, Temple Bar, London. Pp. 317, including appendices and index. (10*s*.)

A SHORT treatise suffices for the statement of the English law relating to clubs, which is set forth in four chapters only, treating of the various kinds of clubs and their organization, registration, and constitutions, statutory requirements as regards liquor licensing, duties and taxes, betting and gaming, etc., club contracts and torts, and expulsion. In an appendix are found model rules, or as we should say constitution and by-laws, of a club, and also of a workingmen's club and institute registered under the Friendly Societies Acts, and another appendix contains the text of a number of statutes. The book illustrates the ease of stating the law of a single uniform jurisdiction. Obviously to set out the law of clubs in the United States with equal completeness would call for a voluminous treatise.

NOTES

The second impression of Lectures on Legal History by James Barr was issued on Saturday, May 31. The Harvard University Press reports that the demand for this book exhausted the first edition of 1,000 copies within three months of the date of publication.

In an able monograph on "Privileges and Immunities of Citizens of the United States," Arnold Johnson Lien, Ph.D., former Richard Watson Gilder Fellow in Political Science in Columbia University, has analyzed, from a careful review of decisions of the United States Supreme Court, all that which is comprised in the meaning of federal citizenship. An interesting part of the essay deals with the opposing theories, of which one, holding the privileges and immunities to be "those which of right belong to the citizens of all free governments," has so lost ground as to have become practically discredited. (Columbia University Studies in History, Economics, and Public Law, whole no. 132. 75 cts. *net* in paper. $1.25 *net* in cloth.)

BOOKS RECEIVED

Crime and Its Repression. By Gustav Aschaffenburg, Professor of Psychiatry in the Cologne Academy of Practical Medicine, and editor of the *Journal of Criminal Psychology and Criminal Law Reform*. Translated by Adalbert Albrecht, Associate Editor of the *Journal of Criminal Law and Criminology*; with an editorial preface by Maurice Parmelee, Associate Professor of Sociology in the University of Missouri, and an introduction by Arthur C. Train, former Assistant District Attorney for New York County. Modern Criminal Science Series, v. 6. Little, Brown & Co., Boston. Pp. xxviii, 322 + 9 (index). ($4 *net*.)

Economics of Business. By Norris A. Brisco, Ph.D., F.R.H.S., Fellow of the Royal Economic

Society, sometime Fellow in Economics in Columbia University, author of The Economic Policy of Robert Walpole, Departmental Editor for Canada of Book of Knowledge, Department of Political Science, College of the City of New York. Macmillan Company, New York. Pp. xiv, 383 + 7 (index). ($1.50 *net.*)

The Lawyer in Literature. By John Marshall Gest, Judge of the Orphans' Court, Philadelphia. With an introduction by John H. Wigmore. Boston Book Co., Boston. Pp. xii, 249. ($2.50 *net.*)

The Law of Accident and Employers' Liability Insurance. By Hubert Bruce Fuller, A.M., LL.M., of the Cleveland, Ohio, bar. Vernon Law Book Co., Kansas City, Mo. Pp. xii, 503 + 22 (table of cases) + 38 (index). ($5 delivered.)

Federal Incorporation: Constitutional Questions Involved. By Roland Carlisle Heisler, Gowen Memorial Fellow in the Law School of the University of Pennsylvania, 1910–12. Boston Book Co., Boston. Pp. 213 + 8 (table of cases) + 10 (index). ($3.50 *net.*)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Admiralty. "Admiralty Jurisdiction and State Waters." By John Barker Waite. 11 *Michigan Law Review* 580 (June).

"The common law ceded to admiralty a separate and special jurisdiction over maritime affairs, not because of any inherent jurisdictional distinction between land and water, or any essential difference in the transactions occurring on one or the other, but solely because the *international* or *extra-territorial character of the sea* necessitated procedure and methods which the ordinary courts did not possess. If, then, the origin and extent of separate maritime jurisdiction arose out of the international commonage of the seas, and not from a difference in natural laws applicable, it is illogical to suppose that its grant to the federal government was intended to cover navigable waters merely as such."

Banking Law. "The Duty of a Depositor to Verify his Balanced Pass Book and Returned Checks." By Julien T. Davies, Jr. 5 *Bench and Bar* (N. S.) 14 (May).

Based on the recent decision of the New York Court of Appeals in *Morgan* v. *U. S. Mort. & Trust Co.* The history of the law before uncertain points were settled by this decision is treated, and the results of the decision are discussed.

Carriers. "Contractual Limitation of Carriers' Liability for Property in New York." By Augustin Derby. 5 *Bench and Bar* (N. S.) 57 (June).

Considers, first, how and when the contract limiting liability is made; second, the interpretation of such a contract at common law; third, the effect of the Public Service Commissions Law of 1907.

"Some Exceptions to the Rule that Common Carriers Cannot Contract Against their Own Negligence." By Sumner Kenner. 76 *Central Law Journal* 443 (June 20).

The subject is treated under two heads: (1) passengers for hire; (2) gratuitous passengers.

Corporations. "Shares without Nominal or Par Value." By Victor Morawetz. 26 *Harvard Law Review* 729 (June).

"The policy of the New York statute is sound. . . . It furnishes to creditors and to the public generally a measure of protection greater than that furnished by the generally prevailing incorporation laws. At the same time it is in furtherance of sound business methods by enabling corporations to raise money by selling shares at their actual value instead of by borrowing or otherwise increasing their indebtedness."

See Federal Incorporation, Monopolies.

Criminal Law. "A Brief Review of Criminal Cases in the Supreme Court for the Past Year." By Prof. Frederick Green. 8 *Illinois Law Review* 104 (June).

A paper read before the Illinois branch of the American Institute of Criminal Law and Criminology.

"The Supreme Court rendered opinions in thirty criminal cases, of which eleven involved convictions for murder, three for rape, two for employing women more than ten hours a day, two for obtaining property by means of the confidence game, and one each for a variety of other offenses. Of the thirty convictions, twenty, broadly speaking, were affirmed and ten reversed. Of the ten reversed, five were for murder."

Damages. "The Doctrine of Mental Suffering in Telegraph Cases." By Needham C. Collier. 76 *Central Law Journal* 406 (June 6).

"It seems clear that the spread of this doctrine through the courts has ceased, and, if we may judge from the fact that only two states have made a rule of statute, its policy does not greatly commend itself outside of the few courts that have taken it up. It seems to be a policy so much encouraging speculative litigation that not even prejudice against corporations can bring it into recognition."

Direct Government. *See* Referendum.

Equity. "The Relations between Equity and Law." By Wesley Newcomb Hohfeld. 11 *Michigan Law Review* 537 (June).

"As against the proposition of these various scholars [Maitland and others] that there is no appreciable conflict between law and equity, the thesis of the present writer is this: while a large part of the rules of equity harmonize with the various rules of law, another large part of the rules of equity — more especially those relating to the so-called exclusive and auxiliary jurisdictions of equity — conflict with legal rules and, as a matter of substance, annul or negative the latter *pro tanto*. As just indicated, there is, it is believed, a very marked and constantly recurring conflict between equitable and legal rules relating to various jural relations; and whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative. Or, putting the matter in another way, the so-called legal rule in every such case has, *to that extent*, only an apparent validity and operation as a matter of *genuine* law. Though it may represent an important *stage of thought* in the solution of a given problem, and may also connote very important possibilities as to certain other, closely associated (and valid) jural relations, yet as regards the very relation in which it suffers direct competition with a rule of equity, such a conflicting rule of law is, *pro tanto*, of no greater force than an unconstitutional statute."

An analytical synopsis and diagrammatic sketch, each entitled "The Position of Equity in the Legal System," which Mr. Hohfeld has been in the habit of using with his classes, are here printed. In them some of the fundamental and general problems of equity are treated, that is, "those concerning the complicated relations and delicate interplay of rules of equity and rules of law — while always fascinating to students, are by no means free from intrinsic difficulty."

The copious analytical synopsis is accompanied by a noteworthy array of erudite annotations. The paper deserves to be read by all students of the higher literature of legal science.

Evidence. *See* Proof.

Federal Incorporation. "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations." By Victor Morawetz. 26 *Harvard Law Review* 667 (June).

"No state can confer a legal right or franchise to act in a corporate capacity in other states, and Congress alone is vested by the Constitution with the power to legislate for the regulation of interstate and international commerce. The organization, powers, and financial condition of a trading corporation may have a direct and important relation to the transaction of interstate and international commerce, and may be of such a character as to render the commercial operations of the corporation a menace to the security and welfare of the people of all the states. A statute prohibiting the transaction of interstate commerce by means of a corporate organization which is a menace to the security of the public would seem justifiable as an exercise of the police power over interstate commerce and as a regulation of such commerce within the meaning of the Constitution. Furthermore, if interstate and international commerce cannot be carried on in an orderly manner and with safety to the public by a multitude of corporations organized under the diverse and varying legislation of forty-eight different states and subject in each state to special regulations and restrictions, it would seem justifiable, under the power to regulate interstate and international commerce, to require all corporations engaging in such commerce to comply with any appropriate regulations for the protection of the public and also to confer upon all corporations complying with the prescribed regulations a legal right or franchise to carry on their interstate and international commerce throughout the United States, free from restrictions imposed by the several states."

Foreign Affairs. "An English View of Mr. Bryan." By Sydney Brooks. *North American Review*, v. 198, p. 27 (July).

"One's instinct is to think that so long as Mr. Bryan retains his present office there will be little talk of American intervention in Mexico; that the American protectorate over Cuba will be lightly exercised; that steps of some sort will be taken to procure or to promise self-government for the Filipinos under an international guarantee of neutrality; that the 'dollar diplomacy' associated with the recent Republican *régime* will be abandoned; that the Monroe Doctrine will be again restricted to a purely passive and defensive role, that the United States will gradually withdraw from politico-commercial 'adventures' in the Far East; and that the spurt in European armaments will not be allowed to influence American preparations for defense. On these high matters, it is true, Mr. Bryan's is not the only, or even necessarily the deciding, voice. But his influence in shaping American policy will be very great."

General Jurisprudence. *See* Equity, Property.

Government. "Political Theories of the German Idealists, I." By Prof. W. A. Dunning, Columbia University. *Political Science Quarterly*, v. 28, p. 193 (June).

This opening instalment deals with Kant and Fichte. "The whole trend of Kant's influence in political speculation at least, was individualistic."

"Experiments in Government and the Essentials of the Constitution, I." By Senator Elihu Root. *North American Review*, v. 198, p. 1 (July).

The first of two lectures delivered at Princeton University last April. (*See* 25 *Green Bag* 262.)

"The Irish Home Rule Bill." By Annie G. Porritt. *Political Science Quaterly*, v. 28, p. 298 (June).

The Asquith bill is declared not to give Ireland the fiscal independence that is essential to real home rule; not the same "measure of home rule

that England has granted to each of her oversea dominions."

See Referendum, Special Legislation.

Impeachment. "The Impeachment of the Federal Judiciary." By Wrisley Brown. 26 *Harvard Law Review* 684 (June).

"The impeachment prescribed by our Constitution weighs well the evil to be redressed and adjusts the ordained relief to the occasion. It is the expression of the sober will rather than the restive whim of the people. It restrains judicial tyranny without overawing the authority of the courts. It regulates the conduct of the judges without disturbing the poise and balance of their judgments. It strikes directly at the judicial fault without destroying the judicial independence that is essential to the preservation of our constitutional jurisprudence. This great body of fundamental law must be maintained intact. It absorbs the changing needs of changing times yet does not change. Upon it the stability and the integrity of our institutions rest. Upon it our civil liberties depend. And without it our republican government could not long endure."

International Arbitration. "Settlement of International Disputes by and between the English Speaking Nations." By Hon. William Renwick Riddell. 22 *Yale Law Journal* 545 (May), 583 (June).

A brief history of the disputes settled by arbitration up to the present time.

Interstate Commerce. *See* Federal Incorporation, Intoxicating Liquors.

Intoxicating Liquors. "The Webb Act." By Allen H. Kerr. 22 *Yale Law Journal* 567 (June).

"In order to sustain the Webb Act a generation of strong decisions will have to be overruled, the theory of interstate commerce control as the exclusive prerogative of the United States will have to be abandoned and state laws given an extra-territorial effect co-extensive with the Union — a combination of opposing forces with which the Webb Act does not seem robust enough to contend."

Judiciary Organization. "American Courts in the Orient." By Arthur F. Odlin. 47 *American Law Review* 21 (May–June).

Address delivered before the Florida State Bar Association at Jacksonville, Florida, at the annual meeting in 1912.

There is a talented American lawyer at the head of this court [in China], with his own marshal, prosecuting attorney and clerk. He sits at Shanghai, Canton and Pekin. Appeals and writs of error from his judgments go to the circuit court of appeals at San Francisco. His appointment comes from the President, with confirmation by the Senate, and his tenure is six years, with a salary of $8,000 per year. The fact that very few cases have been carried to the appellate court, while the number disposed of has been quite large, is conclusive proof of the high character, usefulness and efficiency of this court. It has a great opportunity to establish in that vast country, upon which today are focused the eyes of the whole world, a respect and even an admiration for the government of the United States."

Jury Trial. *See* New Trials.

Labor Unions. "Trade Union Funds." By T. Baty. *Westminster Review*, v. 179, p. 613 (June).

"The general theory of the liability of individuals for the acts of their servants and agents is a very dubious thing. It is dubious in morals. It is unknown to the civil law on which modern jurisprudence has been modelled, and on which it has not improved. Its extension to the case of corporations was a bold step from which some of the clearer thinkers shrank. Its extension to loose organizations would be madness. And it would cut both ways. Not only would the great strength of capitalists — their capital — be exposed to attack, on vague allegations of mutual association; but the recognition of the liability of the union's funds for the acts of union officials would give color to the sentimental idea that the activities of a society are not limited to those comprised in its proposed objects, but may be whatever 'it' chooses to take up — *i.e.*, whatever its officials like to launch into. . . .

"The true remedy, as we conceive, is not to make the contributor to trade funds a vicarious sacrifice for the sins of those who administer them. Vicarious liability is always resented. It always produces friction. And it seldom or never does any good. The true remedy is the certain and immediate fastening of responsibility on the individual responsible for any case of union injustice."

Lawyer and Client. "The Passing of the Legal Profession." By George W. Bristol. 22 *Yale Law Journal* 590 (June).

"It may be better for society that titles be searched, that wills be drawn, that litigation be conducted and corporations organized, by corporations. It may be better for society that the lawyer be eliminated entirely. Then why not let the corporation appear as attorney of record in cases and do away with the legal fiction of having a lawyer appear as attorney for a party in a case when the real relationship of attorney and client does not exist, when the corporation is the real master and the lawyer a mere puppet in its invisible hands."

Legal History. "Colonial Appeals to the Privy Council, I." By A. M. Schlesinger. *Political Science Quarterly*, v. 28, p. 279 (June).

It is of interest to learn that "at least three cases appealed to the English tribunal involved the important principle of American jurisprudence which accords to the judiciary the power of declaring invalid an act of a subordinate legislature.

See Pleading.

Monopolies. "Some Reflections on the

Law as to Monopoly of Trade." By S. S. Gregory. 11 *Michigan Law Review* 572 (June).

"Industrial and commercial freedom has made and developed our domestic trade to its present enormous proportions. Should its very greatness and prosperity suggest wanton and lawless aggression upon society, these manifestations may be properly repressed and punished; but it ought not to be put in legislative shackles nor compelled to submit to the control of administrative leading strings."

"The Disintegration of the Tobacco Combination." By A. C. Muhse. *Political Science Quarterly*, v. 28, p. 249 (June).

"The disintegration of the tobacco combination under the Sherman law is an accomplished fact. . . .

"The economic soundness of dissolution proceedings against monopolistic combinations must be determined by their ultimate results."

It remains to be seen, therefore, whether the new status of the tobacco business will prove more acceptable than the old.

Negligence. *See* Damages.

New Trials. "Trial by Jury in United States Courts." By J. L. Thorndike. 26 *Harvard Law Review* 732 (June).

Discussing *Slocum* v. *New York Life Ins. Co.* (25 *Green Bag* 274)

"The decision of the majority of the court is a public misfortune, because it destroys a simple means of enforcing, without the expense, delay, and uncertainty of a new trial, a right to which the decision shows that a party was entitled at the trial. There is, however, a way in which the consequences of the decision may be mitigated."

"The History and Development of the Motion for New Trial and in Arrest of Judgment." By Morrell De Reign. 47 *American Law Review* 377 (May–June).

"It would seem that the only case in which there is anything for which the motion in arrest is especially applicable, is the case where there is a defect in form in the verdict of the jury. In all other cases there is nothing to be gained by it which could not be secured by the writ of error after judgment, or by a general demurrer before trial."

Perpetuities. "General Testamentary Powers and the Rule Against Perpetuities." By John Chipman Gray. 26 *Harvard Law Review* 720 (June).

Prof. Gray states wherein he is unable to agree with Mr. Kales' views.

Procedure. "Respect for the Law." By Frank L. Fish. 47 *American Law Review* 365 (May-June).

"It is the opinion of good students of the subject under discussion that as a remedy for the law's delay, increased power should be given to the judges. It is probably safe to say that the power of a judge in the trial of jury cases is not so great as it formerly was. In many of our states laws have been enacted limiting the power of the judges and fixing fast and hard rules for their guidance, so that they have become practically moderators in the forum over which they preside, while the battle rages around powerful and learned counsel upon whose wit and eloquence and legal ability the trial hinges."

See New Trials.

Proof. "The Problem of Proof." By Prof. John H. Wigmore. 8 *Illinois Law Review* 77 (June).

The book of which this is the final chapter will be awaited with great interest. Dean Wigmore's latest work, shortly to appear, is to be entitled "The Principles of Judicial Proof, as Contained in Logic, Psychology, and General Experience, and Illustrated in Judicial Trials." It is stated in a footnote that the chapter here published represents the objective to which the prior portions are directed. This objective is "a scientific understanding of the principles of what may be called 'natural' proof," and the development of an apparatus which may be of service in collating a mass of evidence and in determining its net ultimate effect on beliefs. "If we do not begin to develop a science of proof, history will repeat itself, and we shall find ourselves in the present plight of Continental Europe," where for a century past judicial trials have been carried on "by uncomprehended, unguided, and therefore unsafe mental processes."

A scheme for analysis of the probative effect of a large mass of evidence is described, the method proposed being offered tentatively rather than in the belief that it is absolutely perfect. At first sight, the strange symbols employed seem recondite and mystifying, but on closer examination they are seen to be by no means hard to master. These symbols furnish a notation by means of which, first, the various types of evidence, *e.g.*, testimonial, circumstantial, and judicially noticed, may be differentiated; secondly, the logical connection between individual bits of evidence may be graphically indicated by lines connecting the symbols; and thirdly, the degree of credit or doubt given to a piece of evidence may be notated by auxiliary signs. The notation thus created may be used in the concrete operation of charting the evidence presented by either prosecution or defense in any judicial trial. Specimen charts are given by way of illustration.

One of the principal justifications of the scheme is the object of enabling "all the data to be lifted into the consciousness at once." Even though the chart end in an interrogation, one feels that every particle of evidence has been subjected to analysis and fitted into its proper place in the architectural plan.

We refrain from criticism of this scheme until Professor Wigmore's book has appeared and a fuller statement of his views is at hand. Three questions, however, suggest themselves, which we do not now undertake to answer: (1) Can the scheme be of practical use? (2) does it afford a substantially accurate test of the degree of probability? (3) if modified so as to provide

such a test would the difficulty of practical application be so increased as to invalidate the whole project?

Property. "Vested Rights: A Refutation of Vice-President Marshall's Views." By Cyril F. Dos Passos. *North American Review*, v. 198, p. 50 (July).

"The right to devise and inherit are not only natural rights but also rights protected and guaranteed by the constitutions of this country. These rights do not appear to be of equal obligation, for the right to inherit in case of intestacy can, of course, only be effective where no devise has been made. . . . of all. The right of property, admitted in all quarters to be a natural and inherent right, involves in its very nature and as one of its most important elements the right to transfer that property; there is no essential difference between a transfer *inter vivos* and one *mortis causa* for the very good reason that in either case the right of the original proprietor expires at the moment of transfer."

Real Property. "Adverse Possession." By Nicholas J. Hoban, Jr. 76 *Central Law Journal* 391 (May 30).

A summary of the principles of a subject of importance in legal discussion.

See Perpetuities.

Receivers. "Receivers under the Indiana Statute." By Romney L. Willson, Jr. 76 *Central Law Journal* 425 (June 13).

A statement of the principles of the Indiana law of 1881 as judicially construed by the state courts.

Referendum. "Voting Organic Laws." By R. E. Cushman. *Political Science Quarterly*, v. 28, p. 207 (June).

A study of the popular referendum vote on the forty-two proposals of the Ohio constitution of 1912 (*See* 24 *Green Bag* 506).

"In this paper an attempt has been made to analyze the collective mind of the people of Ohio, as it was brought to bear upon political and economic problems of great importance. It has been shown that that mind was not adequately aroused nor sufficiently instructed; that only about half of those who ordinarily vote were interested in the constitutional changes and that thousands of those who did vote based their decisions on insufficient data. In so far as generalization is admissable on the basis of such a vote, it appears that the people of Ohio are conservative when asked to spend money or to share political privilege. They welcome changes, however, which give them new political rights or protect their economic interests or increase their control over their political servants. We have seen that the rural communities of the state are very conservative, while the cities welcome political and economic changes. Although the vote was taken in the heat of a political campaign, partisan politics seem to have exercised little influence upon the people's decisions upon constitutional questions. Finally, we have seen that the public mind will not voluntarily inform itself even upon matters of great importance. The average voter regards it as one of the prerogatives of citizenship to decide offhand upon the questions which face him upon the referendum ballot. Most of his blunders are ascribable to ignorance, carelessness, or indifference; they do not prove incapacity. They are among the lessons taught by the vote on the Ohio constitution of 1912."

"Can Two Propositions be United in One Submission to the Voter?" By William P. Malburn. 47 *American Law Review* 392 (May–June).

A recent decision wherein the legality of a municipal election authorizing a bond issue was questioned, announces it to be a "well recognized principle of law that two propositions cannot be united in the submission so as to have one expression of the voter answer both propositions, as voters thereby might be induced to vote for both propositions who would not have done so if the questions had been submitted singly." *State* v. *Allen*, 186 Mo. 673 (1905).

"Is there such a well established principle of law, and if so, on what is it based?"

The writer refers to the habit of courts to base decisions upon natural rights formulas rather than upon principles, and says that if it is objectionable to include two propositions in one submission, the remedy is by legislation.

Remedies. "Election of Remedies, A Criticism." By Charles P. Hine. 26 *Harvard Law Review* 707 (June).

"The result of this review of the operation and history of the doctrine may be summed up in this way: The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of *obiter dicta* but not reaching the subsoil of principle. The judicial gardeners through whose carelessness it has crept in should be able to eliminate it, or at least to prevent its further growth."

Special Legislation. "Some Aspects of Judicial Control over Special and Local Legislation." By Frederick E. Merrills. 47 *American Law Review* 351 (May–June).

"Some local or special legislation is often desirable, and an elaborate enumeration of limitations thereon, such as is found in Alabama and other states, is apt to prove cumbersome and unnecessary. The more satisfactory plan will be to reduce the number of specific prohibitions, as Michigan has done, and to devise other methods of checking abuses which may result from special legislation. The Michigan plan of submitting every special law to a vote of the community to be affected seems to be the most satisfactory plan that has hitherto been devised, and is of course much more effective than the requirement in some earlier state constitutions of notice of an intention to apply for a special act to be published in the community to be affected."

Testacy. See Property.

Latest Important Cases

Bills and Notes. *Banking — Payment of Check without Knowledge of Drawer's Death — Principal and Agent — Third Parties Acting in Good Faith.* N. Y.

A bank is protected in the payment by it of a check after the death of the drawer, payment having been made in the due course of business and without knowledge on the part of the bank of the drawer's death when it paid the check. This was the holding of the New York Court of Appeals in *Glennan* v. *Trust Co.*, decided June 3 (N. Y. Law Jour., June 20).

In an opinion of unusual interest the Court (Cullen, Ch. J.) said: —

"It is singular that there should be such a paucity of judicial decisions on this question, as seems the case. In my search through the reports I have been able to find only one on the precise point, *Rogerson, executor*, v. *Ladbroke*, decided by the English Common Pleas in 1822 (1 Bing. 93), in which it was held that the payment or rather a charge of a check to a depositor's account made by the banker after the death of the depositor, but before the bank had received knowledge of that fact, was a valid payment, and that the banker was not liable for the amount."

Referring to the common law rule that an agent's power is revoked by the death of the principal, the Court continued: —

"The question is whether payment of checks by banks or bankers is an exception to the rule stated. I think it is. It must be first borne in mind that the rule itself is an exception to the still broader rule that revocation of the power of an agent does not affect third parties dealing with him in good faith without notice. This is the rule of the civil law even where the agency is revoked by death. The common-law rule in some states has been changed by statute, in others repudiated (*Cassidy* v. *McKenzie*, 4 Watts & Sergeant, Penna., 282; *Carragher* v. *Whittington*, 26 Mo. 311), while in still others greatly limited (*Lenz* v. *Brown*, 41 Wis. 172; *Ish* v. *Crane*, 8 Ohio St. 521). There are differences between the liability of banks to their depositors and that of ordinary debtors to their creditors which justifies excepting the payment of checks from the rule. . . .

"But the dominant and controlling reason for holding that the usual rule that a debtor is not protected in payment to an agent after the death of his principal, though without knowledge of that fact, is not applicable to the payment of checks by banks, is that such has almost universally been accepted as the law. As already said, all the text-books so state the law (in England it has been so settled by section 75 of the Bills of Exchange Act of 1882), and apparently the whole country has assumed the text-books to be right. The rule thus adopted, if not strictly a rule of property, is a rule of conduct affecting property interests that very closely approximates to a rule of property. I think the fact that the rule has been adopted by the community is reasonably clear. The use of banks as depositories of money and the practice of making payment by checks prevails in this country to an extent far beyond that existing in any other, so that the situation presented in this case must have frequently arisen. True, where the estate of the depositor is solvent and the check is given for value it is of no practical moment whether the bank is liable for the payment of a check after the death of the drawer or not. Very many, however, must have been the cases where either the estate was insolvent or the check was given without value and the bank had paid it after death in ignorance of that fact. Yet in my research I have not been able to find in the reports in this country or in England a case where it was sought, under such circumstances, to hold the bank liable except the Rogerson case (*supra*), in which the attempt failed."

Contempt. *Publication Reflecting on the Court — Irregular Proceedings Resulting in Finding of Contempt.* Mo.

The Missouri Supreme Court discharged Col. William R. Nelson, owner and editor of the *Kansas City Star*, on June 2, in the proceedings for contempt of the Jackson County Circuit Court. The decision of the Supreme Court was unanimous.

Col. Nelson was found guilty of contempt and sentenced to imprisonment of one day in the County Jail by Circuit Judge Joseph G. Guthrie of Jackson County on Feb. 1. The

Judge based his action upon an article published in Mr. Nelson's paper which said that Judge Guthrie had refused to dismiss a divorce suit, which had been settled out of court, until the litigants paid their attorney fees.

The editor's lawyers saved him from jail by obtaining a writ of habeas corpus. The case was taken to the Court of Appeals and thence to the Supreme Court. A Special Commissioner was appointed to take testimony for the Supreme Court. The Commissioner held that the article was "substantially true," and that it "was as correct a report of court proceedings as a layman could make."

The Supreme Court (Woodson, J.) said: —

"We are clearly of the opinion that the publication was not literally or substantially true, but is highly contemptuous to both the Court and the Judge thereof."

Referring to the trial before Judge Guthrie, the Court called it "a pretended hearing": —

"I use the words 'pretended hearing' advisedly because no disinterested and unbiased mind can come to any other conclusion from reading the record but what the real trial took place on the night of Jan. 31, and that the proceedings in the Court the next morning were solely for the purpose of breathing life and validity into the unquickened and void judgment written the night before."

Court Proceedings in Camera. *Divorce Cases Must be Heard in Open Court — Civil and Criminal Contempts — Appeals under English Judicature Act.* England.

The House of Lords, in a decision rendered May 5 in *Scott* v. *Scott*, held that courts of justice have no power to hear cases *in camera*, even by consent, except in the special cases in which the court is permitted by law to recognize that a hearing in open court might defeat the ends of justice. The Probate, Divorce and Admiralty Division (Bargrave Deane, J.) had adjudged Mrs. Scott guilty of contempt on circulating among her friends the report of a case heard *in camera*, in which she had been accused of infidelity, but had been vindicated. The Lord Chancellor's opinion, in which the other law lords concurred, reversed the judgment for contempt which a majority of the Court of Appeal (107 L. T. Rep. 211; (1912) P. 241) had sustained.

The tribunal held that in any case an order for a hearing *in camera* extends only to the hearing, and it is not a contempt to publish the facts subsequently if it is done *bona fide* and without malice. Such publication is not a criminal cause or matter, in which no appeal lies under sect. 47 of the Judicature Act.

Freedom of the Press. *Federal Newspaper Publicity Law — Regulations Governing Admission of Publications to the Mails — Unfair Discrimination.* U. S.

The validity of the so-called newspaper publicity law was upheld by the United States Supreme Court June 10, in an opinion delivered by the Chief Justice. The Court said: —

"That Congress, in exerting its power concerning the mails, has the comprehensive right to classify, which it has exerted from the beginning, and, therefore, may exercise its discretion for the purpose of furthering the public welfare as it understands it, we think it too clear for anything but statement, the exertion of its power, of course, at all times and under all conditions, being subject to the express or necessarily implied limitations of the Constitution. From this it results that it was and is in the power ot Congress in 'the interest of the dissemination of current intelligence' to so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers.

"The attack on the provision in question as a violation of the Constitution because infringing the freedom of the press, and depriving of property without due process of law, rests only upon the illegality of the conditions which the provision exacts in return for the right to enjoy the privileges and advantages of the second-class mail classification. The question, therefore, is only this: Are the conditions which were exacted incidental to the power exerted of conferring on the publishers of newspapers, periodicals, etc., the privileges of the second-class classification, or are they so beyond the scope of the exercise of that power as to cause the conditions to be repugnant to the Constitution?

"Under the statute, as we have seen, for a long series of years a publication, primarily devoted to advertisements, was not entitled to the benefit of the second-class classification, and by a long administrative construction, embodied in the regulations, the disclosure of the names of the proprietors as well as of the editors of a publication, which has sought to be entered as second-class matter, was required.

"The new conditions imposed are first, that where there is matter the publication of which is paid for, the fact of such payment shall be disclosed by marking the matter as an advertisement, and, second, the disclosure as to ownership, etc., previously exacted is enlarged by making it necessary in the case of a corporation to furnish the names of the stockholders, and also requiring that the names of the principal creditors, etc., be given.

"As the right to consider the character of the publication as an advertising medium was previously deemed to be incidental to the exercise of the power to classify for the purpose of the second-class mail, it is impossible in reason to perceive why the new condition as to marking matter, which is paid for as an advertisement is not equally incidental to the right to classify.

"And the additional exactions as to disclosure of stockholders, principals, creditors, etc., also are as clearly incidental to the power to classify as are the requirements as to disclosure of ownership, editors, etc., which for so many years formed the basis of the right of admission to the classification. We say this because of the intimate relation which exists between ownership and debt, since debt in its ultimate conception is a dismemberment of ownership and the power which it confers over an owner is, by the common knowledge of mankind, often the equivalent of the control which would result from ownership itself. . . .

"We repeat that in considering this subject we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but we are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded."

Interstate Commerce. See Railway Rates.

Monopolies. *Patentee's Alleged Monopoly of Sale — Limitation of Resale Prices by Patentee's Agent — Meaning of "Exclusive Right to Vend" under the Statute.* U. S.

Price restrictions imposed by manufacturers on the resale of patented articles were held not to be binding on retailers by the important decision of the Supreme Court of the United States in *Bauer & Cie.* v. *O'Donnell* (L. ed. adv. sheets, no. 15, p. 616), decided May 26. The decision, which goes a long way toward shearing patent privileges, was not a complete surprise, being consistent with the attitude of the Court in the recent *Bathtub* case (*Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20). It suggests what comes very near being a reversal of the decision in the *Dick* case (*Henry* v. *Dick Co.*, 224 U. S. 1), though this latter case was different in that it involved the enforced use of accessories which were not themselves patented.

The Court (Day, J.) said: —

"The right to make, use and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the *exclusive* right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee. . . .

"The question now before this court for judicial determination is: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

"The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void. It was doubtless within the power of Congress to confer such right of restriction upon a patentee. Has it done so? The question has not been determined in any previous case in this court, so far as we are aware. It was dealt with under the copyright statute, however, in the case of *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339. In that case it was undertaken to limit the price of copyrighted books for sale at retail by a notice on each book fixing the price at one dollar and stating that no dealer was licensed to sell it for less and that a sale at a less price would be treated as an infringement of the copyright. It was there held that the statute, in securing to the holder of the copyright the sole right to vend copies of the book, conferred a privilege which, when the book was sold, was exercised by the

holder, and that the right secured by the statute was thereby exhausted. The court also held that it was not the purpose of the law to grant the further right to qualify the title of future purchasers by means of the printed notice affixed to the book, and that to give such right would extend the statute beyond its fair meaning and secure privileges not intended to be covered by the act of Congress. In that case it was recognized that there are differences between the copyright statute and the patent statute, and the purpose to decide the question now before us was expressly disclaimed. . . .

"The real question is whether in the exclusive right secured by statute to 'vend' a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to and the right to sell, the article purchased without accounting for the proceeds to the patentee and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such facts as are now presented we think the right to *vend* secured in the patent statute is not distinguishable from the right of *vending* given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act."

The decision was a close one, McKenna, Holmes, Lurton, and Van Devanter, J. J., dissenting.

The Court denied an application for a rehearing on June 16.

(See for *Henry* v. *Dick Co.*, 24 *Green Bag* 206, 210; for *Bathtub* case, 25 *Green Bag* 33, 36.)

Railway Rates. *"Minnesota Rate Cases" — Federal and State Powers — Administrative Enforcement of Interstate Commerce Act — Valuation of Railways — Apportionment of State and Interstate Business — Legitimate Earnings.* U. S.

The constitutional power of the states, unless Congress has acted in the matter, to regulate intra-state rates, even where the effect of such regulation, in so far as it applies to cities on the state boundaries or points within competitive districts crossed by state lines, might be to disturb the relation previously existing between local and interstate rates and to create unjust discrimination between points in the state and those similarly situated in adjacent states, was sustained in *Simpson* v. *Shepard*, *Simpson* v. *Kennedy*, and *Simpson* v. *Shillaber*, decided by the United States Supreme Court June 9 (Oct. term, nos. 291, 292, 293; L. ed. adv. sheets no. 15, p. 729). The opinion of the court, delivered by Mr. Justice Hughes, was unanimous, with the sole qualification that Mr. Justice McKenna concurred in the result without offering a separate opinion.

With respect to the constitutional division of federal and state powers, the effect of the decision was to reiterate the well-known principle that the interstate commerce clause is not self-executing, and to allow to the states such powers, in the regulation of their internal commerce, as Congress by its own inaction has left them free to exercise after the passage of the interstate commerce act with its subsequent amendments. Consequently, though it may be that interstate rates cannot be regulated by Congress without imposing some requirements with respect to intra-state rates as they substantially affect interstate commerce, the states are free to establish maximum intra-state rates for interstate carriers. That such requirements may disturb the existing relation between intra-state and interstate rates as to places within zones of competition crossed by the state boundary line is no objection. Any question of unfairly discriminatory rates in violation of the interstate commerce act would be a question primarily for the Interstate Commerce Commission, not for the courts.

On the question of valuation, the Court held that certain formulæ for the determination of the value of the property of a railway do not furnish a proper criterion of the reasonableness of its rates. The effect of the decision was to hold that the valuation must not be swollen by the inclusion of abnormal or fictitious assets. For example, the valuation must not include assets of any extent which do not form part of the operating property of the carrier, or of that

devoted to the public service — the market value of stocks and bonds representing the entire property therefore does not indicate the value of the property on which the carrier is entitled to earn compensation, through its rates. Nor may the value of the land devoted to the public service, figured on the basis of reduplication cost, include the estimated excess over market value which the carrier might be forced to pay for contiguous or similarly situated land, nor an allowance for consequential and severance damages and for improvements that might possibly be found on the land taken. Apart from the cost of reduplicating a railway, its value as it stands shall not include the supposed value of its property for railway purposes in excess of the fair market value of contiguous or similarly situated property. Again, the fair present value of a railway must not be figured by adding to it the outlays during the period of construction for engineering, superintendence, legal expenses, contingencies, and interest. Furthermore, if the carrier claims that its property has appreciated the courts cannot take notice of such appreciation when, instead of being specifically stated, it is alleged in general terms to more than offset depreciation, so as to make the cost of reproduction not a fair test of present value. The obvious tendency of these holdings is to limit the factors which may be taken into account in the valuation of railways with a view to the determination of fair rates.

On the subject of the apportionment of state and interstate business the Court took care to define the correct principles controlling such an apportionment. Either the share of the expenses attributable to intra-state business must be clearly shown, or the value of the property employed in such business, before the intra-state rates fixed by statute can be pronounced confiscatory, and general estimates made without the aid of accurate data will not be sufficient. In apportioning the value of the property, the division (in a close case at least) must not be made in accordance with the revenue derived from intra-state and interstate business, but in accordance with the use of the property, assigning to each business that proportion of the total value of the property within the state that which corresponded to the extent of its employment in that business.

As to the rate of compensation which a railway is entitled to earn on the property devoted to the public service, the Court said that a revenue of only about four per cent from all business, after paying only operating expenses and taxes, was less than the company was entitled to earn.

"Missouri Rate Cases" — Federal and State Powers — Valuation Improperly Determined by Multiplying State Assessment. U. S.

Nine suits, known as the *"Missouri rate* cases," were decided by the Supreme Court in accordance with the principles of the Minnesota decision, June 16, Mr. Justice Hughes again announcing the decision. The suits were brought to restrain the enforcement of the freight rate and passenger fare acts of 1907 of Missouri. The courts below enjoined the rates as confiscatory. On appeal, the Supreme Court sustained the rates as to the Chicago, Burlington & Quincy, the Atchison, Topeka & Santa Fe, and four other companies. On the contrary the rates were held confiscatory in the cases of the three other appellants, the St. Louis & Hannibal, the Kansas City, Clinton & Springfield, and the Chicago Great Western.

Taking up the *Burlington* case first, the Court pointed out that the assessment value had been multiplied by three to reach a value for rates. He declared that if that basis were extended to the whole Burlington system the value upon which rates were to be based would exceed by $115,000,000 the capitalization of the system. The Court declared that the revenue basis adopted by the lower court to apportion the cost of interstate and intra-state business was too general, but actual tests could be made. In the *St. Louis & Hannibal* case the Court said neither the experts for the railroads or for the state could find a basis on which the rates would be remunerative.

The decision brought out the leading considerations that the evidence must be "appropriately specific" as to the value of the lands, improvements, structures, equipments and other properties owned by the company, and that the testimony must disclose an adequate basis for definite findings of value. The company cannot rely, with safety, upon the assessment values made by the state officials for taxation.

The West Virginia two-cent passenger law was also upheld as valid by the Supreme Court June 16, affirming the Supreme Court of Appeals of West Virginia.

The Court upheld as valid the rates imposed by the Oregon Railroad Commission out of Portland, affirming the decision of the federal court of that state.

The Arkansas maximum freight rate law and the two-cent passenger fare law were upheld as valid.

The Editor's Bag

THE McNAB AFFAIR

IT IS unfortunate that Attorney-General McReynolds' term of office should have opened with a blunder which, though not of such gravity as to prove his unfitness for office, tends to undermine confidence in the soundness of his judgment as the head of one of the great executive departments of the nation. His order to the District Attorney at San Francisco to secure postponement of certain trials was nothing worse than an indiscretion, and left his integrity no wise open to attack. If there were anything in Mr. Caminetti's desire to be present at the trial of his son suggestive of tampering with the courts we doubt whether any one would have been swifter than Mr. McReynolds to repel an improper influence of that kind. A delay of justice by no means signifies a miscarriage of justice, and the plan to hold up the cases for a time was innocent enough. What gave the affair an evil look was the suspicion that the operations of the Department of Justice may be subject to outside control by personal influences exerted in high official quarters. The inclination of a prosecuting official to grant harmless personal favors to friends or associates, while it may be innocent, will sooner or later make the official the passive instrument of an unintentional wrong, and needs to be suppressed as presenting a serious and continuous public danger. That Mr. McReynolds would again commit a like discretion is not altogether probable. He must, however, if he continues in office, vindicate his judgment against the charge of weakness which has been incurred as the result of his conduct in this affair. All sorts of intemperate statements have been made in the public press denouncing Mr. McReynolds as unfit for office and calling for his resignation. Mr. McReynolds' position is precisely that of a new employee who has started with a blunder, but whose blunder may be forgiven if his subsequent conduct is such as to prove himself entitled to the confidence of his employer in his ability. If Mr. McReynolds resigns, his resignation will come without a fair test of his unfitness for the office he holds. Political expediency should not be permitted to dictate the proper course in this respect; it is solely a matter of sound organization of the Government service in accordance with the same principles that would prevail in any well managed private business.

The McNab affair, like the Marconi affair in England, has been seized upon by partisan opponents of the Government as a convenient basis for intemperate criticisms which shamefully distort actual facts. Neither the Attorney-General of the United States nor the Attorney-General of England has acted in a manner which reflects upon his personal honor. That partisan rancor must have had something to do with Mr. McNab's inexcusable attack on his

superior is an explanation hardly to be dismissed. President Wilson acted rightly in accepting Mr. McNab's resignation, which should have been demanded had it not been voluntarily offered. A Government attorney need not be a party to proceedings which he deems improper, and can always resign rather than obey commands to which he cannot yield without loss of self-respect. His resignation under such circumstances, however, if any explanation is necessary, should be accompanied by a temperate, dignified explanation unsullied by a personal denunciation which the facts do not warrant. The failure of intelligent newpapers, throughout the country, with almost one accord, to discredit Mr. McNab's sensational charges affords the latest instance of their inability to treat matters affecting the legal system of the country with the impartiality necessary to aid the courts to become effective instruments of justice. If a wholesome public opinion is to be created to improve the administration of justice in this country, the dependence of the public upon an enlightened press for information and guidance is a fact of prime importance.

THE MILITANT SUFFRAGIST

THE analysis of the psychology of the militant suffragist by Dr. Claye Shaw, in the *Lancet* of May 17, 1913, appears sound in its conclusions. Shaw seems to be right in his inference that the explanation of the mental attitude of the suffragette is to be found not in insanity or hysteria, but in inordinate love of notoriety.

That this passion for notoriety is not a pathological condition, in the ordinary sense, seems clear. Some prominent politicians may possess this trait in a marked degree, but society would hardly attempt to deal with them as psychopathic patients. The problem with which the state has to deal with respect to the militant suffragette is not medical. The segregation of notoriety-seekers in psychopathic hospitals is not feasible. Punishment for the actual injuries they inflict to life and property is all that may be attempted. This is true even though love of notoriety may contribute the underlying motive of crime. It was doubtless the chief factor in the mental make-up of Carrie Nation, to take an illustration of a different sort. These cases may show a contributing factor of monoideism, or concentration on some *idée fixe* carrying with it a strong emotional tone. But they are only rarely to be treated as pure cases of monomania. Furthermore, though the notoriety-seeker, whatever his station, high or low, is always more or less of a public nuisance, his activities are treated by the law as wholly legitimate so long as he refrains from acts expressly criminal. Hence the difficulty of dealing with him except to the extent that he is a common law-breaker; even then it is hard for the state to keep in mind his true character. Plainly the law of nuisance cannot be stretched to cover such cases and offers no solution of the problem.

Regulation of the suffragette by legislation appearing impracticable, the question becomes primarily one of penal policy. In this form it has given the Government of England profound concern. The Government, tacitly if not expressly, has recognized that the passion of the militant leaders for notoriety is the element that differentiates suffragist crime from crime of other sorts and gives rise to the perplexing features of the situation. The suffragist law-breaker must be punished, for to ignore or condone the crimes of such a person will only augment the public danger.

On the other hand, punishment is what the person craves, to add to her notoriety, and it makes no difference whether the punishment is mild or severe, for in either case it will only kindle a widespread passion for cheaply bought "martyrdom" and stimulate rather than repress the evil. The Government is thus in a quandary, and because of the difficulty of finding any escape from the dilemma it pursues a faltering and uncertain course. The object of this article is too offer a tentative suggestion of a mode of escape.

If love of notoriety is at the root of the evil, the ideal penal remedy would be one which adopts a mode of punishment from which no advantage of personal notoriety can be derived by the prisoner. The simplest way to do that is to deal with the criminal suffragette not as an individual, but as one of a group. Instead of prosecuting the leaders of the movement, why not prosecute by wholesale indictments all who are in any way accessories to the unlawful acts? We do not suggest that the militant organization be indicted as a body, though that would perhaps be the ideal procedure if it were possible. Our idea is that if say one hundred militants were cast into jail at once, not necessarily including any of the more notorious agitators, there would be much less opportunity to make capital out of personal "martyrdom" than when Mrs. Pankhurst or some other arch-conspirator is given a prison sentence. If a thousand cases were brought instead of merely a hundred, an even severer penalty of individual obscurity would be meted out, in lieu of the abortive punishment which serves only to gratify the personal vanity of the prisoner.

It seems that the common law of unlawful assembly and unlawful conspiracy would furnish principles which could readily be applied in drafting a penal statute expressly aimed at all associations working with a program of unlawful violence. Whether the penalties should be mild or severe, in order most effectually to secure their purpose, is a question that would require careful consideration. By dealing gently with a very large class of offenses the Government could probably accomplish better results than by dealing severely with a smaller group.

If there is any way in which the criminal suffragette can be stripped of her notoriety the problem presented by this class of crime can be met. Otherwise it is hard to see how any measure can prove more than an unsatisfactory makeshift.

THE MIRROR CURE

An Atlantic City magistrate handed a mirror to a man brought before him for intoxication. The man gazed at himself for a full minute and asked for a pledge. He signed it and was released on his good behavior. — *News Item.*

"TO see oursels as ithers see us."
Was Robbie Burns's prayer;
But should "some power the giftie gie us,"
To sit and gaze and stare
Upon our own reflection
From polished mirror's face
With time for introspection,
'Twould throw us off our base
And make us want to swear off
And sign a good stiff pledge.
If the effects don't wear off,
Try it on others, Jedge.

SIRIUS SINNICUS.

A LEARNED JUDGE

CHIEF Justice Richardson, of New Hampshire, supplemented his native capacity, which was extraordinary, by untiring mental industry. He studied the great works of the sages of the law, and that he might not be a mere lawyer, read the Latin and Greek classics, and the best French, Italian and Spanish

authors. Like most men whom culture has broadened Judge Richardson was hospitable to new ideas. He was unlike another judge of the same state of whom it was said:

"It is of great importance that Judge Wingate should form a correct opinion before he pronounced it, for after that, law, reason and authority would be unavailing."

Richardson's readiness to abandon a ruling he had once made was not relished by some of the lawyers. Jeremiah Mason was once pressing a point on the judge with all that force for which he was remarkable.

"The impression of the Court is in your favor," said the judge.

"Yes," retorted Mason, "but I want your Honor to stick!"

Correspondence

BEFORE DAWN

To the Editor of The Green Bag:

Sir: The following letter (no year given) was found among the private papers and correspondence of the late Senator James R. Doolittle of Wisconsin. The case, no doubt, was one pending in the Supreme Court of the United States. Mr. Ryan, mentioned, was the late Edward G. Ryan, later Chief Justice of the Supreme Court of Wisconsin. The author of the letter, Matthew H. Carpenter, was the great constitutional lawyer of the Badger State, and later a United States Senator from that state. The letter was doubtless intended for Mr. Doolittle, who had been a judge of one of the Wisconsin courts before becoming a Senator. The letter is yellow with age and was probably written prior to the year 1860. The letter is too clever not to have a place on the pages of your magazine. DUANE MOWRY.

Milwaukee, Apr. 26.

Dear Judge: — Mr. Ryan says that in the case *Dalton* v. *Strong*, he has no brief; & has quite forgotten the points.

That the bill of exceptions was prepared with great care and will show you the whole case, *in the twinkling of a bedpost.*

Truly yours,
MAT. H. CARPENTER.

BREAD ON THE WATERS

To the Editor of The Green Bag: —

Sir: The Peoria Illinois Star of January the 18th and 20th 1911 tells of an Aunt of Mine leaving 40 acres (coal land) but that is all I.ve ever been able to find out although I.ve written to all kinds of Officials Papers and others and tried to get Lawyers even paid the 25 cts. retaining fee to the Legal Aid Society here They said They could no answer get from Peoria well when I cant get a Lawyer am I a fool if I say that if I am given the facilities of a Lawyer that I.d be willing to face any or all in this case. because none will take it or tell me why must I sit down and look up at the sky. when the Star printed what it did the Administrator Mike Manning of Glasford Ill and His Sister a Mrs. Cook of Emporia Kansas died a short time afterward He was a Mason and good Lodge Man and when I wrote to the Probate Judge there was a Billy Manning Alias Mahoney killed up there nobody knows who done it nor why I was told a man that name had settled up Mrs. Wrights affairs well well the papers say the 2 of them (the Mannings) were former Saloonkeepers and a tombstone and a

deed in St. Louis County have Crane on Them instead of Crehan She was another Aunt and well well if Old King Aladdon Himself got it there could not have been any more ring around the rosying than has been done to protect (Who) well well I do not know what kind of dope is used but it must be the opposite to proving anything well I.ll cast this on the waters.

J. MAHONEY
4553 *Cottage Avenue, St. Louis, Mo.*

P.S. She had no children.

[Perhaps some of our readers can supply our correspondent with the information he desires.—*Ed.*]

The Legal World

Monthly Analysis of Leading Legal Events

Several encouraging indications have occurred which show that the movement for reform of procedure is making progress. Massachusetts has adopted a law designed to simplify procedure by providing for more prompt disposition of cases with regard to the substantial rights of the parties, namely, by obviating the necessity for new trials in cases where it is possible for the appellate court to render a just decision by giving judgment on the findings of the jury in the lower court. Notwithstanding what unfavorable inferences might be drawn from the failure of the recommendations of the law reform committee of the Iowa State Bar Association to enlist support, the state of Iowa has adopted several laws this year which tend to relieve congestion and to improve procedure; while the new statute designed to remedy the evil of reversals for merely technical errors arising from improper instructions to the jury may make the trial in the lower court a little longer, it is likely also to relieve the appellate court. The effect may be much the same as that of the new Texas statute, which abolishes assignments of error as unnecessary and requires the appellate court to examine the case for error upon the motion for a new trial solely; this law is expected to relieve the Texas appellate courts of considerable labor. The new Texas law making it necessary for all objections to the instructions to be taken in writing before they are given to the jury will also do away with one of the most fruitful causes of new trials and reversals.

Particularly gratifying is the effort Massachusetts is making to improve its penal system by creating parole and pardon boards with important functions. The beneficial influence of the new chairman of the Prison Commissioners, Mr. Randall, the expert who was recently brought to Massachusetts from Minnesota, is already evident in the passage of this measure. Iowa has a new law permitting the pardon of first offenders before commitment, while under sentence, a law that at least springs from a humane tendency whether correct in principle or not.

The action that Iowa has taken to secure the nonpartisan nomination and election of all judges on a separate ballot may well serve as a model for other states.

The decisions of the United States Supreme Court indicate a disposition to broaden rather than to narrow the scope of the Sherman anti-trust act and to sustain legislation fixing maximum railway rates not proved to be confiscatory by the clearest and most

specific evidence. The resale price decision, in the *Bauer* case, shows an even more marked tendency to bring patentees within the application of the Sherman law than was exhibited in the *Bath Tub* case. The decisions in the *Minnesota* and *Missouri Rate* cases are more favorable to the states than to the railroads, indicating the reluctance of the Court to proceed too rapidly in prohibiting the "burdening" of interstate commerce by the provisions of state laws. The Court is obviously in sympathy with the program of restriction of rates on a basis of fair return on the investment actually devoted to the public service.

Massachusetts Legislation of 1913

A number of acts of direct concern to the legal profession were passed by the Massachusetts legislature this year. Of these possibly the most important is that to simplify procedure and to avoid repetition of trials and unnecessary delays (ch. 716). As first written the bill was brief, but was subsequently lengthened and carefully redrafted at the hands of the Legislative Committee of the Massachusetts Bar Association. One of the objects of the law is to assist the appellate court by encouraging the framing of separate issues and taking of special verdicts in the trial court, in order to permit of a reversal by the higher court upon the findings of the jury without any necessity for the expense and delay of a new trial. The substantive features of the law are modeled on the best standards and its enactment assists in the reforms advocated by the American Bar Association.

Chapter 652, "An Act to Regulate Appeals in Criminal Cases," amends pre-existent law by permitting trial courts, at their discretion, to hold misdemeanants on their own recognizance, instead of committing them to abide sentence, in all cases appealed from the court of first instance to the Superior Court.

The most important law relating to the administration of criminal law is the act establishing Boards of Parole and an Advisory Board of Pardons. This measure had the earnest support not only of Governor Foss, who has taken much interest in penology, but of the new chairman of the Prison Commissioners, Mr. Randall, who recently came to Massachusetts from Minnesota. Two Boards of Parole are created, one for the State Prison and Massachusetts Reformatory, the other for the reformatory for women. All the powers of the Prison Commissioners in the matter of parole are transferred to these new boards. Employment of such additional agents as may be needed to secure employment for paroled prisoners is authorized. The more important of the two parole boards is made an Advisory Board of Pardons upon which the Governor may call at any time for a report containing its conclusions and recommendations. The act directs that information and recommendations shall also be obtained from the Attorney-General, district attorney, or trial justice in certain instances. This important act became effective July 1.

There are few other acts relating to purely legal matters. Chapter 644, which is of minor importance, makes a slight amendment the object of which is to define more clearly the venue of transitory actions in inferior courts.

The work of the National Commissioners on Uniform State Laws is actively encouraged again this year by the passage of two of the acts recently drafted by the Conference, that to make uniform the law of marriage by providing that a marriage in another state or

country in evasion or violation of the law of the state of the domicile shall be void, and the Uniform Child Labor Law.

Among matters of a more general character the Public Service Commission law ranks as of leading importance. This measure for the first time grants mandatory powers to the former railroad commission and broadens and reorganizes its functions.

Matters of social legislation include, besides the child labor law, a mothers' pension law, teachers' tenure and teachers' retirement measures, a law relating to industrial accidents and occupational diseases, and one requiring reports in respect to industrial accidents (ch. 746). The industrial accident and workmen's compensation laws of the state are strengthened by the new provisions. The teachers' tenure bill directs the state Board of Education to secure the employment of teachers, and the teachers' retirement act is the most important legislation ever enacted by Massachusetts in their favor.

The Legislature of 1913 was in session 171 days, and the pay-roll for the session was $40,421.05. Governor Foss signed 819 acts and returned without his approval thirty-two bills, of which ten were passed by the Legislature notwithstanding his objections. Twelve bills became laws without his signature.

Iowa Legislation Affecting Courts and Procedure

All laws of the 35th General Assembly of Iowa not already in force by publication became effective July 4. Quite a number of chapters in the new session laws relate to court affairs.

All judges, both supreme and district, shall be nominated and elected without regard to political parties. The system is like that adopted for commission cities. Candidates' names go before the voters at the June primary on a separate ballot, and each voter votes for twice as many candidates as are to be elected, and this number is nominated. In November there is a special, "nonpartisan judiciary ticket" column on the official ballot with the names of the nominated candidates.

On petition of any five attorneys in one county the Chief Justice may order the temporary transfer to that county of a judge who belongs in another district to hold court exactly as if he was resident of the district, to relieve an over-burdened docket, or for other reasons.

The mayor of any city or town may get rid of holding court for violation of the city ordinances by an order to send any such case to a justice of peace, who shall try it the same as a state case and with the same fees and conditions. This is to enable cities to get business men for mayors who would not serve if they were compelled to act as petty judges.

Where depositions are taken in an outside county and books of account are competent evidence in the case, a photograph may be taken of the pages and used as evidence.

A material witness may be required to go to another state to attend court where the other state has a similar reciprocity law. The witness desired may be summoned before a court and if the court finds he is a material witness in the other state an order shall be issued for him to answer the summons. The witness must, however, be tendered 10 cents a mile and $5 a day for each day he is wanted.

A person under sentence of court and suspension before commitment as a first offender may now be pardoned by the Governor pending such suspension.

As to instructions to juries by the district court a very important change went into effect July 4. This addition to the Code of Iowa was adopted in the belief it would go far toward ending the reversal of cases by the appellate court on technicalities. It puts a complete end to the system of lawyers working during a trial to encumber the record with errors and to leave them unnoticed until they get to the Supreme Court. It places a burden on the court and will cause some delay in getting cases finished and to the jury; but it also places a responsibility on an attorney to see that the case is properly presented to the jury in the instructions.

Another new law removes the protection from a witness who is testifying in any case involving the creation of a trust or pool, combinations, etc. Such witnesses will not be permitted to shield themselves by the claim that their testimony would criminate themselves.

Social Legislation in New York

Of the thirty-two laws recommended by the New York State Factory Investigating Commission at the last session of the legislature, thirty passed, covering every phase of factory life. Laws for the protection of factory workers in case of fire provide for the prohibition of smoking in workrooms, for fire drills, fire alarm signal systems and adequate fire-escapes and stairways. Others limit the occupants in a factory building to the number that can safely escape by means of the exits provided and prescribe in detail requirements for the future construction of factory buildings. Child labor legislation covers the prohibition of the employment of children under fourteen in tenements or in cannery sheds, and provides better regulations for the issuance of work certificates. Another bill gives wide scope to the Industrial Board, in the prohibition of the employment of children at dangerous machines or in trades or occupations found to be dangerous to their health. The educational standard was also raised. In the protection of women workers laws were passed prohibiting night work for women in factories and requiring seats for women workers. The hours of labor for women were limited to sixty a week during the canning season, and the Industrial Board was authorized to permit their employment for sixty-six hours a week during the pea crop season if, in its opinion, the health of the women workers would not be endangered thereby. The employment of women in the core-rooms of foundries was restricted. Laws were passed dealing with safety and sanitation. Conditions in bakeries were the subject of a separate act. The law dealing with manufacturing in tenements prohibits the employment of children under fourteen and the manufacture, in living apartments of tenements, of any article of food, dolls or dolls' clothing, or infants' or children's wearing apparel. The Department of Labor is reorganized and made one of the great departments of the state. The Industrial Board has been directed to make detailed rules, after public hearing, for safety and sanitation in different industries. The board is also given the powers of a commission of inquiry. For scientific investigations a Division of Industrial Hygiene has been created, composed of trained professional men, a physician, a chemist, a mechanical engineer and a civil engineer. For the health inspection of industrial establishments and the physical examination of children employed therein, a section of medical inspection has been created. The Department of Labor is placed upon a scientific basis and given the facilities with which to

solve the increasing complex problems of modern industry.

Personal

Samuel Rosenbaum of Philadelphia, who took his law degree at the University of Pennsylvania in June and was editor-in-chief of the *Law Register*, has been awarded the Francis I. Gowen Fellowship, which will enable him to spend one year in England and one year in Germany, both in research work for the university. In his undergraduate days Mr. Rosenbaum popularized grand opera in the university, and was known as the most famous debater the University of Pennsylvania had ever had.

A dispatch stating the possibility of Sir Rufus Isaacs being made Lord Chief Justice in England, in the event of the office becoming vacant, seems to have led some American newspapers to assume that Lord Alverstone was dead. Though completely broken in health, and expected to retire at any time, Lord Alverstone was alive up to the time when this magazine went to press.

President Wilson has nominated Jeremiah Neterer of Bellingham, Wash., as United States Judge for the western district of Washington. Judge Neterer served on the Whatcom county Superior Court bench for eight years. He was born on a farm near Goshen, Ind., and took his law degree at Valparaiso University. He has lived in Bellingham twenty-three years, was city attorney of the consolidated cities of Whatcom and New Whatcom in 1893, and chairman of the board of trustees of the State Normal School in Bellingham from its opening until he went upon the bench.

Justice James W. Gerard of the New York Supreme Court, who has been made Ambassador to Germany, is now forty-six years old, a son of James W. Gerard, who was a state senator, a member of the Board of Education, and one of the best known members of the New York bar. He was graduated from Columbia in 1890, studied at the New York Law School, being admitted to the bar in 1892. He entered the office of Bowers & Sands, and at the age of thirty-four became a member of the firm. He was elected a Justice of the Supreme Court in 1907. Before going on the bench he was for four years Chairman of the Democratic Campaign Committee of New York County. Mr. Gerard has traveled extensively and is fond of outdoor life, having achieved some note as a hunter in Scotland, England, and this country.

The Academic Roll of Honor

The following honorary degrees were conferred at the recent commencement exercises of the universities: —

Gray, John Clinton, LL.D. Harvard.

"A judge who in the Court of Appeals of New York for a quarter of a century has earned the veneration of the bench and bar."

Müller, Lauro Severiano, LL.D. Harvard.

"Brazilian Minister of Foreign Affairs; maker of harbors and of railroads, beautifier of a beautiful city; a statesman who has waged war against slavery and disease, a soldier who strives for peace and for that friendly spirit which pervading the Americas will promote the welfare of the western world."

Cadwalader, John Lambert, LL.D. Harvard.

"A lawyer with the strength for great responsibilities, a citizen whose character has added dignity to an honored name."

Wetmore, Edmund, LL.D. Harvard.

"A distinguished son of Harvard who has served the University by his labors on her behalf and by the eminence of his career at the bar."

Sutherland, George, LL.D. Columbia.

United States Senator from Utah.

Beatty, William Henry, LL.D. California.
"Son of Ohio, educated at the University of Virginia; for ten years district judge of Nevada; for five years Associate Justice, then Chief Justice of the Supreme Court of Nevada, at a time when the law demanded creative interpretation; since 1889, Chief Justice of California; man of integrity and conscience; by his office and his person, the firm and central pillar in the structure of the state."

Morrow, William W., LL.D. California.
"Since 1869 a member of the California bar; representative of the federal government in important cases; for six years a member of Congress; then six years district judge; since 1897, judge of the United States Circuit Court of Appeals; trustee of the Carnegie Institution; officer of the National Red Cross Society; ready to all good work in public service; as judge and citizen, humane and just and cheerful."

Pound, Roscoe, LL.D. Michigan.

Streeter, Franklin Sherwin, LL.D. Dartmouth.
Member of the International Joint Commission and a trustee of Dartmouth.

Jewett, Stephen Shannon, LL.D. Dartmouth.
Lawyer, banker, and statesman.

Johnson, Jesse, LL.D. Dartmouth.
Author, and former Justice of the New York Supreme Court.

Rathbone, Albert, A.M. Williams.
Lawyer, of New York.

Wheeler, Charles B., LL.D. Williams.
Justice of the New York Supreme Court.

Taft, William Howard, D.C.L. Hamilton.

Whitman, Charles S., LL.D. Amherst, LL.D. New York.
District Attorney of New York County.

Curtis, William John, LL.D. Bowdoin.
Lawyer and organizer.

Stone, Harlan F., LL.D. Amherst.
Dean of Columbia Law School.

Prentice, Samuel O., LL.D. Trinity.
Chief Justice of the Connecticut Supreme Court of Errors.

Tenney, Horace K., LL.D. Vermont.
A leader of the Illinois bar.

Fletcher, Allen M., LL.D. Vermont.
Governor of Vermont.

Tumulty, Joseph P., LL.D. St. Peter's.
Secretary to President Wilson.

Ratigan, Judge *John B.*, LL.D. Holy Cross.

Miscellaneous

The New York State Bar Association started a movement on June 26 to select non-partisan candidates for successors to Chief Judge Cullen and Associate Judge Gray of the Court of Appeals, whose terms expire on Dec. 31 under the age limitation. A committee of twenty-one will consider the qualifications of candidates for the two prospective vacancies.

Illinois took its position as a woman suffrage state when the House of Representatives passed by a vote of 83 to 58, June 11, the bill giving women the right to vote for Presidential electors and other offices not governed by the state constitution. The bill was introduced by Senator H. S. Magill and had already passed the Senate. Governor Dunne, who has for many years favored woman suffrage, signed the bill June 26. The act became effective July 1, with a probability that it would be tested in the courts.

As the result of the confession made to Judge Swann and District Attorney Whitman in New York City by Isidore Rader, the proprietor of a "fence" and of a school where young boys were taught to steal, hundreds of inquiries have been received by the District Attorney in regard to goods stolen from trucks, piers, and railroad depots in this city. Assistant District Attorney Moscowitz said that $5,000,000 was a conservative estimate of the value of goods stolen annually in recent years by street thieves in the city. This estimate was upheld by a representative of the Merchants' Association. Rader said that the business was conducted by some twenty men, and was as well organized as any legitimate business. He supplied the names of these men to the District

Attorney. According to Assistant District Attorney Moscowitz the net, when drawn, will probably contain policemen, detectives, stoolpigeons, jobbers, auctioneers, truck drivers, warehouse men, gatemen stationed at piers and railroads, and several lawyers who procured the discharge of prisoners arrested for street robberies. The investigation, it was thought, would consume most of July.

Bar Associations

California. — The fourth annual meeting of the California State Bar Association will be held at San Diego Nov. 20–22, 1913. This date was fixed at a meeting of the executive committee in June.

Georgia. — Justice Lamar of the United States Supreme Court delivered the annual address at the thirtieth annual meeting of the Georgia Bar Association, held at Warm Springs May 29–30. Three papers were read on the present government of Georgia, and there was a general discussion of the question, "Does Georgia need a new constitution and is the present an opportune time for calling a constitutional convention?" Officers elected were: President, Robert C. Alston of Atlanta; vice-presidents, G. E. Maddox of Rome, J. R. Phillips of Louisville, Frank U. Garrard of Columbus, E. T. Moon of La Grange; secretary, Orville O. Park of Macon; treasurer, Z. D. Harrison of Atlanta.

Iowa. — For the third successive time, the Iowa State Bar association rejected the recommendation of its own committee on law reform to prevent the reversal of trial court judgments on technical and inconsequential errors. The annual meeting of the Association was held at Sioux City, June 26–27. The first recommendation introduced by the committee was that an amendment be enacted providing that a case shall be reversed by the Supreme Court only when that court is satisfied that the error on which the reversal is based affected the substantial rights of the appellant. It was voted that the section be laid on the table. The committee sanctioned the withdrawal of recommendation No. 2, as a law had recently been enacted to cover the ground of the recommendation. A hot debate arose on a third proposition of the committee. Practically every recommendation of the committee was either tabled or postponed.

A resolution recommending that the bar association take part in the disbarment of lawyers, caused considerable debate and action was finally deferred.

A resolution was passed recommending that the committee on taxation continue its investigation of the administration of the tax laws of the state and make a formal report and recommendation at the next annual meeting.

A resolution was passed giving the committee on uniform laws an appropriation of $100, with which to conduct its investigation.

O. P. Meyers introduced a resolution authorizing the president to appoint a committee of five to make a report next year on proposals which would simplify and make less expensive the transfer of land titles.

Justice Horace E. Deemer delivered the annual president's address at the close of the morning session. He talked on "Representative Government." Mr. Deemer spoke scathingly of three popular law reforms of the day, the recall of judges, the recall of judiciary decisions and the initiative and referendum, opposing all of them.

F. F. Faville of Storm Lake, former

United States Attorney, read a paper on "Criticising the Court."

An address was delivered to the Association by Judge Emory Speer of Georgia vigorously denouncing espionage as a means of obtaining evidence against federal judges.

At the banquet, Judge Deemer acting as toastmaster, J. A. S. Pollard, a banker of Fort Madison, spoke on "Progress and the Lawyer." He declared that while industries, trade and commerce had made great progress, the lawyers and courts were still about fifty years behind. He said the United States Supreme Court and the Iowa Supreme Court showed some evidences of progress.

Justice W. S. Winthrow of the Supreme Bench spoke briefly of the leading cases in the history of the United States.

Schuyler W. Livingston of Washington gave a toast, "The Promise of the Lawyer." He criticised the statement made by Governor Hadley before the graduating class of Northwestern University this spring, that lawyers were becoming more clannish every day and were dominating law making.

J. U. Sammis of Sioux City, delivered a short talk on "Law Making."

His toast was preceded by that of Simon Fleischmann of Buffalo, who spoke on "Returning to First Principles."

The following officers were elected: President, Major John F. Lacey, Oskaloosa; vice-president, Frank Dawley, Cedar Rapids; secretary, H. C. Horak, Iowa City; treasurer, Frank Nash, Oskaloosa.

The next convention will be held at Burlington, Ia., June 25 and 26, 1914.

Maryland. — An address by Judge George Gray of Delaware on the judicial recall was the feature of the eighteenth annual meeting of the Maryland Bar Association, held at Cape May, N. J., July 2 and 3. Judge Gray referred to the recall as "a propaganda of anarchy."

The recommendation of a proposed law giving Baltimore an additional judge on the Court of Appeals was adopted with a referendum provision leaving the choice to the voters of the city.

The recommendation that a bequest shall not lapse because of the death of the legatee before the testator was adopted unanimously.

Judge Hammond Urner of the Court of Appeals spoke on "The Case of *The King* v. *Raleigh*." Congressman A. Mitchell Palmer of Pennsylvania spoke on the "Proposed Federal Income Tax Laws." Chief Judge A. Hunter Boyd of the Court of Appeals, in his address as president, in naming the important attributes of a good judge placed courage first, for unless a judge be corrupt, there could not be a more dangerous man than a coward on the bench. "There has never been a time in the history of our country when a fearless judiciary was a greater necessity," he added.

Edgar H. Gans of Baltimore, in an address on the Orphans' Court, said he hoped the day was not far distant when by constitutional changes the Orphans' Court, at least in large cities of the state, would be given the full dignity of Superior Courts, with power to decide all questions involved in the devolution of the estate of a decedent.

Mr. Justice Mahlon Pitney was the chief speaker at the banquet. Officers elected were: President, Judge Walter I. Dawkins of the Supreme Bench of Baltimore, succeeding Chief Judge A. Hunter Boyd of the Court of Appeals; James W. Chapman, Jr., Baltimore, secretary; R. Bennett Darnall, Balti-

more, treasurer; Ex-Judge Wm. J. Witzzenbacher, vice-president. Governor Goldsborough was also elected one of the vice-presidents.

Mississippi. — The speakers at the annual meeting of the Mississippi State Bar Association, held at Greenwood May 6–7, included Hon. Blewett Lee of Chicago, solicitor for the Illinois Central Railroad, Judge Percy Bell of Greenville, who spoke on "The Relation of Lawyers to Lawlessness," and A. T. Stovall of Okolona, on "Shall Mississippi Adopt the Uniform Commercial Acts?"

New Jersey. — There was some rather warm debate at the annual meeting of the New Jersey State Bar Association at Atlantic City June 13, 14, aroused by the charges made against a certain legislator in the report of the committee to reduce cost of legal advertising. The association voted against the acceptance and printing of this committee report. It was then voted that a new committee be named, to urge upon the legislature the restoration of the legal advertising rates fixed by law prior to 1909, when the present higher rate was enacted at the instance of newspaper publishers.

"There is no need for amending the Constitution of the United States." said Everett P. Wheeler, a prominent member of the New York bar. "Our system of government was founded as an experiment, and how well it has met the plans of the founders we all know."

Governor James F. Fielder, speaking at the banquet, said: "We did not get the brand of jury reform that we expected, but it is a vast improvement over the old system. I think you will agree with me when I say that New Jersey at the present time is in the forefront so far as progressive legislation is concerned. The legislation of the present day is of a higher type than in the old days. The people demand it, and the people always get what they want eventually."

Former Governor Fort responded to the toast, "The Federal Judiciary" on behalf of Mr. Justice Lurton, who had sent his regrets.

The following officers were elected: President, John W. Wescott, of Camden; first vice-president, George A. Bourgeois; second vice-president, John R. Hardin; third vice-president, Frederick W. Gnichtel; secretary, William J. Kraft; treasurer, Lewis S. Starr.

Rhode Island. — The Rhode Island Bar Association had their annual outing at the Pomham Club on Narragansett Bay on June 21. At the dinner a toast was proposed and drunk to "our four former Chief Justices," two of whom were present.

Tennessee. — The thirty-second annual meeting of the Tennessee Bar Association was held at Memphis, June 25-26. Albert W. Biggs, the president, delivered the annual address, and Blewett Lee of Chicago read a paper on "The Law of Aërial Navigation." Dr. William Thornton, Professor of Applied Mathematics in the University of Virginia, spoke on "Who was Thomas Jefferson?" He said there were five vital documents of basic importance issuing from the brain of Jefferson, the lawyer, within two years: (1) The Summary View of the Rights of British America; (2) The Reply of Virginia to the Conciliatory Proposition of Lord North; (3) The Congressional Declaration of the Causes of Taking Up Arms; (4) The Reply of Congress to the Conciliatory Proposition of Lord North; (5)

The Declaration of American Independence.

Hon. Thomas M. Pierce of St. Louis discussed "The City and the Railroads," Hon. John Bell Keeble of Nashville "The Influence of John Marshall on American Jurisprudence," Rome G. Brown of Minneapolis "The Judiciary the Servant of the People," and Judge Edward T. Sanford of Knoxville "The New Federal Equity Rules." Officers elected were: John Bell Keeble, president; J. L. McRee, W. B. Lamb, and Robert Barrow, vice-presidents; C. H. Smith, Knoxville, secretary (re-elected).

Obituary

Avery, Alphonso Calhoun, Justice of the Supreme Court of North Carolina from 1888 to 1897, member of the constitutional convention of 1875, died at Morganton, N. C., June 13, in his seventy-eighth year. He was graduated from the University at the head of his class, served with such distinction on the Confederate side as to earn the title of Colonel, and in 1868 was the youngest member of the state senate.

Bates, Joseph Clement, who died in San Francisco June 6, aged 77, was the oldest practising member of the San Francisco Bar Association, and was the author of several volumes, including "Forms and Use of Blanks," "Horace Hawes Will Case" and "History of the Bench and Bar in California." This last work was issued in 1912.

Batchellor, Albert Stillman, a former president of the New Hampshire State Bar Association, died at Littleton, N. H., June 15, aged 63. He had served several terms in the state legislature and also was a member of the Governor's Council. From Dartmouth, his *alma mater*, he received the honorary degree of Litt. D. He enjoyed an excellent reputation as an advocate at the bar.

Freeman, Harrison Belknap, known as one of the ablest members of the bar of Hartford, Conn., died July 4. He was a graduate of Yale in the class of 1862, and served as judge of probate from 1887 to 1908.

Jones, Judge *Henry C.*, last survivor of the Confederate Congress, died lately at Florence, Ala., aged 94. He was a prominent member of the state legislature before the war and voted against secession.

Kellogg, Sheldon Gaylord, for thirty years a leading member of the San Francisco bar, died at Santa Clara, Cal., June 20. He began practice in Detroit in 1881. During his practice in San Francisco he was associated with the late William F. Gibson, the late Alexander G. Eels and with Edwin T. Cooper. He was a member of the San Francisco Election Commission in 1900–1902, a trustee of the Public Library from 1901 up to the time of his death, and a member of the Civil Service Commission in 1909.

Russell, Horace, at one time judge of the Supreme Court of New York, died at his home, 47 Park avenue, New York, June 15. He was born in Bombay, Franklin County, N. Y., in 1843, and graduated from Dartmouth College in 1861. He attended the Harvard Law School, and in 1869 began the practice of law in New York City. In 1875 Mr. Russell was appointed assistant district attorney and occupied that position until 1880, when he served for three years on the Supreme Court bench. He was Judge Advocate General of New York in 1880–81.

Scott, John E., city attorney of Indianapolis from 1893 to 1895, died in that city June 22, aged 62.

James M. Kerr

DISTINGUISHED AMONG AMERICAN LAW WRITERS BY
SOLID ACHIEVEMENTS AS A PROLIFIC AUTHOR
OF MONUMENTAL TREATISES

The Green Bag

Volume XXV September, 1913 Number 9

James M. Kerr, the California Law Writer

By W. J. Stansfeld-Lamborn, A.A. (Oxon.)

IF, as is truly said by Professor Pierce Butler of Newcomb College, Tulane University, in writing an account of the life of Judah Philip Benjamin, the biography of the mere lawyer, with its bare record of cases won and cases lost, of nice legal points argued and subtile distinctions established, is apt to prove but dry reading, even if pathos, the humorous or the tragic, be injected from the more dramatic episodes in the criminal courts, — if this is eminently true as regards a lawyer in an active practice, what must we expect in the case of a legal author whose whole life is spent in overhauling dust-covered volumes and poring over "precedents," searching, analyzing, harmonizing or distinguishing, and classifying the decisions of courts; whose entire time and attention is confined to the dry and technical subjects in hand, which are to be measured by fundamental principles to fit all cases and not moulded to suit the purposes or necessities of a single occasion; and whose activities are confined within the sacred precincts of the walls of his own library?

Such is the case, and such the paucity of facts and details and incidents in the life and labors of a law-book writer who, for the past thirty years or more, has filled an important niche in the legal world and furnished much valuable literature to the legal profession. So modestly and quietly does he live, so completely is he engrossed in his labors and his studies, that he seldom leaves his own premises, is known by reputation to but few of his fellow-townsmen, and by sight to fewer still. To such an extent is this true that the "Rose Tournament Annual" of the Pasadena *Daily News*, in the issue of January 1, 1913, says:

"Pasadena today harbors and is honored by the permanent citizenship of one of the most noted writers of legal texts the country has produced — and so modestly does he live and enjoy the benefits and beauties of this city that few people within her borders know him, or of him, while his works are found on the shelves of every law library of consequence in the counry. This veritable legal bookworm is James M. Kerr, who resides in a very pretty bungalow, 'Kerowe,' at 1840 Lundy Avenue."

James M. Kerr was born at a log-house in the "maple swamp," in the western part of Miami county, Ohio, December 30, 1851, the son of Jonathan Thompson and Matilda (Westlake) Kerr. He is of Scotch descent, his progenitors being of one of the prominent families of Kers and Kerrs (individuals of the same

household spell the name in these different ways) of Roxburghshire, Scotland, and came to this country, by way of Londonderry, Ireland (where they sojourned a few months only), landing at the port of Philadelphia early in the year 1708. Their descendants took part in the Revolution, fighting for the liberty of the colonists. Mr. Kerr's father and his grandfather, Col. Josias Westlake, were prominent educators for a great number of years, and were also leading farmer-folk. Mr. Kerr grew up on the farm; his life there was much the same as that of any other sturdy farmer-boy of the time; here he acquired a fine physical development and a store of nervous energy which has served him so well in later years, enabling him to work at his desk twelve to fourteen hours a day without undue fatigue. He was well grounded in the rudiments of an education at the district school; attended the high school at Tippecanoe City, walking two miles and a half morning and evening from and to his home; and thereafter attended the National Normal University, at Lebanon, Ohio.

The career and success of Mr. Kerr as a law-writer and author of well-known and highly-prized law books is a signal example of success achieved in the profession by one to whom the active practice — the actual trial of cases in court; the delay and necessary "waste of time" incident thereto — was distasteful in many respects. Being of studious habits and an acquisitive turn of mind he has devoted his life to the acquisition and mastery of the principles underlying the science of the law and to the systematization and elucidation thereof. Preferring fame to pelf, he early commenced to write on legal subjects, and by earnest application and tireless industry has climbed to the vantage-ground of a mastery of the general science of the law and the decisions of the courts.

Being a "disciple of the Dwight method," as contradistinguished from the modern "case method" followed at all the law schools, Mr. Kerr puts his reliance in fundamental principles of general application and not in "precedents" or cases applying to a given state of facts and of restricted application only; in other words, he does not regard all "precedents" as good law, simply because a *pronunciamiento* of a judge from the bench, which may be weak or strong, cogent and correct, or violative of the fundamental principles by which the case is governed, according as the judge is well-read or otherwise on the law, or the *motif* of the decision be upright, biased or otherwise influenced. A judge he regards as good as any other man, as long as he behaves himself as well, and fearlessly and honestly discharges his duty as he sees it, without fear or favor; but a judge on the bench is not different from or superior to or more learned than the same individual at the bar; and the methods by which judges are selected, and the influences which have been and still do dictate in this matter, do not assure that the best men are always selected. A poor lawyer, or one otherwise unworthy, elevated to the bench never can become a learned and eminent judge, and his written opinions are to be respected and followed as precedents in so far and only in so far as they are based on sound reasoning and well-established principles of the law. In other words Mr Kerr is not a respecter of "precedents" as such, merely because they are the deliverance of a judge from the bench.

Mr. Kerr was called to the bar in Ohio in 1877, and thereafter was admitted to

MR. KERR'S BUNGALOW AT PASADENA
In the fireproof library building adjoining he does all his legal work

the bars of various courts, state and federal, in which he subsequently practised or had causes pending, including the bar of the Supreme Court of the United States in 1888. He commenced the practice in the county seat of his native county, utilizing the leisure hours, incident to the building up of a practice by a young lawyer, in study and the preparation of "essays" or articles on narrow and abstruse legal points. These essays he published in the leading law journals and monthly professional publications of the time, including the *Southern Law Review*, *Central Law Journal*, *Western Jurist*, *American Law Record*, *American Law Register*, *Albany Law Journal*, and others. His activities and output in this direction were of such an extent, and the matter of his articles of such interest and value, that in the first volume of "Jones' Index to Legal Periodicals" (published in 1888), Mr. Kerr is given credit for having written and published more legal articles of interest to the legal profession, and worthy of preservation, than any other person in either England or America, with the exceptions of Judge Isaac Redfield, for a great number of years one of the editors of the *American Law Register*, and Irving Browne, for more than twenty years the editor of the *Albany Law Journal*.

Mr. Kerr early drifted from the active practice into legal journalism to such an extent that legal authorship has ever since been his vocation, and the practice of the law but an avocation. In 1882 he joined Charles A. Lord and James H. Bowman in the *Ohio Law Journal*, as the editor of that publication. In 1884 he founded, in connection with George H. Manchester, the *American Law Journal* at Columbus, Ohio, and conducted it successfully until Banks & Brothers, who were the official publishers of the Ohio Law Reports, sought to

enjoin him and his publisher (see *Banks* v. *Manchester*, 23 Fed. Rep. 143) from printing in that periodical the decisions of the Supreme Court of Ohio as they were handed down. Mr. Kerr fought the case successfully through all the courts and finally won a decisive victory in the Supreme Court of the United States (see *Banks* v. *Manchester*, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36), establishing a new principle in the law of copyrights — that the opinions rendered and handed down by the supreme courts of last resort of the country are the property of the people at large, and not of the publisher of the volumes of official reports.

Mr. Kerr then accepted a position as assistant editor to Mr. William G. Myers in the preparation of "Myers' Federal Decisions," and later was employed by the West Publishing Company as editor of the National Reporter System. While still at St. Paul, Mr. Kerr received overtures from and accepted a position with the Lawyers Coöperative Publishing Company and removed to Rochester, New York, where he rendered efficient aid to Mr. Robert Desty in the preparation of the annotated edition of the New York Chancery Reports, published by the Lawyers Coöperative Publishing Company. He resigned his position with the publishing company to accept a partnership in the practice with Mr. Philetus Chamberlain, which partnership was not dissolved until Mr. Kerr's removal to New York City. Mr. Kerr now became for a short time the editor of the American and English Corporation Cases and the American and English Railroad Cases, published by the Edward Thompson Company, and was one of the first editorial writers on the American and English Encyclopædia of Law, and for some of the leading features of that valuable work the publishers and the profession are indebted to Mr. Kerr — as an inspection of his articles in the first eleven volumes of the first edition will show.

While at Rochester Mr. Kerr prepared an edition, in two volumes, of Benjamin on Sales, for Charles H. Edson & Co., of Boston; the third edition of Crocker on Sheriffs and a work on Business Corporations, for Banks & Co., of Albany, N. Y.; Before and at Trial, for the Edward Thompson Co.; Wiltsie on Mortgage Foreclosures (second edition, entirely re-written) for Williamson & Co., Rochester, and a work on Homicide, for Banks & Bros., New York City.

In 1889 Mr. Kerr entered into a contract with Banks & Bros., for the preparation of a treatise on Real Property, in three volumes, and in the fall of that year removed to New York City, entering the office of Morse, Haynes & Wensley, 10 Wall Street. Later he formed a partnership with Charles A. Gregory, under the firm name of Kerr & Gregory, with offices at 261 Broadway, where they did a general practice, and on Mr. Gregory's retiring from the practice with Philip Van Volkenburgh, under the name of Kerr & Van Volkenburgh, with offices at 68 Broad street, and made a specialty of corporation law. As a member of that firm Mr. Kerr made the investigation and submitted the written report upon which was founded the proceedings in the United States Circuit Court, before Judge Lacombe, in which the affairs of the Colorado River Irrigation Company were wound up and a great fraud upon the public ended. In this investigation the laws of Mexico were involved, and Mr. Kerr examined minutely the five codes of Mexico, making, and incorporating in his report, translations of all pertinent laws.

In the year 1895 Mr. Kerr completed, and his publisher brought out, the work on Real Property, in three volumes; in 1897 he completed and Williamson Law Book Company published, a Supplement to his work on Mortgage Foreclosures, a valuable addition to that work making a volume of eleven hundred pages. For two years Mr. Kerr edited and annotated the New York Civil Procedure Reports, published by Peloubet. In 1899 he brought out a local work on Attachment, prepared for the Laning Publishing Company, of Norwalk, Ohio.

During the thirteen years Mr. Kerr was in the active practice in New York City he tried many important cases, with the varying success incident to a careful lawyer with an extensive practice, a few of which only were of such novelty as to be entitled to consideration here.

On the formation of Greater NewYork, by the consolidation with New York City of Brooklyn, Long Island City, Staten Island, and the Bronx, and the turning of the offices and positions of employment in the new city thus formed over to the Tammany Hall organization, considerable important litigation sprang up. Under the provisions of the new charter (§1536) directing "the apportionment between the several public departments, bureaus, and offices, and the assignment to service to said public departments, bureaus and offices respectively, so far as practicable, of all the subordinates and employees in every branch of the public service in each of the several municipalities and public corporations hereby consolidated," it was specifically provided, among other things, for the transfer of the dockmasters to a like department and assignment to perform like duties in the new city, and the law directed the acting mayors and certain judges, as a board, to make the designated transfers, which transfers made, the functions of said board were to cease and said board was to cease to exist. The Tammany authorities succeeded in having the Brooklyn dockmasters, who were all Republicans, transferred to the finance department of the new city, instead of to the department of docks and ferries, as the charter directed. Bird S. Coler, in charge of the finance department, having no duties to which he could assign the Brooklyn dockmasters, discharged them. Twenty-six of these discharged Brooklyn dockmasters applied to Mr. Kerr to secure for them the rights they were entitled to under the charter, and reinstatement as dockmasters. The case was an anomalous one. By the provisions of the charter the mayors of the consolidated cities and county judges named to form a board to make the transfers to the proper departments in the new corporation were no longer in office, and the board of transfer, being *functus officio*, was no longer subject to mandamus to compel correction of the manifest error — at least so Mr. Kerr thought, and he found all the leading authorities so holding. An action in mandamus was commenced against the Commissioners of Docks and Ferries of the new corporation, of which J. Sargent Cram was president, to compel reinstatement as dockmasters and assignment to duty as such, at the same time serving notice on Bird S. Coler, as head of the finance department, of the pendency of the action, which had the effect to prevent the payment of the salaries to the Tammany dockmasters appointed to take the places and perform the duties of the discharged Brooklyn dockmasters. The case was won in the Supreme Court (the court of first instance), but the decision was reversed in the appellate division, on the ground that the error

could not be corrected in a collateral proceeding (see *The People ex rel. Percival et al.*, v. *Cram et al.*, 32 App. Div. 414, 53 N. Y. Supp. 110) which ruling was affirmed by the Court of Appeals, and on the same ground. At the argument of the case before the Court of Appeals the judge expressed doubt as to the procedure taken being the correct one, and Chief Justice Parker remarked from the bench that the proper procedure was mandamus against the board of transfer, and not against the Commissioners of Docks and Ferries, to which three of the Associate Justices gave express assent (see 158 N. Y. 666, 52 N. E. 1125 — this opinion of the judges from the bench is not given).

Mr. Kerr lost no time in instituting another mandamus suit against the defunct board of transfer, secured a correction of the error, and then by mandamus against the Commissioners of Docks and Ferries succeeded in having the twenty-six Brooklyn dockmasters restored to position and assigned to duty in the dock department, and secured for them back pay for the two years they were out of the employment of the city, amounting to something over $68,000.

In *Matter of Hurlbert Brothers and Company*, 160 N. Y. 9, 64 N. E. 571, a New York corporation was going through voluntary liquidation. The referee found and reported that the New York corporation was owing to the E. C. Mecham Arms Company, a corporation of St. Louis, Mo., $13,000, and the order of the court was so entered. The Mecham Arms Company was owing to a client of Mr. Kerr's, who resided in New York, $7,000, and Mr. Kerr immediately filed an attachment on the dividend to be paid by the receiver under the decree of the court. In the meantime the Mecham Arms Company had made an assignment for the benefit of creditors,

INTERIOR OF THE LIBRARY

The windows command fine panoramic views of the neighboring mountains and valleys

to William M. Bulkley, as trustee, specifically providing in the assignment for the payment of certain preferred creditors, but reserving the right to at any time within thirty days pay off the preferred creditors and resume the assets and business. The attachment in New York was made after this assignment, but before the lapse of the thirty days reservation, and without notice, either actual or constructive, of the assignment. Thereafter, and long after the referee in the New York corporation proceedings had made his report to the court and the decree of the court had been entered, Bulkley, as assignee, filed a motion in court to have the decree amended by substituting his name, as trustee, in front of the name of the Mecham Arms Company, as the person entitled to receive the dividends under the decree of the court. On behalf of the attaching creditors, Mr. Kerr opposed this motion on the grounds: (1) that the motion should be made to have the matter referred back to the referee, and a motion made before him for substitution and a correction of his report, so that the right to receive the money as between the referee and attaching creditors could be duly litigated; (2) that the assignment was with preferences, and therefore void as against a creditor in New York pursuing the ordinary remedies by attachment in the New York courts against property located in that state; (3) that the assignment was made with reservation of the right to pay off the preferred creditors within thirty days and resume the assets and business of the corporation; (4) that the thirty days had not elapsed when the attachment was levied, and that the title to the property of the corporation was not vested in the assignee at the time the attachment was levied; (5) that the rights of the attaching creditors were superior to the right of the assignee; and that the legal question was one which must be heard and determined by the referee in bankruptcy, and that he must designate in his report the persons entitled to receive the dividends that might be paid. The contention of the assignee was that the title to the property, it being personalty, followed the person of the owner, and passed *eo instanto*, on the assignment, to him as assignee.

The special term upheld Mr. Kerr's contentions, the assignee appealed, and the Appellate Division reversed the special term (see *Matter of Hurlbert Brothers & Co.*, 38 App. Div. 323, 57 N. Y. Supp. 28). On appeal to the Court of Appeals Mr. Kerr's contentions were all upheld (see *Campbell* v. *Buckley*, 160 N.Y. 9, 17, 64 N. E. 571).

Since coming to California Mr. Kerr has done his most important literary work in his Cyclopedic Codes of California, in six large volumes, comprising about 9000 large pages, and in his Consolidated Supplement thereto (now in press) bringing the Cyclopedic Codes down to date, consisting of two volumes of about 1500 pages each. This work is surely the equal, and in many respects the superior, of anything of the kind ever attempted before, and these Cyclopedic Codes, in less than a decade, have taken their position as a "legal classic." Too much praise cannot be bestowed upon this monumental work. Many lawyers find it all-sufficient for a large and varied practice; and all practitioners turn to it first, when a difficult, or new or a novel question confronts them. While prepared primarily for the state of California, this set of Codes — which are in truth what their name would indicate, a veritable cyclopedia of law and practice — circulates as readily and as extensively, and is as helpful and as

reliable authority, in the other Pacific Coast states as in California.

In addition to his Cyclopedic Codes Mr. Kerr has prepared a set of Pocket Codes and the General Laws, which has some novel and valuable features, and the advantage of being easy to handle and selling at a reasonable price. He has also prepared a volume of Nevada Notes of Cases; edited and annotated three volumes of Water and Mineral Cases, published by Callahan & Co., Chicago, treating of the complicated questions respecting irrigation, drainage, mines and mining, oil, and gas, — all questions of peculiar and vital interest in the western states and territories. He also prepared a new and much improved edition of that standard legal classic, Wharton's Criminal Law, in three volumes, adding more than five hundred new sections and 27,000 cases.

In this connection it may not be out of place to call attention to the fact that Mr. Kerr was the first legal writer who paid any attention to system in the arrangement of the authorities he cites. Before his innovation the citation of cases in all law books was a mere "jumble" of authorities. Mr. Kerr has ever arranged them by states and in chronological order of decision. The advantage of this method of citation and arrangement is so manifest that it has since been adopted by almost all law writers. By this arrangement a work of national scope, like Mr. Kerr's edition of Wharton's Criminal Law, becomes also local to any practitioner in any part of the country, for the reason that the cases of his own state are all collected in one place, and set out by black-faced type, to aid the searcher in going at once to the state wanted — and Mr. Kerr has gained the reputation of citing *all the cases* on any point he treats.

The Recall in Colorado[1]

By Judge Jesse G. Northcutt

IN THE announcement of the program for this meeting, there is the timely and pertinent suggestion that "the purpose of the papers to be given is not to oppose such legislation but, conceding its existence, to endeavor to so shape it that it will accomplish the most good and the least harm."

The force of this suggestion settles down upon us as, by a reference to our statute books, we find that so many of the subjects which were matters purely of speculation in the realm of sociology a few months ago, are now crystalized into law in the document constituting the fundamental principles upon which the frame-work of our statutory law is constructed; and we are made aware — some of us probably for the first time — that law-making has almost become a mania with the people of our land, and the danger lies in making too much law, grown from the inclination to regulate everybody and everything by legislative enactment; and whether we are in favor of or opposed

[1] Read before the Colorado State Bar Association at Colorado Springs, Colorado, July 11, 1913.

to the laws which constitute the subject of this paper is now not a matter of consequence. It is upon us, and the thing to do is to understand it in all of its phases, and prepare to find the best of it and escape the worst of it.

In our determination not to oppose the law, however, we are not deprived of the opportunity of analyzing, criticising, and suggesting in relation thereto; in fact, we believe that is the object and purpose of the occasion.

We in Colorado, as in so many things, are on the subject of the recall more fortunate than many of our sister states. Many of them in the poverty of their legislation upon the subject have but one phase of recall, namely the recall of officers from office. We go them one better, and are provided with the very latest invention upon the subject, namely the recall, or more properly speaking the review of judicial decisions, when rendered upon certain subjects by the only court in which is left the power to speak upon those particular subjects at all. If there is any other state in the Union that has upon its statute books this very novel law, it has not been called to my attention; and whether our constitutional provision upon that subject is a law, which the people of this state will be required to observe, will probably not be known until the court of last resort has expressed its opinion upon the many vagaries, ambiguities, uncertainties, and confusions therein embodied, as will be elucidated by a careful analysis of the constitutional provisions.

Of this particular subject we will speak later; let us now devote our attention to a cursory analysis of the amendment adopted and appearing in our constitution as Article 21, and familiarly known as The Recall from Office.

This amendment was carried by a popular majority of a little over fourteen thousand, less than thirty-five per cent of the entire vote polled having voted on the subject. So it remains a mooted question whether it is the will of the majority of the people of the state, but it is settled that it is the will of the majority of those who saw fit to express their opinion thereon, and this makes it law.

There has been some discussion of the validity even of a constitutional enactment of this character, upon the theory that the direct management and control of the elective officers by the people at large was such a relegation to a purely democratic form of government as to be inimical to that provision of the federal Constitution guaranteeing to each of the states a republican form of government, and that portion of the enabling act whereby we pledge ourselves to maintain, at all times, a republican form of government for our commonwealth. The few state courts that have passed upon this question have held similar constitutional provisions or statutory laws to be within the legislative power, and not inhibited by the federal organic law.[2]

Our federal Supreme Court, while not passing upon this particular question, yet one of similar import — the initiative—has held the question to be not justiciable, but one for the determination of the supreme law-making body of the land.[3]

The matter presents itself to my mind as meaning merely an additional method of removing an incumbent from his office, which if done for cause undoubtedly would appear just as legitimate as would the method by informa-

[2] *Bonner* v. *Belsterling, et al.* 137 S. W. 1154 (Texas).

[3] *Pacific Telephone & Telegraph Co., Pltf. in Error* v. *State of Oregon*, 32 Sup. Ct. 224. See also *Ex Parte Wanger*, 95 Pac. (Okla.) 435.

tion in a court of competent jurisdiction. Being a removal, however, based upon arbitrary, capricious, or whimsical grounds, it could, of course, be tolerated in no forum save the great tribunal composed of the whole people.

But accepting this Article 21 as a part of our organic law, a careful analysis of it discloses many features which, in my judgment, are capable of improvement.

The first paragraph of Section 1 of the Act provides that "Every elective public officer of the state of Colorado may be recalled from office." Standing alone, this language might be construed to apply only to state officers; but the fifth paragraph of Section 4 of the Act extends its application to county and municipal officers, and the seventh paragraph of the same section, as nearly as language can make it, extends the Act to every officer obtaining his office from whatever source, or through whatever channel or avenue, if he discharges any governmental function.

A study of the method and procedure described, and the effect thereof, is indeed interesting. It is provided that a petition signed by twenty-five per centum of the vote cast for all of the candidates for the office recall from which is sought, and filed with the proper officer, namely the officer with whom nominations for such office should be filed, shall be sufficient to set the machinery in motion. Such petition shall contain a general statement, in not more than two hundred words, of the grounds upon which the recall is sought. The only purpose of this statement is the edification of the electors, and the electors shall be the sole and exclusive judges of the legality, reasonableness, and sufficiency of the assigned grounds for such recall, and no review of their determination upon that subject is permitted.

Section 2 of the Article provides a method for determining the regularity and legality of the signatures signed to the petition, and fixes the officer with whom the recalling petition is filed as a tribunal by which such protest must be determined. The hearing shall be summary, without delay, must be concluded within thirty days after such petition is filed, and the result thereof forthwith certified to the person or persons representing the signers of such petition. In case the petition is not sufficient it may be withdrawn by the person, or majority of the persons, representing the signers of such petition, and thereafter amended and refiled as an original petition. The finding as to the sufficiency of any petition may be reviewed by any state court of general jurisdiction in the county in which such petition is filed, upon application of the person or persons, or a majority of the persons, representing the signers of such petition. The review is likewise summary. The tribunal of first instance as well as the reviewing court is barred from looking to the grounds of the petition in determining its sufficiency; that matter is left to the electorate. The petition once determined as sufficient, together with a certificate of its sufficiency, shall be presented to the Governor, who shall call an election thereupon, fixing the date not less than thirty nor more than sixty days from such submission, unless a general election is held within ninety days after the submission of such petition, in which event the recall shall be a part of such general election.

Section 3 provides that if the officer sought to be recalled shall offer his resignation, it shall be accepted, and the vacancy thus created filled as provided by law. The person appointed to the

vacancy, however, shall hold only until the qualification of the person elected at the recall election. If, however, the person sought to be recalled does not resign within five days after the petition seeking his recall is held sufficient, the Governor shall cause the publication of the notice of holding the election, and the officers charged with duties pertaining to elections shall proceed as in other elections. On the official ballot shall be set forth the reasons mentioned in the petition for demanding the recall, and in not more than three hundred words shall be printed, if desired by the officer, his justification of his course in office.

It is well to note here the privilege so benignly bestowed on the incumbent in the shape of one hundred words more of argument than his assailant is allowed, because, as the other provisions of the amendment are examined, his need of this privilege becomes obvious.

The form of the ballot is provided for in the amendment.

Then in Section 4 clearly appears the rough road the recalled one has to travel. It provides that on the ballot under the question asking whether or not the incumbent shall be recalled shall be printed the names of those candidates who have been nominated to succeed the person sought to be recalled; and that no vote shall be counted for any candidate for such office unless the voter also vote, for or against the recall of such person sought to be recalled from said office. Here comes the stinger: "The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office."

If a majority of those voting on such question of recall shall vote "no," the incumbent shall continue in office. If a majority shall vote "yes," the incumbent shall be removed upon the qualification of his successor. No vote is cast expressly for the incumbent. So it will be observed that if all those voting for the candidates whose names are placed on the ballot desire that their candidate should be elected, and prefer him to the incumbent, they should vote "yes" on the recall, which they will understand they must do in order to remove the incumbent, for the individual preference and the affirmative votes for those several candidates should aggregate a majority of the votes ballotted, even though the majority of the people voting might prefer the incumbent to any person nominated against him, and would so express themselves if the incumbent were placed on the ticket with any one or more of the candidates named. For paragraph 8 of the section provides: "If the vote at any such recall election shall recall the officer, then the candidate who has received the highest number of votes for the office thereby vacated shall be declared elected for the remainder of the term, and a certificate of election shall be forthwith issued to him."

To illustrate, let us suppose we wish to remove the Governor. Suppose our vote on that office is 200,000. It was more last year, but we take the easier number for illustration. This would require a petition of fifty thousand names to start the recall. After the petition is held sufficient, we have up to fifteen days for the election in which to file nominations of candidates. If we are really anxious to get rid of the Governor, we will take a favored son from every populous portion of the state, and just as many of them as we like. Let us suppose we have a vote of two hundred thousand and we have ten candidates; nine of them get ten thousand votes each, one of them gets eleven thousand,

making their aggregate vote 101,000 votes, and each one who voted at the election for any one of these ten candidates votes "yes" on the subject of the recall. The Governor is recalled, even though out of the two hundred thousand, and against the ten candidates, there were cast ninety-nine thousand votes against the recall, and the man receiving the eleven thousand votes is elected against the man who really received ninety-nine thousand on the proposition. The proposition is not nearly so large, and much more easily handled in the counties taking the officers one at a time; so it can be readily seen how the merry war will go on when it once starts.

Paragraph 9 of the same section provides that "candidates for the office may be nominated by petition, as now provided by law, which petition shall be filed in the office in which petitions for nominations to office are required by law to be filed, not less than fifteen days before such recall election." Whether this should be interpreted strictly, and leave this the only manner of nominating for office, is not clear. Presumably, however, in carrying out the desired end, to leave everything to the people, they should be permitted to nominate in any way known to the law.

By Section 4, it is provided that "no petition shall be filed against any officer, until he has held his office six months, except a member of the legislature," who is vulnerable to attack from and after the fifth day from the convening of the legislature to which he is elected.

The second paragraph of this section generously exempts the incumbent from a second attack of the recall, save by application of fifty per cent of the electorate.

In Oregon the petitioners on second recall must pay the expense of the first recall election.

Paragraph three of Section 4 provides as follows: "If at any recall election the incumbent, whose recall is sought, is not recalled, he should be repaid from the State Treasury any money authorized by law and actually expended by him as expenses of such election, and the legislature shall provide an appropriation for such purpose." Query: If the legislature has failed to create a fund or make an appropriation to meet contingencies of this character, would the courts enjoin the calling of any election to recall an officer until an appropriation had been made to meet the expenses of his possible victorious campaign?

Section 4: "If the Governor is sought to be recalled under the provisions of this Article, the duties herein imposed upon him shall be performed by the Lieutenant-Governor; and if the Secretary of State is sought to be recalled, the duties herein imposed upon him shall be performed by the State Auditor." The time within which such duties are to be performed is not stated. We presume it is pending the election, or would begin to run probably from the time the notice for the election is published.

Sections 5 and 6 extend the curative provisions of this constitution to county, city and county, cities and town, etc., "under such procedure as shall be provided by law," and provide that until otherwise provided by law the legislative body in such county, city and county, city and town, etc., may provide the manner for commencing such recall petitions in such counties, cities and counties, etc., but shall not require any such recall petition to be signed by electors in number more than twenty-five per centum of the entire vote cast at the last preceding election, as in

Section 1 herein more particularly set forth.

We presume for counties this means the Board of County Commissioners shall signify the procedure necessary to supplement the constitution, to put it in operation in such jurisdictions, and this provision suggests a few queries:

First, Are the expenses of the incumbent sought to be recalled in the county or city to be paid out of the county or city treasury?

Second, Would an appropriation therefor be necessary in order to cause the machinery to be put in motion?

Third, If it is an officer for a district larger than a county but less than a state, such as a judicial officer, from what treasury is he reimbursed, and what county or what Board of County Commissioners fixes the procedure? Would district judicial officers for the purposes of this constitution be denominated state officers? There are conflicting authorities on some of these questions.

Paragraph 7 of this section involves some principles worthy of study. The purpose of the first part of the section was undoubtedly to extend the recall to every known officer, from a constable or policeman up to the Governor. Still there is left open the principal answer, just what officers exercise public or governmental functions, powers, or duties? The last sentence of this section, however, is the one which we apprehend escaped the observation of the average voter, namely: "Provided that, subject to regulation by law, any person may, without compensation therefor, file petitions or complaints in courts concerning crimes, or do police duty only in case of time of danger to person or property." We presume that the last clause, "In case of time of danger to person or property" refers to the right to do police duty. Certain it is that the functions of the District Attorney are by the proviso sought to be handed to any person, and the privilege given to appear in any court and file complaints, and presumably follow the complaint with prosecution.

The last paragraph of the article puts the amendment in full force and operation, without supplementary legislation by the legislature, but condescendingly permits the legislature to so legislate as to facilitate and hasten its operation.

One query worthy of consideration now, which will be later outgrown, is: Can this amendment, which in the absence of the proclamation from the Governor took effect on the 23d day of January, 1913, apply to officers elected at the General Election of 1912: that is to say, inasmuch as those officers, when elected and qualified, took offices the terms of which were fixed by the constitution, can they be ousted by following the provisions of a law which took effect after their induction into office?

We think the various queries hereinbefore suggested are worthy of consideration by the bar. Their resolution, or attempt to resolve them, will lead to a greater familiarity with the law and its purpose, and suggest wholesome amendments and improvements which will promote the accomplishment of the purpose which brought the law into existence. Undoubtedly there was a reason for the enactment of this law, and it is the business of the lawyer to find the reason, and in the light thereof to read the purpose of the law and aid in carrying it out. Like all other instruments of worth it is capable of abuse and if the legislature, through the exercise of the power granted to it by the amendment in question, can throw out such safeguards and such auxiliaries in the way of legislation as will retard

the evil use that may be made of the law, and promote the purpose intended by the law, it will be subserving its duty to the public. That the law is capable of abuse is demonstrated by the views which many people have of it. Since it went into effect, the only talk we have heard in Colorado of invoking it was upon two occasions, and on each of those against officers who confessedly were discharging their duty in the enforcement of the plain provision of the law. But the fact that the ebullition of temper which prompted the agitation subsided when it met with the advice of the more far-seeing, is an evidence that the dangerous element in the law is not of so ready avail, as a discerning fear on reading the document might suggest.

THE OTHER RECALL

The fact that constitutional or statutory provisions for the recall of officers have been made in so many of the states of the Union, proclaims, with almost overwhelming strength, the existence of a good reason for its enactment. The subject has been one of public discussion for more than a decade, has agitated the minds of thinking people throughout the Union, and has elicited through the press and from the platform their well-matured views; hence it cannot be said that the law is hasty or ill-advised, even though we may criticise some of the provisions thereof, and suggest an improvement thereon. While this may be said of the recall of officers, can the same comment be fairly made of the recall of judicial decisions?

This law seems to have had its birth in the utterance of one who had theretofore proclaimed the recall of judicial officers "a very foolish experiment," and said that "its follies may be illuminating to other states in the Union." Such was the language of Colonel Roosevelt in commenting upon the judiciary recall in the constitution of Arizona. He adds: "Personally I do not think, under normal circumstances, it is advisable to have the principle of popular recall applied to the judiciary." (*Outlook*, vol. 98, page 378; *id.* 852.) But after this potent utterance against the application of the recall of judiciary came the decision of the Court of Appeals of New York on the Employers' Liability Law — a favored measure of Mr. Roosevelt — and, we believe, germinated the thought in his mind to stand upon his previous utterance, yet attack the body which, in his judgment, had committed an inexcusable error in its judicial interpretation of the favored statute.

These observations are made with the most profound respect for a person whose views and labor I hold in the highest esteem. It is, however, to be regretted that a longer period of consideration could not have been afforded us upon the adoption of the amendment of Article 6 of our constitution, as I think a less confusing amendment would have been accorded us.

An analysis of the amendment may prove of interest and possibly of profit.

The first sentence of the section reads as follows: "The judicial power of the state as to all matters of law and equity, except as in the constitution otherwise provided, shall be vested in the Supreme Court, District Courts, County Courts, and such other courts as may be provided by law." Comparing this sentence with Section 1 of Article 6 of our old constitution, we find that the only change in that sentence of the amendment is to omit the words "Justice of the Peace," thereby eliminating justices of the peace as a constitutional part of the judicial power of our state,

and to the real technical mind raising some doubt as to whether or not we now have any justices of the peace, for the last clause of the sentence reads: "any such other courts as may be provided by law," or, "as have heretofore been provided by law," or "as are now existing under the sanction of the law." We assume that, for the stability of our judiciary, and the preservation of rights now involved and the maintenance of our Court of Appeals, if this particular question is presented, the Court of Last Resort will probably say that the voter had in mind the courts now in existence, which are purely creatures of statute, and intended to continue them as a part of the judicial power of the state; yet the question is not free from doubt, particularly in its application to justices of the peace. For the query arises: Has the Court of Justice of the Peace been created by law, that is, by act of the legislature? It has been unnecessary, up to the time of the enactment of the amendment in question, to create it by law, as it theretofore existed perforce the constitution; and, if it had not been theretofore created by law, then was it in contemplation of the electorate in adopting this amendment, save to destroy it by such amendment?

A perusal of the statutes on this subject will increase rather than dispel the doubt. The Territorial legislature, in 1868, speaking on this subject (page 188, Section 1, R. S. 1868), uses language which might signify or be interpreted to mean the creation of the Court of Justice of the Peace. It is: "There shall be in each township organized by the Board of County Commissioners of any County two justices of the peace, . . . one justice . . . to be elected annually on the day which may be fixed by law." But in the first Act upon this subject, after the adoption of the constitution, the legislature, evidently recognizing the existence of the court perforce the constitution, uses the language: "The Boards of County Commissioners of the several counties in this state shall, at their July meeting, next after the passage of this Act, divide their respective counties into as many Justice precincts as the necessities of the county may require . . ." (General Laws of '77, Section 551). This language evidently does not create the office, but merely lodges the power with the board to define the territorial limits within which the office shall operate. So to the casual reader it would appear that unless some industrious person can put his finger on the law creating the office of Justice of the Peace, we now have none.

The next thing the new amendment does, after destroying justice of the peace courts, is to create for counties, or cities and counties having in excess of a certain population, to wit 100,000, a new court for the trial of all offenses concerning or involving minors, with exclusive jurisdiction. Query: From the jurisdiction thus fixed, if an octogenarian should murder an infant, would the District Court of the City and County of Denver have jurisdiction to try him on the charge of murder?

The language of the constitution on the subject is as follows: "In counties, and cities and counties, having a population exceeding one hundred thousand, an exclusive, original jurisdiction in cases involving minors, and persons whose offenses concern minors, may be vested in a separate court now or hereafter established by law." Possibly, as this jurisdiction is permissive only, it will be operative only when the legislature declares it shall be so lodged, and not otherwise.

The next and third subject of the amendment is to deprive all of the courts of the state of jurisdiction which they have heretofore had as follows: "None of said courts, except the Supreme Court, shall have any power to declare or adjudge any law of this state, or any city charter or amendment thereto, adopted by the people, under Article 20 hereof, as in violation of the constitution of this state or of the United States, provided that, before said decision shall be binding, it shall be subject to approval or disapproval of the people, as follows . . ." All of the courts have heretofore had the power to express their honest convictions, and follow the dictates of their conscience in determining and declaring the constitutionality of any law by whatever power made. Now they are stricken dumb upon the subject, all save the Supreme Court, and the final conclusive authority heretofore held by it is taken away, and vested in the electorate by the procedure following: "Such decision shall be filed in the office of the Clerk of the Supreme Court within ten days after it is finally made. If it concerns itself with a state law, it shall not be binding until sixty days after such date. Within said sixty days a referendum petition, signed by not less than five per centum of the qualified electors, addressed to and filed with the Secretary of State, may request that such law be submitted to the people of this state for adoption or rejection at the election to be held in compliance herewith."

As to how far the Court, in construing this provision of the constitution, will permit itself to be shorn of power and its jurisdiction destroyed, remains to be seen. It is a fundamental principle of law that the courts have a right to protect, maintain and preserve their existence, and should ignore any law which tends to destroy utterly the purpose for which they were brought into existence. The judicial department, from the nation down, is one of the co-ordinate branches for the administration of the law in the jurisdiction of which it is a part, and constitutes one of the co-ordinate branches of our sovereignty, and, as a part of this co-ordinate branch, the Supreme Court in every jurisdiction has been since the creation of our republic recognized and held to be the Court of Last Resort, beyond which there was none higher. Just the same as the legislative bodies have been recognized as the supreme law-making power of the land, and the chief executive as the head of the executive department, when this power is taken away and thrown back to the people to administer, the distinction between a republican and democratic form of government is destroyed utterly. This fact may not render the law bad, as it is doubtful if a democratic form of government was ever regarded as inimical to the form of government adopted by our people, as they had in mind as the thing to be avoided another form of government, more particularly the monarchical or aristocratical form; but it seems to stand beyond contradiction that a review of the opinion or judgments of the courts of last resort by the people is repugnant to and destructive of the republican form of government. If this provision is valid, the constitutionality of any statute is not determined, and will not be determined until the people have voted upon it. While the amendment suspends the operation of the judgment for sixty days, in order that it may be referred by petition to the people on request of five per centum of the qualified electors, and provides that notwithstanding the judgment of the Court "All such laws or parts of

laws submitted, as herein provided, when approved by a majority of the votes cast thereon, at such election, shall be and become the law of this state . . . to take effect after the date of the declaration of the vote thereon by proclamation of the Governor not less than thirty days after the vote has been cast," it does not provide that, after the expiration of sixty days, without the referendum of the decision, the decisions or opinion of the Court shall become the law, not to be thereafter disturbed. There is nothing to relieve us from an appeal from the Supreme Court to the people, in a subsequent case involving the same state, in which the Supreme Court or even the *nisi prius* courts, upon the doctrine of *stare decisis*, should hold it to be unconstitutional.

The amendment further provides: "If such a decision concerns a charter, or amendment thereto, of a city, or city and county, acting under Article 20 of this constitution, it shall not be binding until sixty days after it has been filed in the office of the Clerk of said Court. Within said sixty days, a referendum petition signed by not less than five per centum of the qualified electors of any such city, or city and county, addressed to and filed with the legislature of said city, or city and county, may request that said charter, or amendment thereto, be submitted to the people of such city, etc., for their adoption or rejection." It then remains that the people of the city or other municipality whose rights are thus involved may approve or reject the decision of the Supreme Court upon the validity of any provision of its charter or law. But the application of this portion of the constitution may have this strange effect: Two or more cities of our state may have exactly the same ordinance, *verbatim et literatim*, all acting under a charter adopted under Article 20 of our constitution. Let us say that the ordinance becomes involved in litigation arising in city "A," goes to the Supreme Court, and is held invalid. It is referred to the people of city "A," who reverse the decision of the Supreme Court, and for that city the ordinance is held valid. The same ordinance is involved in city "B," goes to the Supreme Court, who may follow its former opinion or follow the opinion of the more erudite electorate of city "A," and hold it valid. It is referred to the voters of city "B," who hold it invalid and so *ad infinitum* may pile up contrariety of municipal laws, or confusion therein, throughout our state, under the arbitrary power reserved in the various communities by this amendment.

And when we refer to the initiated amendment of Section 6, Article 20, of our constitution, under the title "Home Rule for Cities and Towns of Two Thousand Population," we find a provision which may lead to even a greater medley and more astounding conflict in laws. The amendment in question, after extending to all cities and towns of more than two thousand population the power to adopt a charter form of government, provides: "Such charter, and ordinances made pursuant thereto, in such matters, shall supersede, within the territorial limits of said city or town, *any law* of the *state* in conflict therewith." Think what a blessing these two constitutional provisions taken together may constitute to some enterprising and extra-liberal minded community on the operation of our sumptuary laws. We have statutes in the state of Colorado regulating the liquor traffic, providing that all saloons shall be closed at midnight and on Sundays, also statutes prohibiting gambling in any form through-

out the state. Suppose some town of over two thousand shall wish to start a modern Monte Carlo, and adopt a charter containing provisions for the unrestricted sale of intoxicants and licensed gambling. Where lies the relief? Let us go further, and in the same municipality adopt a charter repudiating all responsibility and liability for city, county, school, and all forms of taxation save municipal taxes. True, we have a constitutional provision providing for the uniformity of taxation, but the *nisi prius* courts cannot hold the charter provision in question unconstitutional, and if the Supreme Court does we will appeal it to the municipality in question and reverse the Supreme Court. Where is the relief?

One consolation, however, follows, viz.: if the people are as litigious as the law-makers apparently wish to give them an opportunity to be, the starvation period for the lawyer is at an end.

Our criticism as to the conflict of decisions, however, may not be sound, for the amendment upon that subject reads as follows: "All such charters, or amendments thereto, so submitted as herein provided, when approved by a majority of the votes cast thereon in said city, or city and county, shall be and become the law of this state, and of said city, or city and county, notwithstanding the decision of the Supreme Court, etc." Now it may be that the first city which votes upon the proposition will make its decision not only the law of that city, but the rule of construction for the state. If it does, how long will it continue so to be? Forever? Or until some other city votes to the contrary on the same proposition? Certainly it is not intended by the legislature that one city can make the law for all the other cities of the state.

The petition invoking the review of the Supreme Court's decision on any charter question for any municipality "shall be filed with the legislative body of the municipality desiring the review, and the sufficiency of the petition, or any protest filed, shall be passed upon by the officer with whom the petition is thus filed."

This amendment provides that "Legislation may be enacted to facilitate the operation of this Article, but in no way limiting or restricting the provisions thereof, or the powers herein reserved." We feel that this bar association could not perform a greater service than to provide a proper committee to recommend legislation to clarify this confusing provision of our constitution; and probably a better thing would be to appoint a committee of this association to aid the court in determining just what part of this amendment shall fall by reason of its self-destruction through confusion and ambiguity.

We may at times feel that reverence for things which are past is fast fading, that the moorings anchored with so much care and solicitude seem now the victims of virulent attack; but it must not be forgotten that stability and justice were strong fabrics, wrought by skillful hands into the frame-work of our government, and that upon the stability, lucidity, simplicity, reasonableness and efficacy of our laws depend the growth of our civilization, the strength and perpetuity of our government. If the lawyers, by their advocacy and admonition, do not protect and safeguard these essential elements of the law, they fail in the purpose of their education.

Trinidad, Colo.

The Era of the Commercial Lawyer[1]

By Henry Wollman
of the New York City Bar

THIS is the age of commercial law and this is the era of the commercial lawyer.

Constitutional law in this country has, for the most part, narrowed itself down to the question as to whether this or that is commerce, and then if it is, whether it is interstate commerce.

Nearly every Monday, the whole of America awaits with bated breath the decision of the United States Supreme Court as to whether this or that highly important and intensely vital thing is or is not interstate commerce.

The clauses of the Constitution giving the federal Government jurisdiction over commerce between the states have been stretched almost to the breaking point. Things that I believe the framers of the Constitution never even imagined the interstate provisions of the federal Constitution would reach, are now held to be within federal jurisdiction.

It would have taken a man of wild imagination among the framers of the Constitution to even dream that any phase of the traffic in women, now called "white slave traffic," could be punished as being illegal interstate commerce, but that is what is now being done, just the same. Correspondence schools of one state having pupils in other states are held to be engaged in interstate commerce. Under this clause of the Constitution, work that one would naturally expect to see done by state or local boards of health is being done most effectively by the federal Government. The character and quality of the food, drugs and drinks which now are, for the most part, shipped into the state of consumption from the state of production, are regulated and watched over by the federal Government.

The continuously expanding construction of the interstate commerce clause and the enforcement of federal criminal laws enacted under federal constitutional provisions, with reference to post-offices and post roads, are constantly increasing the importance of the federal Government. This, to some extent, is due to the fact that the states neglect to utilize the power they have.

In this age—which might be called the Interstate Commerce Age—the importance of the states as states is waning, while federal power and control are expanding.

For the past few years the lawyers and judges of this country have been treated to an unusual amount of vituperation and abuse. The literature of almost every generation shows that lawyers have always been the subject of denunciation by the demagogue, and of ridicule by the satirist, but just the same the public everywhere puts them in the highest place, public and private, where ability and fidelity are required.

The commercial lawyer has become a very important man. A commercial lawyer is a real lawyer who understands business. The presidents of two of the three largest life insurance companies of the world, in New York City, are lawyers. I imagine they know little about the technique of underwriting, but they are capable of taking broad

[1] Address before the Commercial Law League of America, Cape May, July 21, 1913.

views and administering big affairs in a big way. The head of the Union Pacific Railroad, with its hundreds of millions of productive property, is a lawyer; a country lawyer at that. The presidents of all the street railroads, on, above and below the surface in New York City, are lawyers. The head of the United States Steel Corporation, the largest manufacturing and business concern in the world, is not a steel maker but a lawyer. The president of the United States Rubber Co. was formerly Attorney-General of Rhode Island. The president of the American Biscuit Co. is a lawyer. The president of the Mergenthaler Linotype Co., which makes those wonderful type-setting machines, is a lawyer, and when there was a vacancy in the presidency of the International Paper Co., which supplies a large percentage of newspapers with their paper, the same lawyer was selected. The presidents of some of the largest trust companies in New York, which guard the estates of widows and orphans, amounting in the aggregate to many millions of dollars, are lawyers. Nearly all of the great private banking houses of New York that you read so much about have one or two partners that are lawyers. If you haven't examined into it, you would be surprised how this list could be extended. These men do not usurp the functions of the counsel for these companies, but run and operate these corporations. I have only spoken of New York, but the same thing no doubt holds good all over the country. Now why is this so? Because the practice of the profession gives lawyers a broad knowledge of men and things. It makes them quick to absorb and use the knowledge of genuine experts. It makes them recognize that there are always two sides to every question, and therefore it makes them fair and judicial in their judgments. It makes them faithful and true to those who trust them. They are not selected to fill these positions because they have large moneyed interests in these vast concerns, — which is rarely the case, — but because those who have the moneyed interests know they can trust not only their ability, but, above all else, their honesty and fidelity. There never has been a time when so many lawyers have been called, not through political manœuvring but on their merits, to fill so many places of enormous responsibility.

Was there ever a time when clients consulted lawyers so freely? With absolute and abiding faith they bare their hearts and their souls to their lawyers. They consult them on legal questions, on business questions, and on family matters. Lawyers may not always be as fair to their adversaries as they should be, but do you know of many lawyers who ever betrayed the faith and confidence of their clients? I do not.

Speaking of advice, it seems to me there never was a time when it was so hard for lawyers to give advice on some of the important legal questions of the day as it is now. Many of these questions are finally decided by divided courts. How can a lawyer, with safety, guess which side will have the narrow majority?

Let the flamboyant orator and the sensational newspaper writer say what they will, there never was a time when lawyers, as a class, were so genuinely respected and looked up to and trusted as they are now.

Coupled with the denunciation of lawyers, this country for the past few years has witnessed violent attacks on the judiciary. I am sorry to be compelled to say that some judges of high courts have become frightened by these

attacks, and have allowed their decisions to be influenced by what they believe to be public demand.

When I was a beginner at Leavenworth, Kansas, I tried a replevin suit for a calf, before a justice of the peace in Tonganoxie, a village near Leavenworth. This case aroused intense public interest in Tonganoxie. Local feeling ran high. I felt greatly elated when I won the case. A few days later I met the justice on the streets of Leavenworth and he glumly said to me: "I reversed my decision in your case." I said: "You had no authority to do so. Why did you do it?" He said: "Well, I found that the public sentiment of Tonganoxie did not sustain my decision." That was painfully ludicrous in the Tonganoxie squire, but when the same thing is done by the judge of a high court, it is dreadfully dangerous. If the public sentiment, which produced existing laws, has changed, let that change bring about the enactment of new laws in the proper way. This should be called the Legislative Age. Everybody wants everything done and everything changed by legislation. I venture the assertion that if all the constitutions, state and federal, required that all legislative bills should be introduced one year and passed upon by legislative bodies the next year, a small percentage of the bills now being enacted into laws would, after a year's thought, find their way on to the statute books. The legislative bodies of this country are active enough in making new laws and changing old ones. The courts should not try to encroach upon their territory.

A judge should decide according to the law as it is, not in accordance with what he himself or anybody else thinks it ought to be. A judge should never care whether his decision will be popular or unpopular. Having thoroughly examined the facts and the law bearing thereon, having conscientiously determined on which side justice lies, and having decided according to the right as he sees it, he can rest easy in the knowledge that public opinion always rights itself, and that in the end the public will approve his course although he may at times be temporarily under a cloud of popular disapproval. If he is not brave enough to stand up against the public sentiment of the day or hour he isn't good enough, big enough, or strong enough to be a judge. The perpetuity of this Government, which is unique in the vast powers of its judiciary, depends to a great extent on the strength and unyielding courage of its judges.

20 *Broad Street, New York.*

One Chancery cause in solid worth outweighs
Dryden's good sense and Pope's harmonious lays.

— *Canning.*

The Mysterious "SS.": A Puzzle in Law Documents[1]

By Charles Maar, A.M.

EVERYONE knows the two small esses commonly used at the head of affidavits and other legal documents, following the brace which includes the state and county names where the paper is witnessed or the action at law laid; but who knows their meaning? Judges appear not to have fathomed it, nor have law professors, or dictionaries or encyclopedias.

The average dictionary and book of reference makes a stab at the meaning but apparently no one has seriously gone to work to dig up the origin and significance of "ss" or "*ss.*" as it usually appears.

One authority defines it amply as follows: "Saints; *scilicet*, to wit; *semis*, half; sessions." The usual explanation offered is *scilicet*, but the common abbreviation for this well-known word is *sc.*, and besides, the meaning hardly applies to the place. So with "*sic sigillum*," since [L. S.] — *locus sigillum* — appears appropriately at the end of the affidavit or document. "Solemnly sworn" is volunteered by some, while others more learned in the law frankly confess that "*ss.*" is a mystery, or "a moot point." The standard law dictionaries carry us no farther, although Bouvier refers casually to the "ss collar" worn by chief justices in Great Britain.

General American works of reference are nearly all at sea upon this hieroglyph, as it may properly be called. *Harper's Book of Facts* gives a clue leading back to Great Britain, where our American legal forms and practices had their immediate origin, as follows:

> SS. A symbol of unknown antiquity worn on the collars of the superior judges and lord mayors in England; formerly by persons attached to the royal household and others. It was assumed by certain classes, never bestowed, and had no connection with heraldry. — *Stormonth.*

After this quotation from a standard British source, the following is added to trap the unwary:

> On legal documents, *SS.* or *ss.* (scilicet) means to wit, namely.

Brewer's Hand Book also gives a clue:

> SS., *souvenance*, forget-me-not; in remembrance; a *souvenir.*
>
> It seems that, on the Wednesday preceding Easter Day, 1465, as Sir Anthony was speaking to his royal sister, "on his knees," all the ladies of the court gathered round him, and bound to his left knee a band of gold adorned with stones fashioned into the letters s.s. (*souvenance* or *remembrance*), and to this band was suspended an enameled "Forget-me-not." — *Lytton's Last of the Barons*, IV. 5.

All of which points clearly to English antiquities, and a search in *Notes and Queries* yields from the issue of February 25, 1882, the title of a roll comprising the record of a suit heard under Henry III as follows:

> ss. Rotulus de Placitis que sequebantur dominum Regem coram W. de Raleigh annis Regis Henrici filii Regis Johannis octanodecimo incipiente nonodecimo.

A keen-eyed correspondent, evidently having found no satisfaction in ordinary works of reference, wrote immediately asking for "the correct meaning of *ss.* affixed to the rotulus mentioned and

[1] [This article, though written without knowledge of Mr. Joseph Osmun Skinner's paper (25 *Green Bag* 59), is really tantamount to a criticism of the solution therein offered. We are glad to have so interesting a subject examined in different lights. — *Ed.*]

to similar documents"; but got no reply. But nearly thirty years later the question of the origin and significance of the mysterious esses was again raised and in the issue of *Notes and Queries* for May 13, 1911, occurs an extended historical discussion of "ss" as used on the collar worn by the lord chief justice in an effort to relate the letters to the words "*Souvent me souvient*," or "*Soveigne vous de moi.*"

Going now to the latest and fullest authority, the *Encyclopedia Britannica*, eleventh edition, under the word "Collar," contributed by Mr. Oswald Barron, F.S.A., we find:

> . . . Livery collars . . . appeared in the 14th century, worn by those who displayed their alliances or fealty. . . . During the sitting of the English parliament in 1394 the complaints of the Earl of Arundel against Richard III are recorded, one of his grievances being that the King was wont to wear the livery of the collar of the Duke of Lancaster, his uncle; and that people of the King's following wore the same livery. To which the King answered that soon after the return from Spain (in 1389) of his uncle, the said duke, he himself took the collar from his uncle's neck, putting it on his own, which collar the King would wear and use for a sign of the good and whole-hearted love between them, even as he wore the liveries of his other uncles. This famous livery collar, which has never passed out of use, takes many forms, its esses being sometimes linked together chain-wise, and sometimes, in early examples, bestowed as the ornamental bosses of a garter-shaped strap-collar. The oldest effigy bearing it is that in Spratton Church of Sir John Swinford, who died in 1371. Swinford was a follower of John of Gaunt, and the date of his death easily disposes of the fancy that the esses were devised by Henry IV to stand for his motto or "word" of *Soverangne*. Many explanations are given of the origin of these letters, but none has as yet been established with sufficient proof. . . .
>
> Plain collars of esses are now worn in the United Kingdom by kings-of-arms, heralds and serjeants-at-arms. Certain legal dignitaries have worn them since the 16th century, the collar of the lord chief justice having knots and roses between the letters. . . . ."

Out of all of which comes a clear and reasonable suggestion that from being an ornament of royalty, the esses became the badge of followers of the house of Lancaster, and thence passed unofficially to persons in authority, like magistrates, mayors and justices; and from being used upon the collar came naturally to be used on official writings to indicate the authority of the magistrate, mayor or judge who gave the same.

The mysterious "*ss*" is then, we may conclude, no abbreviation but a symbol of official position. The lawyers of other days in Great Britain knew their Latin and made no obscure abbreviations or impossible applications of words or phrases. Whatever the origin of the symbol, the esses as an ornament passed naturally into a sign of judicial or magisterial authority, and as such properly follow the names of the state and county where a document is witnessed or an action at law laid.

Albany, N. Y.

The Split Guinea Feather

By J. H. Rockwell

ON THE morning of May 11, 1912, a Chicago newspaper printed a story from Los Angeles, California, about a young woman found murdered in an unoccupied bungalow at a lonely spot on the outskirts of that city. A scapular and a medal found on the body bore inscriptions which indicated that the victim had been a member of "The Children of Mary" and "The League of the Sacred Heart." Both of these are societies associated with the Cathedral of the Holy Name, in Chicago. The hat and the clothing worn by the woman also carried the trade-mark of a Chicago department store.

The details of the scapular, medal and trade-mark and a description of the young woman, printed in the report, were all the clews that seemed to carry with them any importance as means by which the murdered woman might be identified, and her murderer brought to justice.

The story as printed in the Chicago newspapers made no mention of a split guinea feather with which the hat was trimmed. It was considered an unimportant detail at the first, and was so considered almost to the end of the investigation, when fate — or Providence — intervened and showed it to be a leading factor in the case. There was another circumstance the papers failed to give adequate weight — the circumstance that the clothing on the body of the dead woman had been partially burned.

On the twelfth of May the captain of detectives in Chicago sent the following message to the chief of police in Los Angeles: "A number of inquiries here about body of girl found murdered in your city. Please send me accurate description and full particulars. If I can be of any assistance, call on me." Back came a message amplifying the description of the unknown woman; nothing, however, was said about the split guinea feather or the burnt clothing. The only clew given to help the search in Chicago, was the scapular and the medal bearing the names of the societies associated with the Cathedral of the Holy Name.

This was not very much, but it was enough to move the detective force to action. Men were sent out on the faint trail thus furnished; it led them in three directions, but to nothing tangible. Into the midst of this search was projected another clew. Word came from Los Angeles that a suit case, which had remained unclaimed for two weeks in a railway station at Pasadena, had proven, upon examination, to have been the property of a nurse from Chicago. Her name was on some of the garments it contained, and the baggage agent with whom the suit case had been left had substantially identified the dead woman as the one who had brought in the suit case.

The hospitals of Chicago were thoroughly searched for trace of a nurse bearing the name and answering to the description of the owner of the baggage at Pasadena, and finally her name was found on the rolls of "The Children of Mary." The trail was becoming more distinct. It was at this point that the split guinea feather became a factor in the hunt. On May 17 word was received in Chicago from the chief of

police at Los Angeles to the effect that the man wanted for the murder they were investigating, in applying for a position as nurse, in that city, gave his name as T. Dillon, his age as thirty-eight, his height as five feet eight inches, and his weight as 185 pounds. He told the man who took his application that he was from Chicago, and had been employed as interne at St. Francis Hospital; he gave as reference, Dr. G. D. Brumbach, 1819 Masonic Temple, whose card he displayed. The Chicago detectives were asked to locate this man, and if possible send a picture of him.

What happened in Los Angeles to furnish the police with the man's name and description was this: They had been following every clue without results, and it was beginning to look as if the mystery of the bungalow murder would remain unsolved. On May 16, a week after the body was found, a woman walked into police headquarters.

"The papers printed a picture of the hat belonging to that woman who was murdered," she began.

The captain of detectives nodded his head.

"I trimmed that hat," she continued. "I am at the head of the millinery department in one of the stores here."

"But this hat was trimmed in Chicago," explained the captain. "It has the trade-mark of a Chicago store on it. Perhaps you trimmed one like it," he suggested.

"No; you are mistaken," she insisted, "I trimmed that hat. I would know the split guinea feather on it, anywhere. The woman brought the frame to me and I trimmed it, using that guinea feather; she had brought the hat from Chicago, untrimmed."

"What more do you know?" demanded the detective, now thoroughly interested.

"I know that her name was Katherine Dillon, and I know where she lived," the milliner replied.

"Where? Can you take me there?" cried the detective, by this time fully convinced that here was something likely to produce results.

The milliner led him to a rooming-house at 940 Hope street. There they found that C. Dillon had roomed in the house a month earlier with a woman supposed to be his wife; that they had come from Chicago, and that they had disappeared a day or so before the body of the murdered woman had been found. Having learned so much about the murder, it was not difficult to learn the rest of the matter given in the telegram to the Chicago police.

Observe how the split guinea feather, overlooked and ignored as a trivial detail of no importance, furnished a complete solution of this carefully contrived murder.

As soon as this telegram reached Chicago, detectives at once took up the new trail, with the certain knowledge that at some recent time, at some point in that city, those two had moved about among people who knew them. Once on their track the remainder would be merely a question of intelligent perseverance. But it was soon discovered that no St. Francis Hospital existed in Chicago, and Dr. Brumbach had never heard of T. Dillon. Nor was the name known in any of the hospitals of the city; neither was any one found who could identify the murdered woman.

But fate was not idle; in her own inscrutable way she was consummating her purpose, as the sequel will show.

Late in the evening of May 16, the day before the Los Angeles telegram containing a description of Dillon and the murdered woman was received by the Chicago police, enough of the story

had reached the daily press of the city — through its special service — to enable it to print on the morning of the 17th the name "Katherine Dillon" as that of the probable victim of the bungalow murder, and the name "I. J. Dillon" as that of the man with whom she lived. The afternoon press of the same date gave a description of them from the telegram received by the police department.

On the morning following the publication of these particulars of the Los Angeles tragedy, a man was found dead on the tracks of the Northwestern railroad at Wilmette, a small town fourteen miles north of Chicago. He had been killed by an early morning train, and undoubtedly had invited his own death. The man's name was Dillon — Caiphias Dillon. He was about thirty-eight years old, 5 feet 8 inches in height, and weighed 185 pounds. Details of his description, compared with those given in the telegram from Los Angeles, were found to be identical.

Three detectives from police headquarters got into an automobile and went to Wilmette. They wanted to determine whether or not the similarity in these descriptions was only a coincidence. The conjecture which took them to Wilmette, it seems, was well founded, for Caiphias Dillon, the dead man, was as like C. Dillon, the murderer, as two men possibly could be.

An envelope had been found in the pocket of the dead man, addressed to David Churchill. The envelope contained a sheet of paper, folded like a letter. The paper was blank, but it told a good deal to the detectives; it carried a message that the man could not express in words. Caiphias Dillon had gone to his death impelled by some fear greater than the fear of death. Something more was learned about the blank sheet of paper that convinced them they were right. The night before his death Dillon had called on some young women in Wilmette. The talk had naturally turned to the story printed that day in the Chicago papers, giving the murderer's name, and describing him.

"Isn't it strange," one of them remarked to Dillon, "that the man's name is the same as yours, and that the description fits you so exactly?" Her remark was wholly guileless, but the man it was addressed to showed unmistakable signs of disturbance. He made excuses for his lack of ease. "I'm blue tonight," he stammered. "I'm awfully nervous. I don't know what is the matter. I feel as if I was going to be held up on the way home. Let me have a sheet of paper and an envelope, will you? And a pencil."

He took the writing material they found for him, addressed the envelope, and stopped. "I can't write!" he exclaimed. The excuse he had offered in explanation of his evident mental distress had suggested a trick to him. He realized there was no escape from the toils of the law closing in about him so completely and relentlessly, and decided to take his own life, but he would do it in such a manner as to lend the appearance that he had been killed by highwaymen; he wanted to save his good name and did not mean to confess the crime he had committed by suicide. So he disposed in some way of his watch and the money he had with him; at least when his body was found both money and watch were gone, and he was known to have both when he left the young women on whom he had been calling earlier in the evening.

The detectives soon learned that Caiphias Dillon had worked for an

Evanston electrical contractor. The contractor told them that Dillon had recently been in California. Of this he was certain for the reason that he had received a post-card from him mailed in Los Angeles about the ninth of May, in which Dillon had said he was coming back to Chicago in a few days and would want to go to work. Other cards were received from him dated at Los Angeles, Sacramento and San Francisco. Dillon had returned, and had been at work within the week. Moreover, he had told the contractor that he had just come from the Pacific coast.

"Where had he lived?" they asked.

"5420 Evanston avenue," the contractor informed them.

"No," another corrected, "he lived at 4621 Evanston."

The detectives went to the first address where they found Mrs. Dillon and her four children. Searching the house they discovered a woman's handbag; it was bloody. Her husband, Mrs. Dillon said, had returned from the coast on Sunday, bringing it with him. She knew nothing more than that.

"Let us go down to the other place," one of the detectives suggested. They went. Yes, Caiphias Dillon had lived there, but under the name of Jones. A woman had lived with him, and was known as Bessie Jones. She had gone to Norfolk, Va., where she had originally come from. This much was common gossip in the restaurants where the two had taken their meals.

The detectives looked at each other wisely. They were nearing the end of their search; Bessie Jones, beyond all doubt, was the murdered woman. They telegraphed to Norfolk, to make certain of it. Back came a reply. A Bessie Jones lived there, but had left some time previous, to join Dillon in Chicago. The case was entirely clear now. Bessie Jones was harassing him; she had threatened to make trouble between him and his wife. He must get rid of her. So he had enticed her to Los Angeles, and had murdered her. They would gather up the few straggling ends and the case was completed.

But they were mistaken. Two hours later a second telegram was received from Norfolk. Bessie Jones was alive, and at that moment in Norfolk. It is extremely trying to have to take up again a task you supposed had been finished, and work at it from another angle. But there was nothing else to do, in this instance, and so they did it. Or rather they stood ready while fate pointed the way.

The captain of detectives was called to the telephone on the morning of May 19th. The newspapers that morning had printed a story identifying Dillon the suicide, as Dillon the bungalow murderer. "I think," said the voice on the telephone, "the name of the woman murdered at Los Angeles, was Quinn — Minnie Quinn."

"Who is this talking?" cracked back the inquiry of the detective.

It was a North Side physician speaking. He had just read the story about Dillon. It had reminded him that a man named Dillon had sent a young woman to him for treatment. It was for the same cause found to exist in the woman murdered in the bungalow at Los Angeles, and that circumstance had awakened his suspicion.

At last they were upon the right track. The North Side physician on being visited and further questioned, said the girl had told him her name and where she lived. She was a maid employed in Wilmette, and expected to

topher and Edward. Of these Charles figures most prominently. His mother was a member of the Society of Friends and, in marrying Charles Lynch, was expelled from the society, her husband, it was said by the elders, not being religiously disposed; but the two young people were forgiven, at length becoming members of the South River Meeting House. To the eldest of their offspring little of Quakerism seems to have descended, Charles Lynch, the son, having rather more of worldly desires than his good brethren could wish, as witness the following from the records of South Meeting House, December 12, 1767:

Whereas Charles Lynch, having been a member of the Society of the People called Quakers, and having, contrary to our known principles, been guilty of taking solemn oaths, we do testify against all such practices, and the acter thereof from being any longer a member of our Society, till it may please God to convict him of his error and work repentance in him by a Godly sorrow, which is the sincere desire of us. Signed on behalf of the meeting.

WILLIAM FERRELL, *Clerk.*

South Meeting House, 20th of the 12mo, 1767.

Charles Lynch was afterwards reinstated, but again turned out with one James Johnson for taking up arms in his country's defense.

In the year 1780-81, General Cornwallis sent Colonel Tarleton and his troopers into the Piedmont country of Virginia, where there were many Tories, who gave much trouble to the Revolutionary party. Frequent conspiracies were put on foot against the Commonwealth, thereby occasioning great loss and injury to the cause of the colonists. Seeing that the state could not afford necessary protection, Colonel Charles Lynch, Colonel William Preston, Colonel James Calloway and Captain Robert Adams enlisted as many men as could be got for pursuit and capture of the marauders. When taken, the prisoners were brought before Colonel Lynch — who had been made judge and jury by his neighbors — who inflicted summary punishment by flogging, imprisonment, and, in some cases, death, the law thus administered being called in honor of the judge "Lynch's Law." The respectable Tories of the country having been flogged, instituted suit for the infliction of such punishment whereupon the General Assembly, in October, 1872, exonerated the judge of Lynch's Law by the passage of the following act:

Whereas divers evil disposed persons in the year 1780 formed a conspiracy, and did actually attempt to levy war against the Commonwealth, and it is represented to the present General Assembly that William Preston, Robert Adams, Jr., James Calloway and Charles Lynch, and other faithful citizens, aided by detachments of volunteers from different parts of the state, did by timely and effectual measures suppress such conspiracy, and whereas the measures taken for that purpose may not be strictly warranted by law, although justifiable from the imminence of danger:

Be it therefore enacted that said William Preston, Robert Adams, Jr., James Calloway and Charles Lynch, and all other persons whatsoever concerned in suppressing said conspiracy or in advising, issuing or executing any orders or measures taken for that purpose, stand indemnified and exonerated of and from all pains, penalties, prosecutions, actions, suits or danger on account thereof; and that if any indictment, prosecution, action, or suit shall be laid or brought against them, of any of them, for any action or thing done therein, the defendant or defendants may plead in bar or the general issue, and give this act in evidence.

Thus we see that Lynch law was brought into being from patriotic motives alone and, for the time, was a valuable adjunct to the law when Virginia was being overrun by a pitiless enemy.

Widows' Pension Laws

(From the *Survey*)

THE American Association for Labor Legislation has made the following analysis of the widows' pension laws of the country, which is up-to-date except for this year's amendment to the California act: —

Since 1908, when the movement began, to date, June 16, 1913, mothers' pension laws have been passed in the United States in seventeen states (California, Colorado, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Utah, and Washington) and in two cities (Milwaukee and St. Louis). Only the state laws are here considered.

The law applies to any parent who, because of poverty, is unable properly to support a dependent or neglected child, but who is otherwise a proper guardian for it, in California, Colorado, Illinois and Nebraska. In Massachusetts, Michigan and Utah this provision is narrowed to apply to mothers only. In New Jersey only widows are included. In the remaining states not only widows but other classes of dependent mothers may receive allowances.

Thus, in addition to widows, deserted wives are included in the benefits of the act in Michigan, Ohio (if deserted for three years), Pennsylvania, and Washington (if deserted for one year); mothers whose husbands are prisoners are included in Idaho, Iowa, Minnesota, Missouri, Ohio, Oregon, South Dakota (unless the wife receives sufficient of the prisoner's wages to support her children), and in Washington; mothers whose husbands are confined in state insane asylums are included in Iowa, Minnesota, Missouri, Oregon and Washington; mothers whose husbands are incapacitated for labor are included in Minnesota, Ohio, Oregon, South Dakota, and Washington; in Michigan alone, divorced and unmarried mothers are included, while in California and Colorado, if neither parent is found fit, a guardian may be appointed to receive the stipend.

The maximum age of a child for whom a pension is payable is fourteen years in Iowa, Massachusetts, Minnesota, Missouri and South Dakota; fifteen in Idaho, Utah and Washington; sixteen in Nebraska (if the child pleads guilty of, or is convicted of, a crime), New Jersey and Oregon; seventeen in Illinois (if a male child) and in Michigan; and 18 in Illinois (if a female child) and Nebraska (if the child is merely dependent and neglected). Legal working age is the limit set in Ohio and Pennsylvania, and in California and Colorado no limit is set.

The maximum amount of allowance for one child is $2 a week in Iowa and $3 a week in Michigan. It is $6.25 a month in California (for widows); $9 in New Jersey; $10 in Idaho, Minnesota, Missouri, Oregon and Utah; $11 in California (for abandoned children); $12 in Pennsylvania; and $15 in Ohio, South Dakota and Washington. In Colorado, Illinois, Massachusetts and Nebraska no maximum is established. The amount for additional children varies from $5 to $12 per month. In California, Ohio, and South Dakota the order is good only for six months unless renewed.

The law is administered by the juvenile court alone in California, Illinois, Missouri, Ohio, and Washington; by the juvenile court or some other county court, in Colorado and Oregon; and by the juvenile court or the county commissioners in Utah. Various other courts administer the law in Idaho, Michigan, Minnesota, Nebraska, New Jersey and South Dakota; the city or town overseers of the poor, in Massachusetts; and in Pennsylvania an unpaid board of five to seven women residents of the county appointed by the Governor.

In every state except Massachusetts the funds come out of the county treasury; in Massachusetts they are provided by the city or town. In California, Massachusetts and Pennsylvania grants in part payments are made to the local authorities by the state.

marry Dillon. She was evidently ignorant of the fact that Dillon already had a wife.

Pushing their inquiries the detectives soon found where a Minnie Quinn had been employed in Winnetka, a little town some three or four miles north of Wilmette; that inaccuracy in the physicians's memory as to the name of the town delayed them for a short time before they discovered where the mistake was. Servants were found in Winnetka who knew Minnie Quinn; they said she had left, expecting to marry Dillon. Her former employer and a woman in a department store identified her by the description given as the victim of the Los Angeles murderer. An intimate friend was found who said Minnie had gone to Los Angeles with Dillon to be married.

A priest at the Cathedral of the Holy Name, Chicago, recalled her distinctly. They discovered the expressman who took the two trunks for Dillon and Miss Quinn to the Northwestern depot, obtained the check numbers from him, traced the trunks to Los Angeles and back to Dillon's house, where they were found in possession of the widow. They also found shoes that were identified as having been sold to Minnie Quinn by a store in West Chicago avenue. The Quinn woman's jewelry was recovered from one of Dillon's relatives, intercepted on his way to Richmond with the body — Dillon's body. The chain of evidence was complete. Dillon could easily have been convicted on less than was now in the hands of the detectives.

Briefly, this is the story of the tragedy: Dillon became seriously involved with Minnie Quinn. He took her to Los Angeles promising to marry her. She did not know he already had a wife. He hoped to be able to free himself of her without recourse to murder, and delayed the deed in that hope. She became impatient and suspicious — there were reasons for haste in the matter. Dillon quieted her impatience under the pretext of looking for a house in which to live. He found a lonely bungalow, far out from the thickly settled part of the city, exactly suited to his desperate purpose.

On the night of May 7th there was some sort of fête in the downtown district in Los Angeles, and he hoped that the outskirts of the town would be drained of its population. So that night he told Miss Quinn to come with him and see the little house he had found for them to live in. She went and he slew her.

After he had slain her he set about covering up the traces of his crime. There was a quantity of thick, heavy paper lying on the floor. Groping about in the evening dusk he found three strips of paper, of considerable size, and wrapped them about the body, which he carefully drew close to one of the walls of the room, and then set fire to the dead woman's clothing which extended several inches beyond the edge of the paper wrapping. Then he fled from the house.

One can easily picture him looking back from time to time, to see the expected glare of the burning bungalow. But the glare does not show. Where has he blundered? He dare not go back to find out. Soon he is down in the heart of the city again, mingling with the crowd of merrymakers that fill the streets, but with a deadly fear at his heart, as he searches the skies for the glare of a burning house. Fate has played her hand in the bungalow murder. In the darkness Dillon had not noticed that the paper he had wrapped the body of his victim in was asbestos,

left on the floor of the bungalow by workmen who finished that day the installation of a heating plant. That was where Dillon blundered, and that is why he looked in vain for the glare of the burning bungalow.

Springfield, Ill.

The Origin of Lynching

By William Romaine Tyree

Attorney-at-Law, Lynchburg, Va.

HOW many people, should they be asked as to the origin of lynch law, would answer that such executions were first in favor somewhere west of the Pecos? These same persons would be greatly surprised, I dare say, if they knew that Lynch's Law (as it was then known) was the outgrowth of a peculiar state of affairs in no other a state than that of the ancient Commonwealth of Virginia. However, Lynch's Law did not necessarily call for capital punishment by hanging; in some instances it was flogging, in others imprisonment, and in few cases, death.

In the year 1724, there was a lad, Charles Lynch or Licht by name, aged 15 years, who became dissatisfied in his Irish home over ill-treatment from a stepmother and the harsh discipline from a schoolmaster. Young Lynch determined on leaving the Ould Sod as one day he chanced on a sea captain on the eve of sailing for America. The lad told his story and asked to be allowed to accompany his new acquaintance. Consent being given, Lynch started on his eventful journey, but a few miles off shore repented of his rashness, leaped from the deck and attempted to reach shore. He was rescued by the crew, the ship continuing her journey.

At length the perilous voyage came to an end; and the good ship, having weathered stress of weather, came to anchor at her berth in His Majesty King George's colony of Virginia. What disposition was to be made of the lad was a question with the captain. At length he happened upon the expedient of apprenticing his charge to one Christopher Clark, a Quaker and wealthy tobacco planter.

Lynch went to work with a heavy heart, but fate was kind to the friendless youth; for the Quaker's daughter, Sarah, being moved to sympathy for his friendless state, fell in love with him and they were married, such a union seeming to be with the consent of Christopher Clark, for the young couple moved on to one of the latter's plantations, "Chestnut Hill," in what is now Campbell county, about a mile from the present city of Lynchburg.

Here Charles Lynch secured large tracts on the rivers James and Staunton. These grants from His Majesty George II, through William Gooch, Lieutenant Governor of Virginia, were bestowed for a few pounds sterling on the promise of improving the land, which embraced thousands of valuable acres.

Six children were born of the marriage of Charles and Sarah Lynch — Charles, Penelope, Sarah, John, Chris-

Reviews of Books

A BIOLOGICAL INTERPRETATION OF SOCIETY

Social Environment and Moral Progress. By Alfred Russel Wallace, O.M., D.C.L. Oxon., F.R.S., etc.,author of The Malay Archipelago, Darwinism, Man's Place in the Universe, The World of Life, etc. Cassell & Co., New York. Pp. 181 (index). ($1.25 *net.*)

THE opinions of a biologist on moral questions, on the contemporary social order as it stands, may be treated as the views of a specialist on matters outside his particular province or as logical deductions based on biological premises. If one approves Dr. Wallace's biological method one is likely to accept the book as a sample of coherent scientific reasoning. That biology has a direct bearing on ethics no one can gainsay. Biology has a very broad meaning, but if this meaning is to be narrowed so as to give special emphasis to the principles of natural and artificial selection the biological method becomes synonymous with a special mode of thought, which may not have been superseded, but has so far been modified and supplemented by later developments as to be no longer characteristic of the age. The "biological" tendency is then a convenient designation which may be used to differentiate a certain Victorian stage of thought from a later psychological stage, and Professor Pound has employed this distinction in his luminous essay on "Sociological Jurisprudence." The venerable author of these reflections, whose name will be linked with that of Darwin in the annals of biological discovery, is not too confidently to be assailed as old-fashioned, for he is neither a psychologist nor a sociologist, and it would not be hard to point to other exponents of a tradition which is, as the saying is, still going strong. But the attitude is surely, none the less, to be classed as a nineteenth and not a twentieth century one. The cocksureness with which moral conclusions are stated is a bit surprising, but it was characteristic of the biological stage to put forward rather extravagant claims, and what seems opinionated and dogmatic now may have appeared rational and discreet not long ago. While a pessimistic survey of modern society would now have to supported by evidence of more comprehensive character, we can well understand the satisfaction of the biologists with the adequacy of their narrow premises, just as we can understand how the contemporary craze for "eugenics," the latest phase of the principle of artificial selection, has come about as the result of their influence.

The strictures of Dr. Wallace on contemporary society, regarded particularly in its moral and legal aspects, hardly call for detailed examination. Much of what he says may be true, much is merely matter of personal prejudice. That science alone can dissipate prejudice is illustrated by the faults not less forcefully than by the merits of this book. The law reformer and the criminologist are not less active than the eugenist in the work of amelioration, but Dr. Wallace seems to overlook this.

PRESIDENT HADLEY ON TENDENCIES IN PHILOSOPHY

Some Influences in Modern Philosophic Thought: Being the fifth series of John Calvin McNair Lectures before the University of North Carolina, delivered at Chapel Hill, April 19, 20 and 21, 1912. By Arthur Twining Hadley, President of Yale University. Yale University Press, New Haven. Pp. 142 + 4 (index). ($1 *net.*)

PRESIDENT HADLEY delivered at the University of North Carolina last year a series of lectures on a foundation endowed with the object of throwing light on the relations between science and theology. The religious interest of these lectures, which have been issued in a slightly modified form, is secondary. Some attention is paid to the aspirations of recent poetry and a spiritual view of the human struggle for existence is harmonized with the doctrine of natural selection. The writer also lays great emphasis on the growth of the modern spirit of tolerance, which has succeeded the intellectual complacency of the first half of the nineteenth century and which finds expression today in the pragmatism of William James and other exponents of the same philosophical principle.

The more suggestive and important element of the lectures, however, lies in the singularly attractive recapitulation of intellectual tendencies of the past hundred years. The characteristics of the thought of the earlier half of the nineteenth century, particularly in England and France, are sketched in general outline, the subject being skimmed in consequence of the limited compass of the lectures, a break coming in the middle of the century with three great discoveries which revolutionized thought and marked the beginning of a new stage of intellectual development. These discoveries were the law of the conservation of energy, the theory of cellular tissue, and the process of elimination by natural selection. There has come about in consequence a change of feeling not only about the problems of the universe, but about politics, trade, and morals as well. Nationalism has succeeded individualism, as the Darwinian theory has taken the place of positivism and utilitarianism. There were two industrial consequences of great importance in this nationalistic movement, high tariffs and large standing armies. In the new pragmatistic view of life that is now making headway, the criterion whether a thing is right or wrong is its permanence. We must not misconceive the struggle for existence as a struggle solely between individuals, it is also a struggle between groups, so that the lesson of natural selection is not individualism, such as the early half of the nineteenth century stood for, but an attitude which recognizes the broad range of social interests and judges questions of morals by the criterion of what is permanent in the life not merely of individuals but also of communities and groups.

It seems hardly likely that the supposed ethical implications of the principle of natural selection will long continue to give writers the concern which has been exhibited in much recent discussion. It is scarcely a topic which can long continue to excite curiosity. It is natural that the implied corollary, extermination of the unfit, should have become almost a by-word, and should have colored the moral beliefs of many in a age eager for conflict and hungry for success. Whether it has supplied a moral conception that will fill a large space in the intellectual history of the age, and merit the same serious attention as such dogmas as *laisser faire* and human equality, would raise an interesting problem. Without offering any judgment on probable developments of the future, we may hazard the view that any distorted version of biological facts, such as is represented in this overemphasis on the principle of natural selection to the disparagement of other factors of equal value, like symbiosis, cannot long prevail in an age of criticism, and that biological facts are not likely to remain confused with biological dog-

mas. We can arrive at sane ethical thinking only by discarding these dogmas, and by restating the principles in a form no longer distorted. The greater our success in such a task, the more complete, doubtless, will be our realization that morals are chiefly, at least, a psychic affair, and that psychological considerations completely overshadow the bearing of vague biological generalizations.

As a description of currents of nineteenth century thought the book is well worth reading. The appended moral and religious interpretations of the author are largely matters of personal opinion, while his faith in pragmatism is illustrative of a widespread tendency of the day, a tendency which may not be unreservedly approved as intellectually wholesome.

AFTER BERGSON, WHAT?

A Preface to Politics. By Walter Lippman. Mitchell Kennerley, New York. Pp. 318. ($1.50 *net.*)

THIS is a refreshing bit of iconoclasm and offers stimulating mental diversion. The existing order, social, legal, and economic, is attacked with the impatience of the zealot who feels that it is all hopelessly blind and stupid. The criticism does not spring merely from a conviction that the law, legislation, and politics necessarily lag behind in the march of progress. Any one could accept such a criticism. The rapid transit system of a city is always years behind contemporary needs. If a community cannot deal with the practical problem of rapid transit with skill and foresight, it would be indeed strange if it did not do even worse with the immeasurably more complex practical question how to accommodate political and legal institutions to shifting needs. One can be critical in this admission without being revolutionary. Mr. Lippmann, however, does not stop with so moderate and just an arraignment of the existing system. He finds it not merely sluggish but dead, not a makeshift but a mistake. And the particular idol he sets himself the task of smashing is that of routine, deriving the incentive to this attack, it would appear, from Nietzsche, who glorified the *Schaffender* or creator and supplied the material of Mr. Lippmann's antithesis between inventor and routineer. The implication that all routine is bad, however, is not to be acquiesced in. The inventor must himself make use of a routine to be effective. In the doing of everything there are details to be mastered and a technic to be applied, and this routine or technic is harmful only when it has ceased to serve a living purpose. Mr. Lippmann is fond of drawing illustrations from literature and art. Routine, he says, is in politics what classicism is in art. The difference between a living and a dead classicism may so far elude the comprehension of persons of a certain temperament as to commit them to a formless and rebellious romanticism. A kindred impulse leads to the denunciation of the man of science and the administrative official as hopeless victims of a stultifying tendency. But if routineer is to be a term of reproach it must be consistently employed in a restricted sense, and the dependence of progress upon mastery of technical detail must be freely conceded. From the reluctance to make such a concession come most of the aberrations of Mr. Lippmann's judgment. Progress is with him so much a matter of aspiration and of feeling that he slights the prodigious amount of labor that must be performed by society in order to work its passage bit by bit toward the distant

goals of such feeling and aspiration. He is pleading the cause of the tyro against that of the expert, he is arrogantly championing the layman as a wiser man than the inventor, he is urging that the *savant* and the statesman follow the populace, not lead it.

Into this view of politics the pragmatist philosophy and Bergsonian voluntarism fit very conveniently. One fears to think of the amount of harm a book like this could do if it acquired any extensive vogue and became a sort of holy writ for every species of tyro and doctrinaire enthusiast. The originators of pragmatism surely could not have contemplated its furnishing a convenient mask for the unintellectualism of large numbers lacking the intelligence which would entitle them to claim anti-intellectualism as a philosophy. Is pragmatism in danger of being thus debased? If so its advocates should look to the safety of their doctrine.

Mr. Lippmann has written with brilliancy and at times with rare enlightenment, nor is he altogether free from the detachment and candor which restrain admiration and temper praise, as in his remarks about Theodore Roosevelt and Jane Addams. He presents his errors with an intellectual vigor which lends them attractiveness, and it is no small good fortune that gives birth to a book on politics so thoroughly permeated with the modernism of social outlook represented by H. G. Wells and Graham Wallas in England. The objection to his politics is that they are superficial, amateurish, and impatient; and because they lack the depth, thoroughness, and patience to give his principles a form scientifically and humanly serviceable, they may never get beyond their present prefatory stage. We sincerely wish they might go further and possibly they may if the author can persuade himself to make certain surrenders before he writes another book on the subject.

BARON DE CONSTANT ON THE UNITED STATES

Les États-Unis d'Amérique. By Baron D'Estournelles de Constant. Librairie Armand Colin, 5 Rue de Mézières, Paris. Pp. 536 (index and map). (5 fr.)

THE first half of Baron de Constant's interesting book on the United States is a descriptive record of his impressions on his several visits to this country in the cause of the international peace movement, and gives a somewhat remarkable birdseye view of conditions throughout the United States, remarkable for sweep of vision more than for keenness of observation. Consequently, in spite of the profusion of information about the agricultural and industrial activities of the country, there is not a great deal in the book that will strike American readers as particularly novel or arresting. The second part is concerned with the problems of American life, and here the individual point of view of the distinguished author is more clearly in evidence. He discusses the dangers of a capital as far removed from some parts of the country as Washington, liberty of education, the questions of the Indian and of the negro, the union of religions, sectional prejudices, and the army and navy. So gentle a spirit as that of Baron de Constant could scarcely find in any of these matters ground for pessimistic fears. He is alarmed at the imperialistic tendencies of the government, and the conflict between the idealism of the American people and the materialism of a government which has "yielded to the temptation to descend; it has wrongly believed that the lower level must be the more popular level." Nevertheless, the Amer-

ican people has but one ambition, "to consolidate the work of the past," and Americans are urged, in the concluding portion, to "complete the French declaration of the rights of the people, and to pay their debt to Europe by applying to international life their enthusiasm as a nation."

COLLINS' FOURTEENTH AMENDMENT

The Fourteenth Amendment and the States: a study of the operation of the restraint clauses of section one of the Fourteenth Amendment to the Constitution of the United States. By Charles Wallace Collins, M.A., sometime Fellow in the University of Chicago, member of the Alabama bar. Little, Brown & Co., Boston. Pp. 174 — 33(appendices) + 13 (index). ($2 *net.*)

THAT the Fourteenth Amendment "expressed no new ideals of law and justice," that the guaranties of the first section "are as old as Magna Carta," Mr. Collins recognizes. The significant thing about the Amendment was not that it embodied new guaranties, but that "it shifted the guarantor from the state to the national government." Evidently Mr. Collins is not wholly in sympathy with the principle of centralization here implied, for he speaks of this reaction from the states' rights theory as "in effect . . . a repudiation of popular government." Obviously the Amendment belongs to the stage of transition of the United States from a federation to a nation, and is one of the first expressions of the unity of the national consciousness. If litigation has grown up under it in excess of all expectation, it signifies that the nation is performing a growing share of the work of standardizing and unifying the law throughout the United States. Consequently we cannot accept Mr. Collins' argument that the states should be allowed greater freedom of action, and that writs of error to state courts should be granted only when the decision of the state court sustaining the validity of the state statute is unanimous. From the point of view of the advocate of decentralization and state autonomy, Mr. Collins reaches consistent conclusions, but it seems to us that progressive reforms which may be demanded to make the Constitution more effectually the servant of the people do not rest upon state autonomy as a prerequisite; progress in this respect should be truly a matter of national concern, and if the whole country cannot move forward it is not desirable that the goal be approached by different paths through a tangle of heterogeneous principles and policies.

It should be pointed out that Mr. Collins is not an advocate of state sovereignty. His position is that of one out of sympathy not with national sovereignty, but with centralization and uniformity. He is one of those for whom democracy and decentralization are cognate if not synonymous terms.

At a time when advocates of social legislation are urging the extension of appeals from state courts to the United States Supreme Court, it is somewhat surprising to find the contrary position that such appeals be restricted urged in the name of democracy. Certainly such appeals should be extended, and there is need of freer interpretation and new definitions by the Supreme Court of the meaning of "due process of law." Only in that way can the Constitution be made to serve the future needs of the people of the United States.

BOOKS RECEIVED

The Law Relating to Cheques. By Eric R. Watson, LL.B. (London) of the Inner Temple, Barrister-at-Law, author of Eugene Aram, His Life and Trial, etc., co-editor of "Byles on Bills," 17th ed. 4th ed. Butterworth & Co., Bell Yard, Temple Bar, London. Pp. xxiv, 148 + 15 (index).

A Digest of Equity. By J. Andrew Strahan,

M.A., LL.B., of the Middle Temple, Barrister-at-Law; Reader of Equity, Inns of Court, London; and Professor of Jurisprudence, University of Belfast, author of A General View of the Law of Property, etc.; and by G. H. B. Kenrick, LL.D., one of His Majesty's Counsel and Advocate-General of Bengal. 3d ed. By J. A. Strahan, assisted by C. H. Castor, of the Middle Temple, Barrister-at-Law. Butterworth & Co., Bell Yard, Temple Bar, London. Pp. liv, 562 + 33 (index).

Retrospections of an Active Life. By John Bigelow. Doubleday, Page & Co., Garden City, N. Y. V. 4, 1867–1871, pp. 572; v. 5, 1872–9, 417 + 14 (appendix) + 28 (index).

The Supreme Court of the United States: With a review of Certain Decisions relating to its Appellate Power under the Constitution. By Edwin Countryman. Matthew Bender & Co., Albany. Pp. xxi, 267 + 12 (table of cases and index). ($2.50.)

Latest Important Cases

Alienation of Affections. *Disinterested and Friendly Advice Leading to Separation Does Not Furnish Ground of Action.* Mass.

In *Geromini* v. *Brunelle*, in the Supreme Judicial Court of Massachusetts (May, 1913, 102 N. E. 67) it was held that a person who gives a husband advice, with an honest and friendly desire to assist him, even though it leads to his separation from his wife, and may turn out not to have been the best advice that could have been given, is not liable to the wife, in the absence of malice.

The *New York Law Journal* comments editorially as follows (July 10, 1913): —

"In actions against the parents of a spouse for alienation of affections it has been very generally laid down that more latitude of intervention in matrimonial affairs is permissible than if the defendant be an outsider. As far as the report of the principal case is concerned it does not appear that the defendant bore any relationship beyond that of a friend to the plaintiff's husband. The decision is a salutary one because expressly disapproving the policy upon which many cases practically, if not avowedly, have proceeded, that no person may, except at his peril, give a spouse advice in good faith and although it was not volunteered, but requested. It is only proper that the plaintiff in such an action should be required to show malice."

Criminal Appeals. *New Trial on Ground of Technical Error.* Ala.

For the fourth time the Supreme Court of Alabama reversed and remanded the case of *Ervin Pope* v. *Alabama*, on June 30, appealed from Anniston city court. Pope, a negro, was convicted of first degree murder in 1909 and sentenced to be hanged. The case was reversed by the Supreme Court on the ground of technical error and Pope was again given the death sentence by the trial court. Judgment of the lower court was again reversed and the court on the third trial again decided that Pope must hang. This was the judgment of the trial court also on the fourth trial. Pope's case was reversed this time because certain evidence had been denied.

McClelland and Somerville, JJ., dissented from the opinion of the court.

Employers' Liability. See Interstate Commerce.

Interstate Commerce. *Federal Employers' Liability Act — Meaning of "Engaging in Commerce between the States."* U. S.

Broad scope was given to the federal Employers' Liability Act of 1908 by the decision of the United States Supreme Court, May 26, in *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146 (L. ed. adv. sheets, no. 15, p. 648). Where an employee of an interstate railway carrier was killed while carrying a sack of bolts or rivets to be used in repairing a bridge which was regularly in use in both interstate and intra-state commerce, it was held that he was employed in interstate commerce within the meaning of the statute, which gave a right of recovery against the carrier for the death of an employee while so employed.

The fellow servant rule was also held to be abrogated by this statute. The opinion of the Court was written by Van Devanter, J. Lamar, J., dissented, and with him Holmes and Lurton, JJ. (Reported and discussed in *New York Law Journal*, June 4.)

Motor Vehicles. *Self-Incrimination — Constitutionality of Statute Compelling Driver of Vehicle to Stop and Identify Himself after Accident.* N. Y.

In *People* v. *Rosenheimer*, decided June 17, the New York Court of Appeals upheld the constitutionality of a statutory provision enacted in 1910, making it a felony for one operating a motor vehicle on the highway to go away

without stopping and giving his name and address and the operator's license number, after causing injury to a person or to property due to the culpability of the operator or to accident. The Court (Cullen, Ch. J.) thus reverses the judgments of the Appellate Division and of the Court of General Sessions. The decision, however, was based upon narrow technical grounds rather than on the broad police power of the state.

Hogan, J., dissented. (Reported in *N. Y. Law Jour.*, June 24.)

Unfair Competition. *Deceptive Reproductions of Photographer's Product — Copyright Protection Essential.* N. Y.

Plaintiff, a photographer using the word "White" as a trade name on its photographs, obtained an injunction against a firm reproducing copies of the plaintiff's portraits in large quantities, ordering the defendant firm to desist from such reproduction unless the copies bore in addition to the plaintiff's trade name, the words "Reproduced by Apeda." The defendants appealed, and the Appellate Division of the Appellate Supreme Court (Clarke, J.) reversed the decree (May, 1913) on the ground that the plaintiff had no copyright, the portraits being the property of the plaintiff's customers, and therefore could not put a stop to competitive practices which are legitimate in all cases where the protection of the copyright law has not been secured. *White Studio* v. *Dreyfoos*, *N. Y. Law Jour.* June 10.

Water Powers. *Rights of Riparian Owners in Navigable Rivers — Condemnation of Private Property — Nature of Ownership in Water Power.* U. S.

By the decision of the United States Supreme Court May 26, in *U. S.* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (L. ed. adv. sheets, no. 15, p. 667), a water power policy has been forced upon the Government. In that case the water power companies complained of unsatisfactory awards made to them in condemnation proceedings under an Act of Congress of 1909 providing for the taking of lands and property in the St. Marys ship canal for improvements of navigation. The Supreme Court, Mr. Justice Lurton writing the opinion, refused to recognize any private right of ownership in the water power of the river for which the companies could claim compensation.

The technical title to the beds of the navigable rivers of the United States, said the Court, is either in the states in which the rivers are situated, or in the owners of the lands bordering such rivers. Whether in one or the other is a question of local law. Upon the admission of Michigan into the Union the bed of the St. Marys river passed to the state, and under the laws of that state the riparian owner acquires title as far as the middle thread of the stream. This title to the bed of the river is at best, said the Court, a qualified one, subordinated to the right of public navigation and to the absolute power of Congress over the improvement of navigable rivers. The owner's title is qualified by the right of the United States to place structures in the bottom of the river in aid of navigation, and therefore the riparian owner could not claim compensation for such use of the river bottom.

"The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows, has been advanced. But whether this private right to the use of the flow of the stream be based on the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."

For these reasons the Court held that Congress having determined that the entire St. Marys river between the American bank and the international line was "necessary for the purposes of navigation of said waters, and the waters connected therewith," that determination was conclusive in condemnation proceedings instituted by the United States under that act, and there was no room for a judicial review of the judgment of Congress that the flow of the river was not in excess of any possible needed navigation, or for a determination that, if in excess, the riparian owners, having title under the local law to the bed up to the middle thread of the stream, had any private right in such excess which must be paid for if they had been excluded from its use.

It was also held that Congress did not act arbitrarily in determining that, for the purposes of navigation, the entire flow of the rapids and falls of the St. Marys river should be devoted exclusively to that end.

The Editor's Bag

THE LEGAL PROFESSION ON THE DEFENSIVE

"WHY is the legal profession on the defensive?" is a question in answer to which Mr. Wilbur Larremore expressed some suggestive reflections not long ago in the *New York Times*.[1] It would hardly be possible to give the meat of that very interesting paper in a nutshell. Mr. Larremore wrote of the importance of the lawyer in American affairs, observed by Tocqueville, the conditions which have made the lawyer an important instrument in the shaping of governmental policy because he alone has the necessary expert knowledge, the extravagances of the doctrine of judicial precedent, the disposition to correct these extravagances that has been more apparent in the courts and among the younger generation of lawyers than in the older section of the bar, the growing sentiment in favor of codification, and the importance of some understanding of constitutional law to the layman. Perhaps the explanation why the legal profession is "on the defensive" furnished by this line of discussion is not explicit, but the general conclusion that too high a barrier has separated the highly technical craft of the lawyer from the other interests of life is likely to be approved as one of the chief causes of the lack of that community of aspiration which is needed to bring the lawyer and the layman into more heartily reciprocal relations.

We are led to regard the realization of two ends as greatly to be desired: first, that of what may be called "humanizing" the law; second, that of teaching laymen something of the law's nature and workings. If lawyer and layman are to meet on common ground the law must come down toward the people, but it is quite as important that the people shall mount toward the law. The way to humanize the law is to banish those artificial doctrines which have fastened on the law its evil appellation of an occult science, to insist that legal problems shall be treated in a spirit of honest scientific investigation, to suppress that logical casuistry which pays more attention to syllogisms than to their premises, and to fit the law into its place in social science rather than to sequestrate it from the general field of knowledge. Only in this way can the law become an open book to the educated layman.

The way to turn laymen toward the law, on the other hand, is to give constitutional law its proper place in a liberal education, to inculcate the general features of our system of law, public and private, in the universities, to present this subject in its organic relations with human society rather than as a narrowly technical discipline, and to see that the law receives its proper share of attention in the teaching of history and politics.

As we advance toward higher scientific

[1] Issue of Sunday, June 1, 1913.

standards there will of necessity be some approach to realization of these ideals, and the gulf that separates the law from other intellectual interests will be narrowed if not completely bridged over. Science is never in need of champions, for it is its own defense. The sooner lawyers are animated by a genuinely scientific spirit the sooner they will cease to be on the defensive. For there will be nothing to defend.

LORD HALDANE'S LAND LAW REFORMS

THE proposed comprehensive reforms of the land laws of England, formulated by Lord Haldane, are likely to be dealt with by Parliament differently from the measures introduced from time to time by Lord Halsbury and others, which encountered opposition among lawyers. Lord Haldane has contrived to bring his own skill as a conveyancer and the experience of other expert conveyancers to bear on the problem of carefully elaborating a project which seems already to have been received with marked favor, though the profession has not yet had time to analyze its intricate details, and it is likely to call forth a large amount of discussion for the next twelve months in legal journals. The two bills have a better chance of passage because the Lord Chancellor has announced that they will not be pressed for enactment until next year, when he hopes they will have been molded into satisfactory shape.

The American lawyer will find the simpler system of land tenure it is proposed to set up far from simple, in comparison with his own system of real property, because in wiping out by a gradual process all the incidents of the old manorial tenures there are numerous complicated interests to be conserved, and the transition from copyhold and leasehold tenure to freehold tenure is by no means as free from difficulty as might be imagined. In the end, when all the manorial incidents have been extinguished by the payment of proper compensation by the tenant, and all tenures have been converted into fee simple and terms of years absolute (not depending on lives), England will have a system of real property offering many advantages over the existing system, but still sharply differentiated from the American by the numerous lesser interests which are to take effect in equity by way of trust, and by the incumbrances, cautions, inhibitions, and restrictions which are to impede the proprietor's freedom in transferring title. The law of real property will continue to be highly technical, if not so technical as formerly, after the passage of these acts.[1]

THE FIRST DUTY OF JUDGES

IF judges are to decide cases not in accord with their own notion of what the law requires, but in an attempt to give effect to a popular understanding of the law, where will the process end? Under the judicial recall, this is precisely what it is proposed to establish. If a proposition as simple in law as the rule that two and two make four in arithmetic cannot be announced from the bench without danger of inciting a sensitive electorate to revolt, the court must mold its law and its arithmetic alike to harmonize with public opinion. This is no mere flippant suggestion; on the other hand, there is danger of that very thing happening in Colorado and other states, under the system which makes

[1] See *Law Journal* (London), July 19, 1913.

the judges servants of the people. To prove the point, we publish an example of a judicial decision which might be rendered by a Colorado court without deviating from the rule of judicial reasoning applied, if possibly differing slightly in phraseology. We are indebted for this specimen to a professor of law who sends the following explanatory remarks by way of introduction:

"The constitution of Colorado contains a provision limiting the number of constitutional amendments which may be submitted at one election. Since the introduction of the initiative and referendum the pressure for amendments has been simply enormous. At the last election I believe some thirty-eight amendments were submitted by way of initiative. The question arose whether the constitutional limitation on the number that could be submitted at any one time applied, and a divided Supreme Court held in substance that there was a popular dispensing power with reference to this constitutional provision involved in the mere voting upon the amendments.

"My attention was called to this some time ago by a lawyer in another state who had been reading the opinion and after reading it formulated 'A Modern Decision Under the Shadow of the Recall' (you will remember that the recall of judges obtains in Colorado), which seemed so amusing to me that I asked for a copy in order to send it to you, and am enclosing it herein. It is really an excellent parody of the opinion and I think shows exactly the sort of stuff that we are going to come to under a régime of recall of judges."

A MODERN DECISION UNDER THE SHADOW OF THE RECALL

John Doe,
Plaintiff in Error,
v.
Richard Roe,
Defendant in Error.

On the part of the plaintiff in error, it is contended that under the constitution of this state, 2 and 2 make four; on the part of the defendant in error, that 2 and 2 make five. The result of this controversy depends on which of these contentions is correct.

It is true, as contended by plaintiff in error, that there is a general rule, supported by many authorities, both ancient and modern, to the effect that 2 and 2 make four. But it is equally well settled that there are exceptions to most rules, and that is apparently true here. For instance, if 2 and 2 be thus arranged — 22 — they make twenty-two.

Now the greater includes the less. It is held by some of the authorities that this rule is without exception; but it is not necessary for us now to determine that point. For the purposes of the present case, we will assume that contention to be correct.

It logically follows from the premises that 2 and 2 may make anything from one to twenty-two. We are not to be understood, however, as announcing that, under peculiar circumstances and conditions, 2 and 2 may not make something greater than twenty-two or something less than one. It is not necessary to consider that question, inasmuch as the parties here agree that 2 and 2 make either four or five, which numbers are, we think, at least for the purposes of this case, included within twenty-two. We see no merit in the contention that the two numbers should be thus arranged — 45 — and are, therefore, not included within twenty-two. Logically they must be considered disjunctively and not conjunctively. It being thus demonstrated that either of the main contentions may be correct, the question remains — What do 2 and 2 make in this particular case? What should be the rule of decision?

The purpose and object of all law is to promote the happiness and welfare of the people, and that is the law which will best serve that purpose.

Certainly as to what will best promote their happiness and welfare there can be no better judges than the people themselves. It is true that the older authorities hold with unanimity that written constitutions are ordained by the people to guard themselves against their own hasty or passionate, and, therefore, ill-considered action. But this notion is now thoroughly exploded as being utterly inconsistent with the principles of popular government. It is now thoroughly settled that the people, as the sovereign, can do no wrong; that the voice of the people is the voice of God. The courts must recognize evolution in the science of government. As custodians and guardians of the constitution it is their duty to make it keep pace, as far as possible, with the march of progress, and not to fasten it as a dead weight upon the necks of a free people. Especially is this true since the adoption of the recall amendment, the purpose

and object and effect of which is to make the courts responsive to the popular will.

We hold, therefore, that in cases of this kind, that is, cases where a question of doubt arises, such as whether 2 and 2 make four or five, it is our duty to ascertain the will of the people, by considering their most recent expressions through the ballot box and by keeping our ears closely and constantly to the ground (to use a common but forcible expression), and to resolve the doubt accordingly. And while we do not definitely determine the proposition, we think it proper here to say that a doubt will probably always arise when the views of the individual members of this court are in conflict with public sentiment. We say this with the hope that it may be sufficient to deter any misguided citizen in the future from questioning any act of the people or from presuming that he has any constitutional rights other than those which public sentiment may permit him to enjoy.

We have considered this case very carefully and have kept it before us until we could be perfectly sure of our ground. We are satisfied that the will of the people is that 2 and 2 here make five, and we shall so hold. We cannot do otherwise without violating the fundamental principle, *Vox populi, vox Dei.* The judgment of the court below is accordingly affirmed.

Affirmed.

THE WIDOW'S THIRD

A New York lawyer tells of an English widow who, by reason of certain legal complications, found it necessary to retain a distinguished attorney to represent her in the adjustment of her late husband's estate.

"You will," said the attorney, during the course of their consultation, "you will get your third out of the estate."

"Oh!" exclaimed the widow, aghast, "how can you say such a thing, with my second scarcely cold in his grave!"

PUBLIC ADMINISTRATION OF ESTATES

IT seems as if the fear expressed by the London *Law Journal*, of the danger of bureaucracy, in extending the office of Public Trustee to the Provinces by the appointment of deputies to act in large towns like Manchester and other industrial centres, must be without adequate cause. If Manchester is given a Deputy Public Trustee, says the *Law Journal*, other towns will demand one, and "the creation of these provincial branches of the department will constitute a genuine test of the principles of officialism on which the Public Trustee's office is based." Is the *Law Journal* out of sympathy with the general principles of a plan which, by its own admission, has proved to meet a public want? If the utility of the department can be increased by the establishment of branches it is hard to see why "devolution" should be opposed, unless such devolution would clearly lower the efficiency of this useful agency. It may well be that investments can be more advantageously placed and funds better handled by one central office. If so, the evils of decentralization are one thing and those of officialism another.

AN UNLEARNED JUDGE

JOHN DUDLEY, who, for twenty years, 1770 to 1791, was one of the most popular judges of New Hampshire, was unlearned in the law, and, it is said, his education was so defective that he could not write five consecutive sentences in correct English. Yet so acceptably did he discharge his judicial duties that Chief Justice Parsons, of Massachusetts, one of the most learned of lawyers, said of him, "We may smile at his law and ridicule his language, yet Dudley, take him all in all, was the greatest and best judge I ever knew in New Hampshire."

Dudley's career is one of those exceptions to the laws of social and educational evolution. His parents were un-

able to give him even a common school education. He learned to read "plain print," but he could never speak, much less write, English correctly. He worked as a laborer for a farmer, and then went into trade as a country storekeeper. Subsequently he became a farmer and a lumberman.

He was elected from time to time to the Board of Selectmen, to the Provincial Congress, and to the State Legislature, where he served one year as Speaker of the House.

Then he was appointed one of the superior judges, in which capacity he acquired the reputation of administering justice better than any other judge in the state.

His judicial functions were, it is said, performed with a judgment that was rarely at fault. He listened attentively to counsel expounding the law, but formed his opinion from the evidence, and enforced it upon jurors with a rude eloquence that was effective. No one questioned his judicial impartiality, and the common people were satisfied with a judge who administered justice on foundations of common sense. Even the lawyers, when unprejudiced by defeat, expressed their satisfaction with the decisions of the rude, unlettered, unlearned, but judicial judge. For he had the judicial mind and temperament, without which no learning in the law, no mental ability to support an opinion, can make a justice a successful judge.

HAPPENINGS IN COURT

ONE day before Judge Gibbons in Chicago two solicitors were arguing fiercely as to the amount of temporary solicitor's fees to be allowed the complainant in her bill for divorce. Finally the argument terminated in the following climax: —

"Now, if the Court please, I submit there is no merit in her case and $10 is enough for his services."

"And I submit, if the Court please, that there is merit in our case and that $200 is not too much for my services."

"Well," smiled the judge, "I will have to compromise for you two. I will give him four times as much as you suggest, and one-fourth as much as he asks, and make it $50. That ought to be fair to both of you. Draw the order."

"Fifty dollars!" shouted the solicitor. "For his services! Why, she could get a good lawyer for that, your Honor!"

"If the Court please," remonstrated the solicitor, "I insist that the defendant be not given further time, but that he be attached for contempt. Five different orders have been entered by this court in as many months that he pay his alimony, and not one cent has been paid. Why, he isn't even here today to offer any excuse, and I have been informed he goes about laughing at me and at this court for trying to make him go to work and support his children. Yes, sir, actually laughing at the dignity of this court!"

"Laughing at the court, you say! I suppose there are a good many that laugh at this court when they get away from here. But if this court hears of it, it will certainly stop it. Mr. Clerk, issue the attachment instanter."

"No, I will order your client to pay the defendant $100 as temporary solicitor's fees and $200 as temporary expense money to defend herself against your charges in this divorce proceeding," finally concluded the judge, in one of the Chicago courts.

"One hundred dollars as temporary solicitor's fees!" shouted the opposing

solicitor. "Why, your Honor, that is more than he pays me for prosecuting his suit!"

"Well, isn't that all right?" asked the judge. "It may be he has a better way of getting fees than you have."

CORNELIUS JOHNSON.

THE PLACE OF THE LAW AMONG LIBERAL STUDIES

(From the *Law Journal*)

SIR JOHN MACDONELL, whose election as a member of the British Academy is a fitting tribute to the position he holds as an exponent of the scientific side of the law, has been declaiming before the Society of Public Teachers of Law against the abandonment, in favor of other studies, of that large field of philosophic inquiry and scientific truth which falls within the province of jurisprudence.

We have gone a long way back from the position which the study of the law held in the education of an English gentleman even in the Middle Ages, not to speak of the dignified place which Locke assigned and Blackstone secured for it in a later generation, and even the high example of Bentham and Austin, which revived the interest in the law as a science a century ago, has failed to be maintained. Much of this neglect, no doubt, is due to the keener struggle of competing studies, but it must be confessed a large part of it must be attributed to the attitude which, nowadays, those who are engaged in the practice of the law take towards it as a science. Our studies are directed too much to the wants of the practitioner, and so we lose touch, so far as law is concerned, with the liberal side of education, and law becomes a "mystery" of the few, instead of an object of intellectual interest for the whole body-politic. The change is exemplified even in our legal literature — "Hail to Halsbury" has taken the place of "Back to Blackstone."

But there are greater symptoms even than that. The latest scheme for the reconstruction of London University finds no place for a Faculty of Law; and this is only one of many indications of the tendency to expel law wholly from the curriculum of liberal studies. Sir John Macdonell does well to invite the public teachers of law to undertake a combat for their science. No time could be better than the present for the renewal of the movement to establish a legal University — a General School of Law — for in Lord Haldane English law has at its head one who is a jurist as well as a lawyer.

INTERNATIONAL LAW LIBRARIES

(From the *Watchman*)

BROWN UNIVERSITY has the finest collection of text-books on international law in the world. It is the Wheaton collection of international law, founded in 1902, in honor of Henry Wheaton of the class of 1802, by William Van Keller of the class of 1872. Its most valuable feature is quite a complete collection of the numerous editions of Hugo Grotius' "De Jure Belli ac Pacis." The editions number about one hundred, and the collection includes a perfect and priceless copy of the first edition of 1625. In this connection it is interesting to know that the student of international law will find in southeastern New England the most complete collection of books on the subject in the world. This is made up of the combined libraries of the Wheaton collection in Brown University; the Bemis collection in the Boston Atheneum, the library of the Naval War College at Newport, R. I., and the Olivart collection at Harvard University. All these are working in harmony. Dr. George G. Wilson, professor of international law at Harvard, is curator of the Wheaton collection, and as lecturer on international law at the Naval College is in charge of that department of the library there, and the Boston Atheneum is adding to its collection in lines of co-operation. The Bemis collection specializes in diplomacy, the Naval College in maritime law, and the Wheaton collection in texts. The Olivart collection of the Harvard Law School covers the whole field.

USELESS BUT ENTERTAINING

Prisoner (to jailer) — "Put me in cell 38."

"What for?"

"It's the one father used to have."

— *Fliegende Blaetter.*

The late Thomas B. Reed, when a lad, was requested to bail out a small boat that had been leaking badly, and was almost full of water.

"I can't do it," replied Tom.

"What do you mean?" inquired the owner of the boat.

"The Constitution of the United States says," replied the future statesman, "that excessive bail shall not be required."

— *Youth's Companion.*

"Yonder is a lawyer who got very wealthy as an inventor."

"And what did he invent?"

"An heirship."

"Is it possible? One that would really go?"

"It went." — *Plain Dealer.*

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.

A Letter Endorsing Melville W. Fuller for Chief Justice

CONTRIBUTED BY DUANE MOWRY

THE copy of the letter which follows is a copy of a typewritten letter, marked "copy" and signed in pencil by Ex-Senator James Rood Doolittle of Wisconsin as "J. R. Doolittle." It is beyond question a copy of an original which was sent to President Cleveland at or about the time indicated by its date. Chief Justice Fuller was appointed in that year, 1888.

The "copy" is in the possession of the contributor and is typewritten on the letter-heads of Doolittle & McKey, lawyers in the Royal Insurance Building, Chicago, which firm was then composed of J. R. Doolittle, J. R. Doolittle, Jr., and Henry McKey.

The letter is, of course, the opinion of a personal and professional friend of Mr. Fuller. But it is more than that. It is the intelligent and patriotic judgment of one good citizen to another, based upon observation, acquaintance and contact. It is the splendid endorsement of the pre-eminent fitness of Mr. Fuller for this high judicial honor by one who knew him intimately and well. And it gives ample and cogent reasons for his confidence in his judicial fitness. The letter does credit alike to the author of it and to its subject.

The reference to the conditions in the South brought about by the war between the states, and the mention of the then recent appointment of the Hon. Lucius Q. C. Lamar to a place on the Supreme bench, was both timely and proper. Judge Doolittle did not too strongly emphasize the possible danger in appointing a Calhoun Democrat.

The reference to other possible candidates for the position is accomplished in a most happy manner and entirely free from a disparaging spirit. This is the right attitude.

The letter is so fair, so unselfish, so just, so complimentary, that the contributor believes it should have the permanent light of day. And in this spirit it is submitted.

Chicago, April 24th, 1888.

To the President: —

Dear Sir: In discharging the great duty of nominating a Chief Justice at this time, I can well understand the earnest desire which must press upon you, to do the very best thing possible.

Among the names mentioned more frequently than any others, are those of Mr. Phelps of Vermont, Mr. Gray of Delaware, and Mr. Fuller of Illinois.

My opinion is very decidedly in favor of the nomination of Mr. Fuller. As a lawyer and jurist, he is fully equal to either of those gentlemen; while, in my opinion, his experience and practice have given him a very decided familiarity with that large class of cases which go to the Supreme Court from such states as Illinois.

You personally know the confidence which I place in him, from the highest testimony which any man can give. When I called upon you with him in Washington, I had associated him as leading counsel with my son in a case of our own, involving a large sum of money, and we were in Washington to attend the argument of the case before the Supreme Court.

It is no disparagement either to Mr. Phelps or to Mr. Gray to say that he is at least their equal as a lawyer and jurist.

There are other potent reasons for his appoint-

ment. I need not remind you that in neither of the great states, of Illinois, Indiana, Michigan, Wisconsin, or Minnesota, is there any member of the Supreme Court.

But, more than all that, he is a Democrat of the Jackson and Douglas school. He is now, and always has been, a firm and consistent believer in the fundamental doctrine of the Constitution of the United States, viz: That the union of the states, as well as the rights of the states in the union under the Constitution, are made perpetual and indestructible.

The recent appointment of Mr. Lamar makes the selection of Mr. Fuller, for that reason, peculiarly fit and appropriate now; and all the more so, because Mr. Lamar, during the recent epochs of secession and civil war, was led away from this fundamental idea of the Constitution. I do not doubt the sincerity with which he accepts the result of the Civil War, and that as a Judge he will earnestly maintain the sacred doctrine, that Union and Liberty, hereafter, are to be forever one and inseparable.

It is not to be forgotten that the Civil War was the outgrowth of a conflict of ideas between the two schools of democracy, at the head of which stood two great men, both of whom were born in South Carolina, — I mean Andrew Jackson and John C. Calhoun.

Both upon principle, and by the teachings of all our experience, all are now satisfied that the perpetutity of our Union, the happiness of our people, the greatness of our Republic among the other nations of the earth, forbid that a majority of the Supreme Court, and that the Chief Justice of that Court, should be chosen from among the disciples of the school of Calhoun, whether the appointment comes from the North or from the South; and least of all, should a Democratic Administration make an appointment of Chief Justice of any man who was opposed to the fundamental idea of the Constitution in which the Republic lives, and moves, and has its very being.

Very respectfully yours,
J. R. DOOLITTLE.

The Legal World

Monthly Analysis of Leading Legal Events

The organization of the American Judicature Society, the outcome of the public-spirited interest of a modest citizen of Michigan in law reform, was perhaps the most gratifying development of the month. The plans for the work upon which this agency entered on August 1 had long been under careful consideration, much of the best expert advice procurable having been obtained by Mr. Harley from leaders of bench and bar long before he was willing to make any details public. The society starts with an able and influential directorate which promises well for the outcome of its efforts, at least in arousing professional opinion to a sense of the need of concerted and intelligent action.

The numerous recent state bar association meetings do not seem to have given any great amount of attention to proposed reforms of procedure, and the topic of procedural reform and obviation of the law's delays is not so often the subject for a bar association address as it was once. The various law reform committees continue to perform conscientious service, but secondary matters of chiefly local concern occupy most of their attention. The explanation must be either that there has been some improvement throughout the country in the general situation — which is not at all improbable, be progress ever so slight — or that the feeling has arisen that relief must now come from legislative bodies, which have only to lend public sanction to projects formulated by the bar. Undoubtedly the problem is chiefly a legislative one at the present time, as the legislatures have entertained numerous bills backed by influential

support and are not always ready to act with the intelligence and promptitude which measures of such importance deserve.

We regret the clumsy outcome of the effort of Philadelphia to provide itself with a Municipal Court of a satisfactory model. While we do not wish to reflect on the soundness of the decision of the Pennsylvania Supreme Court holding the Five Judges Act unconstitutional, our faith in the infallibility of the Court's reasoning is weakened by the considerations that the decision was reached by a closely divided court and that a supposedly competent committee of the Law Association, after careful reflection, had concluded the bill to meet all constitutional objections. Is there not slight possibility, at least, of a similar fate for the Municipal Court Act since adopted? Its constitutionality is by no means free from possible taint of suspicion. Assuming, however, that the Act will stand, we are not confident that the reforms desired can be satisfactorily accomplished without abolishing the Court of Common Pleas. The new act will no doubt work an improvement, but it seems as if the next logical step would be to secure with little delay a constitutional amendment abolishing the Court of Common Pleas and leaving the whole subject of inferior courts and their jurisdiction to the legislature.

Such matters involve fundamental issues of legislative efficiency. James Bryce, in his latest book of public addresses, lays stress on the need of competent bill-drafting agencies. We are pleased to see indications that the idea in which Wisconsin was the pioneer in this country is making some headway. The Colorado Bar Association has adopted a resolution in favor of a bill-drafting bureau. A committee of the United States Senate has reported favorably on the project, even though it will probably be years before a federal bill-drafting bureau becomes possible.

Supreme Court Justice Daniel F. Cohalan was exonerated by a committee of the New York legislature, but not in such a manner as completely to disarm the suspicions aroused by his strange transactions, while a practising lawyer, with Connolly. The *New York Times* summed up the matter as follows:

"The broader moral of this miserable, sordid business is one that has a very direct bearing upon the manner in which the judges of our courts are chosen. The acts charged by Connolly, the acts admitted by Judge Cohalan, are the familiar methods of the Tammany system. Such things have been going on for generations, they are going on now all about us. The influence of the politician is employed in behalf of the contractor or other person seeking to do business with the city. That is not the way in which honest service is got, not the way in which the city gets its money's worth. Yet by the appointment of Tammany these politicians mount to the bench, to the highest office of trust in the community. We persuade ourselves that we elect our judges. That is not true. In this judicial district they are almost universally the appointees of Tammany. As a reward for past service, and, what is infinitely more dangerous, in the hope of securing future service, there are offered to the suffrage of the people candidates morally, mentally, and professionally unfit to sit as judges. Twenty acquittals by the legislature would not take away from Justice Cohalan his bad eminence as a warning example of the evil and the danger of making judges in that way."

The American Judicature Society

An organization has been incorporated under the laws of Illinois, known as the American Judicature Society, its object being to promote the efficient administration of justice. The headquarters will be in Chicago, where the office and bill-drafting bureau were opened August 1. The society has eleven directors, as follows:

Chairman, Harry Olson, Chief Justice of the Chicago Municipal Court; Woodbridge N. Ferris, Governor of Michigan; James Parker Hall, dean Chicago University Law School; Herbert Harley, secretary, Chicago; Frederick Bruce Johnstone, of Runnells, Burry & Johnstone, Chicago; Albert M. Kales, Professor of Law in Northwestern University Law School; Frederic W. Lehmann of St. Louis, former president of the American Bar Association; Nathan William MacChesney of MacChesney & Becker, Chicago; Roscoe Pound, Professor of Law in Harvard Law School; John H. Wigmore, dean Northwestern University Law School; John B. Winslow, Chief Justice of the Wisconsin Supreme Court.

William E. Higgins of the University of Kansas Law School, who is director of the drafting bureau, has been granted two years' leave of absence that he may visit England and the Continent to study procedure in foreign courts.

Three hundred representative lawyers from all the states will co-operate with the drafting bureau.

"This matter of law reform," says Secretary Harley, "is now the leading non-partisan question before the nation. It is certain that before long there will be many attempts on the part of legislatures to improve the conditions. Up to this time a scientific analysis of the defects and a broad reconstructive program have been almost wholly lacking.

"It is to fill this need that the American Judicature Society has been formed. We first will make a thorough study of courts and procedure upon a comparative basis and then project acts looking toward improvement. We aim to present to the country model judicial establishments upon a scientific basis and permitting of the administration of justice in the modern spirit of efficiency."

Personal

Mr. Justice John P. Hand of the Supreme Court of Illinois has resigned because of ill health. While his health has improved, he does not feel able to resume work at the October term. A special election will be held to fill the vacancy.

Judge William W. Morrow of San Francisco, of the United States Circuit Court of Appeals, observed his seventieth birthday July 15. "For forty-four years, ending at midnight last night," said Judge Morrow, in speaking of his decision to remain on the bench though given the privilege of retiring at full salary, "I was compelled to work for a living. Now I shall go on working because I want to."

The Women's Protective League of Denver is said to be behind the movement for the creation of public sentiment in favor of the recall, under the Colorado law, of Juvenile Judge Ben B. Lindsey. The charge brought in the circulars which advocate the recall of Judge Lindsey, is that the Juvenile Court protects men who prey on small girls. Judge Lindsey has been in the East recuperating from a nervous break-

down. His secretary declares that the records of the Juvenile Court show that out of 86 cases of offenders against girls, 53 were convicted and punished and of the remaining 33 the greater part had been dismissed by the district attorney.

The Philadelphia Municipal Court

By a division of four to three, the Supreme Court of Pennsylvania decided the Five Judges Act unconstitutional July 10. Many eminent constitutional lawyers had believed the law constitutional, and the Law Association of Philadelphia, in supporting the passage of the act, had taken this view.

The majority opinion was based on an interpretation of the constitutional provision as signifying that whenever three or more judges are added to the Philadelphia courts they must be formed into a separate court. Consequently it was held that the legislature could not add one judge each to the five Courts of Common Pleas without constituting an additional tribunal.

Shortly after this decision was rendered, Governor Tener signed the Municipal Court bill. Both this and the Five Judges bill had been under consideration in the legislature at the same time, one passing each house and leading to somewhat sharp controversy as to the relative merits of the two measures. The Governor had withheld his signature from the Municipal Court bill awaiting the decision of the Supreme Court.

The Municipal Court Act is not all that was to be desired, as it is impossible to displace the magistrates without a constitutional amendment. It is, however, a well-drawn statute, and it is certain that the new court will take over a considerable share of the business of the Courts of Common Pleas, though exercising a concurrent jurisdiction. The court reproduces the essential features of the Municipal Court of Chicago.

Bar Associations

Alabama. — At the meeting of the Alabama Bar Association, held at Mobile July 11-12, the new rules adopted by the Alabama Supreme Court were approved. One of these rules provides that no cause appealed to the Supreme Court or Court of Appeals shall be reversed and remanded for a new trial on account of the refusal of a charge or the exclusion of evidence or a ruling on the pleadings where said ruling, although erroneous, is harmless and no substantial injustice is done. The Association also discussed the need of purging the profession of shyster lawyers. Judge Edward T. Sandford of the United States Court of Tennessee delivered the annual address.

Colorado. — The Colorado Bar Association held its annual meeting July 10-12, at Colorado Springs. Harry C. Haynes of Greeley, in his presidential address, found fault with the initiative and referendum law of Colorado, and Judge Jesse G. Northcutt discussed "The Recall." Thomas H. Hood spoke on "Colorado's New Practice and Procedure Act," and another feature of the program was an address by Professor Roscoe Pound of Harvard Law School on "Judicial Justice." A resolution was adopted directing the president to appoint a special committee to consider the advisability of establishing an advisory legislative bill-drafting bureau, and also of dividing each session of the legislature into two parts. These officers were elected: Henry A. Dubbs, Denver, president; Frank J. Annis, Fort Collins,

first vice-president; John J. Hendricks, Trinidad, second vice-president; William H. Wadley, Denver, secretary-treasurer, re-elected the fourth consecutive time.

Kentucky. — Former United States Senator Joseph W. Bailey of Texas was the guest of honor of the Kentucky Bar Association at its twelfth annual meeting at Olympian Springs, Ky., July 9–10, speaking on "The Initiative, the Referendum, and the Recall." President Robert H. Winn, in his opening address, felicitated the association on a year of prosperity and progress, and predicted a large growth of influence and membership. A paper read by Judge John D. Carroll of the Court of Appeals excited much interest. Judge Carroll told "Why Cases Are Reversed in the Court of Appeals." A paper on the "Administration of the National Employers' Liability Law," was read by S. S. Willis, of Ashland, and was discussed. Former Judge Samuel Wilson of Lexington read the report of the Committee on Legal Education and Admission to the Bar. Judge T. Z. Morrow read an interesting paper on "Some Great Lawyers of Kentucky." Judge W. T. Sandidge of Glasgow was re-elected president.

Michigan. — At the twenty-third annual meeting of the Michigan State Bar Association, held at Lansing July 16-17, Dean Henry M. Bates, of the University of Michigan, speaking on "Popular Discontent with the Law and Some Specific Remedies Therefor," said: "The prevalent criticisms of our juristic system may, for convenience sake, be traced to the following origins: Defects in procedure; imperfect and meager organization of our courts; lack of adequate training and inefficiency of the bar, considered collectively; a certain sentimentality and lawlessness on the part of the great masses of our people, due to our political origin, our early history and perhaps to our national temperament. Watts S. Humphrey of Saginaw delivered his presidential address and other papers were: "Districting the Judicial Circuits," by Judge Howard Wiest; "The Bench and Bar," by United States Senator Joseph T. Robinson of Kansas; and "City Sovereignty," by William K. Chute of Grand Rapids. United States Senator Porter J. McCumber of North Dakota and Chief Justice Joseph H. Steere of the Michigan Supreme Court also addressed the association. The following officers were elected: President, R. H. Person, Lansing; vice-president, John Carton, Flint; secretary, Harry Silsbee, Lansing; treasurer, W. E. Brown, Lapeer.

North Carolina. — The fifteenth annual meeting of the North Carolina Bar Association was held at Asheville, N. C., July 2–4. Judge Robert W. Winston delivered the opening address, and ex-Governor Thomas J. Jarvis of Greenville opposed woman suffrage, the initiative, the referendum, and the recall. The officers elected were: Thomas S. Rollins, president; Thomas W. Davis, secretary and treasurer (re-elected).

Ohio. — Judge Alton B. Parker of New York was the chief speaker at the thirty-fourth annual meeting of the Ohio State Bar Association, held at Sandusky, O., July 8–10. Judge Parker's address was largely a discussion of the modern teachings of unrest, anarchy, and appropriation of private property, and of the evil of unfounded criticism of the judiciary. It was asserted by Walter A. Knight of Cincinnati that

77.53 per cent of the decisions of the Ohio Supreme Court are reported without any reason being given. Judge R. M. Wanamaker spoke in support of a resolution urging the adoption of an amendment to the constitution requiring the Supreme Court to give opinions in writing and cite the authority upon which it bases its deductions. The association, however, was not in sympathy with Judge Wanamaker's plan for the removal of judges failing to comply with the proposed requirement. The resolution was adopted only after this feature had been eliminated. An address on "Workman's Compensation" was delivered by Wallace D. Yaple, of Columbus. The following officers were elected: President, Harlan F. Burkett of Findlay; secretary, Charles M. Buss, and treasurer, Clement Gilmore of Dayton.

Texas. — The thirty-second annual meeting of the Texas Bar Association was held at Corpus Christi, Tex., July 1-3. Judge John T. Duncan, president of the association, delivering the annual address, outlined many of the bills passed by the last legislature, and stated that it was the opinion of the lawyers that it would be good policy for a committee to be appointed from the bar association, whose duty it would be to attend each session of the legislature to aid in securing the passage of new laws and the amendment of older ones that would affect the development and progress of the state and the administration of justice.

Judge W. C. Morrow of Hillsboro, discussing law reform, said that the need for new laws is not so pressing as the demand for better administration of those in existence. The new procedural laws of Texas were discussed at length.

A paper was read by Hon. O. L. Stribling of Waco on "Trial by Juries in Civil Cases Should be Abolished." In the course of an address on "The Bar as an Institution of the State," Judge Nelson Phillips of the Texas Supreme Court referred to the present attitude of the public as follows:—

"This is peculiarly a critical age. We read and hear a great deal of the lawyer's shortcomings, the obsolete and archaic quality of his make-up, his ultra-conservatism, his disposition to refine and his persistence in appeal, the appropriate waning of his power and the just decline of his influence. He is pictured as the solitary human survival of the technical learning of the Schoolmen, a constant impediment to progress and a kind of continuous peril to justice. He is derided for his defense of those charged with crime, though his duty as an officer enjoins it upon him, in much the same fashion that the Master was scorned as the friend of publicans and sinners. One fault with this arraignment is that it is too general. Another is that it usually exaggerates the conditions upon which it is predicated and is therefore untrue. Like the rains of the heavens, it descends alike upon the just and the unjust."

The report of the Committee on Law Reform and Jurisprudence advocated, among other things, that the various courts of civil appeals remain as they are now, with their present functions and establishments. The plan outlined in the pending constitutional amendment to provide additional judges was indorsed by the committee. It was voted that a committee of seven be appointed to prepare a bill at an early date, which will be printed and mailed to each member of the association, looking toward judicial reform; the bill to be submitted to Governor Col-

quitt early in 1914, who will be asked to call a special session of the legislature to consider the bill and other court reform measures.

The following officers were elected: President, W. W. Searcy of Brenham; vice-president, Allan D. Sanford of Waco; Board of Directors: John L. Dyer of El Paso, Frank C. Davis of Houston, Robert W. Slayton of Corpus Christi, R. E. L. Saner of Dallas and W. C. Morrow of Hillsboro; treasurer, William D. Williams of Austin; secretary, J. B. Cave of Dallas.

West Virginia. — Senator William E. Borah's paper on "The Lawyer and the Public" was the feature of the twenty-ninth annual meeting of the West Virginia Bar Association, at Wheeling June 16–17, though the Idaho Senator was prevented by illness from delivering it in person. He wrote in part:—

"Obligations to the public are to be measured according to ability and opportunity to serve the public; the public weal has a right to exact services in proportion to our ability to meet the exaction, just as the Government should collect taxes in accordance with the ability to pay. Ever since communities began to adopt rules by which their members consented to be governed, the lawyer has been of great and exceptional service to the public. He has been called upon in almost every emergency, from the drafting of the more important ordinances of a town meeting to the most tremendous concerns of state, and when called he has in the past given of his time and learning without money and without price. No member of the profession looks back upon these services characterized with such singular wisdom and self-sacrifice without emotions of professional pride. But the days that have gone carried no greater responsibilities than the days that are coming. Almost every conceivable question, almost every matter of moment to the citizen at this time, involves in some way a knowledge of law and the training which enables us. to adjust well known legal principles to our new industrial and social conditions."

President W. G. Matthews made one of the most interesting addresses ever made before the state association. It was on the subject, "Martial Law in West Virginia," and in it he protested against the views of Governor Glasscock that there was a necessity for the maintenance of martial law in the coal strike districts of West Virginia. Several members took an active part in the discussion of this protest. Some counseled against endorsing or denouncing the Supreme Court's decisions, saying that it would precipitate trouble. Others asked that action be postponed until the United States Senate completed its investigation of the coal strikes. A motion to refer to a committee passed.

The executive council recommended a discussion of the laws regarding the removal of judges as well as several changes in the constitution and by-laws. Investigation of charges of attorneys unfit for the profession was urged. The report was adopted.

A paper by Judge McWhorter was read, on "Courtesy and Its Abuses in Judicial Administration," another address, by John J. Cornwell, dealing with "The Utilization of the State's Water Powers." A highly successful banquet followed. These officers were elected: President, Col. Robert White; vice-presidents, Nelson C. Hubbard, J. J. Cortney, Fleming Alderson, J. W. Vanderwort, Frank Enslow, Jr.; secretary, Charles McCamic; treasurer, Charles A. Kreps.

Miscellaneous

The new workmen's compensation law of California, effective Jan. 1, 1914, requires greater compensation for injuries than the laws of other states, 65 per cent of wages rather than 50 per cent.

The Wisconsin Legislature passed a bill July 25 requiring a certificate of health from both parties to a nuptial agreement as a preliminary to the granting of a marriage license. Examinations by physicians are required. Both houses also passed a bill for the sterilization of the feeble-minded, epileptic, and criminal insane, in state and county institutions.

The amalgamation of the Baltimore Law School and the University of Maryland, which has been hinted at for several months, will take effect at the opening of the fall term. The faculty of the combined schools contemplates establishing a more strict entrance requirement. It is said that the institution will be placed on the same footing in that regard as the Harvard Law School.

The important question of the visitorial powers of Congress and the powers of commissions of inquiry is evidently to be passed upon by the Supreme Court, as a result of the appeal filed July 11 by George G. Henry, a New York banker, from the decision of a New York federal court which refused to release him from custody on a habeas corpus proceeding. Henry was indicted and arrested for contempt because he refused to answer certain questions of the Pujo committee.

The Senate Committee on the library has favorably reported to the United States Senate the Owen bill providing for the establishment of a legislative reference bureau in the Library of Congress. The committee has worked over the bill considerably and has effected many changes. The bureau is to be called "The Legislative Drafting Bureau." It is to be under the direction of an officer known as the "chief draftsman," to be appointed by the President of the United States for ten years at a salary of $7500.

The new Workmen's Compensation Act of Illinois, which became effective July 1, repeals the act of 1911, and provides a system of compensation elective for the employer, who adopts its provision, by filing notice with the Industrial Board, and impliedly elective for the employee unless he files notice of non-acceptance with the board. Questions of law or fact upon which the employer and the injured employee or his personal representative cannot agree are to be determined by committees of arbitration appointed at the instance of the Industrial Board.

John S. Dawson, Attorney-General of Kansas, was elected president of the National Association of Attorney-Generals, which closed its annual convention at Charleston, S. C., July 9. Other officers of the association were elected as follows: Vice-president, John H. Light, of Connecticut; secretary, Royall C. Johnson, of Oklahoma; members of the Executive Committee, Grant Martin, of Nevada, chairman; Charles West, of Oklahoma; Georgia Cosson, of Iowa, and James Tanner, of Washington. The association will meet next year at the place and time chosen by the American Bar Association for its annual convention. Thirty states were represented at the meeting just closed.

The Commercial Law League of America, at its nineteenth annual convention, held at Cape May, N. J., July 21-24, unanimously adopted a resolution which set forth that the "practice of law is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts." "The custom of business men practising law, either in the form of trust companies, notaries public or agencies, has grown to such an extent," continues the resolution, "that the Commercial Law League of America, in convention assembled, now calls upon the profession generally to take more vigorous action in prosecuting offenders against the penal laws, and where necessary to secure further legislation prohibiting the illegitimate practice of law." Copies of the resolution will be sent to every bar association in the Unite States.

John S. Kennedy, former Warden of Sing Sing Prison, was indicted at White Plains, N. Y., July 10, charged with violating a public trust. The indictment contained five counts all dealing with alleged mismanagement of the prison. The first charges him with being absent on different dates. He is charged with putting prisoners suffering from contagious disease in cells with sound prisoners, putting whites and negroes together, putting degenerates and those morally sound together, putting men in dark cells without examining them to see if they were physically fit to stand the punishment. The indictment also says these men only received a loaf of bread and eight ounces of water in twenty-four hours. He is charged with having kept the prisoners from July 13, 1911 to June 5, 1913, with improper and insufficient clothing, unclean and damp bedding, and with blankets that were washed but once a year.

Obituary

Binney, Charles C., of Philadelphia, who died at Little Boar's Head, N. H., July 10, was a graduate of Harvard, class of 1878, and was assistant attorney in the Department of Justice at Washington, D. C., from 1893 to 1897.

Bonnifield, M. S., at one time Associate Justice of the Supreme Court of Nevada, died at Winnemucca, Nev., July 16, aged 80. He was one of the pioneer lawyers of Nevada.

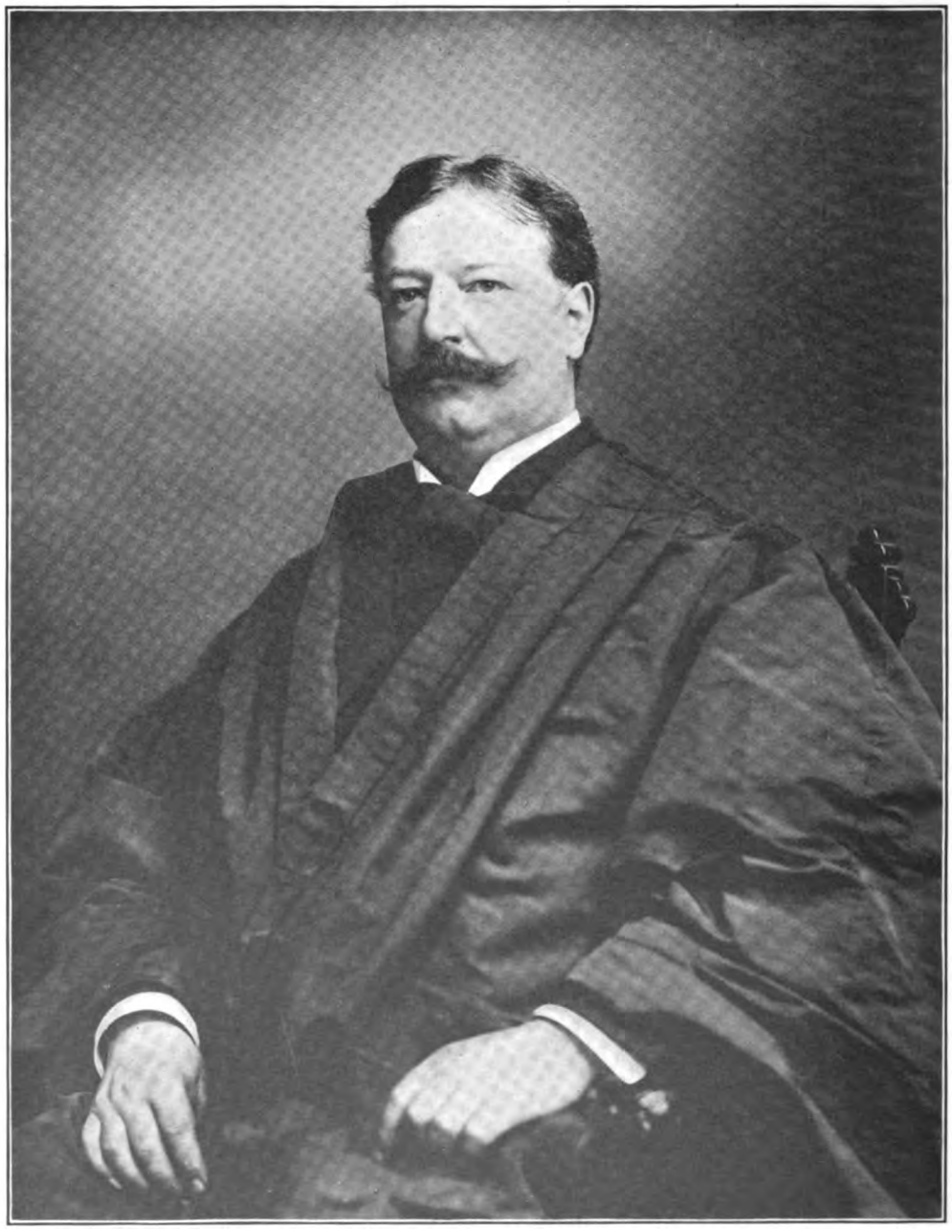
Cooley, Alfred W., Assistant Attorney-General of the United States from 1906 to 1909, and a former Justice of the New Mexico Supreme Court, died of tuberculosis at his summer home at Topsfield, Mass., July 19.

Harrod, Judge *J. H.*, a prominent lawyer of Little Rock, Ark., was killed by an automobile July 11, aged 63. He was slated for United States Attorney and had been a candidate for Governor.

Livingston, S. B., until six years ago president of the Society of Medical Jurisprudence in New York, died at his home in New York City, July 13, aged 60.

Low, Homer B., assistant attorney for the Oklahoma lines of the Rock Island, died at his home at El Reno, Okla., July 9. He had been prominent in legal circles and politics in the state and territory for many years.

Olmsted, Marlin E., former Congressman from Pennsylvania, died July 19, at a hospital in New York City. He had practised law at Harrisburg since 1878. During the hearing on the Payne-Aldrich Tariff bill he presided in the House for a part of the time.



THE NEWLY ELECTED PRESIDENT OF THE
AMERICAN BAR ASSOCIATION

FROM A PICTURE TAKEN DURING HIS INCUMBENCY ON THE BENCH OF THE
UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

Courtesy of the Boston Book Co.

The Green Bag

Volume XXV October, 1913 Number 10

The Thirty-sixth Annual Meeting of the American Bar Association

THE most modern note in all the proceedings of the American Bar Association at Montreal was struck by Lord Haldane. At the present time there is a widespread survival in the legal profession of ways of looking at the law which have come down from earlier periods. While the eighteenth century natural rights theory is not often clearly enunciated nowadays, there are frequent indications that the influence of the analytical jurists of the first part of the nineteenth century has not yet spent itself. This influence is apparent in those who find the sanction of the law in the command of the sovereign, though the sovereign may have died long ago; who rest the authority of the Constitution of the United States on the wisdom of the founders of the nation rather than on its vitality as one of the paramount forces in our national life of today. Another view, which may be called theological, is likewise still in evidence; according to this the divine law is regarded as the fount of eternal justice, and the principles of our organic law have their foundation in something more than secular and contemporary conditions. These attitudes were both in evidence at Montreal. They easily ally themselves with the mental habit of the lawyer whose interests are chiefly confined to the province of his own specialized craft, and who, when he says that the law must be adapted to shifting circumstances, means that a new application of old rules ought to be made rather than that any material modification of the principles of his chosen science ought to be countenanced. Such a view, however, does not come naturally today to the lawyer of broad mental interests, whose mind has received the impress of the more significant intellectual movements of the times. In Lord Haldane's address there was not a trace of any re-actionary attitude; at once broad in its survey of great matters and profound in its insight into deep problems, it was, apart from its other conspicuous merits, an exemplary product of a mind exemplifying the highest qualities of the Anglo-Saxon legal intellect of today. The dignity of this address, considered on its intrinsic merits quite as much as the dignity of the great public office held by its author, imparted a priceless quality of distinction to the sessions at Montreal, and probably no previous meeting of the association had been equally notable in this respect.

A stimulating characteristic of the address was the assumption tacitly made, as if the point were not debateable, that there exists in this country a considerable element of the bar exerting a beneficent influence on the ethical ideals of the community and contributing exten-

sively to the formation and guidance of sound public opinion. This assumption, taking for granted a wide diffusion of lofty ideals and a genuine solicitude for the highest good of society, had the necessary consequence of encouraging earnest devotion to aims which the lawyer may be tempted to regard as lying somewhat beyond the field of his profession, properly concerning the publicist more than the lawyer, yet aims, after all, quite as legitimately his own, to be entered upon in no spirit of diffidence or apology, but with the conviction that they have a direct and vital rather than a visionary and remote bearing upon the problems of his active professional career.

Thus Lord Haldane had in mind the best traditions of the Anglo-Saxon common law, the traditions of the bar and bench which have made experience count for more than logic, which have made the law living and growing, and have repelled the influence of the legal technician, who is devoted more to the letter than the spirit, more to the form than to the substance of legal institutions — he had in mind not that devotion to the syllogism which notwithstanding the absence of codes has characterized much of our legal development, but sensitiveness to what Mr. Justice Holmes calls "the felt necessities of the time" — when he said, in summing up the first point of his address: "We [meaning the lawyers of three closely related nations] can do much to influence opinion, and the history of our law and the character of our tradition render it easy for us to attain to that unity in habit of thought and sentiment which is the first condition of combined action."

The speaker took his second point from the field of sociology and ethics, and expounded it with that deep philosophical insight for which he is noted, further elucidating it with illustrations drawn from dramatic and inspiring episodes in the past life of nations. He advanced the modern conception of *Sittlichkeit:* "The law forms only a small part of the system of rules by which the conduct of the citizens of a state is regulated. . . . There is a more extensive system of guidance [than law or conscience] which regulates conduct and which differs from both in its character and sanction. . . . We find within the single state the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient, in the vast majority of the events of daily life, to secure observance of general standards of conduct without any question of resort to force." For this system of *Sittlichkeit* Lord Haldane said we had no English word. The concept is not unfamiliar, however, because of the attention that recent writers have given to the subjects of "*mores*" and "folkways," and when "public opinion" and "common usage" are referred to in a temporary writing and speech as sanctions for law, municipal or international, these loose expressions must usually include what is more accurately defined by the term created by German philosophers.

Lord Haldane then reached the third, most important point, which supplied the real theme for his discourse on "Higher Nationality." In the first two points there was nothing novel or remarkable, the interest coming chiefly from the manner of exposition, but the third, implying the conception of a community intermediate between the nation and the community of nations, was indeed striking. This third point was found in an affirmative answer to the following question: "Can nations form a group or community among themselves, within which a habit of looking

to common ideals may grow up, sufficiently strong to develop a general will, and to make the binding power of these ideals a reliable sanction for their obligations to each other?" Realizing that the perfect international community which was the hope of Renan, Arnold, and Goethe, and the full development of an international *Sittlichkeit*, was a goal a long way off, Lord Haldane preferred to look to the attainment of something within the present reach of man, namely, the development of a *Sittlichkeit* between the peoples of a sympathetic group of nations drawn together by ties of race and institutions. "The *Sittlichkeit* which can develop itself between the peoples of even a loosely connected group seems to promise a sanction for international obligation which has not hitherto, so far as I know, attracted attention in connection with international law."

If the conception is new to international law, it is nevertheless not likely to challenge criticism, for hardly any one will deny the possibility of a close solidarity among nations closely allied in their habits of thought, and the influence of such an understanding in promoting justice and fair-dealing among the nations making up a group of this kind. Why hesitate, then, to look forward to the unity of formation of one collective public opinion, or *Sittlichkeit*, for a unit larger than the single nation but not all-embracing?

The speaker was careful not to give the misleading impression that he was advocating the formation of a select club of Anglo-Saxon nations to which other nations could not be admitted, as he showed by references implying the possibility of other groups being formed by the nations of Europe, on as high an ethical plane as that of the Anglo-Saxon race. He was, in fact, advocating a world movement; recent events in Europe, he said, point to the ethical possibilities of the group system as a means of preserving peace between nations.

Lastly, recurring to his ideal of a closer Anglo-Saxon solidarity, hopes for which were suggested by the message he brought from the King, Lord Haldane re-iterated his belief in the lawyer's power to influence public opinion, and urged that the lawyers of the United States, Canada, and Great Britain exert their efforts to secure a yet further development of *Sittlichleit* toward the goal suggested. In this spirit he proposed that the coming international centenary observance of the Peace of Ghent should be approached.

Hon. Hampton L. Carson of Pennsylvania responded felicitously to the sentiments of Lord Haldane: "We applaud the spirit of the address that while each nation shall act like a gentleman, all Councils of the World should be controlled by the gentlemanlike nations. In this way we can strike a newer, truer, deeper note of human brotherhood, which like Memnon's statue, bursting into music with every rising sun, will proclaim a new era of peace and good-will, and justice scrupulously exact."

According to the statement of Mr. Francis Rawle of Philadelphia, the Lord Chancellor said afterward regarding his address: "It is official and is intended to be so. It is the declared policy of the British Government announced through my address to the world. It will be published in London before I get home, and it will be published immediately in French, German, Russian and Chinese."

In accordance with the Lord Chancellor's recommendation, no "cut-and dried resolution" was adopted, but the

Association did adopt, on motion of Judge Alton B. Parker, a resolution approving the plan of fitly observing the approaching centenary of peace between Great Britain and the United States, a committee of five being appointed to co-operate with the Joint International Committee already in existence in arranging the celebration.

Mr. Kellogg's Paper

Mr. Frank B. Kellogg, the president of the Association, made in his paper on "Treaty-Making Power," a strong argument in support of the supremacy of the treaty-making power of the United States over conflicting legislation adopted by the several states. He reviewed the historical development of this principle, and considered at some length the decisions of the Supreme Court in which it has been involved. He went a bit too far in maintaining that Congress possesses a plenary power to legislate upon subjects of an international character — in saying that while it may well be the policy of the federal government to leave the regulation of the rights to engage in business and to own property to the states, and that while there are many subjects "which it might be found inexpedient for the government to control by treaties with foreign nations," nevertheless "the power exists, and whenever in the judgment of the President and the Senate it becomes necessary for the federal Government to exercise this prerogative, it is undoubtedly conferred by the Constitution." The federal Government undoubtedly possesses the right to remove, by treaty, disabilities of any kind imposed by the state of California on aliens which are not borne by native citizens of that state; but it could not confer special privileges with regard to the holding of land or ownership of other property, so as to favor aliens more than native citizens, without dealing with a matter that would be an improper one for international negotiation and without exercising a larger prerogative than the Constitution recognizes or permits. The point which Mr. Kellogg wished doubtless to emphasize, namely the power of the federal Government to exempt by treaty the Japanese from the operation of laws aiming at discrimination against them, was well taken. Mr. Kellogg made it clear that he was not advocating indiscriminate admission of alien races to all the rights of native citizens. What he did emphasize — and it was well that it should have been so clearly emphasized in connection with our recent dispute with Japan — was that subjects of this sort are properly to be approached solely as national questions, and not as subjects for independent state action.

A Sound Judiciary

One of the most gratifying features of the meeting at Montreal was the action of the distinguished former President of the United States in throwing the weight of his great influence, on the occasion of his first notable appearance in public after leaving the White House, into the cause of an appointive judiciary with a life tenure. Mr. Taft's paper was chiefly notable as reflecting general conditions among the American judiciary, which came within his observation during his four years' service in Washington, and for the lack of reserve with which he now felt free to express his estimate of the judiciary of those states wherein the elective system obtains. Consequently, the paper was so enriched by reflections based upon direct

observation that no charge of triteness could be brought against it. It contained a moderate, impartial estimate of the relative merits of an appointive and an elective judiciary, which must have elicited hearty approval from lawyers not only in states where the appointive system prevails, but from perhaps a majority of the others who heard it. It was none the less valuable for some of its minor suggestions as to how the character of appointive judges may be improved, and as to what particular shortcomings the federal judges especially need to be on their guard against.

Judge Taft's views were fortified by the adverse recommendations of the Committee on Jurisprudence and Law Reform on the subjects of short judicial tenure and popular election of judges.

That popular indifference toward the fundamental principles enunciated by Judge Taft and the dangers of the Judicial Recall are easily underestimated was made clear by the Committee to Oppose the Judicial Recall, which has distributed a great deal of literature on the subject during the past year and has waged as active a crusade against the panaceas as it could with facilities at its command. Besides being adopted in Oregon and California by constitutional amendment, the recall of judges has been made a constitutional provision by Arizona and Nevada. Kansas and Minnesota have voted to submit it as a constitutional amendment for adoption by the people. Colorado has adopted constitutional amendments for both the recall of judges and the recall of judicial decisions. But "it is a mistake to assume that the agitation has not become a serious one east of the Mississippi. It has already grown up strong, although without as yet sufficient strength for adoption, in the legislatures of Wisconsin, Illinois, Ohio, and other states."

Procedural Reform

The Association, which is doubtless the most active agency in the country at work for the improvement of judicial procedure, shows that notwithstanding legislative apathy it is pressing steadily onward toward the goal. The most important project now being promoted by the Association is the needed reform of procedure on the law side of the federal courts. This matter first came up at last year's meeting, when the Committee on Judicial Administration and Remedial Procedure reported favorably on Thomas W. Shelton's resolution looking to the passage by Congress of legislation empowering the Supreme Court to formulate and promulgate a uniform model system in the same way as has been done for the equity side of the federal courts. The Association then created a new committee, known as the Committee on Uniform Judicial Procedure, to work for the passage of this legislation. This committee, of which Mr. Shelton is chairman, now reports that the proposed legislation has been introduced in Congress.

But the committee has not been satisfied to look solely to Congress for improvement in this direction; it has chosen this year to bring the subject directly before the state courts, by inviting the presiding justices of all the highest state tribunals to meet with it at Montreal with the object of bringing about "uniformity in judicial procedure among the states through fixed interstate judicial relations just as there are now fixed interstate commercial relations." The result was the convening of one of the most impressive and unique assemblies ever brought together. This conference of presiding justices, the first

of the kind ever held, was made a permanent feature of the annual sessions of the Association by vote, and will be known in future as the Judicial Section.

Mr. Shelton, in addressing the conference, urged in a striking manner the substantial good that may come out of these judicial conferences. Helplessness on the part of judges, in the face of the legislative restrictions by which their hands are tied, has too often, he said, been mistaken through ignorance of the public for indifference and even deliberate wrong. The judges need to be freed by Congress so that they can work out the details of procedure without interference, and Mr. Shelton made it clear that the time has come when the judges should place the responsibility clearly on the shoulders of the legislative authority, recognizing that patient acquiescence on their part has ceased to be a virtue and has become a public menace. Lawyers throughout the country, said Mr. Shelton, have accepted the American Bar Association's program and agreed that the Supreme Court should be permitted by Congress to work out the problem. "There is no more use for differing court procedure amongst the states than for the use of differing languages." Mr. Shelton hoped the same benefit would be secured through friendly exchange of views by the judges of the various states as has come about in commercial intercourse between states; he hoped for a fixed system of interstate judicial relations similar to that of interstate commerce relations, and for a growing comity in the decisions of courts similar to that expressed in the uniform statutes thus far adopted by the states.

The creation of the Judicial Section opens up new prospects and opportunities of fruitful activity, and relieves the monotony of the annual declaration of committees that Congress has failed to enact the bills urged by the Association. Three such bills advocated by the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost of Litigation have again failed of passage this year, though each has passed one house of Congress. The Technical Error bill, after being urged upon the attention of Congress year after year, still fails to receive the favorable attention to which its importance entitles it. The committee is able to point to hopeful developments in separate states, as it did last year, in the direction of limiting appeals based on technical error, but Congress persists in an attitude that becomes harder to justify each year. The committee, which has long sought means of alleviating the evil of unnecessary appeals and new trials, also finds the situation presented by the decision of the United States Supreme Court in *Slocum* v. *New York Life Ins. Co.* (33 Sup. Ct. Rep. 523, see 25 *Green Bag* 274) remarkable, in view of the fact that there is no requirement that notice of a hearing involving the construction of the Constitution must be given to the Attorney-General, and a decision may be rendered on a constitutional point of great importance without any opportunity for argument on briefs. Mr. Wheeler, the chairman of the committee, in asking the Supreme Court for a rehearing of this case several weeks ago on behalf of the Association, then declared the granting of new trials in cases where it was decided as matter of law that either party had the right to judgment to be "one of the greatest abuses in the administration of justice." The committee has long advocated the entering of proper judgment on appeal without reversing and sending the case back for a new trial.

The committee also made the report that the Law and Equity bill, which has had the support of the Association since it was drawn by the committee in 1911, has failed of passage. The bill promotes the transfer of suits between the equity side and the law side of the federal courts.

The committee took the position two years ago that whatever reason may have originally existed for limiting the right of appeal from the highest state courts in cases involving the construction of the federal Constitution had ceased to exist, and the Association then endorsed a proposed bill permitting a right of review in the Supreme Court whatever the decision of a state court as to the constitutionality of a state statute. This bill has again failed to pass Congress.

These three bills have again been introduced in the present Congress.

That the Special Committee is thoroughly alive to its responsibility is proved by its serious consideration of a number of important subjects, especially the judicial construction of wills during the life of the testator, the service of process by mail, enlargement of the powers of courts of equity to enable them to give real effect to their decrees, the preservation of the right of the federal courts to stay proceedings in state courts, and the maintenance of their power through injunctions unimpaired by any class exemption in favor of labor unions.

Symposium on Procedure

A symposium on "The Struggle for Simplification of Legal Procedure," in which three distinguished speakers joined, was an interesting feature of the meeting at Montreal. It was opened by Federal Judge William C. Hook of Kansas, whose subject was "Some Causes." The keynote of Judge Hook's paper is to be found in the motive from which sprang the remark he quoted from Hilaire Belloc: "The Professor of Psychology was a learned man, and his sense of reality was not always exact." Thus lawyers need to cultivate a fine sense of the realities of life, they need to avoid the prolixity and subtlety to which their profession predisposes them in an age of such complicated mechanism as our own. "The true critic, the one who does not boil at too low a temperature or see red, who regards the good beneath the evil and would cure, not destroy, has a useful and important place in society and his lash must sometimes cut to affect a hardened, customary wrong. I speak of the criticism which is impersonal. . . . It is but fair to say that some of the criticisms of the judiciary are due to a misconception of their appropriate functions. In the army of progress they should not be scouts far in advance to explore the way, nor on the other hand should they ride in the rear with the sutlers to whom permanent rest is profit and enjoyment. But when ground is gained by the great body and occupied, *there* are law and order and the seats of justice."

The true nature of private property as an institution ordained for the common welfare was recognized in the second paper of the symposium, read by Judge N. Charles Burke of the Maryland Court of Appeals, on "Legal Procedure and Social Unrest." The economic warfare of the present time, he said, is waged between the two opposing camps of excessive individualism and socialism. The relations between capital and labor, he said, are a moral question primarily, the solution of which must be based on an application of principles of justice. The principal causes of the present injustices which have been inflicted upon the

masses were defined as arising (1) from the relations of the public service and industrial corporations to the national and state governments, (2) from the employer's attitude with respect to wages and living conditions of the laborer, and (3) from the unsuitableness of the common law doctrine of master and servant with respect to work accidents. "A recurrence to fundamental principles, and the application of those principles to existing facts, will aid in the solution of many difficulties."

The third speaker, William A. Blount of Florida, considered "The Goal and its Attainment." Mr. Blount was felicitous in his remarks about those lawyers who, like men of similar attitude in politics, social and economic, are to be classed neither as stand-patters nor as progressives, who neither think that whatever is is right nor that whatever is is wrong. This class, properly referred to as "thus far undesignated by any popular epithet," Mr. Blount called the "progressive conservatives," who "garner from the past and the present the best of grain, and make of it grist for the betterment of the future." To say that these "now constitute the great body of the American bar" seems to have been an over-confident assertion. But even though good exponents of the type may be in a minority, the general type, broadly speaking, may widely prevail.

In connection with pleading, said Mr. Blount, "the marvel is not how little, but how much, has been done in the way of simplification and expedition." In this field "we have in large part left to the age behind us the niceties of distinctions and differences, the subtleties and keennesses which deterred, and frequently interred, justice." But this simplification of pleading implies a sacrifice of accuracy to speed, and has resulted in greatly increasing the inability of the jury to distinguish between and separate issues and to apply the law to them. Mr. Blount's paper was largely concerned with the importance of this problem of so improving procedure as to restrict the issues to be found by the jury and in this way to expedite legal actions. The popular criticism of the appellate courts for their decisions upon technicalities are largely due, the speaker pointed out, to the presumptions which the system of jury trial requires to be made. Judges should be empowered, said Mr. Blount, to work out the details of procedure in rules of court, and if there should be uniform federal practice the states would practically conform their practice to the federal standard throughout the Union. But after all, concluded Mr. Blount, the effectiveness of procedure depends upon the assiduity of bench and bar; "pleading and practice are but the reins with which the courts drive the lawyers, and if the horses be sluggards, and the drivers slumberers, then the traces sag and the causes drag."

Uniformity of State Laws

The movement for the uniformity of state laws was shown to be making satisfactory progress; the Committee on Uniform State Laws was able to tell the Association that it had discovered signs of a wide-spread and thoroughgoing awakening, as indicated by the attitude of Governors and legislatures. During the past year there have been about twenty-five instances of the adoption of the standard uniform acts. The Negotiable Instruments act is now in force in forty-six jurisdictions, and the Warehouse Receipts act in thirty, while the other acts have been adopted in numbers of states corresponding to the periods that have elapsed since they were

originally drawn. The Association, while supporting the numerous acts which the committee has approved, this year endorses a new act, that designed to prevent persons from evading laws prohibiting marriage by marrying in other states, having been approved by the Commissioners on Uniform State Laws at Milwaukee last August (see 24 *Green Bag* 474).

The committee laid emphasis in its report on the need of uniform decisions in cases under uniform statutes and urged every member of the Association to use his influence toward this end. A similar point was made by Charles Thaddeus Terry, in his address as president of the Commissioners on Uniform State Laws. The twenty-third annual conference considered, among the great number of subjects presented by the numerous uniform acts already drafted or under consideration, proposed amendments to the Negotiable Instruments act which were advocated by Professor Williston. The Conference voted down all amendments, however, acting on President Terry's recommendation as to the need of securing uniform judicial interpretation of uniform laws.

The Conference gave re-iterated consideration to the two proposed uniform Workmen's Compensation acts, one compulsory, the other elective, the first drafts of which were presented at last year's meeting. The plan was approved of offering the twenty or more states which have not yet enacted any laws on this subject an opportunity to adopt uniform statutes. This subject was also considered in the Association by a special committee which presented its recommendations as to the essentials of a well-drawn Workmen's Compensation act based on the compulsory principle.

The Committee on Commercial Law is also interested in the uniform state laws movement, and reported that it had again introduced into the Senate the Pomerene bill, based on the Uniform Bills of Lading act. This act is in force in ten states, but the courts have held that under existing federal legislation the state bills of lading laws cannot apply to transactions of interstate commerce.

The adoption of uniform insurance laws is the goal toward which the Committee on Insurance Law is setting its face. The Committee has been authorized to co-operate with the Senate and House committees of Congress in the District of Columbia, in the preparation of an insurance code for the District of Columbia. When the draft of this code is approved by the Association, it will serve as a model statute for the several states.

Legal Education

The address of Walter George Smith, chairman of the Section of Legal Education, embodied a timely plea for the inculcation of high professional ideals in the teaching of law and for increasing the attention devoted to the moral character of the applicant for admission to the bar, now that the question of proper intellectual preparation for the bar is nearing its solution by reason of the interest and approval widely aroused by the proposed standard rules for admission. As hereafter the great majority of law students "will carry into practice after admission the ideals they have imbibed in the class rooms of the law schools, a responsibility is imposed upon the individual professor to impress them with the primary duty of making ethical considerations of primary importance. . . . With such faculties as American law schools now possess, we need have no fear that together with the best technical training, every effort will be made to impress the students with noble professional ideals."

The importance of inquiry into the moral character of applicants for admission to the bar was likewise emphasized by Clarence A. Lightner of Michigan, who addressed the Section. He thought that the mental preparation of applicants had been brought up to a quite sufficient level at the present time, generally speaking. "If these standards should be raised, it is along the lines of general education rather than of technical learning." Moral character is of more consequence at present, he said, to the bar and to the public at large. The moral standards of the bar compare unfavorably with those of the medical profession, and the candidate for admission gains a wrong impression of the requirements of the lawyer's vocation from the mistaken emphasis laid on fidelity to the client. In the medical profession this relation of fidelity to the client is taken for granted and is not talked about. The medical profession does, however, claim commendation for itself for its eminent services to the public at large. "It results therefrom, at least in large part, that medicine, with its record of service, is the most popular profession with the general public, while the bar, living chiefly for itself and its clients, has become the most unpopular. . . . When analyzed, it is difficult to understand why the lawyer should ask for commendation for loyalty to his client. That is an easy virtue." The difficulty of devising and applying a satisfactory character test for applicants for admission was discussed at some length. The various methods now in use in different states depend for their efficacy upon the force of the personality that is doing the work, and too often the work is done in a formal or perfunctory spirit. "Perhaps at this time it may not be practicable, may not be wise, to refuse admission to an applicant on other grounds than those that would justify his disbarment, if already admitted. Consider, however, what a long step forward even this standard would mark."

"The Control Exercised by the Inns of Court over Admission to the bar in England" was described by Wilfred Bovey of Montreal in a paper read before the Section of Legal Education. The independent position of the Inns of Court in relation to the Government was clearly brought out. England is remarkable for this system of a bar whose professional standards and requirements for admission are relinquished by the civil authority to the supervision of private agencies. Mr. Bovey characterized the Inns as "perhaps the most conservative institutions in an ultra-conservative country."

Judge Taft likewise addressed the Section, on "The Social Importance of Proper Standards for Admission to the Bar"; and Dean E. R. Thayer of Harvard Law School discussed "Law Schools and Bar Examinations."

Edson R. Sunderland of the University of Michigan asserted before the Association of American Law Schools that the schools had "never taken hold of procedure in a thoroughgoing and comprehensive way. . . . No school teaches procedure under that name. Few teach it at all. . . . The law schools have been too unsystematic with their whole procedural program. They have considered procedure courses as an unscholarly necessity — a form of surrender to popular demands."

The report of the Committee on Standard Rules for Admission to the Bar, presensed by Lucien H. Alexander, embodied a draft of rules as outlined in sixteen main principles. These principles were first evolved in the report of the committee in 1911, when action was

postponed. The report met a like fate this year, action being deferred until 1914, but with the recommendation that the committee then present a final draft which might at that time be adopted.

Bill-Drafting

The Special Committee on Drafting Legislation submitted an important and able report, in which three essential requirements of a legislative bill-drafting service were thus formulated: (1) The reference service should be so organized and operated as to be directly contributory to the drafting service; (2) both the reference and the drafting service should be so organized as to secure permanancy of tenure; and (3) where the available force is not large enough to give expert assistance to all bills introduced, preference should be given to administration bills, that is, bills advocated by the President or Governor, commission bills, and committee bills, in the order named. The committee took occasion to point out the lack of any book in the English language discussing in the light of administrative and judicial experience the legal ways and means by which a given legislative policy can be rendered effective. The committee took the position that the Bar Association should lend its influence toward the production of such a manual, and submitted in an appendix a list of topics to be covered in such a work, with a request that the Association continue the committee with instructions to prepare a manual of this kind for submission to the Association. The Association adopted resolutions to give effect to this project and to express its approval of the principle of bill-drafting and reference services.

A Patent Court

The proposal for a United States Court of Patent Appeals, favored by the Committee on Patent and Copyright Law for several years, and again endorsed by the Association, was reiterated this year, the committee renewing its objections to giving the jurisdiction of such a tribunal to the Commerce Court. That there would be business enough to occupy a separate court of five judges is evident, says the committee, from statistics received from the nine federal circuits, which show that in the first circuit the patent cases take up one third of the time of the court, in the seventh one fourth, and in the eighth one fifth.

Ex-President Taft was elected president of the American Bar Association at the close of the annual meeting. Hollis R. Bailey of Boston heads the executive committee. Other officers elected were: Secretary, George Whitelock, Baltimore; treasurer, Frederick E. Wadhams, Albany, N. Y.; executive committee, Hollis R. Bailey of Boston, Aldis B. Brown of Washington, William H. Burgess of El Paso, Tex., John H. Voorhees of Sioux Falls, S. D., and William H. Staake of Philadelphia.

What the Public Criticizes in the Bench and Bar[1]

By Judge William C. Hook

United States Circuit Court of Appeals, Eighth Circuit

SO MUCH of political and public policy is involved in the work of our courts that the most illogical man in the world is the judge who resents or is impatient of criticism or general disapproval of his judicial acts. He should welcome the outside view and take an inventory. Observe Plato who, when told that the boys in the streets laughed at his singing, replied: "Then I must learn to sing better." The next illogical man is the lawyer who inconsiderately aids and upholds the judge. The confidence, respect and esteem of that great body of men from which the Bench is recruited should be earned with effort, not given lightly or perfunctorily. It is the duty of each to be helpfully corrective of the other. It is but fair to say that some of the criticisms of the judiciary are due to a misconception of their appropriate functions. In the army of progress they should not be scouts far in advance to explore the way, nor on the other hand should they ride in the rear with the sutlers to whom permanent rest is profit and enjoyment. But when ground is gained by the great body and occupied, *there* are law and order and the seats of justice. The complaints of the impatient and the tardy must be endured. Demands will be made to which a judge must not yield; to others he should yield quickly. . . .

I will set down some of the things that are said of us, not as my own, for I am in no position to say them. If greatly pressed I fancy I would have to plead guilty to some and would fear conviction of others. They crowd the books, the periodicals and the newspapers of the day and are talked about in the common highways. In part, they relate to substantive law more than to procedure, but all, whether true or overdrawn, are contributing causes of the movement to make the administration of the law more simple, direct and efficient. It is said: —

That judges, and also lawyers though in less degree, lack human sympathy; that the substance of the human interests they deal with is subordinated to the abstractions they make of the principles of the law; that they especially fail fully to comprehend the spirit of efforts for social and industrial betterment and when statutes come forth they are regarded as strange births, whose missions are not understood; and that they do not keep both hands warmed at the fire of life.

That they are generally in opposition to progress and improvement. The Bench and the Bar are among the great conservative elements of the country. The influences of their calling make them so. Wisely ordered, conservatism in the sense of thoughtful carefulness is a virtue. It tempers undue speed, gives time for reflection and makes advancement sound and enduring. But opposition to all change is an evil. It is a serious evil when it attempts to thwart or shunt change that has been legislatively enacted; and that is sometimes done

[1] Extract from Judge Hook's paper on "The Struggle for Simplification of Legal Procedure: Some Causes," read at Montreal before the American Bar Association.

by saying a statute is against common right and must be strictly construed, or by reading it on the common law as though the common law were a permeating, ever-present restraint. It has frequently been said that the Field Code of 1848 in New York was judicially put to death in those ways. There is significance even in the very title of the subject of our discussion. The movement for simplification of procedure is termed a struggle.

That they blindly and irrationally worship at the shrine of precedent. Of course the law must be uniform, today as yesterday, and for John Doe as for Richard Roe, for that is of the very essence of justice. Otherwise the life, liberty and property of the citizen would not be safe. But the mental accumulations of the past are not always sound or always authoritative; sometimes a precedent embalms an error instead of a principle. If the lowliest magistrate of first instance should deliver an unsound opinion on a new question in law and it should get into the reports it would likely act like a snag in a stream which slowly gathers increment and finally splits or turns awry the true and natural current. Frequently courts reach conclusions with expressed reluctance and debit them to precedent; and lawyers regard a cause well-nigh won on finding a case or two to cite. On many clear-cut propositions there are two opposing columns of authority and sometimes height ranks with quality — occasionally they are found in the same court of last resort. Unhappy but unconscious turns of judicial phrase are followed into error, and careless statements of settled principles produce an evil brood.

That they deal in technicalities, and exalt the hidden meanings. Nice differences are discovered and subtle distinctions are drawn. Deviations from little rules of practice are urged and adopted and assume an unmerited importance. Simple statutory remedies intended as helpful and cumulative are construed as exclusive, and, the field of operation being ill-defined, new and dangerous perplexities are created. Though statutes may be framed rather roughly or coarsely for the practical affairs of life, they are taken into a cloister for metaphysical analysis. Ever since the earnest, truth-seeking lawyer tempted Christ with questions the plain and simple things have been looked at doubtingly. Is not more meant than meets the eye? So it is that what are called "jokers" in legislation are so readily sought for, found and established. Fairly obvious language is given shrewd and distorted twists. An instance of this is told: An indictment charged that the accused "did unlawfully obtain from J. D. his money," etc. It was most earnestly argued that the indictment was fatally defective because according to the words employed the money may have belonged to the accused himself. That was a case where ancient usage failed of observance. On February 3, 1660, Samuel Pepys, who was not a master of English, but whose rugged sentences are easily understood, noted in his diary the following: "In the meantime we sat studying a Posy for a ring for her which she is to have at Roger Pepys his wedding." Many a judge upon the bench has listened to able, ingenious, subtle arguments and yet heard through the open windows the roar of traffic in the street below, where were thousands to be affected and none to understand. And when opinions come down we hear it declared that comment on the results will be withheld until they are closely studied. Sometimes both sides win; one practically, the other theoretically.

That prolixity is the great besetting sin. Directness and simplicity are found only in the lower walks. A merchant suing a delinquent customer simply files his account with a near magistrate. Everybody understands what he means by his bill of particulars — that the debtor at the times specified bought the goods described at the prices set forth, and that the bill is due and he fails to pay. But if the amount is considerable and the merchant employs a member of the bar to bring action in a higher court, what happens? No inferences or implications obtain in that higher atmosphere of learning and experience, a place where, if ever, they should. So in drafting his pleading the lawyer drives a substantive and six and by a plentiful use of "saids" and "aforesaids" he distinguishes the parties from all other persons living or dead and describes the subject-matters as accurately as if attached as exhibits. A simple bill in equity for the foreclosure of a mortgage, instead of being in a few brief paragraphs telling the story as it would be told amply and intelligibly in a book or newspaper, is crowded with surplusage and repetition. The case goes to an appellate court on a record that might be tithed to advantage. There was a case, an ordinary criminal case in which the record covered more than three thousand printed pages, of which the assignments of error took more than four hundred. Besides, there were over eight hundred pages of printed briefs. The opinions of the courts? The books speak for themselves. It is said that the law, the real law, is being swamped. It is common remark that the ablest lawyers draft the most concise pleadings, submit the briefest briefs and make the shortest arguments. There are geniuses among them who think and act that way. They go, as it were, straight through the tangled forest, with an instinct for direction. Others reach the same end, but what a tortuous trail they leave! Acute perception bent upon the ground notes the small dispensable things. Prolixity is also the easy path for tired and uncertain minds. To a judge with whom I am most familiar it came from a disposition to pedantry. Early in his judicial career he determined that in writing opinions he would pursue the legal principles involved to their upper reaches, even to their fountain heads, and also survey the country roundabout so that, besides some little personal renown, no subsequent traveler could lose his way. He found his industry was not appreciated and that where the work went beyond the needs it was frequently inaccurate. And then one day he read of the functionaries in India who wrote "thirty-page judgments on fifty-rupee cases," and the author added, "both sides perjured to the gullet." But prolixity had become almost a fastened habit.

All candid men will agree that for reproach our criminal procedure is in a class by itself. It would be humorous were it not tragic. Some of us flatter ourselves that our procedural eccentricities are due to a tender solicitude for life and liberty and that it is better that the many escape justice than that the one innocent suffer, forgetting the while the rational tests and standards; and that society, having its rights also, has admonished by the frequency with which it has roughly shown distrust of criminal justice judicially administered.

All of us have heard these things, and others, in various forms. To ignore them is neither wise nor consistent with duty. To be rid of such as have real foundation would make for happiness. To the glory of the profession which has in charge so much of the temporal interests of men the baser charge of infidelity

to trust is never made against it. That is the important thing; all else are merely curios gathered on the voyage. Its members have charity, too, for they do not question the clean right of the stone throwers, as perhaps they might.

Patents and Modern Industrial Conditions[1]

By Frederick P. Fish

of the Boston Bar

NO form of reward so fits the achievement, is so productive of advantage to the community, and is attended by so few disadvantages as the grant to an inventor of a monopoly of his invention for a limited time. While many other forms of reward have been suggested (such suggestions were made at the convention which adopted our national constitution), they have nowhere been adopted as part of the machinery of society. Everywhere some form of exclusive control for a limited time has been recognized as the best way of dealing with the matter.

The encouragement of patent protection does not alone stimulate the inventor to intellectual effort; it excites to strenuous effort a long line of intermediaries, capitalists, investors, business administrators, licensees and users who work with or under the patent and whose co-operation is vitally necessary that the invention may not be confined to a paper description, but may actually get into use.

Inventors Helpless Without Patents

Nowhere can it be worth while to invent, unless there is opportunity for utilizing inventions if made. An adequate patent system gives to the inventor, who as a rule never could himself do anything with his invention, something that is tangible and of value, which he can transfer, in whole or in part, to the business enterprises which alone can make the invention of value to the community. Inventors, and business men who develop inventions and introduce them to the service of man, to exactly the same degree and for the same reason are stimulated by the protection afforded by a patent, to efforts which they would never otherwise make. Each class would be helpless without the other. It is only when both are encouraged and protected, as they are by the grant of a patent, that the progress of the useful arts is promoted. Even if the invention meets a real demand, there is frequently the opportunity and occasion for the expenditure of a vast amount of money and of the greatest intelligence and energy on the part of those who are introducing it into use before commercial success can be attained and always there is the chance of utter failure.

Superiority of American Patent System

The standards and rules imposed by foreign patent laws as to working inventions, and as to the grant of compulsory licenses, are and must be purely arbitrary. No man who is inclined to

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[1] Abstract of address delivered September 2, 1913, before the American Bar Association at Montreal.

invent or to promote invention can be sure that any particular invention will not be one of a class that is necessarily rendered unprofitable because the law fails to give him a free field for effort during the term of the patent.

The simple provision of the United States patent law that after the grant of his patent the patent owner shall control the invention absolutely for a short but definite term, having no more payments to make and no fear of interference from competitors during the term, gives to our people a far greater stimulus to invention than does the law of any other country.

Today there are not only a very large number of men struggling with inventive problems or who are on the lookout for the opportunity to invent, but the effort has been systematized to a large extent in accordance with the scientific principles upon which modern business is carried on. With the large enterprises of the country, invention is as much a part of the systematic organization of the business as manufacturing or selling. Intelligent men are employed to determine the problems of the business and to find in what direction improvements should be made that there may be extension into new fields, increased production, greater economy or an improved product. Highly trained engineers and inventors attack the problems as they are presented and work them out in well-equipped laboratories where not only technical skill, but thorough scientific investigation, carried on almost regardless of expense, are applied to their solution. Meantime, as always, individuals, even the most humble, are inventing or hoping to invent. They know that nothing is more likely to advance them in wealth and comfort than an invention, the opportunity for which is wide open before them, reward in proportion to the merit of what they may accomplish being almost more certain than in any other field of human endeavor.

Progress under American Patent System

In 1850 the manufactures of every kind in the United States amounted to $1,019,106,616. In 1880 they had increased only to $5,369,579,191. In 1910 they had attained the enormous total of $20,672,051,870, an amount equal to one-fifth of all the wealth of the United States, six times the total money in circulation, nine times the total gold and silver in circulation, twelve times the total domestic exports, thirteen times the total imports, twenty times as much as what would be required to pay the national debt, and two hundred and sixteen times the value of all the gold produced in the United States.

Between 1905 and 1910 the number of establishments engaged in manufacture increased nearly twenty-five per cent, from 216,180 to 268,491.

The number of employees increased nearly twenty-four per cent, from 5,981,939 to 7,405,313. The wages of employees increased from $3,184,884,295 in 1905 to $4,365,612,851 in 1910, nearly thirty-eight per cent. The amount of wages paid in manufacturing industries in the United States in 1910 amounted to nearly two-thirds of the total wealth of the United States in 1850, nearly one and a half times the total money in circulation in 1910, nearly twice the amount of wages paid out in 1900, over two and a half times the amount of exports and nearly three times the amount of imports in 1910, four times as much as would be required to pay the national debt, four and a half times the amount of wages paid out in 1880, eighteen times the total wages paid out in 1850, and

seventy times the total amount of money coined in 1911.

Patent System Imperative Under Present Unstable Conditions

Up to a recent time we have had an enormous amount of free land which was open to cultivation. This has now been practically exhausted.

The prevailing popular sentiment of today and the new laws and new interpretation of old laws based upon that sentiment require a definite readjustment of business and of business methods in all their relations. The process of readjustment will surely be one of shock to our industries.

Foreign competition is sure to be more serious every year. In our competition with foreigners we are hampered in many ways. In our cost of production we are embarrassed by the high cost of our labor as compared with other countries. We have in the past more than held our own in international competition, chiefly because of our superiority as inventors and in the quick and comprehensive adoption of inventions. If the process of continuous improvement is checked, we shall lose this advantage and there will be no alternative except the destruction of some or many of our most important industries, or a reduction in the wages and standard of living of our workmen.

More Patent Protection Needed for the Future

There is no longer room for the striking advances in agricultural machinery, machinery for making fabrics and shoes, electrical and other power apparatus, machinery employed in the production and working of wood and metals and in other great departments of industry that there was a few years ago. Many of the arts are already developed almost to the point of saturation. It is not so easy as it was to find out how they can be improved and to improve them. There should be every possible incentive to seek out and to develop an incessant series of minor improvements which may in the aggregate afford great possibilities of advancement. The latter are of a kind that especially requires encouragement, for they do not greatly appeal to the imagination and the direct returns from any one of them are not likely to be large. They are not often developed as the result of a happy thought. Close and careful study and scientific effort carried on persistently, systematically and at great expense is generally required for them. Agriculture and the production of food products may be revolutionized during the coming century by chemical inventions. In other fields there is room for many great and important improvements, which cannot be realized unless our patent system affords the requisite encouragement.

American Patent System Threatened

The Oldfield Bill that has been reported by the Committee on Patents to the House of Representatives at Washington is a most serious attack upon our patent system. It restricts the patent owner in the manufacture, use, sale and license of patented articles and under certain circumstances compels him to license the invention to any person or corporation that requests it. Such a requirement would check invention and the development of inventions, invade the established law of the land, and be a national misfortune.

The Influence of the Lawyer upon Public Opinion

By the Editor

THE opportunity of the lawyer to promote the formation of a sound public opinion is no new thought, but it is a thought which derives new significance from Lord Haldane's address. Such an idea does not assume the existence of a bar possessing a monopoly of wisdom and supremely adapted to mould public opinion, to the exclusion of other agencies from a position of equal leadership. It does assume, however, a bar of high intelligence, worthy of taking to itself a large share of the responsibilities of leadership, and of exerting an influence secondary to that of no other social force.

It may be timely, therefore, to inquire into the relative strength of some of the chief forces moulding public opinion in the United States, with the purpose of making clearer how the bar stands in relation to other agencies, with respect both to its opportunities and to its qualifications.

The quality of the lawyer that commonly receives least attention, because it is usually taken for granted, is his prudence. From the earliest times the traditions of his profession have inculcated that virtue, and when a lawyer fails to attain the virtue of prudence it is not by reason of any defect in his training. On the contrary, the rigid mental discipline which the study and practice of the law work to impose must affect even the dullest intellect, and this schooling gives the lawyer an advantage over other men, in that it tends to develop habits of carefully determining the value of evidence, of cautious analysis of premises before formulating conclusions, of looking minutely into the broad range of complicated human transactions, and of clearly observing what lies at the foundation of social order and inheres in the form of institutions. These mental habits constitute the prudence of the lawyer, which is a virtue compounded of caution, observation, thoroughness, exactitude, and impartiality. If the quality of prudence, as thus defined, is an attribute of the ideal lawyer rather than of the ordinary practitioner at the bar, it cannot be denied that the possession of one or more of these ingredients, in a conspicuous degree, is closely associated with the lawyer type in the popular mind. The definition of course is not exhaustive, for it leaves out of account many of the distinguishing marks of those who attain the higher levels of juridical wisdom, but it is explicit enough to exhibit the difference between the prudence of the lawyer and the prudence of the layman, and to show that the lawyer has something, in consequence of his training, to which the layman cannot lay claim in equal degree.

There is danger, in making any comparisons of this kind, of taking too much for granted, of assuming that an ideal is more commonly attained than it really is. Obviously, also, there are to be considered possible advantages, on the layman's side, of freedom from the effects of a possibly contracting discipline, and there is room for an inquiry whether the training of the lawyers of today, and the influences of their vocational environment, are free from shortcomings which may seriously militate against the production of a full, well-rounded professional wisdom. But need

we enter such fields of inquiry? It seems sufficient for the present purpose merely to make a loose general comparison between those two rather hazy abstractions, the lawyer mind and the lay mind, which gives to the former, in the main, a preponderating advantage.

Of the avenues through which a lawyer's influence may be exerted in the direct formation of public opinion speech-making probably ranks first in actual importance, even though writing perhaps ought to be treated by the general public as a more effective medium of expression. Addresses are apt to be widely reported and to reach a much wider audience than the immediate assemblage. If the lawyer is a ready speaker he is likely to make his way into politics easily and to possess himself with little difficulty of the prestige and opportunities for influence which public life affords. Men are much more susceptible to the influence of the spoken word than to that of the written word. Consequently the lawyer is likely to find public life more accessible than literature, and it must be borne in mind that lawyers are frequently good writers, so it is not through lack of aptitude that they make their power felt in the field of public life more than in the realm of letters. The chief opportunity of the lawyer to influence public opinion is through that direct participation in the work of government to which he is welcomed. If the opinions of a legislator have no appreciable effect on the community in general, they usually have weight with his own constituents, and a chief executive can always get the ear of a mass of people.

It was this influence that the lawyer can exert as a factor in public life, both upon the people and upon his personal associates in the councils of state, which Lord Haldane had in mind, but he also spoke of a power exercised by the lawyer more outside the legislature than within it, thus suggesting the numerous ways in which a lawyer's influence may be exerted, both through the written word and by example and precept in the ordinary relations of daily conduct. Many of the best popular books on contemporary problems are written by lawyers, and even when they find it easier to write articles for technical publications than for the lay public they may be influencing those who possess great power in directly shaping public opinion. The work of lawyers in the serious discussion of vital questions is likely to be competent and useful, and they deserve to be encouraged to take up literary production more extensively. The too common view of editors that the public does not care for discussion of this kind is erroneous. Lawyers would do well to seek means of raising the standards of the periodical press by giving their attention to the thoroughness with which it discharges its more important functions.

In the field of public life it will not be questioned that lawyers are likely to be more influential than other men; for this reason the action of a legislature, or its failure to act, is often due to the merit or fault of its lawyer members — a point frequently overlooked. That the work of legislation is not better performed is not, however, a reproach to the legal profession, but to the laity, which is too ready to permit a wrong type of lawyer to gain the ascendancy. Till the public is educated to demand a better type of lawyer-legislator it is hard to see much hope for progress in this field, and from whom is the public to obtain its inspiration to seek improvement, if not from lawyers themselves?

We have briefly considered one great

agency for moulding public opinion, that of public office, an agency which is more in the position of an instrument than of a rival of the legal profession. Let us now turn to one of the chief rival agencies, that of the universities.

Apart from their great function of training the youth of the country, the universities exert an important influence on the intellectual life of the nation. They turn out a large mass of scientific and literary production every year which is not the less influential because it may reach only a limited public. The legal profession of course has nothing to compare with it. The lawyer's leisure for research, when he is qualified to undertake it, is limited, and the circulation of his productions is not facilitated by a subsidized press. Leaving out of account such university teachers as may indeed be characterized as having the legal mind, whether they happen to be law professors or teachers of political science, economics, sociology, or history, the faculties of the universities cannot be claimed to possess higher intellectual standards and capacities than eminent judges and leaders of the bar, and it must be confessed that there is much writing by lay professors on subjects which could be handled more competently by lawyers of capacity. It would aid in the study of history, and of contemporary social questions, if the legal mind could engage more actively in the work of university instruction and investigation. It is fortunate that there are many lawyers not only in the faculties but also among the presidents and governing boards of these institutions, who are naturally sensitive to the opinions of colleagues within their own profession. Perhaps there is the possibility of the lawyer obtaining an increased share in the responsibilities of university management.

With regard to the universities, the dependence of the lawyer upon them for intellectual stimulus is far greater than their dependence upon him for guidance, and any survey of the intellectual influence of the lawyer which left this debt out of account would be incomplete. In fact the relation of the bar to the universities may be made one of more earnest support for their higher undertakings, and an intelligent bar can do much to promote both in its own ranks and among the general public the sort of attitude toward their activities that ought to exist.

Of the remaining agencies none is more significant than the daily press, which is too often a force retarding intellectual progress and actually seeking low levels. The ablest newspapers are closely in touch with the legal profession and disposed to place their services at its command on proper occasions. Their editorials are frequently marked by the clearness of thought, the deliberateness of judgment, of the writer who, if not a lawyer, is likely to be a man of legal training. The legal profession has nothing to fear from the influence of the editorial opinions of a competent public press, and any moral pressure it may exert to correct the faults of superficiality and misconception of second-rate newspaper writing is sure to be worth while. Lawyers who send letters to the press correcting false impressions likely to arise from the hurried treatment of news, or throwing light on perplexing public issues, are performing a public service and are adding to the effectiveness of the papers that print such letters. Toward the news columns of newspapers, however, the attitude of the bar cannot be of the same complacency. They may justly complain of the ill effects of the tawdry sensationalism which obliterates the

actual significance of important public transactions, such as the kind of reporting that makes a laughing-stock of conscientious and efficient courts, charged with the administration of some artificial system that furnishes the real root of the difficulty, or callously flaunts the details of an unimportant and badly conducted litigation on the front page day after day to the exclusion of more important news. They can likewise complain of the disproportionate space allotted to the dissemination of distorted and erroneous views on public questions on the pretext that they are printing the "news" of the day. Here the bar comes face to face with the entrenched habit and usage of newspapers, and the force thus exerted directly by newspapers which do not dare to break away from tradition — and few of them do — is not to be overmatched by any influence exerted by the profession upon public opinion. The bar here meets its most formidable rival, in the low standards of the press. If this foe of progress could be vanquished the greatest obstacle to the moulding of an enlightened public opinion would be removed. The only hope for remedying such an evil must lie in the better impulses of the press itself, in a movement originating within the press of the country, aiming at a new classification of the news worth printing and the news not worth printing. But it would be a mistake to assume that the influence of lawyers on the daily press can be only negligible. Editors are open to friendly advice from persons who seek to point out their mistakes, and if it can be demonstrated to them that the whole body of the legal profession in their cities disapproves of certain things, they will be too solicitous of public favor to ignore the desires of an important section of the public.

In this survey of the opportunities of the lawyer for influencing public opinion, opportunities far greater than those of the equally noble sister profession of medicine, the one disturbing fact that stands out before all others is the menacing power of a deteriorating, demoralizing public press, sowing seeds of folly, delusion, and misunderstanding throughout the land. Perhaps the chief problem of the bar should be to subjugate this arch-enemy of human enlightenment and impress it into the service of the higher interests of humanity. We offer no suggestion how such an end may be rendered attainable. Apart from this one unpleasant factor, the opportunities of the lawyer to diffuse the light of intellectual progress are countless, and for that very reason it would be futile to attempt more than a cursory and incomplete enumeration. Both by allying themselves with other beneficent agencies and by working alone, both by coming before the people and through the quiet discharge of professional duty, lawyers have it in their power to do more, probably, than any other class of men, not even excepting journalists, to guide American society toward the goals of order, justice, and prudence.

The bar is not a caste apart, but owes its virtues and defects to the society to which it belongs, and our bar is what it is today, is no better and no worse today, because it is the creature of American civilization. There are limits to the progress of any living organism beyond the bounds which nature has marked out for it. How far our American civilization may go can be evidenced by no more accurate index of its potentiality than the influence of an intelligent bar, and that this influence seems to be increasing is one of the most hopefulsigns of the times.

Impaneling a Jury in Cook County

By Cornelius Johnson

ONE of the judges of the Circuit Court of Cook County, Illinois, the other day called the roll of a petit jury, and asked for any excuses they might have why they should not be obliged to sit as jurors at that time. Each member, as his name was called, responded and had some kind of an excuse to give, some humorous and some not so humorous, yet sufficiently so to keep the whole court room laughing. When the judge had called all the names, he also laughed and with a good-natured smile continued: —

"The usual story of every panel of jurors I have ever called in this city! No one wants to serve, and all manner of excuses are offered, and some of them are really good. Now, if I could I'd let you all go, but it is getting near vacation and we need all you jurors to finish up your business, so I can only let a very few of you go. I will begin with the best excuse and go down the list.

"First, Nels Erickson. Will you step forward? You are the painter and decorator.

"Yes, sir, Judge."

"Well, this is the time of spring when the whole world takes on a fresh coat of color and assumes the spirit of joy. Your business is to lend a helping hand in that. I realize your season for work is short and that this is the busiest part of it, and that you want to make money while you can. I also realize that you are much sought after by the housewives and that to keep you away from your work would be to disturb much of our domestic tranquillity. So I will have to let you go."

"Thank you, Judge. Next spring I will gladly serve."

"Now, the next juror, Michael Flannigan. You say your mother-in-law died?"

"Yes, your Honor; it was too bad. I'd be glad to serve, but I can't serve my country with her dead at home."

"No, I suppose not. And you will no doubt want to see her buried, so you may go."

"Next juror, Robert Nicholson. You say you have to attend a wedding this coming week?"

"Yes, sir."

"Whose wedding is it? How are you so interested in it that you really have to be there?"

He blushed and then stuttered, "It is my wedding."

"Oh, yours! You will surely have to go then. They could hardly get along without you. I suppose she is waiting for you now, so you had better hurry back."

"Next, Guido de Angelo. You say you are a poor man, married, have seven small children to support and that four of them are sick with the mumps and the measles, and you have to have a doctor and food, and can't get along on the two dollars a day that the state will pay you to act as juror?"

"Yes, Judge, all kinds of trouble at home."

"Well, it looks that way. What do you do for a living, and how much do you get a day?"

"Machinist, and make five dollars a day; double for overtime."

"Well, the pay is not a good excuse, but I think your children need you worse than the state does. It is a pitiable thing when the state of Illinois cannot support you and those dependent upon you, while demanding your services as a juror. I am going to let you go."

"John Brown. And your excuse?"

"Your honor, my wife is in a very delicate condition and expected to be sick now at any time. I must be there."

"Yes, you are right about that. If that is the case, you may go, and go quick. You know the old saying that there are two times in a man's life when he ought to be at home. You are undoubtedly coming to one now. Any lawyer in the room can tell you when the other time is. You hurry home, and God bless you."

"Next juror, Patrick McGinnis. Patrick McGinnis! Isn't Patrick McGinnis in the court room? Oh, I see, I have him marked here as a deaf man! Will someone that knows Pat just punch him once for me?"

The whole court room snickered, one old shriveled-up man grunted, jumped to his feet, hobbled forward to the bar and sputtered out, "I couldn't hear your Honor at first."

"You say you can't hear," shouted the judge.

"What is that, your Honor?" He squinted and raised his hand to his ear for an ear trumpet.

"I say, can't you hear at all?"

"Yes, Judge, I am an old man, but not as old as I look. My hearing began to fail me, though, long before my age. Nigh onto twenty years have I been afflicted, Judge."

"Well, I think I will have to let you go, then," shouted the judge again.

"Thank you, Judge. Thank you. I haven't served for twenty years, and I guess I am getting too old to serve now.'

The judge watched the old man closely as he turned and hobbled away; and then in a low tone of voice the judge said, "It must be a terrible affliction to have been deaf for twenty long years."

The old man turned his shaking head, and in a sympathetic tone of voice said, "Yes, Judge; it has been, it — "

"Well, I thought so," blurted out the judge. "Twenty years is a long time, so you'll have to begin right now to make up for lost time."

Greatly confused, the old man tottered and began to plead, "Oh, no, Judge; I can't hear at all — only once in a while, when certain sounds strike me just right."

"Oh, yes! Well, these sounds will strike you all right. We have a new generation of lawyers since you last served, and if you will take a seat you will find you will have no difficulty in hearing them."

"Now, the next man, Thomas Ryan. You are not deaf, but you say you have lumbago. How does that affect your service as a juror?"

"Why, Judge, I can't sit down for over a minute at a time. I have to stand up or walk all the time."

"Well, that is a different proposition — really a new one," mused the judge. "Ability to sit down is certainly one of the greatest qualifications of a juror, and I might say, judging from the verdicts that have been brought in lately, it seems as if the jurors have used that part of their anatomy more than their heads. You certainly are disqualified, and you may go."

"Now, Jacob Goldstein. What is your trouble?"

"No trouble at all, your Honor; I just said I was studying law, and I wanted the experience of jury service

before I get admitted to the bar, as I can't get it afterwards."

"How long have you studied law, Mr. Goldstein?"

"This is the end of my first year, your Honor," he answered proudly. "In two years more I will have completed it."

"Where are you studying law, may I ask?"

"At the Northwestern University, your Honor," and he proudly thrust forward his broad chest.

"It's no use, Goldstein. To keep you on the panel would be a waste of the state's money. Not a lawyer in the city would permit you to sit on a jury when they find out you are studying law at the Northwestern University. They would be afraid you would know more law than they, and they wouldn't take a chance on you in the jury room. I will have to excuse you."

"Now, as to these others: the man with a sick wife; the man that runs a private bakery in his basement; the one that says he hasn't sound business judgment; and the German that can't read or write English; and this Socialist; well, in fact, all the rest of you gentlemen I will have to hold this time. If it were not that we have to have jurors to finish up our business, we would let you all go."

And thus ended the usual return of a petit jury panel in the great city of Chicago.

Reviews of Books

THE SUPREME COURT AS ABDICATOR, NOT USURPER

The Supreme Court of the United States: With a review of Certain Decisions relating to its Appellate Power under the Constitution. By Edwin Countryman. Matthew Bender & Co., Albany. Pp. xxi, 267 + 12 (table of cases and index). ($2.50.)

A BOOK which sets out to subject the reasoning of the Supreme Court of the United States, in important decisions of the past, to searching scrutiny and the frankest possible criticism, promises a fruitful and constructive treatment of problems of the Constitution. Mr. Countryman's method arrests notice when he undertakes to trace the evolution of doctrine from an origin in *obiter dictum* through the successive higher stages of "cited with approval," "referred to as authority," and "settled law." Such a historical procedure may show insecure foundations for present doctrines, which is the goal of Mr. Countryman's exposition; it savors of penetration into the very essence of the Constitution. Of such penetration there are abundant evidences, in the author's incisive analysis of some features of the frame of government which the Constitution set up. However, to the student of a living Constitution, and not of a paper document, it can make little difference whether an accepted principle declared by the Supreme Court sprang at the outset from an *obiter dictum*, or arose in a painstaking judicial attempt to settle a particular point at the root of some momentous controversy. If the Supreme Court appears to be laying down reasonable doctrine it cannot weaken its reasonableness to prove that the doctrine has a checkered history. There is, indeed, a flaw in the logic which aims to discredit the propriety of Congress exercising control over territories and territorial possessions, to the disparagement of the

time-honored doctrine of the equal authority of the judicial and executive branches, by connecting an "unrepublican" system of this kind with historical instances of the Court's relinquishment to Congress of the jurisdiction conferred on it by the Constitution. The author lays stress on the absence of any right in Congress to limit the appellate jurisdiction of the Supreme Court; this is really the theme of the book. The earnest advocacy of anti-imperialism takes for granted that complete exercise by the court of its appellate jurisdiction would have led to a radically different governmental policy in the treatment of the inhabitants of the territorial possessions. As a matter of fact it takes more to clinch that argument than a historical survey of the Supreme Court's supposed abdication of a large part of its own powers and authority.

BUCKLAND'S ROMAN PRIVATE LAW

Elementary Principles of the Roman Private Law. By J. A. Buckland, M.A., Fellow and Tutor of Gonville and Caius College, Cambridge. Cambridge University Press; G. P. Putnam's Sons, New York. Pp. 410 + 9 (index). ($3.25 *net.*)

MR. BUCKLAND'S work takes for granted the reader's familiarity with the Institutes of Gaius and those of Justinian and is a commentary on the Institutes rather than an exposition of Roman private law. The author is primarily concerned not with principles of law, but with the institutions under which the Romans actually lived. The principal value of the book lies in the information regarding a group of institutions which we must understand to grasp the meaning of the rules laid down by the classical Roman jurists. This is a task of difficulty, and the discussion does not follow a smooth and easy road, but bears witness to the painful inadequacy of our knowledge and the impossibility of giving a conclusive answer to a multitude of perplexing questions as they arise. To teach the student to formulate these questions is quite as instructive as to attempt to solve them. The treatment has an atmosphere of interrogation and of reservation; it is cautious, and some will perhaps say too often negative, but through its very inconclusiveness so painstaking an inquiry can obviously be of great use in stimulating accurate scholarship.

The result of this method of treatment is that the author, if he has not provided the student with an easy and attractive exposition, has nevertheless given him a useful tool to assist his investigations. For it is safe to say that there is no problem which has figured in recent discussion on which the author has not thrown some light by his erudite examination of Roman legal institutions. The treatment is highly intensive, certain topics receiving such thorough analysis that the book will be accounted indispensable by specialists in this field of legal studies.

INSURANCE AS A PUBLIC MONOPOLY

Insurance and the State. By W. F. Gephart, Ph.D., Professor of Economics, Washington University, author of Principles of Insurance. Macmillan Co., New York. Pp. 228 (index). ($1.25 *net.*)

UNTIL legislatures come to realize the need of skilful handling of the subject of insurance, and of correcting the deficiencies to which Professor Gephart refers as having marked much of the legislative treatment of insurance, the controversies engendered by evils that have grown up in a business not yet effectually regulated will continue to take up much attention. The recent demand for anti-monopoly legislation against insurance companies, the author

intimates, might not have arisen if the public could have anticipated certain practices detrimental to the insurance business and prohibited them by legislation. The questions how far insurance should be treated as a monopoly, and whether it should be a public undertaking assumed by the state, have become serious problems of the day, and these problems furnish the principal theme of skilful and dispassionate discussion by a competent specialist and lucid writer. The disadvantages of conflicting systems of state legislation, and the national aspects of the business of insurance, are recognized, particularly in connection with the newer projects of social insurance. The tone of the book is at once progressive and practical; while the author is disposed to look upon insurance as a proper function of the government, his conclusions are carefully qualified and avoid any partisanship or one-sidedness.

THE I. W. W.

American Syndicalism: The I. W. W. By John Graham Brooks, author of As Others See Us, The Social Unrest, etc. Macmillan Company, New York. Pp. 256 + 8 (index). ($1.25 *net.*)

MR. BROOKS has written a most readable account of a new movement which within two years has assumed a momentous importance in this country. A concise definition of syndicalism is not attempted — perhaps wisely. But the book describes by the bulk of its testimony what American syndicalism is; it is obviously a form of revolutionary socialism which has grown distrustful of political agencies of reform and is determined to gain control of the centres and sources of economic power by recourse if necessary to measures of violence. The claim is put forward that this revolutionary force will supersede the ordinary methods of trade-unionism and political socialism, unless the community awakens to a perception of the situation and to the need of conciliating rather than suppressing those who take part in the disturbance. Mr. Brooks has confidence in a disinterested public opinion which can teach employers and laboring men their respective rights, and seems to put his trust in the efficacy of a moderate program of state socialism such as has been employed in Germany and England and was embodied in the Roosevelt platform of the Progressive party. Written by one of our keenest and best qualified students of labor problems, the book contains a valuable survey of the I. W. W. movement, and is highly instructive and deserves wide circulation.

WORKMEN'S COMPENSATION CASES

Leading Cases in Workmen's Compensation. By G. N. W. Thomas, M.B., Ch.B., of the Middle Temple, Barrister-at-Law. Butterworth & Co., London, Winnipeg, Sydney and Calcutta. Pp. 122 + 21 (index).

THE use of this compilation of leading cases to the English practitioner is evident; it may also prove of some slight aid in promoting uniform interpretation of the provisions of our own workmen's compensation acts. The subject of course has a voluminous literature, but a distillation of the original principles of the English case law in a little book of curtailed reports is welcome. We are particularly impressed by the simplicity, directness, and brevity of the opinions of the judges in these fifty-six important House of Lords and Court of Appeal cases. There is not the faintest suggestion of judicial pedantry or legal philomathy in any of them; doctrines of great moment are laid down without hair-splitting and with scant reference to prior authority. The

judgments reflect, in fact, the strength of the English judiciary of today. In the brief period since the passage of the Workmen's Compensation Act a sensible, logically consistent body of law has formed itself, in close touch with the common understanding of men and in harmony with the plain, unperverted, layman's interpretation of the legislative intent. In judgments like these, doubtless, least embarrassed by the deadening weight of legal tradition, we may expect to find the greatest vitality; it is judgments of this sort that put most life and vigor into unwritten law.

THE SLATER TRIAL AGAIN

Trial of Oscar Slater. Edited by William Roughead, Writer to the Signet. Notable Scottish Trials Series. William Hodge & Co., Edinburgh and Glasgow. Pp. lxxviii, 298 + 23 (appendices). (5*s. net.*)

THE Slater trial, though it attracted attention in Scotland because of its sensationalism, would perhaps not be so memorable if Sir Arthur Conan Doyle had not aroused public interest in it and given it a notoriety that has made it almost as well known as the *Beck* case. The present work covers more ground than Sir Arthur's dramatic narrative (25 *Green Bag* 338), and while not more readable, offers more copious details to an appetite hungry for the facts of a curiously confused if not spectacular *cause célèbre*. The editor of the volume, which gives the documents of the case and sets forth the testimony of the witnesses in full, does not permit himself to speak disparagingly of the Lord Advocate's conduct of the prosecution, but he maintains an attitude of discreet scepticism toward the findings of the jury, and directs the reader's attention to the dangers of evidence of identity based on personal impressions, if not corroborated by other evidence. The volume forms a dignified report of a criminal trial, and the thoroughly competent manner in which its materials have been prepared and arranged make it a model for books of its class. But after giving our attention to this long and complicated case we leave it with feelings somewhat akin to those which the jury must have experienced after sentence had been pronounced: "Lord Guthrie thanked the jury for their attendance at that long and complicated trial, and said they would be excused from jury service during the next three years." Only it seems as if they had earned the right to be excused for a very much longer time.

AN ARGUMENT AGAINST THE MONROE DOCTRINE

The Monroe Doctrine: An Obsolete Shibboleth. By Prof. Hiram Bingham. Yale University Press, New Haven. Pp. 112 + appendix and index 42. ($1.15 *net.*)

THE particular merit of this book, which is an enlargement of an article published in the *Atlantic Monthly* (25 *Green Bag* 314) is the force with which it directs attention to actual conditions of public opinion in South America. It serves to exhibit clearly the difficulties in the way of a cordial understanding with Latin America that are destined to continue while our Government keeps on claiming to be sovereign of the western hemisphere. The author writes rather to interpret the alien point of view of Latin America, of which he has made a close study during residence and travel, than to examine questions of domestic policy from the standpoint of a native citizen. He suggests, to take the place of the Monroe Doctrine, the possibility of a concert of the American nations, in which powers we do not now see fit to honor with an ambassador would par-

ticipate, and which would adjust troublesome questions arising from internal disorder in any one state in a manner more conducive to a wholesome general understanding than is possible when the United States takes to itself responsibilities from which other important powers are excluded.

COPELAND'S COTTON MANUFACTURING INDUSTRY

The Cotton Manufacturing Industry of the United States. By Melvin Thomas Copeland, Ph.D., Instructor in Commercial Organization in Harvard University. Harvard Economic Studies, v. 8. Harvard University, Cambridge. Pp. 389 + 23 (appendix, bibliography and index.) ($2 *net.*)

DR. COPELAND has written the first thorough study of the history of the American cotton industry and of its present situation in comparison with the cotton manufacturing industry in Europe. He has gathered together from a great variety of sources a mass of information that will prove of great interest to men interested in economic and business questions. The development since the Civil War receives most attention, as it should. Geographical factors, technical methods, labor conditions, and industrial organization in the principal countries are compared. The author weighs his evidence and submits independent conclusions, which are discreetly formed and are not likely to be impugned. He refrains from attributing any great influence to the tariff on the growth of the American industry; he points out how the larger scale of production in this country and the better factory organization counteracts the higher earnings of the operatives; and while admitting that Lancashire is the chief, and only serious rival of the United States, he is unable to point out a preponderance of advantages on either side. The book is a valuable and exhaustive first-hand study, though the important subject of comparative costs and standards of living is purposely ignored as entailing a special investigation.

NOTES

The fourth edition of Watson on Cheques brings the law as laid down in decisions construing the English Bills of Exchange Act up to date, without departing from the brief, succinct form of the treatise. The decisions rendered since the publication of the third edition have evidently been analyzed with care and the revision has been carried out with thoroughness. (Butterworth & Co. (Canada) Ltd., Winnipeg, Man.; pp. xxiv, 148 and index 15.)

Strahan and Hendrick's Digest of Equity, the third edition of which is now published, is primarily designed to serve as an elementary textbook and as a manual for the practitioner in British courts. While it aims at a thorough exposition of principles, it gives much attention to purely formal and statutory matters, and formulates the rules of equity as a remedial system of local application rather than as a system of substantive rights and obligations. (Butterworth & Co. (Canada) Ltd., Winnipeg, Man.; pp. liv, 562 and index 33.)

The Canadian Law List for 1913 is a useful handbook, containing complete lists of the judiciary of the Dominion, and the names of barristers and solicitors in all the provinces, with many additional features. (Published by Canadian Legal Publishing Co., Toronto.)

BOOKS RECEIVED

Organized Democracy: An Introduction to the Study of American Politics. By Frederick A. Cleveland, Ph.D., LL.D. American Citizen Series, edited by Albert Bushnell Hart, LL.D. Longmans, Green & Co., New York and London. Pp. xxxvi, 465 + 14 (index). ($2.50 *net.*)

A Treatise on the Law of Estoppel, or of Incontestable Rights. By Melville M. Bigelow. 6th ed., revised by James N. Carter, Ph.B., J.M. Little, Brown & Co., Boston. Pp. lxxiii, 807 + 50 (index). ($6.50 *net.*)

The Principles of Judicial Proof, as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials. Compiled by John Henry Wigmore, Professor of the Law of Evidence in Northwestern University, author of A System of Evidence in Trials at Common Law, A Pocket Code of Evidence, etc. Little, Brown & Co., Boston. Pp. xvi, 1179 (index). ($6 *net.*)

The Theory of Social Revolutions. By Brooks Adams. Macmillan Co., New York. Pp. 240. ($1.25 *net.*)

The Editor's Bag

THE FORMATION OF A WORLD *SITTLICHKEIT*

INTERNATIONAL alliances have in the past usually been based on the idea of expediency. Plainly it is diplomatically expedient that the United States should cultivate the good offices of powerful European nations, and it will probably be admitted that the goodwill of Great Britain means more to the United States than that of any other European power. Particularly it is to be desired that we shall be on good terms with all our neighbors in the Western Hemisphere, not only with the British possessions to the north, but with the republics of Latin America. The United States has held aloof from foreign alliances, but if we were to see fit to form any alliance, it would be more logical for us to ally ourselves with the British Empire, or with the republics of Central and South America, than to join any other group.

It is well, however, that attention should be directed to alliances of a different kind, alliances not of expediency but of friendship, a friendship resting on the possession of similar aims, interests, and ideals, requiring no tangible instrument in the form of a treaty bargain for its expression. The history of the United States affords instances of friendship of this kind, which is no new thing in the case of our relations with England and France, and the possession of kindred political institutions has undoubtedly been the chief factor in its promotion. Apart from the republican form of government of France and our gratitude for her past kindnesses to us, there is nothing to draw this country into closer comity with France than with Germany, and there is every likelihood that the future will see growing good fellowship between the United States and both the two great Continental powers with whose civilization we have much in common. There can never, however, be the same sense of community between France and the United States, or Germany and the United States, though there may be cordial friendship, as there can be between England and this country, for the closest of all ties are those of language, common political, legal, and religious institutions, and similar ethical and intellectual traditions. We purposely omit ties of race, because their importance is so easily overestimated. Admitting the great tide of immigration that is pouring into our gates, we have nevertheless only to fear the influx of races that cannot assimilate Anglo-Saxon ideals and usages in the course of a generation or two, and such races are few. The comity of the two chief Anglo-Saxon nations will thus be promoted in years to come by the closest bonds that can unite any two countries. There was something, therefore, in Lord Haldane's address which had an appearance of prophecy, for even should anything ever arise to disturb the Anglo-American *entente*, it will

signify only a temporary rupture, and in any event the old relations will be bound to be restored after only a brief intermission.

A relation between fair-dealing and the sense of having something in common is assumed in Lord Haldane's idea of an international justice promoted by the sympathetic cohesion of separate powers, and it may be that there is danger of over-emphasizing the necessity for international solidarity as a prerequisite to peaceable adjustment of all controversies between peoples. It is quite possible, for example, that treaties of general arbitration may be signed and lived up to between nations which have few interests in common and have little sympathy or attachment for each other, and if so the success of the movement for international arbitration does not depend on the United States or any other power entering into closer fellowship with other nations. This question was not analyzed in Lord Haldane's address, but there is no occasion for interpreting his remarks in a more sweeping sense than seems to have been intended. Without declaring friendly association between nations to be a prerequisite to fair-dealing, the speaker did lay stress on the virtue of the get-together spirit, as a means of strengthening the instinct for international fair-dealing, and there can be no question of the value of such an incentive of comradeship, even if what Dr. Nicholas Murray Butler calls the "international mind" may be evolved by the pressure of other incentives. That the world will progress more rapidly toward the ideal of justice and respect for right under a system of co-operation is manifest, and this may be admitted without the necessity of any determination how close the co-operation must be or whether it may assume more than one form.

The world-goal which Lord Haldane's discussion of *Sittlichkeit* seems to envisage is not that of a political federation as necessary to a law-abiding society of nations, but rather of a morally united community held together by a single code of customary international conduct, or world *Sittlichkeit*, rather than by any actual world polity, which would in fact be no more than a by-product of the system and could be dispensed with. It is self-evident that the leaders in securing recognition of such a code must be the peoples which have the highest standards of morality in their private transactions; in other words the nations highest in civilization are to be the future leaders of the movement for international justice. Although these nations constitute a large and important group, their efforts can be made more effective by breaking the main group into smaller groups, organized on the basis of kindred institutions. The notion of a limited Anglo-Saxon group, working in this manner, is an idea of less potency than that of a great Teutonic cultural group comprehending Germany, Great Britain, the United States, and all the lesser Teutonic nations, but if less majestic and staggering it offers something more concrete and definite, something easier of practical application and tangible fulfillment, to the people of the United States. The strength of Lord Haldane's conception is to be found chiefly in the fact that it puts international right before international law, instead of putting laws and treaties first, that it recognizes the importance of a consensus as to what constitutes international right, and that it looks to the Anglo-Saxon nations as a powerful factor in securing such a consensus by first establishing a consensus of their own. The conception deserves not only to influence councils

of state but the study of two systems of international law, American and English, which need to be brought more closely into harmony and mutual support.

THE MORAL TEST FOR ADMISSION TO THE BAR

WHEN Mr. Clarence A. Lightner told the Section on Legal Education that "there are some arguments worthy of consideration in favor of an open bar," which would place the burden of maintaining the standard of qualifications for practice upon the law schools rather than upon public bar examiners, his remark suggested an interesting alternative to the system at present in force. Why should not the diploma of a law school approved by the state as maintaining a proper standard of legal education entitle the graduate to admission to the bar as a matter of right?

It may reasonably be contended that if a law school is not capable of so training its students that all who are graduated from the institution are fit to practice law — at least so far as their intellectual preparation is concerned — it is failing to perform its function as a law school. There is undoubtedly much in the contention that it is not simply the business of a law school to train candidates for the bar; that, on the contrary, it has a larger function to fulfil, in the education of law teachers, publicists, and others who will never turn to the practice of law as a vocation. While a broad educational aim of this kind is praiseworthy and ought to be encouraged, it is incomprehensible how a degree from a school administered in this broad way could signify anything less in the way of professional preparation than one granted by an institution of narrower technical aims. On the contrary, the state would be likely to more readily admit the right of the diploma of the broader institutions to recognition than that of the narrower ones.

The other important element, that of moral character, has to be considered. Mr. Walter George Smith, doubtless led to speak as he did largely by Mr. Coudert's inquiry into the fitness of candidates for the bar of New York, properly emphasized the importance of training in high professional ideals. If it be urged that moral training is not the function of a university, or is at least only a minor function owing to the nature of the relation of the university to the social conduct of students, it seems fair to reply that there is no other agency fitted to discharge the function under equally favorable conditions, and that a public board of examiners has fewer resources of information as to the character of candidates than a law school faculty.

While the question of moral qualifications looks simple on its face, it is really as difficult to define and determine the standard of moral preparation for the bar as that of intellectual preparation. There is room for a wide difference of opinion as to what should be the requisite moral attributes of a member of the bar, and their relative importance. Probity and fidelity are certainly fundamental, but by no means exhaust the essentials of professional character. It is not enough that a counselor be honest in all pecuniary matters and faithful to the interest of his client. His office is also a public trust, and requires of him an equal or indeed greater fidelity to the state. It is also conceivable that while a trite formula of moral qualifications might appear to be all that public opinion would require, the state would really expect of its practitioners at the bar a higher sense of professional duty

than that expressed in a perfunctory insistence on fidelity, a requirement so vague as to lend itself to a wide range of interpretation. On the other hand, if the definition of moral fitness were made so concise as to include all the qualities reflected, for example, in the American Bar Association Code of Professional Ethics, the resulting test might prove too rigorous to be capable of application, unless the definition of the lawyer fulfilling the obligations of professional honor were made an elastic one. The problem how to define moral requirements for admission to the bar so that they shall be neither too rigorous and utopian on the one hand, nor too inclusive and commonplace on the other, is one of which we cannot venture a solution. It would be far better, however, to have a high, inspiring standard applied with great liberality, than to choose a standard which is easy of attainment by all men of conventional decency and offers no hope of improvement of the character of the bar by weeding out some of the less desirable candidates.

This brings us to a consideration of those qualities for which it is hard to find a name, and which the terms *philistine* and *bourgeois* indicate perhaps better than any other. Certainly the legal profession is a wide profession, with its own minute subdivision of labor demanding of its members widely differing kinds and degrees of moral capacities. Some of its votaries must be men of broad horizon, capable of exercising large public and private trusts, and occupying a useful position of light and leading in the community, but the work of the profession also abounds in petty tasks to be performed, insignificant interests to be protected, and wastes of drudgery to be traversed with the endurance of dulled sensibility. It is therefore too much to expect that the majority of lawyers should have an exalted conception of their obligations to society, or that the legal profession as a whole can be characterized by that nobility of aspiration which goes hand in hand with honorable achievement and so lifts the guild of lawyers above the general level as to render it capable of universally applying the maxim *noblesse oblige*. It goes without saying that the majority of lawyers will oppose, or respond only feebly, to needed reforms of the time, particularly those most needed within their own profession, and will set an example of professional *morale* which, while not bad, is commonplace, and implies an indolent and excessive leaning on precedent and established usage. The characterization, of course, does not apply to the most intelligent and able, and we hope the most influential, section of the bar. There is fortunately nothing seriously disquieting about the legal philistine when he keeps himself in the background; it is when he leaps into a position of influence out of all relation to his personal merit that he is formidable, and that is a by no means uncommon foible of the times. The supremacy of such a type, however, while a frequent, is not a normal occurrence, and should not discourage the higher elements of the bar from working for the maintenance of ideals and achievement of reforms originating in the ethical consciousness of the minority, and offering a reasonable prospect of triumph through the tacit acquiescence of the majority. Thus the profession may reasonably inculcate higher ethical aims than most of its members may be able to attain, and may steadily exert an upward pressure that can be expected to bring about a slow and gradual advance in professional standards.

England confides the admission of candidates for the bar to the four Inns

of Court, but we would not advocate such a system of control by private agencies. If law schools are to be delegated this important function, they should exercise it under statutes which prescribe in general terms the standard to be maintained for admission and give to some public authority the power to select the institutions which shall be approved as supplying the kind of preparation which the statute requires. Under such a system the conferring of the degree of Bachelor of Laws, granted by an approved law school, might entitle the recipient *ipso facto* to become a member of the bar of the state on taking the oath in court. But what guaranty would be given the state, under such a plan, that the law school in bestowing its degrees would give due attention to the moral fitness of the candidate for admission? The cases in which the degree would need to be withheld from students satisfying the test of scholarship would probably be rare, but assuming that to be the fact, in those rare cases it would not be practicable to demand that the institution should depart radically from educational practice by withholding a degree from any one whose attainments in scholarship are high. This is the first difficulty in the practical operation of the plan.

Other difficulties suggest themselves, such as the embarrassments which would interfere with fulfilment of the invidious task of selecting a list of approved law schools, the disadvantages that would attend the admission of candidates from law schools possessing low standards as compared with those of others, the lack of a uniform standard of admission, and the features of monopoly that would bear heavily upon the student who might prefer to prepare for the bar in some other way than by entering one of the approved schools.

There is something farcical and childish about an examination by state law examiners of candidates who have already satisfied the exacting intellectual requirements of a course in one of the best law schools in the country. While it seems idle and fruitless to reexamine such candidates, the plan of admitting them directly from the schools does not appear to be workable. At the same time some compromise between the existing system and the one proposed is perhaps possible, which would tend to the maintenance of a higher level than is possible under the present system of double examinations. It cannot be said that the advantage of such a double system, in the check which one part of it may be supposed to exert on the other, equals the advantage that could result from efficient and responsible control by a single agency entrusted with both the preparation and admission of candidates. Is there any way, then, in which an important public function can be devolved upon the universities in addition to the work they are now performing?

THE TREATY POWER AND "STATES' RIGHTS"

THREE views of the political system of the United States are possible: (1) that it is a government of sovereign states possessing certain reserved powers, the residue of the powers of government being delegated to the central government; (2) that it is a government of divided powers, so arranged as to secure an equilibrium between the internal government of the states and the general government of the aggregate; (3) that it is a government of specific powers vested in and reserved to the general government, the residual powers being devolved upon the states.

Which of these views was the theory underlying the Constitution at the time of its adoption need not concern us, as it originated in a series of compromises which would make it difficult to discover a clear and consistent doctrine, and as the actual development of the Constitution in practice has made the problem one merely of historical interest. The third view is the one indicated and expressed in the existing structure of our institutions. The first view, the states' rights theory, was long since overthrown; the second view necessarily leads to a deadlock between federal and state power which makes it impossible for a firmly welded community of states to be held together in a unified nation. If the United States are to be kept together as a nation and not as a federation, close or loose, of states, state power must yield to the central power whenever the need becomes manifest, even though the manner and extent of this submission be expressly formulated and restricted by the organic law.

In the international community of states, on the contrary, an analogous situation does not exist. The world is at present in the stage of states' rights, or the autonomy of states, and the community of nations is formed only out of residual powers remaining after the exercise of the powers which the states choose to reserve to themselves. The international community for the present cannot become anything more than a loose federation. This federation cannot impose its own will on the separate states, but takes what they choose to leave it. It must concede to the states complete freedom in the exercise of their treaty-making power, and each state is at liberty to determine for itself the scope and extent of such power. It is impossible, therefore, to hold that the treaty-making power is determined by virtue of the membership of the nation in the community of states solely, and overrides and limits the municipal power of the state. Even admitting the recognition by the state of moral rights and obligations to the international community, such rights and obligations do not become legally effective, in altering the application of the treaty-making power, until they are voluntarily assumed as international-legal powers or limitations through the state's conforming its municipal law, fundamental and statutory, to meet the demands of such rights and obligations. Suppose, for example, that the nations should feel that moral justice required conferring the right of naturalization on all domiciled aliens, after a prescribed period of residence, who are allowed to enter the country by the immigration laws. Nothing in our own Constitution prevents the granting of such a right, but we ought not to be held to recognize such a principle as a rule of international law for our own governance until Congress has applied the principle in treaty or statute, or, in the event of the existence of a conflicting state statute, the Supreme Court has clearly indicated that the several states of the Union cannot through their legislation exercise exclusive jurisdiction over aliens. In other words, international law, though not a part of municipal law, is in the present position of the international community limited and controlled by municipal law; and while the adoption of an international law requires action by more than one nation, preparation for such communal action, by setting new boundaries to the treaty-making power, rests wholly with the nation which takes the preliminary step of self-imposed restrictions on its municipal law.

Such self-imposed restrictions on the

municipal law of the United States are made by the Constitution, which excepts certain matters of an international description from the otherwise unimpaired division between federal and state powers, depriving the states of exclusive jurisdiction of the interests secured to them by the Constitution, as the delegation of a dominant jurisdiction to Congress and the prohibition of the states from making treaties shows. But the restriction thus imposed on the municipal law by the Constitution is only general, and specific restrictions are left to the discretion of Congress, which may at once determine and apply its treaty-making power.

While no treaty has ever been held unconstitutional by any court of the United States, the nature of our polity seems to presuppose a right in the Supreme Court to pronounce a treaty unconstitutional as in conflict with the municipal fundamental law, though it cannot void a statute as conflicting with international law. In the *Cherokee Tobacco* case (11 Wall. 616) it was said *obiter:* "It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument."

A right in the Supreme Court to hold a treaty unconstitutional as infringing the reserved rights of the states seems to be taken for granted. "Whenever . . . an Act of Congress would be unconstitutional, as invading the reserved rights of the states, a treaty to the same effect would be unconstitutional." This statement, in *Prevost* v. *Greenaux* (19 How. 1) is true in a general sense, for Congress has no right to alter the system of government prescribed by the Constitution. It is not however a sufficiently concise statement of the rule it seeks to express. The rights reserved to the states are qualified, in the Constitution, by the jurisdiction vested in Congress over international matters, and when Congress legislates on such matters without substantially affecting the internal administration of the state its act is not open to attack, though a similar statute not applying to international matters would be *ultra vires*. The remarks of Chief Justice Taney *obiter*, in the *Passenger* cases (7 How. 283) are thus open to question: "If the people of the several states of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to prove a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the state, would be an usurpation of power which this court could neither recognize nor enforce." This is a rather extreme illustration, which reflects a states' rights attitude toward immigration laws rather alien to current modes of thought. The question would resolve itself into one of the degree to which the constitutional autonomy of the state is impaired by treaty provisions; if it is not materially impaired it seems as if the treaty should stand.

The rule expressed in *DeGeofroy* v. *Riggs* (133 U. S. 258) seems to have been a sound one: "It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which

is properly the subject of negotiation with a foreign country."

It probably cannot be safely assumed that the Supreme Court has at any time in its history maintained the doctrine that Congress cannot in its treaties invade the reserved powers of the states, in an extreme form. The assumption cannot be made merely on the ground that certain remarks scattered through dissenting opinions, or made *obiter* in majority opinions in connection with a general survey of a region presenting no specific subject for elucidation, have reflected such a view. Accordingly it is doubtful whether what Willoughby calls "the *obiter* doctrine that the reserved rights of the states may never be infringed upon by the treaty-making power" (Willoughby on the Constitution, s. 215) was ever seriously maintained. Instead there seems to be a tendency toward clearer recognition of the principle implicitly contained in the Constitution from the first, that the reservation of certain rights to the states is qualified, but not radically affected, by a grant which the Constitution makes to Congress of a very broad but not necessarily unlimited jurisdiction over all matters properly subjects for international agreement.

A PART OF THE WINTER

A CHICAGO mining engineer tells of a law suit tried in that city, wherein one of the witnesses was an old prospector from a mining settlement in the Far Northwest, a settlement situated about twelve thousand feet above the sea, where the snow drifts and packs and remains the year round.

"How long have you lived in Marshall?" asked the lawyer, conducting the examination of the old prospector.

"The best part of one winter."

"That's very indefinite," said the lawyer. "What do you mean by the best part of one winter?"

"Well," said the witness, after due deliberation and reflection, "I've been up there about eleven months."

HAPPENINGS IN COURT

A motion for a receiver of two corporations was being argued before one of the judges in Chicago, and one of the points raised was that the four men in control were operating the two competing concerns through one office and employing the same bookkeepers for both companies, and thus were enabled to favor, and were favoring, one corporation to the injury of the other.

"Well, what is there wrong about the two concerns sharing the expenses of the same bookkeepers?" argued the judge. "I remember that when I was in business, I didn't have enough money to hire a bookkeeper myself, and I used to share the expense with another concern."

"Both competitors? In the same line of business?" asked the astute lawyer.

"Competitors? I didn't have any competitor; but it was the same line of business," admitted the judge.

"And may I ask what your line of business was," persisted the lawyer keenly.

"It was the law business — but Mr. Reporter, don't put that in the record though. The Supreme Court probably would not believe it."

Once Happy Hooligan, having heard so much praise in favor of army life and having become tired of his wanderings around the land, decided to become a soldier boy of dear old Uncle Sam.

The dignity of the military discipline, the illusive grades of military rank, and

the clanking together of heels with prolonged salutes were difficult and arduous for Hooligan and on the third day he was brought up for trial before the Colonel on the following charge and specification:

"*Charge:* Violation of the 62d Article of War, conduct to the prejudice of good order and military discipline.

"*Specification:* In that he, when meeting his Captain, did waive his hand to him and did say 'Hello, there, Kiddo!'"

"Is that lawyer for the woman, or against her," asked one bystander of another after they had been listening to his argument for an hour.

"I don't know, I am sure," was the quick reply, "he hasn't committed himself yet."

In the Criminal Court of Chicago, the other day, a young attorney that was battling for the life of his client ended his plea with the following burst of eloquence:

"Gentlemen of the Jury, there is a nigger in the woodpile somewhere! I can see him floating through the air; and I know you will nip him in the bud."

"Look at this document and tell the jury whether your signature appears thereon," directed the young attorney.

The witness scrutinized the paper carefully and then hesitatingly said: "I don't know. I can't —"

"Does it or does it not appear thereon? Yes or no — no explanations are necessary," interrupted the court.

"I object to the question," interrupted opposing attorney; and then followed a long argument between the two attorneys and the judge, after which the court ruled:

"I will let him answer. Does your signature appear thereon? Answer by yes or no."

"I don't know, judge. I can't see. I haven't my other glasses with me, and I can't see with these."

—CORNELIUS JOHNSON.

CURIOSITY

"AMONG the most amusing incidents I've ever seen in court," says a Cleveland lawyer, "was that which occurred recently in my town.

"A big chap stood at the rail completely swathed in bandages. One might say that little of his face was visible, aside from one eye that peered through an opening in the bandages.

"'You are charged with disorderly conduct,' said the Court.

"'So I understand,' said the man at the rail, 'And I want to be held for trial.'

"This was a decidedly unexpected announcement; and everyone in court was correspondingly astonished.

"'I should think,' said the Court, after a moment's hesitation, 'that you would plead guilty now, and pay a fine of five dollars, ending the matter.'

"'I thank your Honor,' said the man, 'but I want to be tried.'

"'Why?'

"'For this reason,' explained the mussed-up man. 'The last thing I remember was that I was standing very peaceably on a street corner. When I came to, two doctors were busily engaged in sewing me together. I want to be tried so that I can hear the stories of the witnesses. That's about the only way I'll ever find out what came off.'"

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

First Street Urchin (at the reception given to Lord Haldane in Montreal at the galleries of the Art Association). — "What be all these fellers doin' here?"

Second Street Urchin. — "They are all lawyers except the judges."

Lord Haldane, asked by a reporter in Montreal if he had brought the Great Seal over with him, is said to have replied that he understood a large fish had followed his boat, and he "had no doubt that it was the Great Seal."

One of the briefest and queerest wills on record is that of an old Western farmer who, though reputed to be rich, died penniless. His will ran: "In the name of God, amen. There's only one thing I leave, I leave the earth. My relatives have always wanted that. They can have it." — *Exchange.*

Pat, who was left-handed, was being sworn in as a witness in the West side court of Denver, Col.

"Hold up your right hand," said the judge.

Up went Pat's left hand.

"Hold up your right hand," commanded the judge, sternly.

"Sure, and I am, yer honor," declared Pat. "Me right hand's on me left side." — *Woman's Home Companion.*

"You say a pedestrian has rights the same as a motor car?" asked the querulous person.

"Certainly," replied the policeman.

"Well, mebbe he has. But I can't help wondering what would happen to me if I went along the street making the same kind of a noise as some of these automobile horns." — *Washington Star.*

"Yes," exclaimed the young man, "I've finished my legal education at last!"

"And now," said the friend, "you'll sit down and wait for clients."

"I will not," replied the new attorney. "I've got a job promised me in a dry goods store."

— *Cleveland Plain Dealer.*

"The young fellow who's coming to see you, Elsie, must be a lawyer."

"What makes you think that, father?"

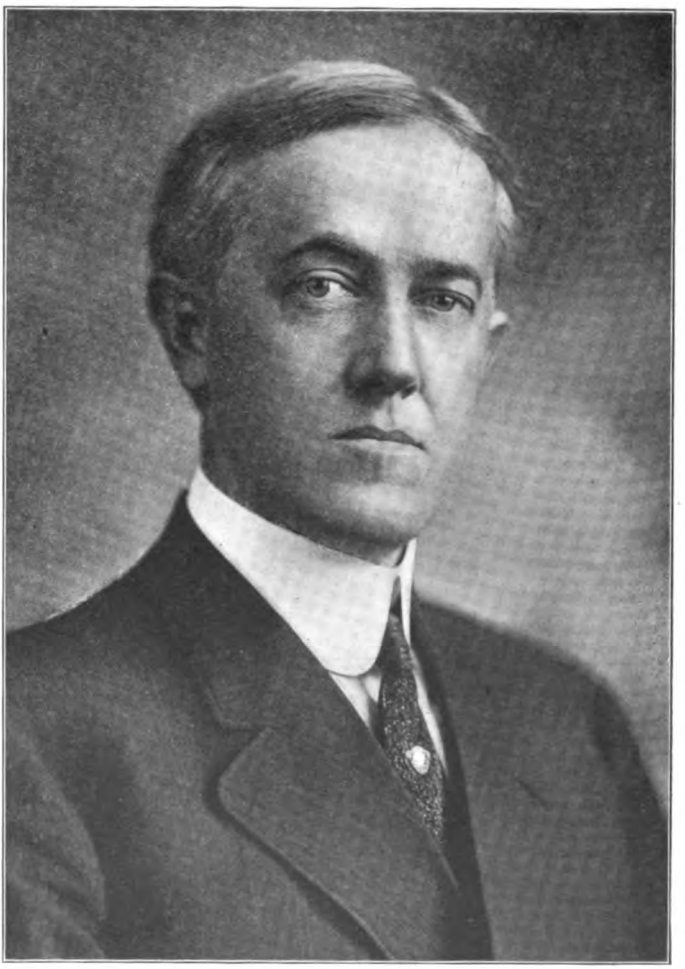
"Because I notice whenever he comes to court he always pleads for a stay." — *Baltimore American.*

"Well, son, now that you've graduated, what are you going to be?"

"I think I'd like to be a lawyer, sir. There's a good deal of money passes through a lawyer's hands, isn't there?"

"He never lets it pass through if he knows his business, my son." — *Boston Transcript.*

In view of the pressure of material supplied by the meeting of the American Bar Association it has seemed better to omit this month some of the regular departments of the GREEN BAG, which will be resumed in the next issue.



HON. JOHN WILLIAM DAVIS

SOLICITOR-GENERAL OF THE UNITED STATES

The Green Bag

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John William Davis, Solicitor-General of the United States

By Edward Grandison Smith
of the West Virginia Bar

ON THE 30th day of August, 1913, Congressman John William Davis became Solicitor-General of the United States.

The Solicitor-General assists the Attorney-General in the performance of his general duties, and by special provision of law, in case of a vacancy in the office of the Attorney-General, or of his absence or disability, exercises all those duties. Under the direction of the Attorney-General, he has general charge of the business of the Government in the Supreme Court of the United States, and is assisted in the conduct and argument of cases therein by the Assistant Attorneys-General. He also, with the approval of the Attorney-General, prepares opinions rendered to the President and the heads of the executive departments, and confers with and directs the law officers of the Government throughout the country in the performance of their duties. When the Attorney-General so directs, any cause in which the United States is interested, in any court of the United States, may be conducted and argued by the Solicitor-General; and he may be sent by the Attorney-General to attend to the interests of the United States in any state court, or elsewhere.

While the Attorney-General is a member of the Cabinet, and as the head of the Department of Justice is the chief law officer of the Government, his duties as an executive outnumber those as an attorney. Indeed, he need not be a lawyer at all. The Solicitor-General is "an officer learned in the law" and his duties are chiefly those of a practitioner.

At the time of his appointment as Solicitor-General, Mr. Davis was serving his second term in Congress from the First District of West Virginia. In the House he had distinguished himself as a member of the judiciary committee and as one of the authors and chief advocates of the injunction bill, and as one of the House managers of the successful impeachment of Judge Archbald.

Upon the retirement of Nathan Goff from the United States Circuit Court of Appeals, Fourth Circuit, to become United States Senator, to which he had been elected without being a candidate, the bench and bar of West Virginia was so unanimous for Mr. Davis to succeed Judge Goff that the commendation of him to Attorney-General McReynolds and President Wilson greatly impressed them, and while he was not appointed to that office, but a few months elapsed until he was made first trial lawyer to the

nation. He comes of a strong family, distinguished in morals and in law. They are blue-stocking Presbyterians and of rigid integrity. His father, John J. Davis, has been a leader of the West Virginia bar since the '60's, twice member of Congress, and ever a most eloquent and formidable champion for the common people. His uncle, Judge Rezin C. Davis, held like rank at the Kentucky bar up to the time of his death in 1910. Judge Davis left two sons who are prominent members of the Louisville bar.

The Solicitor-General is a graduate of Washington and Lee University, class 1892 — occupied a chair in the law department of that institution '95–6 — was a member of the Legislature of West Virginia, session 1899, chairman of the judiciary committee and floor leader of the House; was President of the West Virginia Bar Association in 1906, and chose as subject for his annual address "The Growth of the Commerce Clause of the Constitution."

Aside from public position, he has had a very thorough and diversified practical experience at the best bars of the state, covering a range of almost every phase of litigation arising in West Virginia. He has represented all classes of clients from the poorest to the richest, sometimes appearing for striking laborers and at other times appearing for corporate interests, now winning a verdict for personal injuries against a railroad, and now defending a railroad in a similar suit, now appearing for one oil company, and now winning immense values for his client from another oil company — sometimes appearing in celebrated criminal causes, but more often for private individuals in litigation touching property interests.

His ideals for his profession are fairly mirrored in the two eloquent excerpts quoted below, the first taken from his speech nominating the writer for Judge of the Supreme Court of Appeals of West Virginia, and the other taken from his speech in the Senate of the United States upon the Archbald impeachment.

There is no more solemn function which any set of men can ever be called upon to perform than that of selecting those who are to interpret and administer the laws of our country. There is no position in the country more sacred and important than that of a judge, and none the candidates for which should be scrutinized with more exacting care. He who would fill a position on the bench of the Supreme Court of Appeals of this state must be of a high order of intellect and intelligence; he must possess a broad and comprehensive knowledge of the law, and a physique which will enable him to sustain the exhausting labors of that position; and above all he must possess an incorruptible purity of heart before he can be deemed fit to minister upon that high altar.

* * * * *

So far as I know, it has been regarded from time immemorial as a gross indecency on the part of any court to solicit or accept suggestions, discussion, or argument from one party to a litigation in the absence or without the knowledge of the other. Every code of judicial ethics ever written has forbidden it, and if it did not, the common conscience of mankind would protest against it. No subtler poison can corrupt the streams of justice than that of private access to the judge.

Mr. President, all that was good in the feudal nobility was summed up in the two words of their deathless motto, *noblesse oblige*. They recognized that rank and station have their duties and obligations no less than their privileges. If this be true of those whose elevation springs from the mere accident of birth, how much more so of those whose title to office depends upon the esteem of their fellow-citizens? How dare they for one moment forget that with them always and everywhere *noblesse oblige*? No man can justly be considered fit for public office of whatever rank or kind who does not realize the double duty resting upon him, — first, to administer his trust with unflinching honesty, and, second, and hardly less important, to so conduct himself that public confidence in his honesty shall remain unshaken. This confidence of the people in the integrity of their officers is the foundation stone, the prop, the support of all free government; without it con-

stitutions and statutes are empty forms, executives, legislators, and judges the creatures of an ephemeral day. In forms of government only that which is best administered, in fact and in appearance as well, is best. A public man, it is true, may be as chaste as ice and as pure as snow and not escape suspicion. Try as he may, he cannot always avoid the ready tongue of slander; but what he can do, and must do is to avoid putting himself in any position to which suspicion can rightfully or reasonably or naturally attach. More cannot be expected of him, but nothing less should be permitted.

If it be possible to discriminate in such matters, does it not seem that these obligations rest with peculiar force upon the Judge? His life is to be spent as a peacemaker in adjusting the quarrels and difficulties of his fellows and in vindicating the right of society to peace and order. The appointing power or the electorate, as the case may be, his solemn oath, the state, society itself, all stand sponsor for his absolute honesty and strict impartiality. To preserve these virtues, therefore, both in essence and in seeming, should be his first and most especial care. He must realize that he has entered upon a career monastic in its requirements, not only of labor, but of abstinence and self-denial as well. Many things which he may have been accustomed to do, many things which in other men may be permitted, or approved, or, if not approved, forgiven, are cut off for him from the moment when he dons his official robe, and many avenues of life are closed to him forever. The pursuit of fortune, the chase for wealth he must put behind him; and though he need not strip himself of all his worldly goods, nor cease to give a decent degree of care and thought to the preservation of such property as he may own, he must recognize that his period of accumulation, his active participation in commercial pursuits is over for the time. He has undertaken to content himself for this loss with the honors and emoluments springing from his position and the opportunities for service that it brings. His ideal must be that expressed by John Randolph, who said, in speaking of the great chancellor of Virginia, George Wythe, that "he was in the world, yet not of the world, but was the mere incarnation of justice."

Following is a list of Mr. Davis' predecessors in office, stating their terms of service and other interesting information: —

SOLICITORS-GENERAL (*Created by Act of June 22, 1870*)

Name	Appointed	Retired	Whence Appointed	President
Benjamin H. Bristow	Oct. 11, 1870	Nov. 15, 1872	Ky.	Grant
Samuel F. Phillips	Nov. 15, 1872	May 3, 1885	N. C.	Grant
John Goode	May 1, 1885	Aug. 5, 1886	Va.	Cleveland
George A. Jenks	July 30, 1886	May 29, 1889	Pa.	Cleveland
Orlow W. Chapman	May 29, 1889	Jan. 19, 1890	N. Y.	Harrison
William H. Taft	Feb. 4, 1890	Mar. 20, 1892	Ohio	Harrison
Charles H. Aldrich	Mar. 21, 1892	May 28, 1893	Ill.	Harrison
Lawrence Maxwell, Jr.	Apr. 6, 1893	Jan. 30, 1895	Ohio	Cleveland
Holmes Conrad	Feb. 6, 1895	July 8, 1897	Va.	Cleveland
John K. Richards	July 1, 1897	Mar. 16, 1903	Ohio	McKinley
Henry M. Hoyt [1]	Feb. 25, 1903	Mar. 31, 1909	Pa.	Roosevelt
Lloyd Wheaton Bowers	Apr. 1, 1909	Sept. 9, 1910	Ill.	Taft
Fredk. W. Lehmann	Dec. 12, 1910	July 15, 1912	Mo.	Taft
Wm. Marshall Bullitt	July 16, 1912	Mar. 11, 1913	Ky.	Taft
John W. Davis [2]	July 28, 1913	————	W. Va.	Wilson

[1] Mr. Hoyt took the oath of office and entered on duty March 16, 1903.
[2] Mr. Davis took the oath of office and entered on duty August 30, 1913.

One Code for all the United States the Only Remedy to Cure American Law of its Confusion and Uncertainty

By Professor Charles P. Sherman

Department of Law, Yale University

THAT English law country which today most needs a codified private law which shall be uniform from one border to another is the United States — and Great Britain is easily next.

Why should 91,000,000 [1] Americans longer endure the miserable confusion of 48 different varieties of state "common law," superimposed by that other variety known as "federal common law" — all of which (except in two states) [2] are but unwritten or customary law located in a tangled jungle of multitudinous statutes, reports of decisions and digests of these? The uncertainty of our law, its confusion, its startling bulkiness, redundancy and prolixity, increased annually by some 20,000 new statutes and thousands of new reported cases, make our law today the most intolerable in the world and perhaps the worst ever known to human history — all because its form and lack of uniformity are so objectionably bad.

A German jurist who should come to this country to prosecute legal research in American law would be lost almost hopelessly in the maze of hundreds and thousands of unsystematized decisions without any possibility of systematizing or standardizing them himself, and could not discover one law for all the United States. As it is, American lawyers are finding it almost impossible to advise their clients competently — they perforce resort too frequently to guessing at the law. No wonder our courts are clogged, and the justice of American law is often excessively delayed and is in danger of becoming a by-word to the civilized world.

But there is a way out for our America just as there was for Rome, France, Germany and all the other non-English countries. *The logical succession to multitudinous precedents is codification.* Rome was at one time almost as sorely harrassed as we are; then came the final codification of her law by Justinian. What France and Germany did, we can do. And we have their modern codes to help us, whereas they had to go back across the centuries to Justinian's code for help.

Objections against one and only one system of codified private law for the entire United States. — The arguments against the formation and inauguration of a Federal code of private law uniform throughout the United States which shall abrogate the private law of 48 states are broadly based on two grounds: that American law cannot be codified, and that a federal codified jurisprudence would damage, if not destroy, the integrity of the several states.

Objection I — Anglo-American law is essentially non-codifiable. This objection constituted for many years the citadel of the opponents of codification in Eng-

[1] Census of 1910: our population will soon be 100,000,000.

[2] Louisiana and California.

land and the United States. But this position is no longer impregnable, if it ever was. In every country, to discourage codification, the cry has been raised: "Let well enough alone." It has been heard in more than one century: Rome, Paris, Berlin have listened to it. To "let well enough alone" is a fine principle of conduct *only* when nothing better is obtainable.

If uncertainty, diversity and diffuseness — the "hall-marks" of present American and English law — denote a jurisprudence needing no improvement, then wretched will be the future of Anglo-American law. On the contrary, it is this long continued lamentable condition itself of American and English law which is responsible for the present movement, now well under way, toward codification. Lord Macaulay, although referring to Anglo-Indian law and the then pressing necessity for its codification, very clearly pointed out the path of future progress for English and American law when he said: "Our purpose is simply this — uniformity when you can have it; diversity when you must have it; but in all cases certainty."[3]

The idea of a codified jurisprudence as applicable to English and American law did not find a ready reception when first broached; it savored perhaps too much of inferring that English law could be treated for codification purposes like any other law. English and American insularity became prejudiced against codification; it has fiercely assailed codification — and the fighting is not yet over. But while the opponents of codification have been reiterating and fulminating that English law cannot and ought not to be codified, an examination of recent events and present tendencies in English law on both sides of the Atlantic and elsewhere will reveal the great fact that codification of English law is slowly being accomplished right under their very noses.

Already the movement toward codification has begun in England and America. Almost at the very outset of the nineteenth century revival of Roman law study, Sheldon Amos published in 1873 his "English Code," in which he laid down the essential principle of English law codification, namely accurate classification — the rock on which the hopes of David Dudley Field and the movement toward codification started by him were wrecked. What a pity Field did not try to make a thorough use of Livingston's magnificent work so full of accurate classification — the famous Louisiana Code!

The glory of first showing to the world that English law can be codified belongs to English jurists. Included in the acts of the Governor-General of British India are the world-famous Anglo-Indian codes of criminal and civil law, uniform and applicable for all India. These constitute irrefutable facts, proof positive of the possibility of codifying English law. These Indian codes, by their very existence, completely upset the argument that English law wherever found is inherently non-codifiable, and point to the inevitable conclusion that, if Anglo-Indian law can be successfully codified, then Anglo-American, Anglo-Canadian and British law are also susceptible of codification, given the right men to do it — trained jurists familiar not only with their native law but also with the Roman law and the modern codes, and not politicians with a smattering of legal knowledge.

The first Indian code was the celebrated penal code of 1860.[4] Now there

[3] See Stokes, *Anglo-Indian Codes* (reverse of title page).

[4] Amended in 1861, 1870, 1872, 1873, 1882.

is a codified law uniform throughout all India on the topics of civil as well as criminal law. The most important of these later Indian codes are those which cover the subjects of successions,[5] contracts,[6] evidence,[6] prescription,[7] negotiable instruments,[8] transfer of property,[9] easements,[9] trusts,[9] civil procedure,[9] criminal procedure.[9] So highly are the codes of criminal procedure regarded, that these have been made applicable also to British Zanzibar in Africa.[10]

The effect of these Indian codes on British law has been enormous. The partial codification of the law of England along a few lines of special topics is largely due to the success of the Indian codes. From England the movement toward codification, even by attempting it piecemeal, has spread to America. In the year 1910 it was announced in the House of Lords by the Lord Chancellor that he and other eminent jurists were engaged in an attempt to codify the criminal law of England.[11] The English particular codifications of special legal topics by statutory enactment are now no longer strange: on the contrary this plan has been adopted in the United States — the "uniform" negotiable instruments, practice and sales acts bear witness to the success of the American adoption of this English method.[12]

[5] Enacted in 1865.
[6] Enacted in 1872.
[7] Enacted in 1877.
[8] Enacted in 1881.
[9] Enacted in 1882. Other important codes are: The "Court Fees Act" of 1870, "Oaths Act" of 1873, "Specific Relief Act" of 1877, "Registration Act" of 1877, "Stamp Act of 1879, "Suits Valuation Act" of 1887, "Debtors Act" of 1888. See Preface of Stokes, *Anglo-Indian Codes*.
[10] See Stokes, *Anglo-Indian Codes*, Table of Contents.
[11] *Law Notes*, May 1910, p. 36.
[12] It should not be overlooked that the publications of vast encyclopedic treatises of law, like Lord Halsbury's "Laws of England" and the "Cyclopedia of American and English Law" are stepping stones to a complete codification of law in both countries.

Objection 2 — *A republic cannot codify its law; to do this necessitates a monarchy or an empire.* This is a weak argument, and is easily refuted. If it be argued that the codes of France and Germany, etc., were made possible only by the power of a monarchical government, and that Napoleon [13] and William II are reminiscent in this respect of Justinian, there is one irrefutable reply: Has not Switzerland, a republic — and a federated republic also — successfully codified her private law?

A lesson in experience can also be taken from our Spanish American sister republics — especially Argentina and Chile — which, although republics, have excellent codes of law uniform for each country. Did not Louisiana codify her law most excellently soon after her admission to the American union? Finally, have not many of our American states already codified parts of their own law, for example the Negotiable Instruments Act? The argument that a republic cannot codify its law falls to the ground from its own weight.

Objection 3 — *Uniformity of American law can be obtained by making state legislation uniform; there is no necessity for a uniform codified federal system of private law.* This objection recognizes by implication the value of a codified American law, even if it is attempted to do this piecemeal: for a code is a promulgated collection of laws scientifically arranged,[14] and a code may comprise an incomplete as well as a complete system of positive law. In other words, codes may be partial as well as complete. The various uniform state acts adopted by many American states are of the nature of

[13] Napoleon was not Emperor, but First Consul, when the Code Civil was completed; but the Empire quickly followed.
[14] See Black, *Law Dict.* ("Code and cases cited).

partial codes. If each branch or topic of the law shall be reduced to writing, eventually all our law will thus achieve full codification. Perhaps then the lack of coherence due to this piecemeal process would be remedied by welding a true code out of these many parts of a code.

This method of codifying law a part at a time originated, as has been shown, in British India, whence it spread to England and America. It is the easiest — but not the best — way to achieve a full codification, because the movement is along the line of least resistance, and deals with the difficulties of only one legal topic at a time.

The prospect of uniformity of state laws in the United States looks very promising on the surface. Sanctioned by the American Bar Association and ably executed by the Conference of Commissioners on Uniform state Laws, the promotion of uniformity of state legislation by practically partial codifications has been greatly advanced during the past twenty years. Forty states have already adopted the uniform Negotiable Instruments law,[15] which was first published in 1896 and like many of the subsequent Uniform Acts was, as to its conception, borrowed from England. Twenty-three states now have a uniform Warehouse Receipts Act.[16] Ten states already have a uniform Sales Act.[17] Eight states have a uniform Bills of Lading Act.[18] Six states have already adopted a uniform Foreign Wills Act.[19] Five states have already adopted a uniform Stock Transfer Act.[20] Four states now have a uniform Family Desertion Act.[21] There states now have a uniform Divorce Act.[22] "And the outlook for continued strength of the movement for uniformity is exceedingly encouraging," declares a recent President of the Conference of Commissioners on Uniform State Laws.[23] The case for uniformity of American law via state legislation and codification is apparently won — certainly from a superficial point of view.

But what is the meaning of the following observation made in the very next sentence of his article by this same President of the Conference of Commissioners on Uniform State Laws — himself a strenuous advocate of uniformity via state action only? He says: "The business world begins to realize that there is *only one alternative*[24] to an agreement among the states upon matters of vital concern to all of them. . . . They must agree among themselves or the pressure of sentiment will cause amendments to the Federal Constitution that will still further minimize the importance of the states and jeopard the basic principle of local self-government. Business has long since overleaped state lines."[25]

Right here crops out the fatal weakness of any scheme for making one law for the United States via uniform state legislation: when once uniform laws or partial codifications are thus obtained, *how long* will these stay uniform? The answer is, just as long as the legisla-

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[15] 23 *Green Bag* 620 (Dec. 1911).
[16] First published 1906: 23 *Green Bag*, p. 620–1.
[17] First published 1906: 23 *Green Bag*, 621.
[18] First published 1909, 23 *Green Bag*, 621.
[19] 23 *Green Bag*, 621.
[20] First published 1909, 23 *Green Bag*, 621.
[21] 23 *Green Bag*, 621.
[22] 23 *Green Bag*, p. 621. Moreover the Conference of Commissioners has drafted or has under consideration these additional acts: a Uniform Child Labor Act, Uniform Marriage and Marriage License Act, Uniform Workmen's Compensation Act, Uniform Act as to Insurance, Uniform Act as to the Situs of Property for Taxation.
[23] Smith, "The Outlook for Uniformity of Legislation," 23 *Green Bag*, 621.
[24] The italics are mine.
[25] Smith, "The Outlook for Uniformity," 23 *Green Bag*, 621–622.

tures of the states refrain from acting on the "basic principle of local self-government." Sooner or later the legislatures will inevitably tinker — each one probably in a different way — these uniform acts secured after so much trouble, and then will begin again the old familiar American condition of diversity of law. Already the oldest uniform state law, the Negotiable Instruments Act — only seventeen years old [26] — is attacked because it is beginning to cease to be uniform.[27] Permanent uniformity of American law is utterly impossible via state legislation. This magnificent movement toward one law for the United States is doomed to a miserable failure unless it be switched to the "main line" of legal progress.

There is only one route to permanent uniformity of law in the United States — an act of Congress. In no other way can one private law for our great republic be secured. When our business world, which "has long since overleaped state lines," realizes that diversity and uncertainty of law will not actually disappear until a federal codification be promulgated, verily "the pressure of sentiment will cause amendments to the federal Constitution" to secure but one system of law instead of forty-eight.

Let all traditional prejudices be dismissed, and let the subject of a federal codification of private law be investigated intelligently: it will soon be seen that the importance of the states will not be injuriously "minimized" by the promulgation of a federal code of private law. Such legislation must come eventually. When it does come, a great debt of gratitude will be owed by every American to those who fathered and developed the movement for uniform state laws — thus revealing the fact that codification of American law was not impossible after all.

Objection 4 — *A federal codified jurisprudence abrogating the private law of the states is impossible without impairing the integrity of the several states.* It is argued that because the United States are an enormous country equal in area to practically all Europe, federal uniformity of private law throughout the United States would not work well or be satisfactory; that uniformity of law through federal legislation or control would be an experiment, the dangers of which are unknown.

This easy-going belief is entirely superficial, and is quickly refutable. Ignoring our uniform rules of naturalization, do not the United States already possess federal uniformity of law as to bankruptcy and admiralty? Have these worked so badly that these ought to be made matters to be regulated by 48 different state laws? On the contrary, the wisdom of the framers of the Constitution in making bankruptcy and admiralty federal matters grows more apparent, and is more highly prized than ever. Furthermore, we often feel that many of our present evils might have been avoided had more matters — such as marriage and divorce — been entrusted to federal regulation, thus securing uniformity of law thereon. Uniformity of law through federal legislation has never worked ill to the people of the United States.

If we turn to history, we find that the size of a country does not derogate from the value of uniformity of law. The vast Roman Empire found uni-

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[26] It was first passed in 1896.

[27] Hening. "The Uniform Negotiable Instruments Law: is it producing uniformity and certainty?" 59 *Penn. Law Review*, 471 (1911). See Judge Mack's article, 6 *Illinois Law Review*, 62.

formity of law highly satisfactory. The vast extent of the influence of the Napoleonic codification in both Europe and the twin Americas shows the value of a simple codified legal system is not canceled proportionately by increasing the size of a state. Finally, it is indisputable that the elements of law in the vast English law countries have remained the same without suffering detriment from the enormous spread of English law by colonization.

Not well founded is the conviction that a federal codification of our law made uniform throughout the United States is not only impossible, but, even if it were possible, it would also irreparably damage or destroy the states themselves. The facts of history point to this very solution as quite possible and not injurious to the integrity of the states of a federal union. The best answer to the assertion that any proposition for a uniform federal codification of American law would be like a leap into the dark is to look at a federal Germany and Switzerland. Both were able to rise out of the quagmire of intensely active state pride, jealousy and historical traditions, and to enact one codified private law for over twenty Swiss and German states without in any way destroying these states themselves. Is the Constitution of the United States the sole supreme wisdom of statesmanship? The framers of the Constitution never held this view as to their work; they provided for amending it whenever necessary.[28]

It is quite possible to pass an amendment to the Constitution giving Congress power to enact a federal codification for the entire United States which shall abrogate the private law of the several states. It may also be expressly stipulated in the amendment that the public law of the states shall be left untouched: such a reservation of power was left to the German states when the German Civil Code was promulgated. The public law of the several American states need not be disturbed; but their private law should be replaced by federal codes of civil and commercial law[29]— thus resulting in one and only one uniform and codified private law throughout the entire United States. Such a single codification of American law would be of a permanent nature. At any rate, future changes in law would operate uniformly throughout the whole United States. But this is centralization! greater nationalization! Very well — it is better to hang together by the adhesive force of one uniform system of private law than to be pulled asunder by the disintegrating forces of 48 different systems.

But it may be urged, assuming the existence of a uniform federal codification, would not diversity of interpretation soon arise, and how can this be avoided as long as we retain adherence to precedent — that salient feature of the common law of England? This is the answer: the force of *stare decisis* no longer has today in Anglo-American law the binding power it once had — it is useful but no longer controls; why not then abrogate it entirely, as Germany, France and other countries have done? When there is a written code of law, the force of precedents is no longer binding; the code itself is its own interpreter.

The argument against one codified law for all the United States made under

[28] And seventeen amendments have already been adopted.

[29] Perhaps also federal codes of criminal law, civil and criminal procedure, may some day be deemed advisable.

federal auspices gains no additional strength because the task would be very difficult to accomplish. But it should not be forgotten that the conquest of the obstacles to the codification of American law can be greatly expedited for us with the aid of the many codifications already made by other modern nations, — an inestimable privilege not so abundantly enjoyed by them when they codified their law. Justinian first showed to the modern world how to remove the stones of practical difficulties so as to smooth the way to a uniform, codified private law. If the Napoleonic codification was made easier of accomplishment by the example of the Justinianean, and the German and the Swiss, a century later, were made easier of accomplishment by the previous examples of the Justinianean and the Napoleonic, how very much easier is our task than theirs, when there are before us so many examples of successful codifications of private law? Is our problem more difficult or even as difficult as the problem of codification was in other countries, especially in France or Germany?

France can give us hope and courage for a Herculean cleaning of our Augean legal stables. Prior to the Napoleonic codification, France had 300 different varieties of law more or less alike: but French lawyers finally succeeded in accomplishing the task of obtaining one codified law for all France — the first genuine grand codification since Justinian's age then nearly thirteen centuries in the past, and of enormous blessing in the nineteenth century to all mankind.

Germany, to obtain one codified law, had a very difficult problem to solve. Early in the nineteenth century there were some 1800 different states in Germany, which left as a legacy to the modern German Empire numerous conflicting systems of law; but not even this mischievous legal heritage from the past was allowed to stop the formation of one German law in codified shape — the magnificent code of 1900. It is absurd to believe that Americans are mentally inferior to Romans, Frenchmen or Germans.

Objection 5 — *The effect of one federal code for the entire United States would cause American law to become atrophied.* It is also claimed that to put our law into permanent shape in the form of a federal codification would cause it to become atrophied. How could it grow if codified? The answer is so easy: amend or revise the code whenever necessary, as for instance just as France has frequently done since 1804. Instead of causing a stoppage of growth, on the contrary a code really facilitates growth in law: for a code in course of time reveals its own deficiencies, and the law being made certain by the code, is easily alterable because of this discernible certainty — there is no danger of "leaping into the dark" when revising a code.

This whole argument of the atrophying influence of an American federal codification is quickly seen, when analyzed, to rest on a *very unscientific basis*. Furthermore, it demeans the dignity of the legal profession. *If* the enactment of a uniform federal codification of American law will have the bad consequence of introducing the "deadening" influence of a standardized law, then such an evil ought now to be true of the effect of our uniform state acts; but to claim that these are exerting a "deadening" influence is obviously nonsensical. At once *the reactionary spirit* of the argument is revealed: it would persuade us to turn back the hands of the clock of legal progress;

why not let, for instance, the Texan keep and enjoy his kind of law, the Californian his variety, and the Pennsylvanian his? — let them all grow and flourish *ad libitum;* standard legal ideas and principles are to be regarded as destructive of local state peculiarities of law! And so this argument totally ignores the fundamental principle of juridical evolution, that the fittest law should survive; on the contrary, it seems to lay emphasis on keeping alive outworn and obsolescent law.

All this is but another and sentimental way of injuriously emphasizing "state rights." Every citizen today has to suffer an enormous legal risk in business because of the increasing uncertainty of knowing just what the law is throughout these United States — a situation largely due to the present perpetuation of traditional state doctrines of law without regard to the law of any other state. Perpetuating the local dissimilarities of state law is a good thing for but one class of persons — namely pettifogging lawyers, who naturally will do their best to hold back as long as possible the chariot of legal progress. Must all the vast multitude of interstate business transactions in this country be jeopardized, in order that Rhode Island or Delaware, for instance, be kept dissimilar in order to benefit the lawyers of these states?

The present malady of American law is its lack of uniformity. Sooner or later our bulky, prolix, largely case law, which is increasing proportionally in uncertainty as it increases in bulk and in its visible form annually deluges law libraries, which alone may store its host of new reports, must give way to a scientific codification of small volume, wherein the law is clearly and definitely set forth, easily found, and which shall be the sole private law of the land from the Atlantic to the Pacific Ocean!

The Shortcomings of the Case Method

CRITICISMS of the case method of teaching law which go into details are infrequent. The impressions of a foreign observer who took the trouble to study the system at first hand are therefore the more valuable.[1]

Professor W. Harrison Moore of the University of Melbourne visited the United States in 1911 for the purpose of acquainting himself with the workings of the case system. His four weeks in this country were divided equally between the Harvard and Columbia Law Schools. He attended classes, sitting side by side with the students, and also had opportunities to discuss matters with the members of the staffs of both institutions.

Professor Moore readily acknowledges the merits of the case method of instruction. Before citing his opinions, his description of the methods used at Harvard and Columbia will be of interest, the more so because he attended classes of nearly every teacher of the two staffs and his summing-up must therefore give a fairly accurate picture of the methods in vogue.

In theory, he says, neither text-book nor formal lecturing enters into the course. "The students are required to read ahead of the class work, and the

[1] "Legal Education in the United States." By Professor W. Harrison Moore. 13 *Journal of Comparative Legislation* N. S., pt. 2, no. 28, p. 207 (July, 1913).

fifty minutes class may range over twenty pages or more of the case-book. The professor, on taking his seat, calls on some member of the class by name to give an account of a case, and care is taken by the instructor that the statement shall be of such a kind, and in such a form, as shall in the clearest manner exhibit its *ratio decidendi*. This, in itself, is admirable practice. The statement is followed by close examination of any questions left undecided or suggested by *dicta*, by comparison with other cases, and often by criticism; these last features are facilitated, of course, by the frequent divergence of state jurisdictions. The professor does not hesitate to press the students hard, and it was very interesting to notice the different manners of both professors and students at this stage. Some men, whom I thought to be rather severe, were, I was told, among the most successful teachers; certainly students responded *con amore* in some instances. Sometimes the professor will heckle a single student for ten minutes or more before he passes on to some one else."

Professor Moore speaks of the classes he saw as very large; he remembers none with less than a hundred members or so. In these classes "only a very small proportion can actively take part in the discussion during the allotted fifty minutes. Moreover, I found that the same students appeared prominent in several different classes, and I learned that in practice there was a tendency for the discussion to fall into the hands of the professor and a comparatively small number of members of the class."

A system of this sort obviously has its merits: "The student studies his law from the outset as he will have to study it for purposes of argument in court. He acquires familiarity with legal method, and with the process of legal development; he gains great facility in the use of his materials; he gains confidence, a critical habit of mind, and independence of thought; and his studies are carried on in the stimulating way of contest with his fellows and his instructor." As to the objection that the value of the system is impaired by the relatively small number who took part in the discussion, "one was told that, at any rate, the men who took part in the discussion got the benefit of it, and that those who did not had the advantage of hearing it, and were certainly no worse off than if they had had the law expounded by a lecturer without discussion. Certainly the demeanor of a large class indicated close attention — there was no appearance of listlessness or boredom in the audience."

Against these merits, must, however, be set certain disadvantages. "The discussion must often leave a large number of members of the class in a good deal of doubt as to what really is settled in the law. I have already remarked on the tendency of the discussion to fall into the hands of the abler men in the class; and a very little experience and reflection shows that this must be so. Discussion which would demonstrate everything to the duller intelligence would be hardly tolerated by the keener intellects, and would require an immense amount of time. In many respects the system recalls tutorial tuition, with the relation between an Oxford tutor and his best men, and just in so far as it does this it makes one doubtful of its aptitude, or at any rate sufficiency, for class work, except amongst selected men. The discussion soon reaches difficult and doubtful problems; and when the subject was one with which I was not familiar I several times left the room without a clear notion of what was settled law in the matter. Of course,

the diligent preparation of his cases by the student ought to obviate some of this danger; but it does not, I am convinced, avoid it altogether."

This criticism is in substance that teaching by oral discussion does not work advantageously in large classes, but calls for a small body of selected students, similar to the seminars in graduate departments of our universities. The remedy Professor Moore himself suggests, and one does not have to look far for it, for it is hardly external to the case system. "In some cases instructors recognize the position by a short expository address, either at the beginning or at the close of the class, of which the students take diligent notes. It seems to me likely that this practice will grow, and that the result will be a system which combines the case method with expository lectures."

Professor Moore points out that the efficiency of the case system, in the opinion of its advocates, rests on certain assumptions. These are: (1) a certain maturity on the part of students, as when they are required to be A. B. degree holders; (2) a sufficiently large staff to handle a law course broken up into numerous special topics; and (3) a course allowing a sufficient amplitude of time both to the student and to the instructor.

He questions whether the case method of instruction is well-balanced; whether it does not throw its weight too greatly on one side. "It seems to me that, in the familiar academic contest of *Method in Teaching* and *'Learning to Learn'* v. *Imparting Knowledge*, the first is rather over-emphasized in the case system, and I was very much disposed to agree with suggestions that the advantages which the case method admittedly has could be sufficiently secured by its exclusive adoption in one or two subjects — one, at least, should be in the first year — and that the rest of the course might be pursued with a more liberal use of the text-book and the expository lecture."

A more serious criticism, however, is that which gathers momentum from such declarations as that of the Columbia Law School teacher who was emphatic in assuring Professor Moore that the case system tends to accentuate the evil of a political bias which carries the student far from the current views of the day, unless such a tendency is corrected. "The correction that was attempted at Columbia was to link as closely as possible the study of the law with political science, and particularly to encourage the pursuit of economic and sociological studies by those who are intending to practise or to teach law."

The Australian critic's views on this phase of the subject are interesting and timely. "We know on good authority," he says, "that debate makes a ready man, and that the legal method of detail makes men cut deep. But we know also that it has not the tendency in the same degree to make them take broad views. Now, it seems to me that a system of education resting exclusively upon the study of cases tends to exaggerate the logical side of the law, to consider it too exclusively on its formal side, to over-emphasize the consistency and harmony of the law. These are dangers to which the lawyer is prone, and which, time and again, have manifested themselves in history. As professional thought is one of the principal factors in legal development, this stamps itself upon the law, with the result that the law may become less and less an instrument for accomplishing present social ends, and more and more an institution to the needs of which social ends themselves must be adapted. . . . Law

and politics, indeed, are not one, nor are bench and bar legislators. Nevertheless, opinions as to the end and purpose of government and of laws are amongst the sources of our law, which in one form or another find common expression in judicial decisions. In America the wide range of constitutional law brings these opinions before the student with great frequency; and he thus acquires, in his legal education, a political bias which carries him very far from the current views of the day. Judgments which are frankly based on political doctrines which were orthodox in the eighteenth century, but are now branded as 'conservative' or 're-actionary,' widen the breach between profession and public; they sometimes very seriously impair the understanding of legislation."

Reviews of Books

ADAMS' SOCIAL REVOLUTIONS

The Theory of Social Revolutions. By Brooks Adams. Macmillan Co., New York. Pp. 240. ($1.25 *net.*)

"THERE can be no doubt," writes Mr. Brooks Adams, "that modern civilization has unprecedented need of the administrative or generalizing mind." This need of what may be called the synoptic as opposed to the specializing mind is as great in science as in the practical departments of commerce and statesmanship; intellects are needed which can co-ordinate the results of research in special fields. The theme of the book before us, that of social revolutions, is one of those complex topics which are not to be handled satisfactorily by the political scientist, the economist, or the psychologist working alone at his particular specialty. It calls for treatment by a mind capable of understanding and correlating the fruits of several different sciences. And Mr. Adams approaches the task with this purpose of making a comprehensive survey.

He writes a book dealing largely in generalization, but the matter of which consists to a great extent of historical illustrations. In a book of not much more than two hundred uncrowded pages, making copious use of historical discussion, it is difficult to make great headway in elucidating the complicated principles that govern social catalysms. In a vivid retracing of the record of the French Revolution, for example, it is impossible, without taking much more space than a book of this kind permits, for the author to make a searching analysis of the underlying causes of that prodigious movement. It is likewise impossible for him to set forth, with anything like thoroughness, the data of observation from which his generalizations are drawn. This book deals largely in generalization, but the reader gets rather hazy notions of the meaning of principles that are not to be taken for granted, but demand fuller exposition to make them clear. Mr. Adams' treatment is to be commended for its attempted breadth of survey, but it would have been more persuasive if its author could have shown himself possessed of a nicer feeling for detail. A closer attention to detail would doubtless also have guarded against some errors and distortions, and likewise have aided the reader to gain clearer impressions of the writer's ideas.

The book is a hard one to review, because it is difficult for the reviewer to comprehend just what the author means at all times. Nowhere has the author attempted a concise definition of capitalism. Yet in a book the whole argument of which turns on the contemporary influence exerted by capitalism, and the dangers confronting it, it is essential that the conception be expounded clearly. Exception likewise may be taken to general propositions like the following, enunciated without thorough study of economic or sociological principles: "In fine, monopolies, or competition in trade, appear to be recurrent social phases which depend upon the ratio which the mass and the fluidity of capital, or in other words its energy, bears to the area within which competition is possible"; "The judge may develop a principle, he may admit evidence of a custom in order to explain the intentions of the parties to a suit, as Lord Mansfield admitted evidence of the customs of merchants, but he should not legislate"; "What we call civilization is, I suspect, only, in proportion to its perfection, a more or less thorough social centralization, while centralization, very clearly, is an effect of applied science." Phrases like these reveal a lack of power to state abstract conceptions clearly, and a tendency to inexactitude of thought as well as of utterance.

If the judiciary has been influenced by capitalism to the extent Mr. Adams assumes, the point is of too great importance to be passed over without an attempt to portray the relation between the bench and the so-called capitalistic class, and without a survey of the judicial decisions which are supposed to betray this unfortunate partisan bias. The incredulous may accept the conclusion without examining the premises, but we are not incredulous enough to follow, with sympathy or comprehension, Mr. Adams' plea that the judiciary needs to be withdrawn from politics, *i.e.*, that political questions are never for the courts, but always for the legislatures. That the courts may have been compelled to decide some partisan controversies does not indicate that their functions are ordinarily more political than judicial. And if there is, indeed, the need of withdrawing the judges from politics, how can short elective terms, and the recall of judicial decisions, combined with a disability to hold statutes unconstitutional, fail to force judges further into politics, instead of taking them away from it?

The author has in his concluding pages much to say about the lawyers being, like the universities, under the control of the capitalist class. But if, as it seems to us, we live in an era of capitalism, and this era is likely to endure for many centuries longer, purged perhaps of some of its abuses, the modern labor union may be considered a part of the capitalist *régime*. In that case to call a man a capitalist cannot be to accuse him of partisanship. If capitalism be taken in a narrower sense, are we to consider that there is any such battle now raging between capital and labor in this country as the *doctrinaire* socialist has in mind when, preaching the gospel of Marx or Loria, he sets the economic system of modern society at defiance? And is it not possible that Mr. Adams takes surface phenomena rather too seriously, that he has lost sight, in a word, of the distinction between revolutions and oscillations? Political parties are composed of such mixed elements that it overtaxes credulity to explain the national Republican convention of 1912, with the lesson of the French Revolution in mind, as exemplifying "the inability of a declining favored

class to appreciate an approaching change of environment which must alter its social status."

DR. CLEVELAND'S ORGANIZED DEMOCRACY

Organized Democracy: An Introduction to the Study of American Politics. By Frederick A. Cleveland, Ph.D., LL.D. American Citizen Series, edited by Albert Bushnell Hart, LL.D. Longmans, Green & Co., New York and London. Pp. xxxvi, 465 + 14 (index). ($2.50 *net*.)

DR. CLEVELAND evidently felt that the word "democracy" ought to be part of the title of his book. His earlier treatment of a portion of the same subject was entitled, "The Growth of Democracy in the United States."

From this small circumstance, however slight its importance may seem, one nevertheless gets a correct premonition of the tenor of the book. Our first impression was that the title "Organized Democracy" rather detracted from the dignity of so thorough and scholarly an exposition of the American constitutional system. The writer showed himself so diligent in wide reading, historical research, and searching analysis, that it seemed as if a book of such largeness and solidity would better have borne some such title as "The Principles of the American State, in their Historical Development and Present-Day Application." In comparison with such a title, "Organized Democracy" would seem to make a needless concession to the popular taste for the short, loose phrase. However, in spite of the fact that the author has performed his task in a scholarly spirit, with that recognition of the complexity of the American state which many latter-day writers labor to cover up, he is plainly actuated by a desire to provide something apart from a dispassionate work of political science. It is not as a critic but as a protagonist of American democracy that he writes. Mark also the more liberal connotation that "Organized Democracy" has, in comparison with "Limited Democracy" or "Self-Restrained Democracy." Moreover, it is the noun rather than the adjective that has the stronger significance; it is of "Organized Democracy" rather than of "The Organization of Democracy" that the book treats. We look in vain for such expressions as that indulged in by a recent writer in one of the economic journals, who spoke of "that half-truth, the notion that all men are created free and equal." For Dr. Cleveland this is evidently much more than a "half-truth." We have here a book which puts its unquestioning faith in the soundness of the general will. The compositeness of the general will is recognized, but not in all its implications of strife between lower and higher wills. Nor is there any questioning of the notion that the majority must always be in the right.

A treatise undertaken in this fashion has its defects and limitations. Dr. Cleveland's idea that he has solved the problem of the turmoil in our public affairs, by proposing the remedy of co-operation for the common welfare, is not a fertile conception, for it ignores the difficulty of finding out what is for the highest good of humanity. His view that women possess higher qualifications for the duties of citizenship than men is based upon a very incomplete sociological survey. His remarks about the recall of judges show a less penetrating understanding of the function of the judiciary than Mr. Judson's recent little book exhibits.

While the book has some conspicuous merits by reason of its comprehensive exposition of the details of our system of government as they affect the individual citizen, it suffers from the lack of a keen discrimination of the capacities

and limitations of the American people, and of a strict impartiality that holds impulses to over-confident assertion and optimistic speculation in check. It is a book that overrates the opportunities of American democracy and underrates the dangers besetting it.

MR. JUDSON'S LECTURES ON PROBLEMS OF THE JUDICIARY

The Judiciary and the People. By Frederick N. Judson. Yale University Press, New Haven; Oxford University Press. Pp. 255 + 15 (index). $1.35 *net*.)

IT WOULD be difficult to find a more luminous discussion of problems involving the courts, within a limited compass, than that contained in these five admirable lectures delivered by Mr. Judson at Yale University. They are marked by an exceptional largeness of view and by a full knowledge of contemporary needs. They embody the ripe suggestions of a well-informed and public-spirited lawyer as to the best means of improving existing conditions. They are readable and scholarly, the product of a mind too thoughtful and alert to fall into any sin of platitude or prejudice. The completeness with which a survey of the relation of the American judiciary to the people can be presented in so few pages is really astonishing.

The multitude of topics touched by the author is remarkable. He thoughtfully expounds the doctrine of the separation of powers, not dogmatically, but with due regard for recent criticisms; he goes deeply into the history of the judicial authority to set aside a statute; he compares the functions of the American judiciary with those of the judiciary under the English Constitution and in Continental systems; he offers pregnant matter bearing upon the American Bar Association proposal to extend the jurisdiction of the United States Court to review decisions of state courts; he temperately describes the evil effect on the independence of the judiciary of short elective terms, the recall of judicial decisions, and the recall of judges; he offers a novel and striking explanation of various circumstances which render the judiciary the weakest, rather than the strongest, of governmental powers; he points out the inconveniences of too many constitutional restrictions on the power of state legislatures and the burden poorly drawn legislation imposes on the courts; apart from the last mentioned cause, he shows how the work of the courts is increased, and they fall into arrears, because of the artificiality of rules of evidence and the consequences of the doctrine of presumption of prejudice from error, which is characteristic of the American system; he urges the need of reform not only in the foregoing things, but in the custom of preparing written opinions for all decisions, a custom in many instances prescribed by statute; he recognizes the need of removing the exemption of the accused from self-incrimination; and he urges the importance of legal procedure attaining simplicity in place of that technicality which is the sign of an undeveloped system of law. The foregoing rather bare summary suggests the impossibility of epitomizing the contents of the book in a brief notice. It treats so many questions soundly and helpfully that every lawyer is sure to profit by reading it.

COLLIE'S MALINGERING

Malingering and Feigned Sickness. By Sir John Collie, M.D., J.P., Medical Examiner London County Council; Chief Medical Examiner Metropolitan Water Board, Consulting Medical Examiner to the Shipping Federation, etc.; assisted by Arthur H. Spicer, M.B., B.S. Lond., D.P.H. Illus-

trated. Longmans, Green & Co., New York. Pp. 321 + 19 (index). $3 *net.*)

NO one is better qualified to write a book on malingering to secure benefits of workmen's compensation than Sir John Collie, both because of his large medical experience and his familiarity with the workings of the British laws.

Speaking at the International Medical Congress last August, Sir John, who is a member of the Government advisory committee on the National Insurance Act, expressed the opinion that the extent of the evil of malingering to obtain benefits under that statute was much overrated. The vast majority of those who gave the appearance of shamming, he said, were persons of poor physique whose standard of health was at best below normal. He thus showed himself free from any tendency to exaggerate the dangers for which public officials must be on the lookout, and while the present work "deals with a very dark side of human nature," Sir John may be trusted not to paint it any darker than it really is.

The book is a semi-technical treatise on the medical aspects of malingering which deals comprehensively with the whole subject, and should aid greatly in helping to distinguish between genuine and feigned symptoms of diseases. It is the best book in the field and will undoubtedly be of use in helping us Americans to be on our guard against abuses in our own new and comparatively untried systems of sickness insurance.

BRISCO'S ECONOMICS OF BUSINESS

Economics of Business. By Norris A. Brisco, Ph.D., F.R.H.S., Fellow of the Royal Economic Society, sometime Fellow in Economics in Columbia University, author of The Economic Policy of Robert Walpole, Departmental Editor for Canada of Book of Knowledge, Department of Political Science, College of the City of New York. Macmillan Company, New York. Pp. xiv, 383 + 7 (index). ($1.50 *net.*)

ACCORDING to the author, the chief difference between the employer of the nineteenth century and of the twentieth is that the latter treats the employee as a man and not as a machine. The employee, to do his best work, must be led and not driven, and the best way to awaken his enthusiasm for his work is a problem for the future.

The foregoing is to be taken as an illustration of the tone of Mr. Brisco's book, which is a simple text-book on the economics of production in which the human factor receives a liberal share of attention. Business men will get many good ideas from the very helpful treatment of the numerous problems of minimizing costs and promoting efficiency. The book is also designed for class-room use, for which it is well suited by reason of the writer's familiarity with what leading economists have written on the subjects, and the excellent bibliographical notes appended to each chapter.

STREET RAILWAY REPORTS

Street Railway Reports, Annotated; Reporting the Electric Railway and Street Railway Decisions of the Federal and State Courts in the United States. Edited by Austin B. Griffin, of the Albany bar, and Arthur F. Curtis, of the Delhi bar. V. 8. Matthew Bender & Co., Albany, N. Y. Pp. 866 + 127 (index-digest to all eight volumes.)

THE usefulness of this series of reports covering a field of considerable extent is now made more apparent by the wide scope of the index-digest, in which the contents of the eight bulky volumes is made readily accessible. The series can now show many practical footnote articles on special topics, such subjects as Contributory Negligence of Passenger Riding upon Running Board,

Duty of Street Railway Company as to Lights on Cars, Duty of Motorman as to Control of Street Car, and Exemplary Damages for Assault or Ejection of Passenger, being among the chief subjects thus treated in the new volume.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Admission to the Bar. "The Lawyer and the Legislator." By Justice Andrew Alexander Bruce. 77 *Central Law Journal* 57 (July 25).

The result of the controversy in America over the right of the legislature to control the admission of candidates for the bar "seems to have been a compromise, and to have culminated in the rule that although the courts may not admit to practice persons or classes of persons whom the legislature, in the exercise of its reasonable discretion and judgment, has decided to be incompetent, the legislature, on the other hand, has no right or power to prove or command that any person possessing certain qualifications or possessing none, shall or must be admitted to practice in the courts, and much less it is authorized to assume the judicial function of determining whether or not such persons actually possess the necessary qualifications. There has, however, as yet, been no rancor evinced over the matter, and no serious dispute in relation thereto. The conclusions of the courts so far have been silently acquiesced in."

Biography. "John Westlake, K.C. (1828, Feb. 4 – 1913, Apr. 14)." By A. V. Dicey, T. E. Holland and Norman Bentwich. 29 *Law Quarterly Review* 260 (July).

"Westlake succeeded," says Professor Dicey, "because he was, unlike most of the Benthamite reformers, a thoroughly trained English lawyer who almost instinctively understood the nature and the expansiveness of judge-made law, and who throughout his life was a practising and successful barrister, and thus kept up and increased his knowledge of English law as it daily works and grows. This combination in Westlake of an English real property lawyer and of a jurist well versed in the speculations of foreign professors is then one main source of his deserved success in the introduction of new principles into the rules of private international law as now administered by English tribunals. It is also the cause of his one defect as a writer, namely, a certain stiffness and obscurity of expression. In the edition of 1858 one occasionally finds terms which need explanation by some adept in the literature of German law."

"While thus essentially an international lawyer," says Professor Holland, "Westlake was also a keen politician, political economist, and social reformer, actively sympathetic with oppressed nationalities, whether in Finland or in the Balkans. His career as a Liberal member of Parliament for the Romford Division of Essex, 1885–6, was shortened by his characteristically independent action in voting against Home Rule for Ireland. He was, indeed, in all things *tenax propositi*, while conciliatory to opponents and the kindest of friends."

Mr. Bentwich declares that it would be giving a one-sided view of Westlake "to represent him exclusively as the jurist and the publicist. What, I think, most struck a student when he came to know him was his enthusiasm for every liberal cause and the unswerving progressiveness and freshness of his mind. In the eagerness of his sympathies he surpassed the most youthful of us."

"The Great Jurists of the World: XVII, Gaius." By J. C. Ledlie. "XVIII, Andrea Alciati and His Predecessors." By Coleman Phillipson, LL.D. "XIX, Robert-Joseph Pothier and French Law." By J. E. de Montmorency. 13 *Journal of Comparative Legislation* N. S. pt. 2, p. 232 (no. 28, July).

"The student of Roman law," says Mr. Ledlie, "may find that there is a good deal more in the Institutes of Gaius than a mere dryasdust antiquarianism. When he comes to the Digest, it may happen that, after a hard struggle with a passage from Julian or Africanus ('Africani lex, ergo difficilis') or Papinian, he will greet with no small pleasure the sight of the plain five-lettered name at the head of the next excerpt, well knowing that, whatever the point to be dealt with, he will be sure to find a model of terse and lucid exposition."

"Lord Chancellor Hardwicke." By J. A. Lovat-Fraser. 38 *Law Magazine and Review* 447 (Aug.).

"His memory has hitherto suffered from the want of an adequate history of his career. In the case of Hardwicke as in that of other Chancellors, Lord Campbell has distorted and misrepresented the man whom he professed to depict. In the work of Mr. Philip Yorke an adequate and noble tribute to his memory has been provided."

Contracts. "Freedom of Contract, II." By

R. L. Marshall. 38 *Law Magazine and Review* 401 (Aug.).

Continued from 38 *Law Magazine and Review* 278 (25 *Green Bag* 311).

"It is important to estimate rightly the true position of consideration in contract. Now, as it seems to the present writer, consideration is not inherently essential to contract: it may be incorporated in the contract as part of it, or something collateral to it; it may be a term of the actual performance of the contract, or a condition precedent to it: but in no case can any amount of considerations, or cause, or motive, or *quid pro quo*, of themselves constitute a contract: in no case can the mere fact of work done constitute an obligation to pay for it. What does constitute a contract is the promise of one party and the agreement of both: the consideration is rather of the nature of a buttress to support the agreement. And this is perfectly consistent even with an artificial rule that there must be consideration: it is not only consistent with, but implied as a matter of course by the evidentiary view of consideration, which view modern writers and judges have found it necessary to adopt from time to time."

See Sales.

Conveyances. "The Recording System." By Axel Teisen. 70 *Legal Intelligencer* (Philadelphia) 538 (Aug. 22).

"Our recording system has reached that point in the evolution where all title papers are recorded *in extenso*, in separate books, according to their nature, with indexes of names divided into separate books corresponding to the separate books of record.

"We have no indexes of the land according to separate holdings, and the recording and indexing of transactions and events affecting real estate have not been concentrated into one office and worked upon one principle, but are spread among a number of institutions and offices and worked differently in the several places. . . .

"It may be necessary to increase the cost of recording, or — what would be better — levy a tax on all transfers of land according to the price paid or the assessed value, the amount of the mortgage or lien; during the period of transition this may be somewhat of a hardship, but in a comparatively short time an index like the one proposed will make title insurance superfluous in almost all cases, and a more than corresponding saving will be made."

See Real Property.

Corporations. "Responsibilities of Officers and Directors of Private Corporations." By Charles Kerr. 47 *American Law Review* 561 (July–Aug.).

"This is essentially a business age. It is an age when the commerce of the world is handled through the medium of corporate capital. What then would be a clear rule for the measurement of the responsibility of the director or officer of a corporation, growing out of mistakes of judgment, must be exceedingly difficult to establish. And a somewhat hasty examination of the subject leaves little doubt that the only safe rule lies in the 'rule of reason' as it may be applied to the circumstances of each case."

Criminal Law and Procedure. "The Revival of Criminal Jurisprudence." By Professor Maurice Parmelee. *Independent*, Sept. 18, p. 676.

"There must be a revival of the study of criminal jurisprudence in order that criminal law and procedure may be brought up to date and harmonized with the new forms of penal treatment. This study must be based upon the two sciences which deal with the causes of crime, criminal anthropology and criminal sociology. No system of criminal jurisprudence or of penal treatment has a sound scientific basis which is not based upon the data and inductions of these sciences. The penal reforms to which we have referred have been too empirical because they have lacked this basis. . . .

"American criminal law has been derived from the English common law. This system of law was evolved in the course of several centuries in a very empirical manner out of the decisions of judges. Neither in England nor in America has much study been made of the theory of the law. This has been a great loss to our criminal law, which has not been submitted to the critical examination which an attempt to formulate theory requires. But now that scientific standards are to be applied to the law such a critical examination must be made, and necessary changes must follow in order that the theory of the law may harmonize with these standards. . . .

"Penal responsibility requires a legal criterion according to which the responsibility in each case can be measured. It must be determined to what extent premeditation or intention can serve as this criterion, and what else is needed to complete it. The fundamental principle of modern criminal law, *nulla poena sine lege criminali*, must be interpreted in the light of criminological science. A legal doctrine of attempted crime in harmony with the facts of criminal psychology must be developed. The same must be done for plurality of crimes and plurality of the agents of crime or complicity. A penal code must be devised in which crime will no longer be treated as a juridical abstraction, but in which the character of the criminal will receive due recognition. These are a few suggestions as to what needs to be done to give our criminal law a broad theoretic basis in harmony with the facts of science.

"Still more extensive changes need to be made in criminal procedure; these changes are even more important than those in criminal law because of the increased emphasis which is being laid upon the character of the criminal in the treatment of crime. Procedure must become an agency for determining this character as well as a more perfect agency than it now is for determining whether a crime has been committed and who has committed it. To accomplish these functions more evidence should be gathered. The police, who are usually among the first to reach the scene of a crime, could gather more evidence than they now do if they were trained

to detect it. Expert evidence should be used much more freely in deciding technical questions."

See Criminology, Indictments, Juries, Professional Ethics, Roman Law, Witchcraft.

Criminal Statistics. "A Working Program for an Adequate System of Collecting Criminal Statistics in Illinois." By Arthur James Todd. 4 *Journal of Criminal Law and Criminology* 175 (July).

"Professor Robinson wrote me recently that from his experience it has been up-hill work to compel the county clerks to send in the returns. There ought, therefore, he says, to be an easy method of enforcing the law concerning the collection of these statistics. But what this easy method is we shall have to determine by experiment. Personally, I am inclined to trust rather to the tact and persuasion of the director of our bureau than to any summary penalties for non-reporting which we might deem necessary for strengthening the law."

Criminology. "A Prison Psychosis in the Making." (Report of a case.) By William A. White, M.D. 4 *Journal of Criminal Law and Criminology* 237 (July).

"I would call particular attention to the fact that here a pretty complete psychological analysis has been able to build up an explanation and understanding of the prisoner, not only in her present condition, but with reference to the crime, and that it has been possible to evaluate all of her various statements without recourse to anything outside of herself. In other words the whole picture has been constructed from internal evidence alone, a fact which psychiatrists fully appreciate as perfectly possible, but which our legal brothers appear never even to suspect can be done. Witness the constant and repeated questions on cross-examination with reference to alleged delusional states; constant attempts to prove that delusions correspond to facts, with the implied assumption that if they are found to so correspond, then they are not delusions — a wholly inaccurate method of attack upon the problem, but one which, of course, can be easily understood when we take into consideration our present methods of legal procedure.

"It is certainly open to question whether the ends of justice can best be served by methods which are so accidental as the ability to present a scientific view in a convincing and simple manner to a lay jury, and to be free from the embarrassment of the physician on the witness-stand that the expert is very likely to suffer, especially if badgered by a persistent cross-examination.

"After a wide experience I am almost convinced of the practical impossibility of presenting, at least with any degree of satisfaction to myself, a scientific position from the witness-stand."

"Present Day Aims and Methods in Studying the Offender." By William Healy, M.D. 4 *Journal of Criminal Law and Criminology* 204 (July).

"In general the study of mental quantities and qualities may be spoken of as a differential psychology. In this investigation of roots of criminalism one is looking for those mental states which act as driving forces of conduct. We must include estimation of mental defects, aberrations, obsessions, instabilities, impulsions, irritations, repressions, worries, conflicts, imageries, grudges and suggestibility. We are bound to become involved in a study of what John Stuart Mill and several German authors call characterology. Of course it is necessary to look farther and record and combat every possible condition which aroused the activity of these driving forces. But the most immediate point of contact with causes is to be gained by employment of the knowledge which has been developed, a good deal of it quite recently, in the field of abnormal psychology."

"The Causation of Crime." By H. Fielding-Hall. *Atlantic*, v. 112, p. 198 (Aug.).

"Is the criminal so because he wants to be so? No, and no, and no again. No more wicked fallacy was ever foisted upon a credulous world than this. Nobody at any period of the world ever wished to be criminal. Every one instinctively hates and fears crime, every one is honest by nature; it is inherent in the soul. I have never met a criminal who did not hate his crime even more than his condemners hate it. The apparent exception is when the man does not consider his act a crime; he has killed because his victim exasperated him to it; he has robbed society because society made war on him. The offender hates his crime."

Defamation. "Libel of Public Officials." By William Beers Crowell. 5 *Bench and Bar* N. S. 104 (July).

"This rule in malicious prosecution actions has been applied by the Court of Appeals in private suits for libel (*Ormsby* v. *Douglass*, 37 N. Y. 477, 480), and why should there be a different rule when a public official be attacked? If the libel be outrageous and far beyond reasonable criticism, then perhaps the question would be for the jury under a charge following the rule laid down in *Howarth* v. *Barlow* (113 App. Div. 510, cited and approved in *Cook* v. *Pulitzer Pub. Co.*, 145 S. W. 480 [Mo.]).

"It is submitted that for reasons of public policy the more liberal rule should prevail when a citizen criticizes a public official, and that he should not be made to guarantee the truth of the facts on which the comment is based."

Distress. See Real Property.

Federal and State Powers. See Treaty Power.

General Jurisprudence. See Biography, Legal Education.

Government. "The Treaty-Making Power." By Edward C. Eliot. 20 *Case and Comment* 78 (July).

"If the proposition can be successfully maintained that the treaty-making power can have the aid of federal legislation, although that legis-

lation may seem to impair what is called the reserved power of the states, then it is competent for Congress to enact laws of the following character:

"First: To declare the violation, or attempted violation, of any existing treaty of the United States with any foreign nation to be an offense against the laws of the United States, and providing adequate punishments according to the grade of the offense and the official responsibility of the person offending.

"Second: To provide that all injuries to persons or property of aliens who are within the protection of any treaty obligation shall be cognizable by the courts of the United States, concurrently with the state courts.

"Third: To confer jurisdiction upon the federal courts to entertain applications for extraordinary legal and equitable writs at the instance of the Government of the United States against any persons whose acts threaten to violate treaty obligations and perhaps against a state as such.

"Fourth: To authorize the use of the armed forces of the United States to carry treaties into effect or to prevent their breach."

Canada. "The Alberta and Great Waterways Railway Case." By A. H. F. Lefroy, K.C. 29 *Law Quarterly Review* 285 (July).

"It is of epoch-making importance so far as concerns the powers of provincial legislatures in Canada, under the constitution of the Dominion established by the British North America Act, 1867, over 'property and civil rights,' or, at all events, over 'civil rights,' in the respective provinces."

See Legal History.

Illegitimacy. "The Problem of Illegitimacy in Europe." By Victor von Borosini. 4 *Journal of Criminal Law and Criminology* 212 (July).

"The statistics of firstborn legitimate children reveal that in Berlin 45%, in Dresden 48%, in the kingdom of Saxony and in rural Denmark 39%, and in Amsterdam 26.4% are born less than seven months after the wedding. . . .

"Of Berlin's registered prostitutes, 75.7% were of bastard origin, according to statistics published about 10 years ago. Of 88 girls between 15 and 17 dealt with by the juvenile court of Munich in 1911, 33% were of illegitimate origin. The same is the case in 23% of registered prostitutes and of 28% of the girls arrested for soliciting in Munich. Illegitimately born girls are, as these figures reveal, in greater danger of becoming law breakers, are more handicapped in the struggle for life, than the men, and ought for these reasons to be placed under the special care and supervision of the state and the municipality."

Indictments. "Simplified Criminal Accusations and the Supplementing and Amending Thereof." By L. Pearson Scott. 61 *Univ. of Pa. Law Review* 540 (June).

The writer makes a thorough examination of the law which governs the form of criminal accusations, and makes out a clear case in favor of the constitutionality of any simple form of indictment which gives the accused fair notice of the nature of the charge lodged against him.

International Law. "The American Institute of International Law." By James Brown Scott. 61 *Univ. of Pa. Law Review* 580 (June).

"An examination of the constitution shows that the American Institute is democratic and that it rests upon the principles of federation — democratic in the sense that it will be composed of an equal number (five) of publicists from each of the American states, and that they will not be selected arbitrarily by the Institute itself, but by the publicists composing the national or local societies of international law, to be founded in the capital of each of the American countries. It is federative in the sense that the national or local societies are affiliated with it, and that the members of the Institute recommended by the national or local societies can properly be said to represent them. The Institute is not to meet regularly in any one country, although it may have permanent headquarters, and it is provided by the constitution that the members of the national or local societies become as of right associate members of the Institute by the payment of the annual dues."

See Biography, Government.

Judiciary Organization. "The French Judicial System: Part II, Criminal." By C. A. Hereshoff Bartlett. 38 *Law Magazine and Review* 313.

Continued from 38 *Law Magazine and Review* 257 (25 *Green Bag* 313) (Aug.)

Juries. "The Mind of the Juryman: With a Side-light on Women as Jurors." By Prof. Hugo Münsterberg. *Century*, v. 86, p. 711 (Sept.).

Professor Münsterberg describes his interesting experiments with dotted cards to test the accuracy of his students in arriving at a determination of a question of fact analogous to what a jury has to consider. In the experiments there was an interval for discussion, followed by a second vote which gave an opportunity to the voters to yield to the influence of the discussion. The second vote showed in the case of the men a much higher percentage of right judgment than the first, but in that of the women there was no such advance, the women showing a predilection for their own first instinctive impressions. Because of this inability to profit by discussion women are considered psychologically unfit for jury service.

Jurisdiction. "A Definition of Jurisdiction." By Samuel Barnet. 47 *American Law Review* 518 (July–Aug.).

The writer proposes this definition: —

"Jurisdiction is the authority derived from law and conferred upon a magistrate or tribunal to take cognizance of and decide according to law and by the means which the law has provided for that purpose, the particular case brought to its bar, and to carry its judgment into execution."

Labor Problems. "Monopoly of Labor." By

Professor J. Laurence Laughlin. *Atlantic*, v. 112, p. 644 (Oct.).

"The only real permanent aid to low wages is to increase the productivity and skill of the persons at the bottom. Instead of talking of such injurious palliatives as minimum wages, create institutions at once where those persons can be given a trade or training for a gainful occupation. . . . Under unrestricted competition there will be seen the inevitable results of 'natural monopoly' by which superiority comes to its own, and wages are in some proportion to productive power. Thus organization may be used to forward merit; and our individualistic democracy may found its material development on the satisfactory basis of correct economic principles."

Law Books. "Reports and Some Reporters." By Henry Budd. 47 *American Law Review* 481 (July–Aug.).

"This debased condition of the reports does not necessarily show that the present reporters are inferior in ability to those who, in times past, were led to engage in the labor of reporting primarily by love of the work. Some excellent lawyers have been and some now are official reporters. Occasionally (but alas! rarely) a case is admirably reported, and that fact is proof that good reporting is still possible. The condition is due very largely to two reasons: (1) Because the reporter does not as a rule hear the cases argued. (2) Because of the adoption of a bad system, due in part, at least, to the demand, voiced in some cases by legislative enactment, that every case of a court of last resort shall be reported in the official series, and reported with great promptness. The report of every case we have, but it can hardly be said 'with great promptness,' when we find cases decided January 2, 1912, appearing, with imperfections to be corrected before final publication, in advance sheets dated May 24, 1912. All reasonable requirements would be met should decisions which are manifestly of trifling importance in point of law be merely noted in a very abbreviated form. There may be, there probably are, other reasons for the present state of the reports; but it is very probable that if the reporter were in court, and if discrimination whether a case should be reported or noted were permitted to be exercised by him, always assuming him to be a well-trained lawyer, our reports would be much improved. But whatever the reason, reporting as formerly known seems to be a lost art or an abandoned practice in this country. The last struggle for good reporting in our state [Pennsylvania] has its monument in the forty-four volumes of the Weekly Notes of Cases. originated and, for a time, edited by Elias L. Boudinot, and for by far the greater part of their existence by Mr. Outerbridge."

"Evolution in Annotation." By Henry P. Farnham, M. L. 20 *Case and Comment* 114 (July).

"The highest evolution in annotation, and that which the best publishers are more and more nearly approaching, begins with an absolutely exhaustive collection of the cases bearing upon the subject in hand, and a search for the underlying principle which should be applied to its decision. From the cases collected is prepared an elucidation of the principle involved, so clear that the reader will have no difficulty in determining what the law is, and why, setting out each case fully enough to indicate how the principle was applied in it, and just what it is worth as a precedent, indicating the best-reasoned cases, and those decided by the strongest judges, so as to enable the lawyer or judge to examine the fewest cases possible in the preparation of brief or opinion. All cases are so classified, harmonized, and distinguished that the needed one may be found in the shortest time, and if any reason exists why a particular one should or should not rule the one under consideration that reason plainly pointed out. This gives ample scope for the profound study and constructive ability of the text-book writer, and the exhaustive and painstaking care of the case lawyer, and furnishes to the profession a combination of principle and case which is of the highest value. This is modern annotation in the true sense."

"The Common Law's Debt to Annotations." By George F. Longsdorf. 20 *Case and Comment* 192 (Aug.).

"The truth is that in an evolutionary system of law like ours, wherein we generalize from cases to doctrines, there cannot be too many cases. The law is enriched, and not smothered, by its many cases. But the generalizing must be done by careful and accurate method and with adequate expenditure of time, neither of which the lawyer can be expected to bring to such work. And so it has come to pass that, after the work of the great commentators, and in sequence the work of the digesters has been done, need has developed the modern annotator and his methods. His work relieves the common law from the necessity of a Justinian or a Napoleon to recodify our law; for when a 'conflict of authorities' is rightly and patiently examined, and the cases explained in a good annotation, the conflict is often found to have been an appearance, and not a reality, or else the true and the fallacious are sifted so thoroughly that the lawyer as he reads is freed from doubt and vexation."

"The Bible as a Law Book." By Judge Charles S. Lobingier, Manila, P. I. 47 *American Law Review* 556 (July–Aug.).

"Aside from its legal authority in ancient Israel it has repeatedly been given the force of law by Christian peoples. When, in the seventh century of our era, the Visigoths laid the foundation of the modern Spanish law by promulgating their great law book, the *Forum Judicum*, they drew very considerably from the Mosaic legislation. The same source was largely utilized by John Calvin, nine centuries later when he came to devise laws for that interesting theocracy which he established at Geneva. In New England the followers of Calvin almost re-enacted the Mosaic Code."

Legal Education. "The Social Sciences as the Basis of Legal Education." By William

Draper Lewis. 61 *Univ. of Pa. Law Review* 531 (June).

"When social ideas are undergoing a process of comparatively rapid change, then the man who is set apart, as is the judge, to do a special piece of work requiring concentration and skill is apt to get out of touch with current social ideas unless his training tends to make him interested in social questions. If, therefore, I am right in the main position I am here taking, that the important function of the judge is to adapt, within the limits and in the way indicated, the law to existing social ideas, that function at a time like the present cannot be properly performed unless we emphasize the importance of the social sciences as a necessary basis of legal education.

"What law students need are courses showing the development of legal principles given by men who are capable of pointing out the relation between the principle and the social ideal on which it rests. We need books like Mr. Justice Holmes' Common Law written by lawyers interested in and trained in economic theory. Such men and such books do not now exist. They will have to be evolved from the necessity of the situation.

"If I may make an attempt at a practical suggestion, let those of us who are connected with Law Schools and those who are connected with departments of Philosophy, try the experiment of conducting joint seminars open to students of law and students of the social sciences, these seminars to discuss legal theory and social ideas, or, if you prefer, the development of law as affected by economic conditions."

"Legal Education in the United States." By Professor W. Harrison Moore, University of Melbourne. 13 *Journal of Comparative Legislation* N. S. pt. 2, p. 207 (no. 28, July). See p. 467 *ante*.

See Admission to the Bar, Professional Ethics, Roman Law.

Legal History. "Constitutional History and the Year Books." By Professor Paul Vinogradoff. 29 *Law Quarterly Review* 273 (July).

"We cannot expect, of course, to find in full operation at this early stage the legal principles which had to be established as the outcome of the long struggle against Stuart kingcraft, but it is certainly not without importance to note that there was a vast body of traditional jurisprudence in circulation in the courts of the fourteenth and fifteenth centuries, in which some of the doctrines of the later rule of law were outlined."

"Westminster Hall: A Retrospect." By William D. Riter. 47 *American Law Review* 636 (July–Aug.).

A readable historical paper dealing not so much with Westminster Hall as with the dramatic side of English legal history, and with the great common law judges who added to the renown of Westminster Hall.

See Biography, Contracts, Roman Law, Sales, Witchcraft.

Marriage and Divorce. "The Divorce Reports from an American Standpoint." By J. Arthur Barratt. 13 *Journal of Comparative Legislation* N. S. pt. 2, p. 186 (no. 28, July).

The author gives general support to the majority report of the English Divorce Commission, and disposes effectually of the attempt of the minority to find an argument for their restrictive policy in the experience of the United States. He says: —

"They totally fail to fortify their position by any substantial amount of reliable American evidence, the weight and amount of which is conclusively against their contentions. For, notwithstanding some grave abuses and an undue amount of divorces, the opinion of the Commissioners on Uniform State Laws, of the majority of twenty-eight Presidents of Bar Associations throughout the United States, and the bulk of American opinion as expressed in the public press, is overwhelmingly in favor of the causes for divorce recommended by the majority of the Royal Commissioners."

Medical Jurisprudence. "The Compra-chicos." By John Boynton Kaiser. 4 *Journal of Criminal Law and Criminology* 247 (July).

An erudite investigation of the historical sources of Victor Hugo's account, in *"L' Homme Qui Rit,"* of a people who practised the infamous craft of trading in children and mutilating them to supply the demand for court clowns, hunchbacks, dwarfs, etc.

Perpetuities. "Limitations of Land to Unborn Generations." By Charles Sweet. 29 *Law Quarterly Review* 304 (July).

Continuing the animated debate with Professor John Chipman Gray over *Whitby* v. *Mitchell*. See 29 *Quarterly Review* 26 (25 *Green Bag* 235).

See Real Property.

Pleading. See Indictments.

Penology. "Prison Reform." By Lex. 38 *Law Magazine and Review* 358 (Aug.).

A suggestive article, reviewing recent works by Gabriel Tarde, Tighe Hopkins, and Heinrich Oppenheimer.

See Criminology.

Procedure. "Amendments to the New York Code of Civil Procedure in 1913." 6 *Bench and Bar* N. S. 11 (Aug.).

Reviewing the amendments of general interest; this and similar reviews in the past have been a valuable feature of *Bench and Bar*.

See Juries, Criminal Law and Procedure.

Professional Ethics. "Legitimate Limits of Counsel in Summing Up." By Robert Ferrari. 4 *Journal of Criminal Law and Criminology* 165 (July).

"This gentleman said in the course of his speech to the jury that he had been in practice

for twenty-five years. He does occupy an enviable position at our bar. He is, in addition, the author of two insignificant books treating of the art of cross-examination and trial practice, in a popular way. Though the books are worthless, though they contain nothing that is not better expressed in any number of works I might mention, though they include much fat and little meat, they are somewhat used. And in spite of the fact that they inculcate expressly and by implication the idea that a trial is a game, and that all sorts of tricks are allowable, and not at all that it is a stern, solemn proceeding for the ascertainment of truth, they have acquired a certain sort of popularity. He is a man who is looked up to, especially by the younger generation. I saw present at the trial young men just out of school, and some still raw and callow in the practice of law. To these there is responsibility. To these, as well as to others, men like this distinguished counsel must talk. What are such members of our profession going to think about it? What are they going to do about it when they hear declared in open court by a person who is prominent and mighty in the profession that to break the law of morals is a sacred duty not only of a lawyer, but of a clubman, of a policeman, of a juryman, of all of us? What is the public who listens in wondering astonishment to this oracle to think of us lawyers when such a model speaks in our name, proclaiming that he who reveals to the lawfully constituted authorities that a crime has been committed is an outlaw and an outcast? Is it right? Is it fair? Is it just that we should be dishonored and debased in that way? Is it right that a distinguished lawyer in a foolish attempt to save a client from conviction of a misdemeanor should drag into the nethermost depths of Hell unexperienced young men who believe in him; should disgrace a profession that is not yet, thanks be given, permeated with putrefaction, and should hold up to the community an ideal that is against morality?"

See Admission to the Bar, Legal Education.

Real Property. "Future Estates." By Herbert T. Tiffany. 29 *Law Quarterly Review* 290 (July).

A paper which deserves the attention of every student of real property law who aims at precision of thought. The author examines fundamental conceptions expressed by writers of recognized standing, which appear to him open to criticism, in the endeavor "to show that, by a different method of treating parts of the subject, some of its difficulty and obscurity may be removed."

"Powers of Distress and Bills of Sale Acts." By Walter Strachan. 29 *Law Quarterly Review* 340 (July).

The writer contends, challenging a statement made in Key and Elphinstone's Conveying Precedents, that the English Bills of Sales Acts do not invalidate a power of distress given by way of indemnity between co-owners or for securing rent-charges.

See Conveyances, Perpetuities.

Roman Law. "The Teaching of Roman Law." By Professor Paul Frédéric Girard, University of Paris. 13 *Journal of Comparative Legislation* N. S., pt. 2, p. 171 (no. 28, July).

"If the edifice is already almost completed, if we can contemplate the grand lines of it with the feeling of satisfaction inspired by the view of a solid and welcome building, this does not mean that this building does no longer call for any complementary work. . . . It follows that this learned and admirable edition [Mommsen, Digests of Justinian], which many people — and I am one of them — have long considered as definitive as a human work can be, will have in its turn to give place to a new edition that shall preserve its merits while avoiding its shortcomings."

"Problems of Roman Criminal Law." By W. D. Aston. 13 *Journal of Comparative Legislation* N. S. pt. 2, p. 213 (no. 28, July).

"On the whole Mommsen, happy in the possession of the German word *Strafrecht*, properly covering the whole penal law, takes care to avoid speaking of 'criminal law.' If the Roman system contained no definite conception of crime, the statement that the delicts were part of the criminal law would have meant little to a Roman jurist."

See Biography.

Sales. "The Transaction of Sale in Saxon Times." By Gilbert Stone. 29 *Law Quarterly Review* 323 (July).

"We suggest that by 'port' the Saxons meant 'market,' and that the '*portgerefa*' was the person to whom, in each place, the control of the trading community and the markets was given. If this is so, the *Liber Albus* is correct when it describes him as the ancestor of the mediæval Mayor."

Torrens System. See Conveyances.

Treaty Power. See Government.

Waters. "Beneficial Use as the Basis for Greater Uniformity of State Laws Governing Water." By Clesson S. Kinney. 77 *Central Law Journal* 3 (July 4).

"The question arises as to which of these two systems is the best adapted for the fullest development of irrigated agriculture in this Western country — the system which permits the water to flow by a man's riparian land simply because it enhances the prospect, or the system of beneficial use, under which every drop of the water in the stream may be used for some beneficial use or purpose. . . . The common law of riparian rights is in force in England at the present day. But the greatest argument in favor of the total abrogation of the common law of riparian rights in this Western country, is the fact that all of the English provinces which occupy territory where irrigated agriculture is necessary, with one exception, have either abrogated entirely common law of riparian rights, or have so limited and restricted these rights that they are practically abrogated. In Egypt

India, Australia, and Canada, these rights have been abrogated. And the single exception is that of the province of South Africa or Cape of Good Hope, and here trouble and litigation is already being had as the result."

Witchcraft. "Scottish Witch Trials: I, The Witches of North Berwick." 25 *Juridical Review* 161.

An interesting account of prosecutions for witchcraft in King James's reign. "He found the sport congenial; it combined at once amusement and instruction, ministering as it did both to his cruelty and vainglory, with him two very powerful passions."

Workmen's Compensation. "In What Spirit Should the Liability Laws be Received?" By Axel Teisen. 77 *Central Law Journal* 39 (July 18).

"It becomes not only to the interest of society at large, nay, it becomes the duty of society, or of the state, to protect both employer and employee against ruin by these unavoidable incidents to their business. In the carrying out of this thought, great variation may be found, but two distinct types may be marked. In England and America we have Employers' Liability Acts or Workingmen's Compensation Acts, while on the continent we find Workingmen's Insurance Acts. The names do not make much difference, but in the names is hidden a difference in principle. The English and American acts, owing to the peculiarities of the law prior to them, have been looked upon as a special legislation intended to be in favor of the employees and, therefore, as directed against and inimical to the employer. In Europe, it has always been clearly understood that the insurance acts were meant and intended to, and did actually, work for the benefit of both employee, employer and society at large."

Latest Important Cases

Appellate Procedure. *Error of Form Rather than Substance in the Complaint — Appeal Based on Technicality Denied.* N. M.

In *Canavan* v. *Canavan*, 131 Pac. Rep. 194, decided by the Supreme Court of New Mexico, the action was for divorce. Complainant had failed to allege the residence necessary to give the trial court jurisdiction. Defendant, instead of demurring, which would have led to an amendment, appears to have relied on a loophole of technical error as a means of escape. Defendant, at all events, raised the issue of jurisdiction in the Supreme Court. The evidence clearly and without controversy showed residence for the required period. The Court denied the appeal, presumably recognizing the existence of the statute requiring that all omissions, defects etc., not against the right and justice of the matter of the action, shall "be supplied and amended by the court where the judgment shall be given or by the court into which the judgment shall be removed by writ of error or appeal."

Trial by Jury — Massachusetts Constitution Does Not Guarantee Right to a Second Jury Trial of the Same Controversy. Mass.

The Supreme Judicial Court of Massachusetts, in *Bothwell* v. *Boston Elevated Ry.*, 102 N. E. Rep. 665, held that St. 1909, c. 236, of Massachusetts, does not invalidate Bill of Rights, art. 15, providing that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it had heretofore been otherwise used and practised, the parties have a right to a trial by jury, and that this method of procedure shall be held sacred except where the Legislature, in certain cases specified, shall alter it.

The statute thus upheld applies to civil cases where a request that on all the evidence a finding or verdict be returned for either party has been denied at the trial, and a finding or verdict has been rendered contrary thereto. In such instances, the statute directs that if it shall be held by the Supreme Judicial Court on exceptions that the request should have been granted and if all exceptions by the prevailing party shall be overruled, this court may direct the entry of judgment for the party in whose behalf the request was made and erroneously refused.

We quote from the *New York Law Journal* (editorial, Oct. 7, 1913): "The learned Chief Justice [Rugg] notes that *Slocum* v. *N. Y. Life Ins. Co.*, [228 U. S. 364, see 25 *Green Bag* 274] holds that 'the right of trial by jury' secured by the seventh amendment of the Constitution of the United States 'does not permit the entry after a verdict in favor of one party, of a judgment for the opposing party under circumstances like those in the case at bar.' . . . The function of the jury is to pass upon the facts involved in an action. The statute now under review does not infringe upon this province in any degree. A trial judge always has had power to direct a verdict provided the law required it.

The statute simply permits that to be done by this court which ought to have been done at the trial. The hypothesis by which alone it permits the order to be made is that at the trial no question of fact was in truth presented, but only one of law, which the court should have ruled as such. It does not disturb the plain boundary between fact which a jury must determine and law which the court must rule. It permits the right ruling to be given at a time later than that at which it should have been made when no substantial rights have accrued in the meantime.' "

Extradition. *Evidence of Insanity — Waiver of Breach of a Treaty by Executive Branch of the Government.* U. S.

Several questions involving the regularity of the extradition proceedings in the celebrated *Charlton* case were presented to the *United States Supreme Court* in *Charlton* v. *Kelly*, decided June 10, the Court (Lurton, J.) holding the proceedings entirely regular. It was held, for example, that evidence of the insanity of the accused was excluded without any violation of law by the committing magistrate. Much of this discussion is perhaps to be considered to have been purely *obiter*, as the principle that a writ of habeas corpus cannot be used as a writ of error was clearly re-iterated.

A more interesting question was that found in the refusal of the Italian Government to surrender its own nationals committing crimes in the United States. Did this constitute a breach? The Court held that the executive recognition, by the United States Government, of its own obligations under the treaty, constituted a waiver of the breach, if there was any, and left the treaty in force as the supreme law of the land.

Jury Trial. *See* Appellate Procedure.

Local Government. *Cleveland Charter Constitutional — Preferential Voting.* O.

The new Cleveland charter, adopted under the home rule provisions of the new Ohio constitution, was held constitutional by the Ohio Supreme Court on August 26, by a tie vote of three to three. The decision was rendered in a suit brought to test a ruling of Attorney-General Hogan, who had declared unconstitutional the preferential vote and the primary elimination features of the charter. The charter provides for the abolition of the direct primary nomination and substitutes nomination by petition. It also abolishes partisan designation upon the ballot, and permits the voter to denominate a second and third choice for mayor, the only elective office.

Race Distinctions. *Civil Rights Act of 1875 — Limitation of Legislative Intent by Judicial Decree Refused.* U. S.

In *Butts* v. *Merchants and Miners Transportation Co.*, decided June 16 (L. ed. adv. sheets, Oct. term 1912, no. 17, p. 964) the Supreme Court of the United States passed upon the validity of the Civil Rights Act of 1875, in federal territory, the statute having been held invalid in state territory in the *Civil Rights* cases in 1883, as exceeding the powers of Congress. This statute declared the equal rights of all persons throughout the jurisdiction of the United States to the accommodations of inns, public conveyances on land or water and theatres, forbidding any discrimination on grounds of race, color or previous servitude.

The Court (Van Devanter, J.) now held the act wholly unconstitutional, on the ground that, as the purpose of Congress was plainly to make one law for the whole country, and as this purpose failed for want of power in Congress to apply it to the states, it failed *in toto;* that the Court cannot, or will not, assume that Congress would have made such a law for the federal jurisdiction outside the states, by itself, if aware of its incapacity to apply it alike to all places; and, accordingly, to allow it to operate outside the states would be, in effect, to make a law by judicial decree which Congress did not make and may not have been disposed to make.

White Slave Act. *Construed as Applied only to Interstate Traffic in Women for Commercial Purposes.* U. S.

Judge Pollock of the United States District Court, in a decision rendered at Wichita, Kas., has ruled that the Mann White Slave Act applies only to persons who transport women from one state to another for commercial purposes. He instructed a defendant to change his plea from guilty to not guilty, with the intimation that he would instruct the jury to acquit if it did not appear that the girl was taken into another state to commercialize her immorality. "Under the law as I construe it," the Court said, "the commercial feature must be proved. It was not the aim of Congress to prevent the personal escapades of any man. If the Government cannot prove this man took the girl to another state for a commercial purpose, I shall instruct the jury to acquit him. The jurisdiction of the Government in cases of this kind is based on the commerce clause."

The Editor's Bag

THE NEW TYPE OF LAWYER

EVEN though the criminal procedure of the United States may be, as the *London Times* says, "hopelessly enmeshed in technicalities,"[1] it is nevertheless true that a movement is under way to simplify procedure and to institute a system by means of which substantial justice may be administered more expeditiously and effectually than under the old system.

Even though the improprieties committed by counsel, in working on the passions of low-grade juries by prostituting the art of advocacy to ignoble uses, may call forth denunciation from an able writer in an influential legal journal,[2] it is nevertheless true that there is a movement in the bar to raise the standards of professional ethics, and to improve the character of criminal procedure so that it will furnish a dignified and accurate way of determining issues both of fact and of law.

Even though Mr. Brooks Adams, in his "Theory of Social Revolutions," may vaguely complain that the American legal mind is contaminated by the sinister influence of capitalism,[3] a charge which, whatever else it may imply, seems to include the arguable plea that the American lawyer tends to over-emphasize the rights of property and to under-emphasize the rights of persons, it is nevertheless true that a movement is on foot, within corporations as well as without, to promote that justice to the individual which is fundamental to a well-ordered and prosperous community.

There are, indeed, when one considers the present situation of our legal profession, depressing signs, but there are also cheering ones, and while an unduly optimistic view is not to be taken there is surely no need of a pessimistic one.

Without entering upon a discussion of the causes of the over-technicality of American procedure, or hazarding other than a few hasty remarks, one can readily see that the movement for a simplified procedure, "one trial and one review," owes something to the growing demand of the times for efficiency not only in the field of commerce but elsewhere. Needless delay and senseless duplication, the careless waste of energy every moment of which needs to be economically utilized by a civilization aiming at production, wealth, and cultural advance on the largest possible scale, are intolerable as society strives for a more closely knit or better synthetized co-ordination of all its working parts. We err when we assume that this movement toward closer co-ordination will go on rapidly, enthroning experts in all the seats of power, and purging government and industry completely of their present crudity of method and organization. The goal of a perfectly organized society is still too remote to

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[1] See p. 492–3 *post.*
[2] See p. 480–1 *ante.*
[3] See p. 471 *ante.*

be attained for ages to come. We are safe, however, in making the assumption that the tide of the industrial movement which began not so very long ago is rising to a level never before attained, and will continue to rise till it is checked by some unforeseen catastrophe. Since the days when Mill wrote, less than a century ago, it may be difficult for many people to conceive that any great change has occurred. It is doubtless from this inability to perceive the momentous workings of social change that the attitude has arisen which fruitlessly endeavors to preserve an unbroken continuity of legal tradition, and resists innovation of every kind. As a matter of fact, over-technicality of legal procedure is bound up with a stage of thought that even now belongs more to the past than to the present, and it is virtually impossible that the cumbrous forms which characterized nineteenth century procedure should survive late into the twentieth.

If the ineptitude of legal procedure in this country, during the last century, was bound up with the doctrine of imperfectly co-ordinated individualism and over-reliance on unfettered extra-state initiative of which Mill was the exponent, it seems also true that the "sporting theory of justice" and the overvaluation of property interests were likewise bound up with that system, and therefore belong to a passing phase of legal development. Clumsiness of legal procedure has to give way to speed and simplicity, as the social conscience becomes aroused to the evils of waste incident to a haphazard system; and for the same reason, crude and error-breeding institutions of jury trial must yield to better machinery for determining the issues of legal controversies. If the bench itself cannot be strengthened, so as to exercise the same control of the trial as under the English system, the bar must be, and already we see a rising conception of the lawyer's duty to the court as overriding his supposedly conflicting(!) duty to his client. The sporting theory, the art of an advocacy to be practised without scruple, will not be able to defy a public opinion which comes to demand elimination of levity from the conduct of legal proceedings. Nor, merely to glance at a larger topic, will a future age show any indulgence to the lawyer who makes an impudent defense of the *laisser faire* dogma that exempts private property from the sphere of state control.

These considerations suggest the coming of a new type of American lawyer, if it is not too much to say that he has already come. Are we not likely, within the next generation, to see a marked advance, in undertakings that aim at delivering our litigation from cumbrousness, levity, and denial of the right to govern? If so the new lawyer will have the leading part in the approaching drama of legal progress.

THE ANTIQUATED MISSOURI CONSTITUTION OF 1875

"Revolutionary changes in industry and commerce, affecting both country and city dwellers, have created new social problems not foreseen nor provided for by the framers of the constitution in 1875. . . . .

It was the stated conviction of Thomas Jefferson, the paternal genius of American democracy, that a state should thoroughly revise its fundamental law not less often than once in nineteen or twenty years. Missouri has permitted twice the Jeffersonian period to elapse without acting upon his counsel." — *St. Louis Post-Despatch.*

This is a surprising bit of ultra-conservatism. Have there not been vast social changes in the United States since the day of Thomas Jefferson? And if it was true then that a state should revise its "fundamental" law at least in

every nineteen or twenty years, may it not be true now that a thoroughly live community should revamp its "fundamental" law at least once in every decade?

AN EFFECTIVE JUDGE

"I WAS once called over to a neighboring county to act as special judge in a divorce case," said Judge Sam Davis of Marshall, Mo. "The wife was plaintiff, and the court had entered up an order decreeing her an allowance of $250 for the expenses of prosecuting her suit. For some reason or other the court had failed to enforce its order. The wife became convinced it was the judge's fault that she did not get the money, and I was called in by her to see if I would have any better luck.

"In the court room was a table for the judge. Hanging by a heavy chain at one side of the table was a copy of the statutes and on the other side another book of similar weight also suspended by a chain. It seems to have been the practice over there for lawyers to borrow books and forget to return them.

"The husband was sworn and interrogated by the wife's lawyer: —

" 'Mr. Blank, the Court made an order for you to pay your wife $250 pending this trial, didn't he?'

" 'Yes, sir.'

" 'Have you done it?'

" 'No, sir.'

" 'Why not?'

" 'Because I don't want to.'

"Then I took a hand: —

" 'Have you got the money, Mr. Blank?'

" 'Yes, sir, I got $400.'

" 'Where is it?'

" 'Right here in my pocket,' he smiled, as he patted his breast to show where it was.

"I reached down for the statutes and the big chain rattled like a brace of handcuffs.

" 'Hold on, Judge!' cried the defendant in alarm. 'What you going to do?'

" 'I'm trying to find a way to make you pay that money,' I said, as I dived down and pulled on the chain.

" 'Hold on! Don't shoot, Judge!' yelled the defendant; 'I'll come across!' "

HAPPENINGS IN COURT

"RASTUS, do you know what an oath is?" asked the judge of the colored witness about to be sworn.

"Yes, sir; I knows that all right."

"That you must tell the truth, the whole truth and nothing but the truth."

"Yes, sir; I knows that all right, Judge."

"Do you know what will happen to you if you don't tell the truth?"

"Yes, sir; my lawyer here done tol' me all about that, Judge."

"Do you know what will happen to you if you do tell the truth?"

"Yes, sir, Judge, he done tol' me that, too. I am very much obliged to you, Judge, but I am all prepared for him and you needn't try to help me, because I don't wants to get mixed up when that lawyer over there gets to asking me those quick questions that I knows he has got ready for me. I knows I have to be very careful what I say here, Judge, and I knows just what I have to say. All de rest ob it, I sure have forgot and don't remember nothing about."

"Mr. Witness," said the lawyer to an old grey-haired negro, "look at this signature which is signed 'George Washington, by "X" his mark,' and tell the Judge if you wrote that or any part of it."

"Yes, sir; I sees that, but I didn't write that."

"You mean to tell the Judge here that you didn't write that there," growled the lawyer.

"No, sir, Judge, I didn't — I didn't — I didn't write that, Judge. I jes' dictated it."

The jurors filed into the jury box, and after all the twelve seats were filled there still remained one juror standing outside.

"If the Court please," said the Clerk, "they have made a mistake and sent us thirteen jurors instead of twelve. What do you want to do with this extra one?"

"What is your name," asked the judge of the extra man.

"Joseph A. Braines," he replied.

"Mr. Clerk," said the Judge, "take this man back to the jury commissioners and tell them we don't need him as we already have here twelve men without Braines."

"Now, your Honor," began the shrewd, grizzled old attorney, "this has been a long and tedious trial, but it becomes very simple when resolved down to its basic elements. Let us see what we have here. There is the old bachelor, with no known relatives. Then there is the middle-aged woman, and the young man, both of whom the old bachelor takes a special interest in, whatever it may be. The old bachelor is wealthy, and he dies, leaving to this middle-aged woman, the defendant here, his fortune of $200,000, and to the young man, the plaintiff here, so much thereof as she herself, the defendant, shall elect. Those are the very words of the will. That makes it very simple. Now, all the pleadings here, the testimony introduced, and the admissions of the defendant herself on the witness-stand, show that she has chosen and elected out of the immense fortune, $190,000, and has given the boy only $10,000. That is clear, undisputed, and admitted by the pleadings and by the defendant herself. Upon those facts, and upon the will itself, the whole case becomes very simple. You see this will expressly provides that this son shall have so much thereof as this lady here shall elect. She having elected $190,000, the plaintiff asks for that as his just share of the estate. Upon that state of facts, the plaintiff rests his whole case."

"Why did your husband strike you that time," interrupted the Judge of the Chicago woman who was suing for divorce.

"Why — he — he said I was flirting," she answered, demurely.

"Well — were you flirting?" piquantly asked the Judge.

"Why, Judge," she replied, with all the glow of her coal-black eyes full upon him, "I am looking at you now — am I flirting with you?" *Cornelius Johnson.*

OLD PROHIBITION LAWS

IN 1654 the General Court of Connecticut ordered the confiscation of "all Barbadoes liquer commonly called 'Ruin Kill Devill' which shall be landed within the jurisdiction of the Commonwealth." The order was directed against the growing practice of selling intoxicants to the Indians.

But six years before the Court had found it necessary to check the indulgence of white men in wine and strong drink. It had therefore ordered: "That no inhabitant in any town should continue in a tavern or victualling-house in the town in which he lived more than half an hour at a time, drinking wine, beer, or hot water."

The abuses arising from the use of tobacco also attracted the attention of the Court. The law-makers ordered that no person under the age of twenty years, nor any one unaccustomed to its use, should take the weed until he had obtained "a certificate under the hand of some who are approved, for knowledge and skill in phisicke, that it is useful for him, and that he has received licence from the Court for the same."

An order was also passed for "the regulating of those who had already made it necessary for their use," which ordained "that no man in the colony shall take any tobacco publicly in the street, nor in the field or woods, unless when traveling at least ten miles, or at the ordinary time of repast, commonly called dinner; or if it be not then taken, yet not above once in the day at most, and then not in company with any other."

The constables were directed to present the names of such as transgressed the act to the Court.

NOT TO BE CAUGHT

A JUSTICE of the Supreme Court of New York has a habit, well known to old practitioners before him, of asking three questions of counsel arguing at the bar. The first question is usually a simple one — the lawyer answers carelessly; the second question is a little more difficult — the respondent answers with some uncertainty; the third question is bound to be a "poser" fraught with humiliation.

On one occasion, when a lawyer who was quite familiar with his Honor's little habit was presenting a most important case, he replied in answer to the first question: —

"I don't know."

"Don't know?" said his Honor. "Why don't you know?"

"Because, your Honor," said the wily attorney, "I haven't heard the other two questions!"

TECHNICAL TERMS

HOW every calling has its technical vocabulary is illustrated by a story a Boston lawyer tells of an old horseman in Maine who had run over a man and was being sued for damages.

The Court asked the defendant if he was driving fast. He answered, "I was going a pace."

The Court then said, "Now kindly tell the gentlemen of the jury just how fast you were going."

"Well," said the defendant, "I reckon I was going a clip."

"Will you kindly tell the jury how fast a clip is?"

"Well, it's going a dite."

"Will you tell the jury how fast a dite is?"

"Well, a dite's a dite. Anybody knows what a dite is."

HE WAS PREPARED

"IT ISN'T always that a witness is prepared for all eventualities in court," says a New York lawyer, "but there was one trial in which I was interested at which a certain witness did certainly show his foresight.

"This man had been an eye-witness to a shooting, and his evidence was, therefore, most important. When, after direct examination, he was turned over to the prosecution for cross-examination, he showed at the outset that he was a match for his interrogator.

"You will tell the Court," said the prosecutor, "just how far you were from the spot where the defendant stood when he fired the shot."

"Just ten and one-half feet," answered the witness without the slightest hesitation.

"And now," said the prosecuting officer, in a tone of cool sarcasm, "you will further enlighten us, I trust. How comes it that you are so cock-sure as to the exact distance?"

"Because I carefully measured it," said the witness. "I felt pretty certain that some lawyer would ask me about it sooner or later."

PRINTING SUPREME COURT DECISIONS

(From *Case and Comment*)

ALL printed copies of United States Supreme Court decisions have been prepared in the same little printing shop for the last seventy-five years. In all that time, so far as anybody knows, there has not been one "leak." And yet the possession of an important decision a day or so in advance might enable one to make a fortune in stock speculation.

The original proprietor of the printing shop did the work himself, taking no chances on the secret getting out through an employee. At his death, the foreman of the shop conducted the establishment for the estate and continued to get the Supreme Court work. Another man — only the third manager in seventy-five years — is now running the plant. The printing is divided among several employees in such a way that no one has enough of the decision to make any sense out of it. And the final paragraph — the part where the court puts in the "cracker," saying whether the case is reversed or affirmed — is always set up by the manager of the shop himself.

Copies of the decision are turned over to the clerk of the Supreme Court, to be handed to the news associations as soon as the Justice starts to read it from the bench.

But for some reason, much to the vexation of the newspaper men, there are never enough copies to go around. Sometimes there is only one copy given out, and the news association favored with that one copy has a brief lead over its rivals in getting the report on the wire.

DISPUTED WILLS

(From the *New Orleans Picayune*)

DISPUTED wills are a prolific source of litigation and cases involving them consume a considerable amount of time in the courts. To remedy this evil it has been proposed that a statute be passed providing that a testator may, if he pleases, file his will in court during his life and give due notice of the fact to persons affected, and that if any one wishes to question the validity of the will he must appear within a certain time or forever be barred. If, under this plan, a contestant appeared, he could be required to prove his interest and then be permitted to inspect the will. If he still desired to contest it he could be required to raise the issues while the testator is yet alive to demonstrate capacity and to explain his action. Any measure which will help the testator to carry out his wishes and which will prevent disagreeable litigation should be encouraged.

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

Little Girl. — "Why did your mama spank you?"

Child. — "Because she is too untutored and ignorant to devise a more modern reformatory method of punishment." — *Life.*

Willie. — "Paw, what is a jury?"

Paw. — "A body of men organized to find out who has the best lawyer, my son."

— *Cincinnati Inquirer.*

"Is he rich enough to keep an automobile and a yacht?"

"Yes, he is even richer than that. He keeps a lawyer." — *Chicago Record-Herald.*

"Rastus, what's a alibi? "

"Dat's provin' dat yoh was at a prayer-meetin' whar yoh wasn't in order to show dat yoh wasn't at de crap game whar yoh was."

— *Life.*

The Legal World

Monthly Analysis of Leading Legal Events

Procedural reform is receiving much attention, particularly in Missouri. There are indications in certain states, for instance Missouri, Texas, Alabama and New Mexico, that reversals and new trials on technical errors are regarded with very different feelings from formerly. The president of the Missouri Bar Association, in his annual address, while he urged that procedure be simplified and rendered more expeditious, said:

"I believe that the number of judges should be increased in every jurisdiction until the judges can clear our dockets and give every litigant a hearing in thirty or sixty days after an action is instituted. Moreover, our courts are so crowded by litigants that cases are not always tried as carefully as they should be.

"A hurried trial is a grievous wrong to both litigants.

"Many decisions are reversed solely because the judge has had a congested docket to dispose of, with litigants clamoring for trials, and has not had sufficient time to carefully consider each case."

Such an utterance voices a typical attitude. If procedure is really to be simplified, it would seem as if the way to do it would be to put the burden of expeditious and effective justice on the shoulders of the bench and bar, where it belongs. If speed and accuracy cannot be combined, it can be only because the bench and the bar are too weak to bear the burden; we need, not more judges, but stronger judges — assuming that the bar has the requisite efficiency.

What the *London Times* says about our procedure being "enmeshed in technicalities" is too sweeping, in the light of many recent developments. In fully half the states, there is a strong counter-tendency already. As the *National Corporation Reporter* says (Sept. 4), "It is a matter of everyday occurence, in scanning the reports, to find such deliverances as the following: 'In this the trial court erred, but as the verdict and judgment are in accordance with the manifest justice of the case, we do not feel justified in setting them aside.' "

No doubt the adequate preparation of candidates for admission to the bar is receiving a great deal more attention now than ever before. One of the most significant and important of recent developments is undoubtedly the investigation of American law schools lately undertaken by the Carnegie Foundation for the Advancement of Teaching.

Personal

Hon. William H. Taft is to deliver a course of lectures on Professional Ethics at Boston University Law School this winter.

The re-appointment of Rome G. Brown of Minneapolis, as chairman of the American Bar Association's committee to oppose the judicial recall, was announced by Hon. William H. Taft Oct. 6. Judge Taft said the appointment was made to insure the continued and increased efficiency of the most important committee of the association and in recognition of the work organized and carried out last year by Mr. Brown as its chairman.

The nomination of Henry Wade Rogers as Judge of the second federal circuit, succeeding Judge Noyes, was confirmed by the Senate on Sept. 29. Judge Rogers was graduated from the University of Michigan in 1874 and was dean of the law school there from 1885 to 1890. He then became president of Northwestern University, and in 1900 went to the Yale Law School as lecturer, becoming dean in 1903. He has been a president of the Association of American Law Schools.

President A. Lawrence Lowell of Harvard University, in an address delivered to the entering class of Harvard Law School at the beginning of the academic year, said, according to a newspaper report which appears to be authentic: "Criminal law, as administered in our courts today, is a disgrace to the country. The great criminal trials are conducted like pitched battles — like tournaments or baseball games — to be displayed for the enjoyment of the public in the front pages of the newspapers in a way that is shocking to civilized men. The reform in criminal law of the future is in the hands of the lawyers of the future, and this is the duty for which law students should prepare themselves."

The Missouri Bar Association

Procedural reform and the revision of the state constitution took up much of the attention of the Missouri Bar Association, which held its annual meeting at Kansas City, Sept. 24–6. Hon. Ralph F. Lozier, in his address as president, urged that additional judges be appointed to help relieve the congestion of the courts, and also that procedure be simplified and made more efficient and less technical. The plan to revise the constitution of 1875 had its opponents, but the Association unqualifiedly declared for a constitutional convention and for a complete revision of the constitution, to provide for a better means of building up great cities, for more sanitary and better governed towns and villages, as well as for a better and broader educational system in rural communities.

With only three dissenting votes the association adopted the report of the special committee on judicial administration and legal procedure, headed by Frederick W. Lehmann of St. Louis, recommending the passage of a statute following the Michigan plan, "An Act to Simplify Judicial Proceedings." This act empowers the Supreme Court to make rules governing procedure in all courts of record. At present the legislature has not delegated that power to the court and it has not revised procedure for sixty years.

The report of another committee, the Park committee, was also adopted, favoring a constitutional amendment making possible the merging of the Courts of Appeal with the Supreme Court, and legislation which would simplify practice and pleading and prevent reversals on purely technical error.

Justice N. Charles Burke of the Maryland Court of Appeals made an address in which uniformity of legislation and ideals of professional ethics were discussed.

Henry D. Estabrook of New York supplied the oratorical feature of the banquet, making a spirited defense of representative government.

Bar Associations

Minnesota. — The annual meeting of the Minnesota State Bar Association was held at Mankato, Minn., on August 19 and 20. The principal speakers

were Frank B. Kellogg, president of the American Bar Association, and Dean W. R. Vance of the University of Minnesota. The Committee on Jurisprudence and Law Reform presented a lengthy report on the "blue sky" law. The following officers were elected: President, H. V. Mercer, Minneapolis; vice-president, H. L. Schmidt, Mankato; secretary, Chester L. Caldwell, St. Paul; assistant secretary, John M. Bradford, St. Paul; treasurer, Royal A. Stone, St. Paul.

North Dakota. — The annual meeting of the North Dakota Bar Association was held at Mandan, N. D., on September 9 and 10. The program included the president's address by A. G. Divet of Wahpeton, the annual address by Hon. Charles W. Willard of the federal bench of Minnesota, and an address by William G. Owens on "Inheritance Tax Laws."

Utah. — The Utah State Bar Association elected H. R. Macmillan president at its annual meeting Aug. 16. Carl A. Badger was re-elected secretary. An address was delivered on "Present Day Government Tendencies" by Frank S. Dietrich, United States judge for the district of Idaho. His topic centered mainly in the proposed recall of judges, and the trend of public opinion as relating to the work of the bench.

The session opened with the annual address of the retiring president, H. H. Henderson of Ogden, and Frank Holman spoke on "The Inns of Court." The banquet furnished the occasion for some good speeches.

Virginia. — The Virginia State Bar Association held its annual meeting at Hot Springs, Va., on July 29, 30 and 31. Richard Evelyn Byrd, Speaker of the House of Delegates, delivered an address on "Tax Reform in Virginia," which subject was the basis for the principal discussion of the meeting. Professor William H. Lyle of the University of Virginia gave the president's address, and the annual address by Hon. Hampton L. Carson of Philadelphia was devoted to a consideration of the "Recall of Judges." Major Samuel Griffin of Bedford City was elected president of the association.

An English Estimate of our Criminal Procedure

"In criminal cases as conducted in the United States," says the *London Times*, "it is not the prisoner in the dock, but the judge on the bench, who really is on trial. It is the fetish worship of forms and rules that makes judicial procedure in America a hindrance to justice and a comfort to criminals, and too many decisions of state courts on social, industrial, and constitutional issues seem to have been formed with the same quibbling spirit. They have lost touch with life; they have grown petrified in pettifogging abstractions, and no problem that confronts the American people is more urgent or cuts deeper than the problem of how to lead them back to reality and common sense."

Commenting further on Mr. Taft's recent Montreal address, the *London Times* declares: "Mr. Taft's pronouncement is bound to intensify misgivings which many Americans have come to feel in the efficiency of their state courts and the system on which they are based. It would be mere flattery to pretend that judges at these tribunals have anything like the standing of our own judiciary. The great and growing lack of confidence in state courts, in their honesty and impartiality, as well as in their technical efficiency, is one of the most disquieting

phenomena observable in America today. What the United States needs more than anything else is a reformer of the Jeremy Bentham type, to restore common sense to its codes and simplicity to the administration. The criminal procedure, especially, of America today is very much as ours was in the time of the Stuarts. It is hopelessly enmeshed in technicalities, and neglects justice and perspective to chase after impossible infallibility of form."

Miscellaneous

The Common Law, by Mr. Justice Oliver W. Holmes, has been translated into German, by Dr. Rudolf Leonhard. The book was translated into Italian in 1890.

The Carnegie Foundation for the Advancement of Teaching, at the request of the American Bar Association, is now engaged in making a thorough investigation of the law schools in the United States, as was done three years ago to so good effect in the case of medical schools.

A psychologist has been appointed as probation officer in the Boston Municipal Court. Dr. Victor Vance Anderson, instructor and special student of psychology in Harvard University, and a member of the staff of the state Psychopathic Hospital, plans to make a thorough study of two or three cases at first, with a view to throwing light on the problem of criminal responsibility and most effective penal measures.

The dedication of the Palace of Peace took place at The Hague on Aug. 28, in the presence of Queen Wilhelmina, and a distinguished gathering of diplomats and publicists. This building, erected by the Carnegie Foundation at a cost of $1,500,000, said Abraham van Karnebeek, president of the Foundation, at the dedicatory ceremonies, "is first of all a palace of justice. But it was the idea of Mr. Carnegie that it should also be a symbol of peace, the first tangible outcome of international co-operation. Many countries have contributed to its completion. For instance Holland gave the site, and provided the building with stained glass windows. Northern countries gave granite, others wood, marble, and other materials. This palace is to be the center of internationalism, the meeting place of peace congresses, conferences, and other activities in the cause of peace. In it there can be no room for hatred, for the plant of peace is a tender plant; it demands an atmosphere of tranquillity, majesty and distinction."

The Governors of about three-fourths of the states met in conference on August 26 at Colorado Springs, Colorado. Papers were read and addresses made on a number of subjects for the most part not of special concern to lawyers. Governor O'Neal of Alabama made a notable address on "Distrust of State Legislatures, — the Cause and the Remedy." He urged that the powers of legislatures should be increased, rather than diminished, and also said: "The present salary in almost every legislature is utterly inadequate. It would be better for the state to invite free service from her citizens than to pay the miserable pittance she now offers. One of the strongest objections to our legislatures as now constituted is that the members represent only localities and are more concerned in promoting local legislation than in enacting necessary laws for the state at large. It would unquestionably elevate the tone of a state legislature if a certain proportion of its members

were elected from the state at large. The membership of our legislatures should also be decreased."

Obituary

Brown, Henry Billings, LL.D., Associate Justice (retired) of the United States Supreme Court, died of heart disease at Bronxville, N. Y., while absent from his home in Washington, on Sept. 4, in his 78th year. Justice Brown was appointed to the United States Supreme Court in 1890 and served until May, 1906. Before this appointment he served as deputy United States marshal, assistant United States district attorney and United States circuit judge in Detroit. He was born at South Lee, Mass., and was graduated from Yale in 1850. While he was serving on the bench of the Supreme Court his sight failed him and he was advised by one of the most eminent specialists of the country that he would be totally blind for the remainder of his life. For a time, however, he was able to perform his judicial duties, notwithstanding almost total impairment of his eyesight. Of late years the blindness which led to his retirement had become somewhat relieved, instead of growing worse.

Evarts, Maxwell, general counsel for the Southern Pacific, and youngest son of the late United States Senator William M. Evarts, died at his home at Windsor, Vt., Oct. 7, aged 51.

Fay, John C., who died at Washington, D. C., in September, practised chiefly in the Court of Claims, in which he tried many important cases.

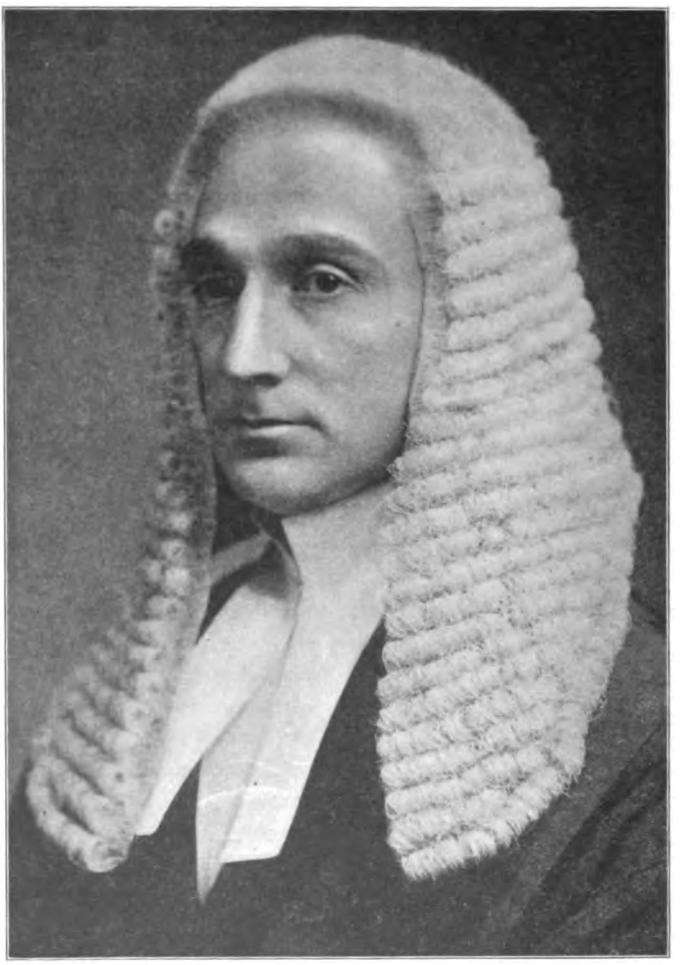
Gaynor, William J., Mayor of New York City since 1910, and Justice of the Supreme Court of New York from 1893 to 1909, died of heart failure on Sept. 10, *en route* to Europe on the White Star liner *Baltic*. The *New York Law Journal*, in an appreciative editorial published in its issue of Sept. 22, thus spoke of his career as a judge: "His judicial work displayed originality of thought, acute powers of analysis, absolute courage of conviction, contempt for mere authority, and, lastly, the same pungency of style that since he has been mayor has made not only his official utterances but his ordinary correspondence notable."

Jackson, Alfred A., formerly president of the Wisconsin Bar Association, and more recently chairman of the state law examining board, died at Janesville, Wis., Aug. 31, aged 82.

Rose, Uriah M., LL.D., president of the American Bar Association in 1901 and 1902, and delegate to the Second Hague Peace Conference in 1907, died at his home at Little Rock, Ark., Aug. 12, aged 79. Judge Rose was one of the most eminent jurists of the South.

Stiness, John Henry, LL.D., formerly Chief Justice of Rhode Island, died in Providence. Sept. 6, at the age of 73. He was elected to the Supreme Court in 1875 at the age of 34, and after a service of twenty-five years on the supreme bench was made Chief Justice in 1900. He retired in 1904.

Von Bar, Ludwig, member of the Hague Permanent Court of Arbitration, and former president of the Institut de Droit International, has died in Germany. He was born in Hanover in 1835 and after teaching many years in the University of Göttingen published his first book in 1859, "Zur Lehre von Versuch und Teilnahme an Verbrechen". The last twenty years of his life had been devoted to the reform of the German penal and civil code and to the cause of international arbitration.



LORD CHIEF JUSTICE ISAACS

SUCCESSOR TO LORD ALVERSTONE AS LORD CHIEF JUSTICE OF ENGLAND

Photo. by Underwood and Underwood

The Green Bag

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The New Judicial Appointments in England

AGAIN the English judicial system has given proof of its singular effectiveness in filling vacancies by meritorious promotion. The advancement of Sir Rufus Isaacs, K.C., M.P., to the office of Lord Chief Justice of England has been singularly well received. The explanation is to be found in the general recognition of those merits which the London *Law Journal* sought to define when it spoke of "the unremitting industry, the large grasp of legal principles, the ready grasp of facts, the innate sense of fairness, the serenity of temper and the dignity of demeanor which Sir Rufus Isaacs has always displayed at the bar."

The marked ability of the new Lord Chief Justice as an advocate, the attractiveness of his personality, and his great sense of fairness, have endeared him to the English bar, of which he has been one of the most popular members. As an advocate his success has been founded on lucidity of argument and skill in cross-examination more than upon forensic eloquence. His unusual grasp of details of financial and commercial transactions, the foundation of which was laid during his stock-brokerage experience, made him a master of intricate subjects of litigation, and he brings to the chair of Mansfield an equipment in the law merchant which suggests that of his great predecessor.

In some of the reports of his rapid rise, a romantic coloring has been given to his adoption of the legal career at a comparatively late age after he had met with failure in his stock exchange career. As a matter of fact Sir Rufus Isaacs was called to the bar at the age of twenty-seven, an age at which little advantage can be derived from a few years' experience in practice. His rise has been the steady progress of a barrister of conspicuous attainments, and as he is now fifty-three years old his appointment as Lord Chief Justice comes as the reward of twenty-five years of hard work at his profession. The record reads as follows: called to the bar in 1887, made a Q.C. in 1898, succeeded in 1900 to the commanding position at the bar made vacant by the appointment of Sir Edward Carson as Solicitor-General, was advanced in 1910 to the post of Solicitor-General upon the advancement of Sir Samuel Evans to the presidency of the Probate, Divorce, and Admiralty Division, and some six months later succeeded Sir William Robson as Attorney-General.

The retirement of Lord Alverstone from the office he has filled with such ability for thirteen years is universally regretted. The retiring Lord Chief Justice was a judge of great breadth of mind, freedom from pettiness, and gen-

erosity of disposition particularly marked in his relations with counsel. In the Court of Criminal Appeal, which began its sittings under his presidency, he created, as his successor has happily said, out of the dry bones of an Act of Parliament a great institution. It fell to his province to develop the policy of a court the function of which was but vaguely outlined in the statute establishing it. He has worked out a wise, moderate policy for this tribunal, such as to interfere neither too little nor too much with the judgments brought before it for review. The cardinal features of this policy may be said to be to sustain verdicts reasonably found on evidence properly admitted, not to interfere with the sentence passed unless the judge has gone wrong in principle and within these limits to standardize sentences as far as possible, and not to quash a verdict for mere technical error in instructions unless they might have led the jury astray.

Sir John Simon, K.C., who succeeds Sir Rufus Isaacs as Attorney-General, is a man of remarkable intellectual force, which has been displayed in Parliament as well as at the bar, where he has gone forward rapidly in only fourteen years of practice. He is only forty years old, and such phrases are written of him as that his rapid promotion has been "certainly unique in modern times," and that he "possesses a capacious and cultured mind and a strong and attractive personality."

Mr. Stanley Owen Buckmaster, K.C., M.P., becomes Solicitor-General. He has won a great reputation at the Chancery bar, and is considered an effective speaker in Parliament.

Lord Justice Hamilton has been promoted to the office of Lord of Appeal, from his position at the head of the Scottish judiciary. Lord Dunedin has also become a Lord of Appeal. These two appointments increase the strength of the House of Lords and of the Judicial Committee of the Privy Council, having come about under the provisions of the Appellate Jurisdiction Act looking to the appointment of two additional Lords of Appeal in Ordinary.

Mr. Justice Phillimore has been advanced from the King's Bench Division to the position of a Lord Justice, and his learning will find a new field for its exercise in the Court of Appeal.

Mechanics of Codification

By W. L. Goldsborough

of the Code Committee of the Philippine Islands

THE suggestions contained herein were formulated and submitted to the "powers that be" in the Philippines in 1909–1910, when a committee was organizing and entering upon the work of revising the existing codes and laws of the Islands and preparing new codes "in accordance with modern principles of the science of law."[1] Four years' experience as a member of that committee have confirmed the writer's first conclusions as to the number of codes which should go to make up a complete system, and as to the plan of

[1] Act 1941 of the Philippine Legislature.

campaign best calculated to avoid omissions, oversights and inconsistencies, and to produce a system of codes harmonious and useful to the limit of the committee's capacity.

It may not be amiss at this point to distinguish between true codification, to which this article relates, and mere compilation. The latter may be described as the comparatively hasty and unscientific grouping together of existing laws so that they can be more conveniently used than when scattered through the volumes in which they were from year to year promulgated. The so-called codes of Maryland and Mississippi are compilations and not codes. Codification, on the other hand, is the logical distribution of existing laws to specific codes, and the concise and systematic expression and arrangement in the codes of such laws and the new legislation required to form a clear and harmonious whole, designed to meet all present exigencies and to provide so far as possible for the future. California and Montana are states whose laws have been codified.

In constructing a complete code system for a state, the plan at once most logical and most nearly approximating the better modern practice is to embody the general laws in four codes, political, civil, penal, and remedial, accompanied by a fifth book to bring *all* the laws of the state into the scheme, each of the five books having its own index and also a general index to all the books, as follows: —

GENERAL LAWS :

1. *Political Code* (With and preliminary to which should be printed the Organic Laws, being the Constitution of the United States, the Constitution of the State, and all Treaties, Acts of Congress, etc., having special reference to the territory out of which the state was carved). Containing the public laws relating to governmental constituents, organization and administration, including public property, revenues, works, education, health and morals.
2. *Civil Code* : Containing the private laws, or the laws governing private persons with special reference to their interrelations, property, and obligations.
3. *Penal Code* : Containing the laws relating to crimes and punishments.
4. *Remedial Code* : Containing the laws relating to relief, and to procedure in civil and criminal cases, including the law of evidence.

5. SPECIAL AND LOCAL LAWS (With and preliminary to which should be published a table showing what disposition the committee has made of each section of every act of the Legislature in force on the date of completion of the codes). Containing the laws not included in the foregoing codes.

True codification can only be carried to a logical conclusion when an entire code system is begun and completed at one time, because the codes are interdependent and the provisions of each must be framed so as to supplement the provisions of the others in the even attainment of the common object — the clear and orderly expression of the entire body of the law. Moreover, numerous acts and many sections passed by the legislative body include provisions which belong in, and should be distributed to, several different codes, and such acts and sections can be broken up and their various provisions successfully placed and preserved each in its proper code only when all of the codes are in preparation simultaneously. It is also true that the new legislation needed to complete a given code frequently calls for legislation pertaining to another code, so that the single code would be in part inoperative unless legislation belonging to a different code was adopted at the same time. Thus, where a civil code alone has been in preparation,

remedial provisions will almost certainly be found in it; and where a code of procedure has been built up independently, some civil code matter is apt to have slipped in. This is true of the old codes now in force in the Philippines. Complemental adjective provisions were necessary to quicken substantive provisions, and *vice versa*, and as only the one code was in hand at the time, the really misplaced matter was included.

The work of codification involves the most exhaustive study and intimate knowledge not only of the laws to be included in the codes but also of the judicial interpretation and construction of them. In the effort to state the law plainly and correctly and to eliminate doubt and ambiguity, not only conflicting existing legal enactments but also conflicting decisions must be studied and reconciled. Full annotations are therefore incidental to the preparation of the codes and should be published with the text when it has been adopted by the legislature.

The preliminary steps in the work of codification should include: (*a*) the adoption of a plan showing the number of the proposed codes or books into which the laws are to be grouped, and the name and scope of each such code or book; (*b*) the careful examination of all laws in force, and the preparation of tables showing the distribution of such laws to the proposed codes; (*c*) the study of the arrangement of the contents of like codes in similar systems adopted by previous codifiers.

To avoid the danger of overlooking a provision of existing law in the preparation of the new codes, a set of books should be prepared and preserved containing all such laws. On the margins of these books the committee should account for each section of such laws by showing where it has been placed in the new codes or why it has been omitted therefrom. Conversely, the source or sources of the text of each section of the new codes should be stated in a marginal note to such section.

As the work proceeds and the necessity or advisability of new legislation or considerable amendments to existing legislation becomes evident, proposed acts embodying such changes should be prepared for presentation to the legislature, so that new principles which it is desired to introduce into the codes may be threshed out and approved preliminarily, and be then embodied in the codes without fear of endangering them when they come up for final adoption.

When the drafts of the new codes have been matured and completed to the point where they are deemed ready for adoption, they should be printed with marginal notes indicating the source or sources of the text of each section, and accompanied by a table showing where each section of every existing law has been placed in the new codes, or why it has been omitted therefrom. Enough copies of the proposed new codes should then be distributed to place a set in the hands of each member of the legislature, each chief of a department or bureau of the state government, each judge, each prosecuting officer, and each prominent lawyer, banker, merchant, professor, writer, or other person who may be induced to consider and criticise them, pointing out errors and suggesting advantageous changes. With the proposed codes should go a circular letter urging the distributees to examine particularly those portions of the codes embodying the laws with which they are specially familiar or in which they are peculiarly interested, and requesting that the committee be promptly notified in writing of errors and advisable changes. The circular should also state the period of time during which criticisms and suggestions can

be received and considered before the codes are finally submitted to the legislature to be enacted into law. This period should certainly not be less than six months and it would be much wiser to make it at least a year. The time and money expended would be well spent if it resulted in so far perfecting the codes as to enable them to serve their purpose as the settled law for a number of years without material amendment. If they are adopted without giving the public an opportunity to examine and criticise them, errors may develop necessitating their amendment within the first few months after their promulgation.

In connection with the suggestion contained in the last preceding paragraph, the following remarks of the dean of the Harvard Law School, and of the lecturer on the law of bills and notes in the University of Pennsylvania, when discussing certain changes which it was thought would have been advisable in the original draft of the Uniform Negotiable Instruments Law (which has now been enacted by forty of our states and territories), are instructive: —

> Codification is with us a new art, and it is not surprising, although it is unfortunate, that the Commissioners did not realize, as Continental codifiers realize, the *extreme importance of the widest possible publication of the proposed code, and the necessity of abundant criticism, especially of public criticism*, from practising lawyers and judges, professors and writers, merchants and bankers.[1]
>
> The whole controversy (concerning certain proposed changes in the Negotiable Instruments Law) should serve as a useful lesson to those who will in future direct the preparation of statutes codifying other branches of the law in this country. The Negotiable Instruments Law was originally drafted with the greatest care by a learned expert. It was then revised by a sub-committee of the Commissioners on Uniform State Laws, and was then revised by the Commissioners themselves at their annual conference. In addition to this, the statute, prior to its adoption by the Conference, had been brought to the attention of a number of experts generally throughout the country, and had received at least some consideration at their hands. Moreover, all who shared in the preparation of the act enjoyed the very great advantage of having before their eyes the English Bills of Exchange Act, which offered suggestions on every important point; afforded a constant opportunity for useful comparisons; whose provisions moreover could be examined in the light of twenty years' experience. In spite of all this, some errors (precisely how serious no one can say as yet) crept into the Negotiable Instruments Law which might have been avoided had the act, prior to its final revision, been *subjected for several years to the most searching criticism obtained by giving to it the widest publicity* and by soliciting the active co-operation of the considerable number of men whose thorough knowledge of the law of negotiable paper, whether from the standpoint of the banker, the practitioner, or the student, had fitted them to render valuable assistance in the preparation of a code on that subject. *The two or three additional years consumed by pursuing this method would have yielded an ample return, and those who would object to the labor, expense, and time required by this method little appreciate the gravity and difficulty of the task of embodying the law in a series of authoritative abstract propositions.* Many will regard the shortcomings of the Negotiable Instruments Law as not very serious, but all may well remember that those shortcomings (such as they are) can probably be ascribed to the lack of adequate criticism.[2]

It is to be noted that the above-quoted remarks of Messrs. Ames and McKeehan refer to a law on one particular subject containing less than two hundred sections, while the complete system of codes which this article has in contemplation would embody the entire general law and contain many thousand sections. The "gravity and difficulty" of the task of preparing the codes, and the opportunity for errors to creep in, would therefore be many

[1] Extract from article on Negotiable Instruments Law, by James Barr Ames, 14 *Harvard Law Review* 241.

[2] Extract from article on Negotiable Instruments Law by Charles L. McKeehan, 41 *American Law Register*, N.S., 437, 499, 561.

times greater than in the case of the Negotiable Instruments Law.

Under no circumstances should a proposed code be submitted to the legislature for adoption until the work of the committee has at least reached that stage where it is reasonably well satisfied that the logical distribution of the laws to their proper codes has been accomplished, and that the codes have been so far completed that they will harmonize with and properly supplement each other. Preferably a single report of the committee should present the entire system of codes for legislative action.

And under no circumstances should the legislature attempt to tinker with the codes. They should either be adopted as presented by the committee, or returned to the committee to be modified by that body in certain specified particulars and again submitted for adoption or rejected *in toto*.

Manila, P. I.

The Rules of the Game

By A. G. Zimmerman [1]

IT WAS a fine old legal celebrity of a Middle Western state, — now passing the last decade of near a century of active life in the equable climate of the Pacific coast, after emerging from the Civil War a Brigadier-General, and subsequently presiding on the bench, mostly in the appellate court, for some forty years — who, in volume 29, page 183 of the reports of a state whose volumes now number over 150, gave expression to the following language: —

> The question is not alone, What is the natural and inherent justice of the case? but it is, are the principles and rules of equity sufficiently broad and comprehensive to reach the case?

The great jurist was legally, and perhaps even equitably, right, of course; but the quotation suggests the proposition that "natural and inherent justice" does not in the least enter into the judicial calculation of probabilities in a cause, unless it is "justiciable" in the sense only that it is within the settled technical rules and precedents of the machinery of the law.

Certainly! one can get justice in a court of law or equity — if the case is "justiciable" and comes within the established court-made rules and precedents. Otherwise, the justice seeker must keep out of a "court of justice."

Clear and simple, is it not? If you are within the rules of the game, you may have a chance to get justice — if there is no other unlooked-for technical hitch. Otherwise, you must pay up and shut up! Or, get justice after the manner of the Middle Ages, or of the more recent far West, and then if perchance successful get locked up or hanged as a finale.

The judge of the Orphans' Court was perplexed. He was perfectly clear in his mind as to what he ought to do — to do justice. But the thing that troubled him was, How could he make

[1] Judge of Dane County Court, Madison, Wis.

the law and the equity of the books — and the great common law and chancery rules lying around loose everywhere to fill in the chinks overlooked by the statutes — harmonize with justice?

The case had been fully and fairly presented. The evidence, under the liberal rules of his court, made the facts quite clear. The arguments of counsel on both sides had been concluded. There was no serious controversy as to the facts. And, indeed, there was no appreciable difference of opinion expressed by the lawyers on the opposing sides as to the law.

There was unanimity among all in the court room as to "the natural and inherent justice of the case." The difficulty at hand consisted in endeavoring to apply the law to the facts in such a way as to harmonize with "justice," and — keep within the law.

The lawyer for the claimant-executor contended that the law was in complete harmony with justice in this case.

The counsel for the residuary legatee had nothing to say about justice. That was not his cue. He was not interested just then in justice. He was not retained to defend or look after justice. Justice could take care of itself. It was not his affair. Besides, he was an ex-judge himself and well versed in the technicalities of his mistress. What he was there for was to uphold the majesty of *the law;* not of justice, nor yet of the equity of the books. He wanted for his client what the law gave, the full technical letter of the law — nothing less and nothing more. He wanted the pound of flesh — but of course he did not put it that way.

The case was simple. The material evidence was undisputed. It was the lawyers who were disputing, and making vicious jabs at each other, and at the executor, a lawyer not in active practice.

An old maiden lady had died leaving her all, a small patrimony, by will to her brother. She named her nephew as executor. She had depended entirely upon this nephew during the last three years of her life. He provided a house for her, cared for, supported her, and paid most of the bills.

The legatee brother staid away, paid nothing, and let the nephew take all the responsibility, and also pay the bills.

The estate consisted principally of a note against the nephew-executor. It had been understood, or at least legally implied, that what he paid for her was to be applied on this note. This would use up about half of the note.

Having the note in his possession, to apply the payments thereon and make an adjustment, the executor neglected to regularly file a claim against the estate. He had always held the note — both before and after the testatrix's death.

So he made the adjustment on the back of the note on December 22, that being the date he had made the endorsements in the years that had gone before. It so happened that the time for filing claims expired December 29, a week later. Of this the executor was entirely unconscious at the time. It was not until long thereafter, upon filing his final account, that his lawyer discovered to him his predicament — that it was necessary for him to file his claim, that he had failed to do so, that the time had expired, and that his claim was therefore barred.

The legatee brother, whose interest in the sister developed after her decease, knew the claim was just and equitable, and that as a matter of simple decency it ought first to be paid before he took the estate. But he stood on the strict letter of the law, he insisted on his

pound of flesh, and all the little drops of blood.

After skirmishing about, the claimant-executor's resourceful lawyer finally discovered a late statute, still all but lost in the innumerable session laws, that seemed to have been enacted especially to fit such a case. It provided: —

"In all cases where an executor or administrator shall or may have paid in good faith any debts or claims against the estate which he represents, without the same having been duly filed, approved or allowed as required by law and his final account has not yet been settled, such payments may be allowed by the court having jurisdiction of the matter, upon proof satisfactory to said court that said debts or claims were just and existing demands against said estate at the time of the payment and were paid within the time limited by law for the presentation of claims." Due notice was provided for, etc.

This providential statute seemed to fit upon all fours with the facts and circumstances in this case. Nevertheless the judge of the Orphans' Court took the case under advisement for a time, so as carefully to re-examine the testimony and the law.

It goes against the grain for a court to decide against the established hard and fast rules of the law of generations, on the strength of an unconstrued *parvenu* statute, though the circumstances cry aloud for "natural and inherent justice."

But the judge eventually decided for the claimant-executor, saying, among other things in his memorandum of decision, the following: —

> The question is not alone, What is the natural and inherent justice of the case? but it is, Are the principles and rules of equity sufficiently broad and comprehensive to reach the case?
>
> The testimony indicates with reference to his claim that, while the claimant should have filed it earlier and in due season, still the equities are with him. There is no question on the facts but that he expended considerable sums of money for the deceased and saw that she was well taken care of.
>
> On the other hand the defendant here, who gets the bulk of the estate under the will, interposes technical objections and is making every effort to retain the estate for himself and to avoid the re-payment of funds for the care and support of the deceased in her lifetime.
>
> The record shows, practically without dispute, that there was expended for the deceased by the claimant in all the sum of $987.53. It is clear that there should be a recovery from the estate of this full amount unless there are clear and positive reasons to the contrary.
>
> If there are doubts as to the construction of the law, the claimant in this case is entitled to the benefit thereof, and the Court is inclined to the opinion that under the new statute, and the facts as testified thereto, the claim was seasonably and legally filed as having been paid in good faith by the executor before the time for filing claims had expired, and should be allowed.

Of course the case was in due time appealed to the Superior Court — a court of general jurisdiction, where the technicalities of the law are, perhaps necessarily, more persistently heeded and given full credit. The matter was there retried by the court, without a jury, on the identical testimony and record, by stipulation of the parties.

The judge of the Superior Court, too, was perplexed. He also took the case under advisement for a considerable period. He was a most careful, able, and conscientious judicial officer. He wanted to do "natural and inherent justice."

However, as this jurist had frequently been battered about, pummeled, and reversed by the mighty and autocratic appellate court above him, for trying to deal out justice by winking at technicalities on occasion, he had evidently literally been whipped into line, to decide things with an eye as to

what he thought the appellate autocrats would do to him if he did not.

He agreed perfectly with the judge of the Orphans' Court "as to the natural and inherent justice of the case." But he evidently concluded that this was a case in which the appellate autocrats would rap him over the knuckles, if he did not follow the strict technical rules of law.

So he decided against the claimant-executor, and then, apparently again following appellate court precedent, undertook to substantiate his decision. It cannot be said that he was altogether happy in this feat. In his memorandum of decision, the judge of the Superior Court says: —

"All the payments for the support of the deceased were made prior to the date that the executor was appointed," indicating that this fact would not bring them under the statute. Why, of course they were made before the decease, otherwise they would not be claims at all and there would have been no controversy. Then the judge properly says the claim cannot be allowed, "unless it can be said that the executor made payments on the note which he personally had given the deceased in her lifetime, under such circumstances as to bring these payments within the provisions of the new statute.

It is to be remembered that the executor-claimant personally had possession of this note. The judge's memorandum continues: —

> As these are transactions in which the executor acting in a trust capacity is dealing with himself in his personal capacity, the burden rests upon him to satisfy the court that such payments were actually made by him while acting as executor. The evidence upon this question is not clear, but rather tends to establish the fact that the advancements from year to year had been treated as payments on the note. The fact that the computations or endorsements may not have been made each year does not change the rule.

Well, while "the burden rests upon" the claimant-executor, yet it should be remembered that the legatee-defendant is invoking a hard limitation statute, which the law requires to be strictly construed against him. Again, the claimant's uncontradicted testimony and the figures endorsed on the note satisfied the judge who heard the testimony and had opportunity to observe the bearing of the witness on the stand; while the Superior Court judge who had only the cold typewritten testimony before him, apparently again adopting appellate-court-discerning wisdom, thought he knew better about the witness's veracity, and evidently refused to believe him.

And again, was not the fact, if it was a fact, "that the advancements from year to year had been treated as payments on the note," as stated by the judge, rather an additional reason, and cumulative evidence, for allowing the claim, than part of a reason for disallowing it? If they were "treated as payments," ought he not to have received credit therefor?

And then the judge, perhaps out of commiseration for himself for having so to decide, or because of sympathy for the executor for having so decided, generously concludes: —

> It is unfortunate that the executor should have failed to take the necessary steps to protect his rights. He contributed generously to the support of the deceased, and should be repaid these sums. But the Court must administer the law as it finds it and not seek to read into the evidence facts which the executor has not established as a basis for the Court's action.

This concludes natural justice *versus* law and equity, at least for the time being. The case is now on the way to the appellate court, which must finally decide the matter. Were it a decade ago, before the modern handling of the judiciary without gloves, the Superior

Court's decision would almost certainly be sustained. As it is, there is some doubt. The question is, how much doubt? Time and the autocrats must decide as to the sequel — for or against "the natural and inherent justice of the case."

A Year Later. — The appellate autocrats jolted the Superior Court for following the trend of their own past decisions. They apparently caught the modern spirit. Yet they do not admit any change — perhaps are conscious of none.

Probably the judges are not conscious of a past habit of accentuating technicalities. Very likely they are unconscious of any purpose now to iron out the wrinkles in the cases, in the interests of "natural and inherent justice."

Nevertheless they are doing it, more and more. And the "rules of the game" are being applied less and less technically.

Genuine and Spurious Interpretation

(A NOTE ON POUND'S "COURTS AND LEGISLATION"[1])

BY THE EDITOR

PROFESSOR McILWAIN, in criticizing Lucas's "Corporate Nature of English Sovereignty,"[2] withholds his approval from the rule unhesitatingly laid down that "the English sovereignty" is and always was "co-operative," that "all the practical hindrances to a feudal king are necessarily constitutional limitations," and comments as follows: —

> The method of applying "appropriate modern descriptions" to "innominate forms" is essentially unsound. It is based on the fundamental error, pointed out long ago by Maitland, of mistaking the indefinite for the simple.

The foregoing illustration serves to indicate an ordinary type of error in description. Such misdescription, it would seem, may assume either of two forms: the attempt may be made to convey an indefinite object in a definite term, or through equivocation a term susceptible of an indefinite connotation may be employed in a definite sense.

In this light the legal term "interpretation" may be examined. While the word may not always mean exactly the same thing, in the case of everything interpreted, a statute, a deed, or a formal contract, the general notion of legal interpretation is a fairly uniform single concept. And so little does that concept differ from the popular concept of interpretation, outside the sphere of the law, so little does it add to it or subtract from it, that one need not consult law dictionaries to elucidate its fundamental meaning.

"To interpret" is, alike in legal language and in the vernacular, to set forth the meaning of anything. There appears to be no adequate synonym in the language. No equivalent verb being

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[1] 7 *American Political Science Review* 361. See p. 519 *post.*

[2] 7 *American Political Science Review* 502.

available, we are driven into a periphrase consisting of verb and object, for the notion of a meaning to be expressed is quite as essential a part of the concept of interpretation as the act of expression itself. "To interpret" is thus, so to speak, a holophrase to be defined only by defining its component elements, and a moment's reflection will show that it is the objective element of the concept, rather than the active or verb element, which chiefly needs to be defined.

The definition need not go so far as to set forth fully what "meaning" signifies. The obscurity of the signification of the word "interpret" arises from the fact that there are two kinds of "meaning," certain and uncertain, and that the verb "interpret" contains as its implied object undifferentiated "meaning," which may be either certain or uncertain. In its earlier use "to interpret" seems to have signified to set forth a fixed and necessary meaning, which was the only meaning to be ascribed, as in speaking, for example, of the interpretation of language, of dreams, or of signs. The original notion, for example, was not that a dream might mean any one of several different things, but that it had only one meaning, which it was the seer's business to explain. The usage still prevails, for if the premise be granted that this or that law can have but one meaning, we may speak of the act of setting it forth as interpretation. Interpretation is then equivalent to elucidation or analysis, synonyms which are of course not available where there is no fixed meaning to be intellectively envisaged.

So clear, however, is the proposition that "interpretation," in the legal sense, usually involves much more than pure intellectual analysis that it is unnecessary to develop a treatment of this subject. If the meaning of a statute or of any document whatsoever were a matter of purely ratiocinative demonstration, leading invariably to conclusions of invincible soundness, even if we suppose that the technical skill of the lawyer would still be in demand for the solution of the problems of interpretation, his services would be utilized rather in consultation than in litigation over those matters which furnish so large a proportion of contentious questions. It is because interpretation is not pure inference, but a choice of expedients, that the interpretative process becomes something more than a purely descriptive process, and engages the judges in the exercise of a function far more momentous than that of dragging forth obscure truths into the light of day.

Interpretation thus means either of two things: the setting forth of a fixed or certain meaning, discoverable by a purely intellectual process, or of a meaning which is indeterminate or uncertain. These two varieties of interpretation may be distinguished by using the terms Analytical (or Absolute) and Selective Interpretation.

Of the two kinds of interpretation, analytical and selective, the latter is by far the more important for the reason given by Professor Gray: — [3]

> Interpretation is generally spoken of as if its chief function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. . . . The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is not to determine what the legislature did

[3] Quoted by Pound, "Courts and Legislation," 7 *American Political Science Review*, 361, 381.

mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present.

In other words, courts are driven to employ selective interpretation because of the absence of any legislative intention how a specific matter should be treated or because they possessed at best only a hazy intention; and it is the duty of the courts to say, not by a process of loose speculation, but with the utmost care and deliberation, what meaning must be supposed to underly the statute.

It might be supposed that laying down a definite criterion by means of which the intent of a law may be discovered would place in the hands of the interpreter an instrumentality which would make possible the substitution of analytical for selective interpretation. That end is to be attained, however, only if two conditions are fulfilled: (1) the criterion must itself be a valid analytical formula, and (2) the meaning unearthed by the application of this test must be certain and not uncertain. Neither of these conditions appears to be realized in Kohler's recipe:[4]

> . . . the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, . . . he works with the views and conceptions that are drawn from his sphere of culture, . . . he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual. The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become.

This proposal that the interpretation of law be treated as tantamount to the interpretation of the parent culture of which it is the offshoot should not be permitted to obscure the complex nature of culture, which is by no means so simple a thing as to fuse all antagonistic elements in one great stream, so as to enable us to say in every case what the actual thought of a given time is or was. On some questions no doubt there would sometimes be one fixed intention, embedded in the culture of the time, which this historical-sociological method would bring to light, and then a purely analytical interpretation would be possible. Equally if not more often, however, the interpreter would experience perplexity in unraveling the problem; candor would then direct an analytical interpretation which would itself mirror the complexity of the situation and yield no decisive result of any juridical utility. The interpreter would still be compelled to fall back upon selective interpretation in prosecuting his sociological inquiry.

Can we, however, treat Kohler's criterion as an analytical formula? Is it scientific to urge that a law be studied only in relation to the culture in which it had its origin? The conception of origin is of itself vast, stretching back into the limitless void of antiquity, and if we are to trace one of our laws back to Magna Carta, and construe it in accordance with this formula as a product of the culture of King John's reign, how can we disregard the earlier origins of the clauses of Magna Carta and the cultures from which they sprang? The Kohler formula is historical and retrospective, it looks back to cultural origins, rather than to the

[4] Pound, *op. cit.*, p. 379.

contemporary culture which maintains and reacts upon the law. In this view the present is disfranchised, and in that view of the case, it is hard to see any valid reason, when we cannot trace law to its primeval root, for preferring one developmental stage of culture to another as a means of elucidating it.

For these reasons the Kohler criterion seems unscientific, as erroneously overvaluing the temporal element. Contemporary culture is not less necessary than past culture to throw light on the meaning of any law, unless an hypothesis of implicit repeal is to be carried to unprecedented lengths, and such a theory of implied repeal seems to be involved in Kohler's apparent assumption that a law is alive at the moment of origin, or in the stage of active legislation, and is thenceforward to be interpreted only retrospectively.

The Kohler criterion is dogmatic, rather than analytical. Divested of its dogmatism, it would read somewhat as follows: Rules of law are not to be interpreted according to the will of the law-maker, but according to the thought of the whole people; they are not to be interpreted solely according to the culture from which they have been formed, but also according to that culture through which they are maintained and in which they have their being.

That such a formula would be practically applicable, and of any great assistance to the judicial interpreter, is unlikely. The difficulties that are so conveniently removed by the historical rule of interpretation re-appear as soon as this aid is withdrawn. Our judges have to interpret a living and contemporaneous law, and they have to heed, above all else, the thought-currents of their own time, in which they are themselves swept along, though with more circumspection and with better opportunity for steering a safe passage, it is to be hoped, than those charged with less weighty undertakings. In reaching these selective interpretations of the meaning of living laws, sociological understanding will no doubt be of assistance, but there can be no sociological key that will unlock all problems of the interpretation of statutes.

The judge must legislate, and selective interpretation is legislation, while analytical interpretation, from the point of view of legislation, is a purely administrative act. The spectre of judicial usurpation conjured up in the minds of those who dread judicial legislation in every form, and would like to restrict the courts to purely administrative functions, will never vanish. Selective interpretation is a necessity of every system in which the judiciary is clothed with any authority. But one cannot jump to the conclusion that the legislative powers of the judiciary are unlimited. On the contrary, interpretation itself discovers the legal limits to its authority by the very act of interpretation. Furthermore, it itself perceives the dangers of erroneous interpretation and is on its guard to avoid them, without the necessity of rigorous statutory inhibitions. These precautions should become more certain and effective with the growth of a scientific legal system, and the chief desideratum, at the present time, is that selective interpretation should free itself from all figments and sophistries and evolve higher virtues of prudence and self-restraint.

The dogmas inherited both from the Analytical and the Historical schools, to use Professor Pound's nomenclature, should go, and dogmatic interpretation should be abolished. In this sense only

is Austin's term, "spurious interpretation,"[5] to be employed, namely, in the sense not of finding a new rule, but of finding a new rule by an unsound process. If the new rule is found by a sound process we should not accuse the judge, as Austin did, of "spurious interpretation." His terminology was out of joint in permitting him to treat interpretation, in the sense of finding some new rule, as a fiction. His objections to what is here called selective interpretation have become obsolete with the passing of the school of which he was the able exponent. The real fiction is found not in the Austinian conception of "spurious interpretation," but in that of "genuine interpretation," namely, the concept that the meaning of law is fixed from the moment it leaves the hands of the law-maker and is to be construed solely with reference to the law-maker's will. That notion, which shows itself, for instance, in the conception that the meaning of the American Constitution was absolutely determined in the eighteenth century, needs to be got rid of.

In this emphasis on the necessity of selective interpretation and of judicial legislation there is implied no abandonment of the principle of *stare decisis*. That judges are bound by prior decisions goes without saying, and that principle holds good with the sole proviso that it must not be carried to extravagant lengths. The duties of judges are to administer the law that is in force quite as much as to make law; in fact the second duty must always yield precedence to the former, and there can be no duty or right of judicial legislation except in situations where there is a want of law and the judges are called upon to fill up the gap.

The first stage in the process of adjudication is to ascertain whether there is law governing the situation, and if the law exists to state it. This might be termed the process of law-finding, but for the connotation of determination attaching to the word "finding," and but for the unfortunate association which "law-finding," at the hands of judges devoted to the historical doctrine, has had with law-making. The equivocation may be avoided by speaking of this as the process of law-perceiving, or law-perception, as finding in the sense of getting at something which already exists, rather than of determining something that ought to exist. The judge must ascertain whether there is a rule in existence which has the force of a mandate. It is not sufficient that a precedent be found, the precedent must have mandatory force, otherwise it is not law. The historical school, by losing sight of this fact, fell into the error of finding law to exist which as a matter of fact did not exist, though it had existed at some previous time. The historical school thus employed a fiction by means of which they conceived of that being law which as a matter of fact was not, and from spurious interpretation of that sort judges ought to be free. If there is clearly law in force governing the matter in hand, no act of interpretation is indeed necessary, save only in developing the corollaries of the principle obtained; and these corollaries may be a matter of such positive demonstration that the act of interpretation will be analytical and not selective. If the law that is sought for clearly exists, and can have but one meaning, there is of course no opportunity for selective interpretation, and the court does not legislate, but merely applies existing law. A great deal of the popular criticism of the courts for overturning statutes on the score of

[5] Pound, *op. cit.*, p. 367.

unconstitutionality would no doubt be mitigated if the people could be shown clearly in how many cases the action of the court is administrative and not legislative, and that where courts have legislated it is because they have been compelled to legislate by want of law.

A more difficult problem confronts the courts when the law is itself obscure, when a rule laid down in previous case-law appears to be discredited, or where the obscure corollaries of an accepted rule have to be elaborated. Courts are then driven to the exercise of their second function, that of selective interpretation. They have to deliberate upon the various possible meanings and choose what appears to be the soundest explanation. They are concerned with what, for lack of a better term, may be called an indefinite meaning — which is properly speaking no meaning at all, but what is referred to in the quotation at the head of this paper as an "innominate form." A strictly analytical interpretation would nearly always in such cases state the rule too indefinitely, yet the closer the approximation to an analytical interpretation, based on sociological as well as legal premises, the higher will be the degree of validity of the selective interpretation, and the less will be the extent of the resort to judicial legislation. The further the court wanders, on the contrary, from a purely analytical interpretation, in selecting solutions alien to prevailing popular habits of thought, the more the court subjects itself to possible censure for propounding a "spurious interpretation" of the matter with which it has to deal.

Professor Pound believes that judicial legislation is a necessity: "Within somewhat wide limits courts must be free to deal with the individual case so as to meet the demands of justice between the parties."[6] He considers, however, that much more attention should be paid by legislatures to the quality of their legislation, and that obnoxious rules should be met squarely and fairly by legislative repeal and not left to the courts to interpret out of existence. He thinks that in this way much cause for contention between the courts and the people would be removed, and that the strain "unnecessarily" imposed upon courts by compelling them to do what should be the work of the legislature would be relieved.

It is highly desirable, in the view of the writer, that legislatures relieve the courts of the task of performing so large a share of the legislative function as now devolves upon them, but however desirable this may be, it is unlikely that we are soon to see legislatures grow into strong juristic agencies capable of shouldering the heavy tasks which they have turned over to the courts. It is reasonable to look forward to a considerable improvement in the quality of statute legislation and perhaps to a more intelligent formulation of organic law, by more effectual methods of amendment, but it is extremely doubtful if such improvements would relieve the courts of any considerable amount of the responsibility of filling up the larger as well as the smaller gaps of a legal system that can never be complete even in its main features.

The real strain imposed on the courts would appear to come not from the burden or the nature of their tasks, but from the misunderstanding which the people have of the functions of the courts — a misunderstanding intensified by the lack of candor in judicial reasoning and by the deception caused by the

[6] *Op. cit.*, p. 365.

persistence of conventional fictions. The attitude of the courts should be that of not legislating, under any circumstances, without acknowledging the fact that they legislate, and making it clear that they legislate solely because they are compelled to legislate and because to dismiss a case for want of law would be a breach of their judicial trust. If candor of this sort prevailed courts would not be suspected of legislating when they merely administer the law, and the criticism unjustly aimed at them would be directed into quarters where its fairness and force would work more swiftly the necessary remedy.

Johann Wolfgang von Goethe, Attorney-at-Law

By Roy Temple House

PROFESSOR IN THE STATE UNIVERSITY OF OKLAHOMA

THE general estimate which a reader of Goethe might synthesize from his frequent allusions to the law, is by no means complimentary to that august profession. In one of the most frequently quoted passages from "Faust," spoken by Mephistopheles in the course of his advice to a student concerning the choice of a profession, the waggish Prince of Darkness replies thus to the student's confession: —

Student

I cannot reconcile myself to Jurisprudence.

Mephistopheles.

Nor can I therefore greatly blame you students
I know what science this has come to be.
All rights and laws are still transmitted
Like an eternal sickness of the race, —
From generation unto generation fitted,
And shifted round from place to place.
Reason becomes a sham. Beneficence a worry:
Thou art a grandchild, therefore woe to thee!
The right born with us, ours in verity,
This to consider, there's, alas! no hurry.

In the Netherlands drama "Egmont" we are told that, "The rascal always has the advantage. As prisoner he pulls the wool over the judge's eyes, as judge he takes delight in proving the innocent guilty. . . . When there is nothing to confess, an ingenious judge invents something. Honesty makes a man careless, sometimes even defiant. So the judge begins asking harmless questions, the prisoner is proud of his innocence, as they call it, and speaks out flatly everything that a sensible man would conceal. Then the cross-examiner builds questions out of the answers and keeps his ears open till he finds a little contradiction, etc."

In the less well-known play, "*Die Aufgeregten*" (The Excited Ones), occurs a very curious estimate of the relative merit of the learned professions: "I tell you, child, a surgeon is the most worthy of reverence of any man on the whole face of the earth. The theologian frees you from sins which he has invented himself; the jurist wins your case and beggars your opponent, who has as good a right to win as you have; the physician cures you of one disease and brings on another, so that you can never be sure whether he has helped or injured you; but the surgeon frees you from a real evil, which you have brought on yourself, or which has come upon you accidentally and without your agency; he helps you without injuring any man. . . ."

In the epic "Reynard the Fox," Master Isengrim, the Wolf, has studied law at Erfurt, and seems to have gained nothing at that seat of learning but pedantry and rascality. As the poet puts it in a passage from his autobiography, "Truth and Fiction": "Lawyers, accustomed from their youth up to an abstruse style . . . could not easily rise to anything of freedom"; and later in the same work: "The ceremoniousness of the legal profession, their striving for place, I had seen so often in friends and acquaintances, and my father himself, with all his advantages and all his good-will, had foundered, so to speak, on this very rock." And to cite two flings at the fraternity from the powerful early tragedy "*Götz von Berlichingen*": We meet in that play a young advocate from Goethe's own city of Frankfort, a *Doctor Juris* of the University of Bologna, whose countrymen fail to treat him with adequate respect because they suffer from the strange delusion that good sense is quite as valuable an asset as a head full of Justinian; and we also make the acquaintance of a shrewd old gentleman who marries his daughter to his adversary in a lawsuit, on the theory that this is the only way of preventing the amount involved from leaving the hands of both and becoming the property of the lawyers.

But for all his sarcasm, Goethe was a lawyer to the end of his life, and a good one. Educated at Leipsic and Strassburg, winning his degree at the latter institution with credit, even though the faculty declined to publish his dissertation on the desirability of establishing one state religion to which all citizens must conform — a refusal which annoyed his father mightily but appears to have troubled the son himself very little, as he had picked his theme at random and written merely to please that exacting old dogmatist — he practised a short time in Frankfort, pleaded a few months before the Imperial chamber at Wetzlar, and on his removal to Weimar, served the government of that little Duchy for the greater part of his life, first as Privy Counsellor of Legation, and later as President of the Chamber of Finance. As a government official he could scarcely have been more resourceful, judicious, or industrious. His colleagues were at first suspicious of a man who had been known to write poetry and who had been guilty of the most talked-of sentimental novel of the day; but the event proved that in legal knowledge, business ability, and discretion, he was quite the equal of the hardest-headed of them all.

His distaste for the law as an uninterrupted life-work is easily accounted for. In addition to the general fact that so exact a study could scarcely be expected to satisfy the soul-cravings of so richly imaginative a nature, there is the still more general fact that as versatile and independent a temperament as Goethe's could never have confined itself within the limits of any one profession. And further, in spite of the respectful tone in which he always speaks of his father, that gentleman's method of procedure was exactly calculated to produce in his son a distaste for whatever the father advocated. The elder Goethe's pedantry, his dogmatism, his martinet ways, would have troubled a more docile child than his son of his; and though the child knew Hoppe's "*Examen institutionum imperialium*" by heart almost in infancy, and had worked so carefully through Struve's "*Jurisprudentia Romano-Germanica forensis*" and others that when he came to attend lectures at Leipsic and later at Strassburg, the professors had little to tell him that he did not already know, his heart was

often far away, and a favorite occupation of his in the class in German Law was to draw on the margin of his book extravagant likenesses of the highly respected legal authorities who happened to be under discussion, to the scandalized amusement of his neighbors. It seems that at Strassburg in particular the method of instruction was thoroughly denuded of interest and allowed no play for individuality, consisting as it did of little more than the literal memorizing of such laws as would be practically useful, with minimum of historical study and extremely scant appeal to the reason.

The professors who had the young Goethe in charge had to deal with a mind so marvelously superior to that of the average youth that such tasks as kept his fellow-students straining every nerve to accomplish were not even difficult enough for him to keep him interested. And hence, when he waxes sarcastic at the expense of the university institutions of his day, it is not fair to jump at once to the conclusion that the average young German of that generation was not fairly well taken care of. And even Goethe, in school or out of school, acquired such an interest in the legal side of affairs as shows itself in almost everything he wrote. One of the most amusing pages in his "Italian Journey" tells how, in the year 1786, he was an interested spectator at a trial in Venice — and it may be interpolated that like the New York ex-Assistant District Attorney Arthur Train in a very similar page dealing with another Italian trial, he comes to the conclusion that the Italian method of procedure is superior to that in his own country. The defendant in the case Goethe witnessed was the wife of the Doge himself, which fact gave the republican audience a peculiarly comfortable feeling of equality and universal sovereignty; but a circumstance that appealed to the poet particularly was the conduct of the old time-keeper with his hour-glass, which it was his duty to hold perpendicular while the attorney was speaking and horizontal during any other procedure, and which during certain rapid interpellations flashed up and down with the speed and sometimes the uncertainty of a game of "Simon says thumbs up." And he quotes appreciatively a thoroughly foreign but genuinely clever thrust from one of the attorneys. The point at issue was the question whether a certain bequest was really the property of the testator at the time when it was given. The clerk, a miserable hireling in the shabbiest of clothing, read from the document: "I give, I bequeath — "

"You!" shouted the lawyer, amid the delighted shrieks of the audience, "you wretched little starveling. What have *you* to give and bequeath?" Then he went on thoughtfully, "And you are just like this giver you are reading about. *He* was very ready too to give when he had not a *lira* in the world."

Goethe won the first case he undertook in his native city, but was rebuked by the presiding judge for the bitterness with which he attacked the plaintiff; which would seem to indicate that the law did not always bore him as sadly as he maintained. He records that on one occasion in the middle of his university course, when he went to an elderly lawyer friend of his to ask his advice as to the expediency of dropping the law and majoring in the classical languages, the old gentleman assured him that the best way to the classics is through the law. However this may be, the young man found that one way at least to the position of the most eminent of German writers, was through a Strassburg Doctorate of Jurisprudence.

Reviews of Books

GEST'S LAWYER IN LITERATURE

The Lawyer in Literature. By John Marshall Gest, Judge of the Orphans' Court, Philadelphia. With an introduction by John H. Wigmore. Boston Book Co., Boston. Pp. xii, 249. ($2.50 *net.*)

WHEN lawyers employ their leisure in the production of something that is not a law book, the outcome is usually but new fuel added to the fires that no perishable book can escape. But this cannot be said of Judge Gest's writings. He is one of the literary *élite* of the law, and the book before us has permanent worth and distinction. "The Lawyer in Literature" is the work of a mind saturated with the classics of English literature. It is not a production of severe scholarship, of painstaking criticism or precise historical exposition, but it does express the mellow experience of a mind that has found its highest delight in the satisfaction of its bookworm cravings. It is not easy to single out any one essay as more notable than the rest. That on Coke surely deserves to rank for a long time as a classic characterization of the great jurist, and is a memorable attempt to do justice to his nobler traits and to rescue his fame from disparagement and misconception. The essay on "The Influence of Biblical Texts upon English Law" will undoubtedly be found richly suggestive, by every student of the history of our institutions, as entering a fertile field which has thus far received surprisingly little attention. The glowing essays on the lawyer side of the novels of Dickens, Scott, and Balzac are probably the most notable contribution that has been made on this side of the Atlantic for years to the *litterae humaniores* of the law — to that department of letters of which Judge Gest, living in an age when specialists are many and humanists are few, is one of our most honorable exponents.[1]

We are tempted to quote from what another humanist of the law, Dean John H. Wigmore, says of these essays in his spirited introduction to them, but piecemeal quotation would fail to do justice to a striking exposition of the manifold service of literature to the profession of the law.

BLACK'S INCOME TAXATION

A Treatise on the Law of Income Taxation, under Federal and State Laws. By Henry Campbell Black, author of Black's Law Dictionary and of treatises on Judgments, Bankruptcy, Constitutional Law, Interpretation of Laws, Judicial Precedents, etc. Vernon Law Book Co., Kansas City, Mo. Pp. xvi, 262, and appendix and index 141. ($4.)

THE Federal Income Tax presents a new sort of problem for our lawyers. Few states have had effective local income taxes and the decisions under the income tax of war times are comparatively few. Hence there are few precedents for interpretation of the new Act of Congress of 1913. Although corporate bonds since 1894 have usually contained clauses providing for payment of coupons without deduction for any tax, having in mind a possible future federal income tax, most business methods have been developed quite without reference to such a tax. The new statute is modeled on the two earlier acts in this country as well as upon the English Act, but it is modified in many places with a view to more efficient collection. Hasty changes in the final conference occurred, as is customary in

[1] See 23 *Green Bag* 456.

Congressional legislation. These increase the ambiguity which already existed in many parts of the statute. Treasury regulations evolved in haste since the passage of the Act have clarified some of the confusion, but apparently this has been accomplished by exceeding the powers conferred on the Department under the Act. In the uncertainty as to the exact effect of the Act books on this subject will be much sought by lawyers.

Considering the promptness with which this book was issued after the passage of the statute it is remarkably good. The author was in Washington during the debates on the Act and had much material in readiness based on decisions under the English Income Tax and those rendered under our earlier statutes as well as under the few state statutes. These cases will be the first beaçons to guide through the maze of conundrums which the application of the statute to the actual conditions will produce. There are a few parts of the Act that the book hardly treats at all, such as the paragraph imposing the additional tax on larger incomes, but as far as it goes the book is intelligent and accurate. It contains a discussion of the constitutionality of income tax laws, a discussion of many questions that will arise in the interpretation of the Act, and an appendix containing the income taxes imposed not only by the present Act but by the preceding federal and state statutes, the decisions under which are cited in the body of the book.

S. R. W.

WOERNER'S DECEDENTS' ESTATES

The Law of Decedents' Estates, including wills, An abridgment for the use of law students of J. G. Woerner's great treatise for practitioners on The American Law of Administration. Edited by William F. Woerner and F. A. Wislizenus, instructors in the law department of St. Louis and Washington Universities. Little, Brown & Co., Boston. Pp. xxxvi, 496 and index 29. ($4 *net*.)

PROBATE law is not an important subject in the curriculum of our law schools. Often, when it is taught, only a little time is allotted to it in the work of the final year. Frequently it is an elective and not a prescribed study. When probate law is taught at all, the course given is usually one on wills and administration; a survey of the general topic of decedents' estates is usually not attempted. On the subject of wills we have Costigan's Selection of Cases and Chaplin's Principles of the Law of Wills with Selected Cases, both of them good books for instruction. Schouler on Wills is an extended standard treatise particularly suited to the practitioner, containing much matter unnecessary in a short law school course.

The law of decedents' estates is so largely statutory, and deals so largely with formal matters which are mere excrescences on the surface of substantive law, that it does not seem worthy to be given a place of such prominence in the prescribed curriculum as to exclude subjects more important to the training of the lawyer. If, however, it is to be taught, the branch of it dealing with wills seems the most profitable to take up, owing to the existence of a body of legal doctrine in this field which plays an active part in the jurisprudence of today and may serve a highly instructive purpose.

The editors of the book before us state that in lecturing upon the subject of wills and administration in Washington and St. Louis Universities they found no suitable text-book covering this field. What they have done is not to make a book supplying this need of a text on wills and administration, but to prepare a text the scheme of which

mingles the law of wills with the law of decedents' estates, and permits no deviation from a comprehensive study of the whole subject. The book therefore contains a great deal more than can be taught in a short course. Much of the historical matter is excellent, and the treatment of the practical details of administration is so extended as to offer very thorough preparation for the special work of probate practice. There is, however, a certain lack of proportion in a scheme of this kind, both intrinsically and in relation to other subjects in the curriculum, and a work based on such a scheme does not seem to be quite what the higher standards and more approved methods of legal education call for. This, however, can be nothing more than the result of considerations which influenced the editors, and does not reflect in any way upon the ability which they brought to their task.

MR. BIGELOW'S CONCLUDING RETROSPECTIONS

Retrospections of an Active Life. By John Bigelow. Doubleday, Page & Co., Garden City, N. Y. V. 4, 1867–1871, pp. 572; v. 5, 1872–9, 417 + 14 (appendix) + 28 (index).

THE two remaining volumes of Mr. Bigelow's autobiography, though issued posthumously, under the editorship of his son, come to us virtually in the same shape as if we had received them from his own hands. They bring the record down to the year 1879, where it must stop. While it is to be regretted that one of the greatest of American autobiographies falls so far short of measuring the full span of an eventful existence, we are permitted to hope that the mine of information left in his letters, diaries, and other literary remains may be utilized in future publications prepared by those closest to him.

In their general character the volumes differ little from the three already reviewed (22 *Green Bag* 592). The most striking difference is that to be found in an increased preoccupation with literary interests, for after giving up his diplomatic mission to France Mr. Bigelow spent three years in what he calls "comparative idleness," interesting himself in his farm and in literary pursuits, and afterwards, though he accepted such responsibilities as those of editor of the *New York Times* and Secretary of State, not to speak of other engagements, he was unable to play the role of publicist for any length of time to the exclusion of that of the scholar, bibliophile, and author. During these years he wrote his "France and Hereditary Monarchy," his sketch of Tilden's life, and his "Wit and Wisdom of the Haytians." He also met many of the literary celebrities of the day, American and foreign, of whom his lively impressions are recorded.

These "retrospections" are exceedingly readable, they reflect the sane estimates of a ripe mind of the men and movements of his own time, and they are of inestimable historical value. Further, in the absence of the note of egotism, they are a model for autobiographies.

WHITIN'S PENAL SERVITUDE

Penal Servitude. By E. Stagg Whitin, Ph.D., general secretary of the National Committee on Prison Labor, assistant in Social Legislation in Columbia University. National Committee on Prison Labor, New York. Pp. vii + iii (introduction) 100 + 62 (appendices) + viii (index).

THIS book was written to express current progressive opinion in favor of the state use system as opposed to the contract system of prison labor. But while the subject treated, in its economic, political, and educational aspects, is primarily that of prison labor, the book deals also with the broader subject of

penological reform, not methodically, it is true, but in a way that takes for granted fundamental principles of the newer penology, like the individualization of punishment and the preparation of the convict to earn an honest livelihood after his release. Dr. Whitin is secretary of the National Committee on Prison Labor, and his book purports to be "a brief summary of the findings" of that committee. It is more than merely a tract, a circular, or a report, it is a conscientious and intelligent contribution to the literature of penology.

COOK ON CORPORATIONS

A Treatise on the Law of Corporations Having a Capital Stock. By William W. Cook, LL.D., of the New York bar. 7th ed., 5 vols. Little, Brown & Co., Boston. Pp. lxxii, 4030 + 954 (forms, table of cases, and index). ($32.50 *net*, delivered.)

THIS standard treatise on private corporations, oftener cited than any other authority, and unquestionably the leading general work in its field, attains increased value by thorough revision and enlargement at the hands of the author. The inclusion of a large number of forms, many of them never before published, is a novel feature of the work which will add to its utility to the practitioner. The extent of the work is increased by one volume, it now running into five volumes, and it is more than ever a monumental treatise on a great topic. Since the work was begun, nearly thirty years ago, about 60,000 citations have been personally examined and summarized by the author. The treatise has been of slow growth, and we can thus understand its freedom from marks of haste or mechanical routine and applaud the skill of the author in building up his edifice of exposition on such firm foundations.

Among the important topics which have received much judicial construction since the appearance of the last edition in 1908, and have rendered a new edition necessary, are: watered stock, who may buy stock, fraud in sale of stock, trusts, dissolution, frauds on stockholders, *ultra vires* acts, *intra vires* acts, powers of officers, stockholders' suits, bonds, receivers, *quasi*-public corporations, telegraph companies, and express trusts under the common law. About 6,000 new citations have been prepared and inserted by the author, and he has brought the text fully up-to-date.

COHEN'S TRADE UNION LAW

Trade Union Law. By Herman Cohen, of the Inner Temple, Barrister-at-Law. 3d ed. Stevens & Haynes, Temple Bar, London. Pp. xx, 182 + appendices and index 77. (7*s.* 6*d.*)

THE enactment of the Trade Union Act of 1913, passed to alter the law as declared by the House of Lords in *Osborne* v. *Amalgamated Society of Railway Servants* (1910, A. C. 87; see 22 *Green Bag* 135), has furnished the occasion for a revision of an excellent synopsis of English trade-union law, arranged in the form of a collection of statutes with commentary. The author has brought to his task abilities of a high order; his prefatory matter on the liability of trade-unions for torts, the history of trade-unions, and restraint of trade, will interest even those who would not have occasion otherwise to make use of a book of this sort.

HEISLER'S FEDERAL INCORPORATION

Federal Incorporation: Constitutional Questions Involved. By Roland Carlisle Heisler, Gowen Memorial Fellow in the Law School of the University of Pennsylvania, 1910–12. Boston Book Co., Boston. Pp. 213 + 8 (table of cases) + 10 (index). ($3.50 *net.*)

A VERY satisfactory treatment of federal incorporation is given in the able but not extensive work for which the University of Pennsylvania

Law School stands sponsor and which it has listed as No. 3 in its series of publications. The treatment of the constitutional questions is logical and convincing Four possible methods of making federal incorporation compulsory are discussed. Two of them, exclusion of products of state corporations from interstate commerce and exclusion of their matter from the mails, the author thinks of questionable constitutionality as infringing the equal protection of the laws. Of the other two, the writer gives his preference to exclusion of state corporations from interstate commerce, though he considers that taxation of interstate commerce transacted by state corporations would be equally constitutional. Other phases of the subject are also discussed, and in the concluding chapter a clear definition of interstate commerce is attempted.

NOTES

"The Income Tax Law of the United States of America Analyzed and Clarified," by Albert H. Walker of the New York bar, is a pamphlet of 132 pages, in three parts. The first is a very clear analysis and criticism of the new federal Income Tax, calling attention to many problems of construction, with suggested interpretations. The second part is an attack upon another pamphlet issued by another author shortly after the Act took effect. The third part is the text of the Act. The pamphlet will prove entertaining and instructive to all students of the new federal Income Tax. (Privately printed, New York, 1913.)

The Proceedings of the 36th annual meeting of the New York State Bar Association, held at Utica last January, contain much important matter on the judicial recall and popular criticism of the courts (see 25 *Green Bag* 127). These were not the only subjects to receive extended and noteworthy discussion, and the printed report shows what serious attention was given to such topics as uniform procedure in federal courts, arbitration of the Panama Canal tolls question, revision of civil practice in New York, bipartisan nominations for judges of the Court of Appeals, workmen's compensation, etc.

One of the most interesting of recent bar association reports is that of the last annual meeting (1913) of the Illinois State Bar Association. So much discussion of the subject of procedural reform in Illinois took place at the sessions that the volume contains much that is worthy of attention. Besides the extended debate the papers delivered by President Harry Higbee, William E. Higgins of Kansas, Herbert Harley and Albert M. Kales, all touch various phases of the general topic of procedure and the administration of justice. Of the committee reports included, one of the more significant is that of the Committee on Legal Education, in which the chairman, Dean John H. Wigmore, presented a strong dissenting opinion in which he urged that more adequate recognition be paid to the laxity of requirements for admission to the bar in Illinois.

BOOKS RECEIVED

The Thirteenth Juror: A Tale Out of Court. By Frederick Trevor Hill, author of Lincoln the Lawyer, The Accomplice, etc. Illustrated by Gordon Grant. Century Co., New York. Pp. 211. ($1.20 *net.*)

Public Opinion and Popular Government. By A. Lawrence Lowell, President of Harvard University. American Citizen Series, edited by Albert Bushnell Hart, LL.D. Longmans, Green & Co., New York and London. Pp. xiv, 303 + 112 (appendices and index). ($2.25 *net.*)

Politician, Party and People. Addresses delivered in the Page Lecture Series, 1912, before the Senior Class of the Sheffield Scientific School, Yale University. By Henry Crosby Emery, LL.D., Professor of Political Economy in Yale University. Yale University Press, New Haven, Conn.; Oxford University Press, London. Pp. 173 + 10 (index). ($1.25 *net.*)

A Treatise of the Modern Law of Evidence. V. 4, Relevancy. By Charles Frederic Chamberlayne, of the Boston and New York bars, American editor of Best's Principles of the Law of Evidence, American editor of the International Edition of Best on Evidence, American editor of Taylor on Evidence. Matthew Bender & Co., Albany, N. Y. Pp. xxxv, 1148 + index to all four volumes 335. ($28 for the 4 vols.)

A History of Continental Criminal Procedure, with Special Reference to France. By A. Esmein, Professor in the Faculty of Law of Paris. Translated by John Simpson, of New York; with an editorial preface by William E. Mikell, Professor of Law in the University of Pennsylvania, and introductions by Norman M. Trenholme, Professor of History in the University of Missouri, and William Renwick Riddell, Judge of the High Court of Justice for Ontario. Continental Legal History Series, v. 5. Pp. xlv, 606 + 34 (appendices and index). ($4.50 *net.*)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Actions. "When is a Freehold Involved, within the Meaning of Section 118 of our Illinois Practice Act?" By Elmer M. Liessmann. 8 *Illinois Law Review* 176 (Oct.).

"It is submitted that a simple test of whether a freehold is involved or not is this: Is there a deed, decree or title regular on its face, and purporting to pass a freehold, under which one party claims a freehold, the validity of which is disputed by the other party? If so, then a freehold is involved."

Under the Illinois Practice Act a litigant is entitled to go directly from the *nisi prius* court to the Supreme Court when a freehold is involved.

Adjudication. See General Jurisprudence.

Aerial Law. "Sovereignty of the Air." By Blewett Lee. 7 *American Journal of International Law* 470 (July.).

Useful as an introduction to the literature, already large, of a contentious subject; the author directs attention to many of the latest Continental contributions.

Asexualization. "A Protest Against Laws Authorizing the Sterilization of Criminals and Imbeciles." By Charles A. Boston. 4 *Journal of Criminal Law and Criminology* 326 (Sept.).

In this notable article, Mr. Boston convincingly maintains that all legislation of this sort is premature, in view of our lack of the requisite knowledge of the laws of heredity. He quotes Leonard Darwin as saying that asexualization should not be enforced even on those whom Mr. Darwin regarded as certain to transmit a criminal tendency, until further information on the subject is available. The constitutionality of the punishment, or penal substitute, also receives full consideration.

Biography. "Francis Lieber." By Hon. Elihu Root. 7 *American Journal of International Law* 453 (July).

Senator Root's address as president of the American Society of International Law, delivered at the seventh annual meeting, at Washington, D.C., last April.

"Lord Hardwicke." *Blackwood's*, v. 194, p. 482 (Oct.).

"The damning fault of the work is the author's attitude to his hero. Much may be forgiven to the piety of a collateral descendant, but Mr. Yorke's idolatry exceeds the utmost bounds of reasonable indulgence."

While the writer of this review does not reach so favorable an estimate of the biographer as has been expressed by Mr. Lovat-Fraser (25 *Green Bag* 475) he gives most of his attention to Hardwicke, and offers a most interesting article on his life.

See International Law writers.

Consideration. "Antecedent Indebtedness as Constituting Value in New York." By David H. Miller. 13 *Columbia Law Review* 612 (Nov.).

"It is submitted that the foregoing outline of the subject considered, shows that the law in this regard is in a confused and unsatisfactory condition and that the result of various statutes as enacted in New York has not been to place it on any logical or consistent footing."

Constitutionality of Statutes. "The American Doctrine of Judicial Power, and its Early Origin." By William M. Meigs. 47 *American Law Review* 683 (Sept.–Oct.).

"The extant evidence seems to demonstrate conclusively the intention of the Convention that the judiciaries of the states and of the central Government should be bound in all cases to refuse to carry out state laws in violation of the intended Constitution."

See General Jurisprudence, Police Power.

Contracts. See Consideration.

Conveyances. "The Delivery of Deeds in Illinois." By Albert S. Long. 8 *Illinois Law Review* 159 (Oct.).

A concise and detailed exposition of Illinois case law.

Criminal Law and Procedure. "A New System of Criminal Procedure." By Maurice Parmelee. 4 *Journal of Criminal Law and Criminology* 359 (Sept.).

This richly suggestive paper is one of the most noteworthy of recent articles dealing with a more scientific procedure. Professor Parmelee indicates in what way criminal procedure may be remodeled so as to utilize more accurate methods of determining issues of fact, to the end that the process of legal proof may become more rational and trustworthy. We reserve the article for later notice.

"A Revolution in English Criminal Procedure." By T. Baty. 47 *American Law Review* 648 (Sept.–Oct.).

"What I desire to draw attention to in this paper, is the change in this respect which is rapidly coming over English jurisprudence. It amounts to the introduction of the inquisitional system in a characteristically irregular and unauthorized way, subject to none of the safeguards which attend that system on the Continent. . . .

"The new principle appears in connection with the new Criminal Evidence Act. That act is accordingly seen to put a new pitfall in the way of innocent accused persons. Either they must incur the suspicion which attaches to an accused who dare not go into the witness box to be examined — or they must throw themselves into the witness box at the earliest moment, before they have had proper and full legal advice, and at a stage when the prosecution can take full advantage of their admissions and mistakes."

See Insanity, Penology, Privileged Witnesses.

Criminology. See Penology.

Diplomacy. "Our Disorganized Diplomatic Service." By James Davenport Whelpley. *Century*, v. 87, p. 123 (Nov.).

"At no time in the recent history of the State Department has the American diplomatic service been in a state of such utter disorganization and ineffectiveness as at present."

See Nationality.

Due Process. See Taxation.

Federal and State Powers. See Insurance, Interstate Commerce, Taxation.

Freedom of Speech. "The Courts and Free Speech." By Stephen S. Gregory. 8 *Illinois Law Review* 141 (Oct.).

"The intelligent student of English history will recall that the great controversy which lasted for over twenty years as to the powers of juries in criminal prosecutions for libel, when Lord Camden and Erskine, afterwards with the powerful aid of Charles James Fox, fought to a successful issue this great battle for free speech against all the judges of England, terminated in the adoption of Fox's Libel Act, declaratory in form, which secured the right of juries in such cases to pass on law and fact. Modern legislation in that country seems to me to have impaired this somewhat; and the rigor and strictness of the law of libel in that jurisdiction certainly tend to limit free discussion. I sincerely hope these views may not obtain in this country. Free speech and a free press are absolutely essential to free institutions. It is no reflection upon courts and judges to say that these rights cannot exist in all their integrity without trial by jury."

General Jurisprudence. "Proceedings of the Conference on Legal and Social Philosophy." *International Journal of Ethics*, v. 24, p. 70 (Oct.).

The Conference on Legal and Social Philosophy was organized in New York last April at a meeting held under the chairmanship of Professor Dewey of Columbia University, inquiry having shown considerable interest to exist in the subject among teachers of law and teachers of philosophy. The institution of the Conference was suggested by the action of the Association of American Law Schools in recognizing the need of a conscious philosophy of law, and by the preface which its committee drew up to the Modern Legal Philosophy Series.

This first meeting, which served the purpose of organizing the new body, was called to discuss "The Relation of the Law to Social Ends." It was arranged that the next meeting should be held November 28–9 to discuss the problem of "Administrative Justice." This meeting will be held at Chicago University.

Abstracts of several interesting papers presented at the meeting last April are printed in this journal. The subjects were: "The Philosophy of Law in America," by Roscoe Pound; "The Ethnological Approach to Law," by A. A. Goldenweiser; "Ihering's Theory of Law," by Isaac Husik; "Responsibility," by H. Rutgers Marshall; "Criteria of Social Ends," by James H. Tufts; "The Conception of Social Welfare," by Felix Adler; "Law and Progress," by George W. Kirchwey; "The Content of Social Justice," by S. N. Patten; "Our Litigious System," by E. L. Henderson; "The Social Sciences as the Basis of Legal Education," by William Draper Lewis (see 25 *Green Bag* 479–80); "The Process of Judicial Legislation," by M. R. Cohen (the secretary of the Conference); and "The Social Ends in the Preamble to the Constitution," by G. A. Black.

We quote one extract, taken from the abstract of Mr. Henderson's paper; this is how he describes the drawbacks of "the extreme individualism of the litigious system," weighed against certain advantages likewise enumerated:

"(1) It matches the wits and the enterprise of the attorneys and so ultimately the resources of the contestants, rather than the facts for and against a case. Each party suppresses evidence against it and distorts testimony to suit its case. It fights. As in the mediæval trial by combat, with which it is directly akin, litigation makes the decision rest upon factors irrelevant to the issue of justice.

"(2) The expenses of litigation discourage those who are wronged from seeking redress, especially if their resources be slender.

"(3) The lawyer, trained to the task of the advocate, is put in the attitude not of seeking justice, but rather of winning his case. *Hence the legal profession develops no sense of responsibility for such laws and such procedure as will most efficiently secure justice.*" [The Italics are ours.]

"Courts and Legislation." By Roscoe Pound. *American Political Science Review*, v. 7, p. 361 (Aug.). Also 77 *Central Law Journal* 219 (Sept. 26).

"We cannot keep before us too clearly that finding the law — if you will, judicial law-making — is one thing, and true interpretation quite another. In dealing with statutes, since from the nature of the case all causes could not be foreseen, this finding the law or judicial law-making or spurious interpretation is necessary unless we would have the court decide by throwing dice or casting lots. But in constitutional law, where the issue is simply whether the legislative act must yield to the supreme law of the land embodied in a constitutional provision, the question can only be one of genuine interpretation. In the first decision upon the legal tender act, indeed, and in other cases occasionally, implied limitations upon legislative power

have been derived by analogy. But such implied limitations, if they exist, must be implied in fact. The idea of a prescriptive constitution, of principles running back of all governments of which bills of rights are but declaratory, is only another phase of the idea of natural law, and in its application means simply the finality of an ideal development of the fundamental principles of the common law. In many of our state courts this idea has been the bane of constitutional decisions upon provisions of the bills of rights. Indeed it has some warrant in the notions of those by whom the bills of rights were framed, and if these were statutory provisions, the position that they might be extended analogically as being declaratory of common law doctrines might be well taken. For our bills of rights represent the eighteenth century desire to lay down philosophical and political and legal charts for all time, proper enough in men who believed they had achieved finality in thought in each connection. The first period of our constitutional law was under the influence of these ideas. But legislatures at that time were willing to be guided by the prescribed charts and would have conformed thereto had there been no such constitutional provisions. The chief complaint during this period was that the courts extended the possibilities of governmental action by interpretation; for example, that they allowed the federal government to do much which it was denied the Constitution had granted thereto. Later, a period of vigorous legislation upon social subjects began and the complaint changed. Now it is urged that the interpretation of courts is too narrow, that legislatures, state and national, are shorn of the powers that belong to them. What has happened is this. Experience has shown, as judicial experience has always shown, the unwisdom of hard and fast enactment. The eighteenth century political and legal charts have been found unsuitable. We have found that after all a bill of rights was wisely omitted from the original draft of the federal Constitution. Such provisions were not needed in their own day, they are not desired in our day. It is true they have been aggravated to some extent by taking them to be declaratory and then reasoning from assumed first principles instead of applying the provisions themselves. But that practice has been disappearing with the wane of the idea of the finality of the common law, and the current reports show that with few conspicuous exceptions, both federal and state tribunals are definitely rejecting it. Consequently it is a misfortune that at the very time when spurious interpretation is thus losing its only foothold in judicial interpretation of constitutions, there should be a strong public demand for elimination or mitigation of undoubted restrictions by a process of spurious interpretation. . . .

"With respect to interpretation, . . . I take it our tasks are: (1) to rid ourselves here also of absolute theories, and in particular of the remains of the dogma of finality of the common law, (2) to repeal what ought to be repealed directly and straightforwardly and not store up mischief for the future by demanding indirect repeal by spurious interpretation, (3) above all to develop a sociological method of applying rules and thence if need be of developing new ones by the judicial power of finding the law."

(See p. 504 *ante*.)

"The Future of the Common Law." By Surrogate Robert Ludlow Fowler. 13 *Columbia Law Review* 595 (Nov.).

"That the newest-comers from Eastern and Southern Europe will take longer to assimilate and to become imbued with the national spirit, and familiar with the national laws, is not unlikely; but that their descendants will ultimately reject the laws and the customs of their new country is contrary to experience and our past history. Generation by generation these aliens too will soon fade away into the dominant and stronger mass of the already mixed population of this country. . . .

"To the common lawyer, the common law is not an end in itself, but a means of furthering the convenience of political societies subject to that law. To the German jurists, for example, law is an end in itself, and they go off on the origin of society and the purposes of law; they are intensely interested in the motives which first led men to regulate conduct by law. To them jurisprudence is one branch of philosophy or sociology. Their speculations and theories have to common lawyers an odor of the laboratory; they do not smell of the common law workshop. German jurisprudence is pre-eminently a jurisprudence of conceptions; the jurisprudence of the common law is a jurisprudence of actualities. Common lawyers say, in substance, that there is no such thing as a 'science of law' in the true meaning of 'science.' The Roman lawyer, like the common lawyer, never regarded law from a purely scientific point of view. The Romans did not speak of *juris scientia*, but of *juris notitia, juris peritia, juris prudentia*. As used by common lawyers a 'science of law' refers merely to the result of an orderly research among a great mass of material. When most common lawyers speak of a 'science of law,' they do not employ 'science' in its true signification of a finding of some thing which is and exists before we discover it, but they use the term 'science' in its secondary meaning, as denoting an organized body of known facts. It has been well said, 'that' 'law' 'does not exist until men make it, nor does it exist as a subject outside of our consciousness.' The deliberate opposition of common lawyers to the Continental philosophies of law is founded on the opinion that 'they are darkened by metaphysical thought and weakened by defective analysis of positive law.' "

"The Law-Making Forces." By William M. Blatt. 47 *American Law Review* 641 (Sept.–Oct.).

"Laws are kept in force by the constant balanced pressure of numerous social groups, and laws are made by the withdrawal (through fear, indifference or self-sacrifice) of the pressure of one or more groups. An important corollary is: no law can be effective unless sustained by the pressure of a powerful group or of several groups in a powerful combination."

See Government.

Government. "The Political Theories of the German Idealists, II." By Prof. W. A. Dunning, Columbia University. *Political Science Quarterly*, v. 28, p. 480 (Sept.).

Continued from *Pol. Sci. Qu.*, v. 28, p. 193 (25 *Green Bag* 342). This is the concluding part of the paper. In the earlier instalment Kant and Fichte were dealt with; Wilhelm von Humboldt and Hegel are here considered, and there is a valuable summing-up of the influence of the German idealists.

"There was great diversity among those whom I have classed together in this essay. But there was also an essential likeness that justifies the classification — the conviction common to all that the vital truths of political science were to be reached rather through the processes of pure thought than through investigation of experience."

These political idealists (1) developed to its utmost limits "the idea of will, as the ultimate element in politics and law"; (2) they began by formulating the social contract theory afresh, but Hegel "dropped it entirely in his explanation of the state"; (3) they "ascribed immeasured majesty and excellence to the state," preparing inevitably a tendency for the individual to wither and the attributes of authority to become the core of discussion; and (4) Fichte and Hegel both gave considerable stimulus to "the doctrine of nationality as a fundamental principle of political organization." The conceptions worked out with respect to the last "played a great role in the demand for German national unity that figured so largely in the stirring history of the mid-nineteenth century."

See Constitutionality of Statutes, Legislative Policy, Separation of Powers.

Insanity. "The New York State Bar Association Questionnaire — Some Comments." By Smith Ely Jelliffe, M.D., Ph.D. 4 *Journal of Criminal Law and Criminology* 368 (Sept.).

"To those who have followed the gradual development of psychiatry from the time of Bayle, who first started the splitting process which is segregating the psychotic conglomerate into fairly definite entities, to such a medical insanity has become an impossibility.

"A still wider retrospect shows that even the Hippocratic psychiatrist recognized this; for although Hippocrates himself used the words 'paranoia,' 'mania,' 'melancholia,' in the widest of senses, yet he was careful to say that one could recognize an entirely different mental affection in phrenitis; and although paranoid kinds of thinking, *i.e.*, mad, disordered, crazy thinking might be present in phrenitis, yet it was not to be confused with his mania, nor his melancholia — because it was not conditioned as they were by the passage of bile upward to the pituita, nor downward to the black gall of the liver.

"It was the early Roman, with his great desire to systematize everything, who gave us the word 'insanity.' The Roman despised what he called Greek subtleties in those days — just as the law of today is stupid regarding medical concepts. It was the legal type of mind that produced this false medical generalization, which even the early Greeks had avoided.

"In the long periods of submerged culture and civilization, Roman ideas prevailed, and with them the idea that there was one mental disease and that was 'insanity.' . . .

"How much does a Beethoven symphony weigh? is the kind of a question that law and medicine are asking each other under the present order of things.

"Law asks for a definition of a social status; not for a medical disease. It wishes to know as a protecting and regulating bit of machinery, how best to guide itself under certain circumstances, and desires as far as possible to put it in black and white and make it usable. Here again appears that Roman spirit that would reduce everything to form. This time the law is at fault in hanging on to old concepts long after they have outlived their usefulness. The law wishes to make one generalization upon a mental state as it relates to responsibility for an anti-social act, of the validity of a contract, as to the capacity to confer with counsel, as to the ability to handle one's estate, etc.; they would envisage all of the situations under one term, and then their definition as given is supposed to cover it — true with later modifications known to lawyers themselves, but still all pigeon-holed in the one category 'insanity.' . . .

"The term 'criminal insane' is a particularly unfortunate term. It is not an apt phrase. It is a very bad one. A sick man with a psychosis, let it be a paresis, a delirium tremens, an acute excitement in an epileptic, typhoid or pneumonia patient, may commit an anti-social act among many others. This individual should never be treated in any other way than any other sick man. His place is in a hospital under medical treatment, not in a jail under the curse of the law, seeking, as the vengeful hand of the wounded social body, to extract from him the eye for an eye, the tooth for a tooth. . . .

"What shall the law consider as a *crime?* This question is a large sociological one, and has little place in this questionnaire. It is too large to discuss. In general a society under certain forms of government called democratic does theoretically what it desires. How far this is from being true has been a theme for discussion for centuries. So far as the sick man is concerned — whether he may have committed an anti-social act or not — that is absolutely indifferent — he must always be regarded in the light of one needing medical and only medical treatment. Such medical treatment, if society so desires, may be under certain restrictive regulations, but the proper attitude of mind is that medical care and treatment is primary, legal restrictions secondary. The present system almost amounts to nothing but legal regulation and restriction. In New York State even the so-called 'Hospitals for the Criminal Insane' are bits of the political machinery of the 'Department of Corrections.' In many other states there are even no decent hospitals. The sick man is locked up in jail. And this is an age that prides itself on enlightenment. . . .

"The only interest that society has in the so-

called criminal insane is his mental disease. He is to be treated solely from that point of view. He is not a 'criminal' save from the standpoint of legal sophistry; he is a sick man, suffering from a psychosis. . . . He needs treatment for his psychosis so long as it lasts, and society can only demand that the doctors know their business, will treat the disease as it should be treated, and if society needs protection at the same time, or at subsequent times, that the proper provision shall be made. . . .

"My final comment is that the questionnaire itself attempts too much. It could be limited to the question of so-called medical insanity and the so-called legal tests — then discussion might be of profit."

See Criminal Law and Procedure.

Insurance. "Franchise in Conducting the Business of Insurance and Regulation of its Rates." By N. C. Collier. 77 *Central Law Journal* 166 (Sept. 5).

"Each state should be allowed to select its own table of expectancy. . . . The public only took over rate regulation of public service companies, because of the maxim that no one should be a judge in his own case. . . . When the people are convinced that insurance rates are but justly compensatory and uniform, a more general resort to insurance will be the result."

International Law. See Maritime Law, Nationality, War.

International Law Writers. "The Authority of Vattel." By Charles G. Fenwick. *American Political Science Review*, v. 7, p. 395 (Aug.).

"If the practice of nations is frequently quoted in support of a given proposition, it is merely because Vattel regards it as confirming the truth of a rule which he has already established *a priori;* the real test of the lawfulness or unlawfulness of a given act is always its conformity with the law of nature."

The author announces that a critical estimate of the actual rules of international law formulated by Vattel will appear in a later issue.

See Biography.

Interpretation. See General Jurisprudence.

Interstate Commerce. See Insurance, Railway Rates.

Invitation. See Trespass.

Judicial Powers. See Constitutionality of Statutes, General Jurisprudence.

Judiciary Organization. "The Security of Judicial Tenure." By Edmund F. Trabue. (Report of Committee of Kentucky State Bar Association.) 47 *American Law Review* 667 (Sept.–Oct.).

"It is said the plan is quixotic; that the people will never clothe the Judges with life tenure. If it be the best, this is certainly an impeachment of the capacity of the people for self-government. Clearly, it does not seem the part of statesmanship to abandon the best plan and urge something inferior upon the assumption that the people have not intelligence sufficient to adopt the best. The apprehension, however, of opposition from the people arises largely from the confusion of our plan with that of appointing the Judges. Appointment by the Governor, or other officer, takes from the people the power of direct action. But we propose the election, not the appointment of Judges."

Labor Unions. See Monopolies.

Legal Fictions. See Insanity.

Legal History. "Notes on the History of Commerce and Commercial Law; II, The Middle Ages." By Layton B. Register. 61 *Univ. of Penn. Law Review* 652 (Oct.).

A valuable historical survey. Continued from 61 *Penn. L. Rev.* 431 (25 *Green Bag* 313).

"The customs of the commercial classes, preserved in the statutes of the corporations of merchants and of the municipalities, had authority over very limited territories and were so numerous as to be confusing. The great maritime codes brought some order out of the chaos in their particular field, though their authority was probably simply public acceptance. The hostile occupation of the African and Asiatic shores of the Mediterranean by the Arabs obstructed the route to India and, with the advent of the compass, led to the discovery of the ocean route to India and a new hemisphere and the decline of Italian and German commerce. In the period to the French Revolution commercial supremacy passed to new nations more favorably situated to carry on a world trade. National consciousness and national law were born."

"Colonial Appeals to the Privy Council, II." By A. M. Schlesinger. *Political Science Quarterly*, v. 28, p. 433 (Sept.).

Continued from *Pol. Sci. Qu.*, v. 28, p. 279 (25 *Green Bag* 343).

"By far the greater proportion of the cases appealed were cases of private law and involved nothing but private rights."

"The Development of the Canadian Legal System." By Sidney T. Miller. 61 *Univ. of Penn. Law Review* 625 (Oct.).

Describing the legislative and judiciary system of Canada both before and after the British North America Act.

"Historical View of the Office of Sheriff in England." By Benjamin M. Day. *Case and Comment*, v. 20, p. 320 (Oct.).

"It has been reduced, step by step, been shorn of its strength and glory, and is now at last little more than an automatic performer of routine affairs, retaining as if in feeble imitation of ages past, the shell of stately ceremony. As Maitland says, 'The whole history of English justice and police might be brought under this rubric, the decline and fall of the sheriff.' "

See Constitutionality of Statutes.

Legislation. See General Jurisprudence.

Legislative Policy. "The Drift in French Politics." By J. Salwyn Shapiro. *American Political Science Review*, v. 7, p. 384 (Aug.).

"So completely has the radical spirit taken possession of the French people that even the reactionaries are dominated by it; for what is a *coup d'état* if not a revolutionary method of establishing a conservative government? The aristocratic spirit, driven from the body-politic, has found refuge in literature; there French tradition still rules, unbroken and unchallenged."

Maritime Law. "The Hudsonian Sea is a Great Open Sea." By Thomas Willing Balch. 7 *American Journal of International Law* 546 (July).

"If the legal situation of Hudson's Bay is regarded in the light of the historic development of the gradual abandonment of the claim of various states to jurisdiction over large extents of the sea, and the substitution for those restrictive claims of the principle of freedom of navigation, commerce, and fishery for all nations, more and more over the high seas, it is perfectly clear and evident that in the light of present international law, the waters of Hudson's Bay — the three-mile belt of territorial waters following the contour of the shore always excepted — form part of the high seas and are free to the vessels of all nations for fishing as well as navigation."

Mr. Balch recommends, as a question for the Third Hague Conference, a re-statement of the limits of territorial seas, and a convention on the subject, as a means of forestalling unnecessary friction in future between any two great powers as a result of fishery controversies.

Monopolies. "Six Months of Wilson." By George Harvey. *North American Review*, v. 198, p. 577 (Nov.).

"The proviso [exempting labor-unions from prosecution under the Anti-trust Act] was regarded by its sponsors as a mere precursor of a definite amendment of the 'substantive statutes' to exempt one class from the punishment visited upon all other classes for criminal offenses against the law. Already signs appear that, encouraged by President Wilson's attitude, Mr. Gompers intends to urge this explicit proposal upon Congress at the coming regular session, in conformity with the prediction of Senator Hughes."

"What the Sherman Anti-Trust Act has Accomplished." By Alfred Hayes. 47 *American Law Review* 697 (Sept.–Oct.).

"If price regulation fails, government ownership of all organizations dominant in their trade may be inevitable."

Nationality. "Basic Elements of Diplomatic Protection of Citizens Abroad." By Edwin M. Borchard. 7 *American Journal of International Law* 497 (July).

An admirable survey of the subject seen in broad historical perspective; philosophical in tone, and clear in its exposition and arrangement of leading principles of existing international law.

Negotiable Instruments. See Uniformity of Law.

Open Seas. See Maritime Law.

Penology. "A Plan of Rational Treatment for Women Offenders." By Katharine Bement Davis. 4 *Journal of Criminal Law and Criminology* 402 (Sept.).

"The plan includes: —

"1st — The limiting of functions of all courts which deal with women solely to determining the question of her innocence or guilt.

"2d — The establishment of a State Commission into whose care all women delinquents should be given as soon as convicted.

"3d — This commission might consist of seven members — two from each of the three districts, into which the state would be divided, and one commissioner at large. The commission should be absolutely non-political in character — probably appointed by the Governor of the state — one each year to serve for a term of seven years, and should be men and women fitted by training and experience for so important a duty. Preferably, I would have such a commission composed of three men and four women. The state could be divided into three districts. The first district to consist of Greater New York, the remainder of Long Island and Westchester County; the second and third districts would comprise the remainder of the state, so divided as to give, practically, the same population to each division. . . .

"4th — At a central point in each district, but outside of a city, the commission should locate a clearing house. Through those clearing houses all women convicted in each district should pass. Each clearing house should have a staff consisting of an expert physician, or physicians, a psychologist, and field workers. As a result of their study of the individual cases, the women would be assigned by the commission to the proper institution. The commission would be responsible for the work of the clearing houses; would appoint the heads of each, subject to civil service regulations, with the desirable proviso that all scientific positions will be open to competition from any well qualified person whatsoever, regardless of state boundaries.

"5th — Co-operation should be provided for between the commission in charge of delinquent women and the state probation commission whereby the latter would be directly responsible for the women placed on probation. All persons who were found on the clearing house examination to be of fair mentality, capable of self-support, and otherwise suitable for probation would immediately be turned over to the state probation commission.

"6th — The women's department in all our county penitentiaries, in the New York workhouse, and in our state prison should be abolished. Women should be detained in the county jails and city prisons (preferably in all of the larger cities in detention houses especially for women) only until they have been judged guilty by the courts.

"7th — The using of private institutions only for the care of delinquent girls under sixteen years of age, making the state responsible for the care of all adult women law breakers.

"8th — A change in the law whereby with proper safeguard all sentences for women should be absolutely indeterminate. The law to provide the conditions under which parole and final discharge should be made.

"9th — The more rational use of the existing state institutions for women and the establishment of such other institutions as would be necessary to carry out the plan."

"Control of Crime in India." By Charles Richmond Henderson. 4 *Journal of Criminal Law and Criminology* 378 (Sept.).

A highly informing descriptive article, based on observations made in visits to prisons, interviews with the prison superintendents, and readings of works of travelers and government reports. A bibliography is appended.

See Asexualization, Criminal Law and Procedure, Insanity.

Perpetuities. See Real Property.

Police Power. "Problems of the Police Power." By Prof. Ernst Freund, Ph.D., J.U.D. *Case and Comment*, v. 20, p. 301 (Oct.).

"A future critical retrospect of the period of twenty-five or thirty years now apparently drawing to a close will probably condemn the attitude of the courts toward the police power in matters of labor legislation as constitutionally unsound and politically unwise. The impartial historian will, however, find an explanation of this attitude in the great difficulty of confining the exercise of the police power within legitimate bounds.

"It is even now in many cases almost impossible to determine whether or not a measure is demanded by considerations of health or safety, and the agitation for a further reduction of hours of labor of women will have to face the difficulty of justifying itself on these grounds. If however, legislative control is admitted on the broad and practically unlimited basis of social advancement or economic readjustment, what guaranty is there against the abuse of the police power for the furtherance of special or class interests parading, as they have always done, under the guise of the public welfare?"

This number of *Case and Comment* contains also the following articles on "The Police Power": "The Police Power: Its Indefinable Character a Potent Reason for Guarding the Manner of Selection and Independence of Those whose Duty it is to Declare its Scope," by Hon. Andrew J. Cobb; "Public Opinion and the Police Power," by Hon. Horace M. Towner; "The Police Power of the States as Restricted by the Federal Constitution," by Albert H. Putney; and "Power of Municipality to Prevent Overcrowding of Street Cars," by Herbert C. Shattuck.

Privileged Witnesses. "Waiver of Physician's Incompetency to Testify." By N. C. Collier. 77 *Central Law Journal* 264 (Oct. 10).

"I think this character of statute should be treated in a liberal way to the securing of the beneficent result it aims at, and the temper of some of the cases do not seem in this direction. If waiver is to result from a course of conduct, the conclusion of waiver should be very clear, and the fact that incidentally it may prejudice an adversary should not be the test of abandonment of a statutory privilege."

Procedure. See Actions, Criminal Law and Procedure, General Jurisprudence, Privileged Witnesses.

Railway Rates. "Some Legal Problems of Railroad Valuation." By Royal E. T. Riggs. 13 *Columbia Law Review* 567 (Nov.).

"Since that time [of the decision in the *Granger* cases] the right of a state to fix the maximum rates to be charged for the transportation of persons and property within its own jurisdiction, unless restrained by some charter or contract, or unless what is done amounts to a regulation of foreign or interstate commerce, has been unquestioned. No limitations upon the effect of the decision were suggested, and its sweeping effect was pointed out by Justice Field in his dissenting opinion in *Stone* v. *Wisconsin* (94 U. S. 181): —

" 'The questions thus presented are of the gravest importance, and their solution must materially affect the value of property invested in railroads to the amount of many hundreds of millions, and will have a great influence in encouraging or repelling future investments in such property. . . . The doctrine advanced in *Munn* v. *Illinois* has been applied to all railroad companies and their business, and they are thus practically placed at the mercy of the legislature of every state.' . . .

"So far as the relations of the railroads and the intrastate rates of any particular state are concerned, we cannot but conclude that although resting theoretically within the shadow of the Constitution, the railroads are really from the almost superhuman difficulties of proof which must be surmounted, before a state system of intrastate rates will be declared invalid, thrust back to the age of Mr. Justice Field when he wrote the words already quoted, and may yet find in the growing power of the Interstate Commerce Commission, so vigorously combatted in so many hard fought legal struggles, their salvation."

Real Property. "Possession as a Root of Title." By T. F. Martin. 61 *Univ. of Penn. Law Review* 647 (Oct.).

A lucid exposition of English common law doctrine, citing one recent case (*Perry* v. *Clissold* (1907), Law Reports, A. C. 73).

"Application of the Rule in Shelley's Case Where the Limitations are Equitable, or Where There is an Executory Trust." By Prof. Albert M. Kales. 8 *Illinois Law Review* 153 (Oct.).

"The trust is executory, so that the Rule in Shelley's case does not apply only where a settlement is to be executed or a conveyance made by the trustee and where there is an informal or

imperfect indication as to what that settlement is to be, or where the language used to describe the settlement to be made is not intended by the settlor or testator to be taken in its strict legal sense." A statement of this kind does not eliminate difficulties; "it now becomes a question of construction to determined whether the testator has been his own conveyancer," etc.

See Conveyances.

Separation of Powers. "The Lines of Demarcation between Legislative, Executive and Judicial Functions, with special reference to the Acts of an Administrative Board or Commission." By Edward D. Martin. 47 *American Law Review* 715 (Sept.–Oct.).

"An examination of the cases shows that generally speaking the lines of division laid down in the organic laws are strictly adhered to. When one department crosses into what is technically the realm of another such crossing is either constitutionally authorized, or is necessary for the department so encroaching to properly carry out its own functions."

Social Legislation. See Constitutionality of Statutes, Police Power.

Taxation. "Congressional Regulation of State Taxation." By Prof. Frank J. Goodnow. *Political Science Quarterly*, v. 28, p. 405 (Sept.).

"It may accordingly be claimed that the decision in the *Civil Rights* cases does not exclude the view that Congress may, in the exercise of its legislative powers under the fifth and last section of the Fourteenth Amendment, prohibit as a taking of property without due process of law the exercise of the taxing power of the several states in at least some instances; for example, the taxation by states of mortgages apart from the domicil of the mortgagee or apart from the situs of the land upon which they are secured. In other words, Congress has some degree of power to define as against state action what is a taking of property without due process of law, just as it has some degree of power to define under the Thirteenth Amendment what is 'involuntary servitude' and under the Fourteenth Amendment what is 'equal protection of the laws.' "

Trespass. "Status of the 'Turntable' Doctrine in the United States." By D. Goode Tinsley. 77 *Central Law Journal* 245 (Oct. 3).

Uniformity of Law. "The Attitude of the Bench and the Bar toward the Uniform Negotiable Instruments Law." By Hon. Amasa M. Eaton. 77 *Central Law Journal* 282 (Oct. 17.)

"When adopted, the Act itself is the source of authority and the only source of authority, and therefore it should be cited and followed and decisions under the same sections in cases under the same law are the only real precedents. Of course, former decisions and old text-books may be cited by way of illustration or explanation or to explain the historical development of the principle involved, but the real authorities are the provisions of the Act and the decisions under it, whether in the state where the particular case is being argued or whether they be decisions in the courts of other states under the same sections of the same uniform law. It is only by following this course that uniform decisions under a uniform law can bring about uniformity throughout the nation. . . .

"Uniformity of decisions under a uniform law is absolutely necessary to real uniformity, and how can there be such uniformity in decisions without citation and following the decisions of other courts upon the same sections of the uniform law?"

Appended to this article is a criticism of the federal decisions in which the Uniform(?) Negotiable Instruments Act has been construed or where it should have been the basis of the decision and wherein its provisions were not cited and the decisions of other states thereon ignored; in place of which, however, the courts cite the old common law decisions and the old text-books as if they were now the source of the law instead of the Act itself.

See Consideration.

War. "The Prisoner of War." By George B. Davis. 7 *American Journal of International Law* 521 (July).

Review of a recent French treatise by du Payrat, which General Davis regards of great excellence, and the subject-matter of which he presents and discusses at some length.

Latest Important Cases

Burglary. *What Constitutes Breaking — Opening a Door Left Ajar — Sliding Door of Freight Car.* Vt.

A rather full consideration of the legal definition of burglary was set forth in the opinion of the Vermont Supreme Court in *State* v. *Lapoint*, in which a conviction on a count charging burglary was confirmed, where the accused had entered a freight car by pushing the door, which was open about an inch, halfway open and climbing in. The court, on exceptions, held this sufficient to constitute a breaking. Munson, J., said: —

"It may be conceded at the start that by all the earlier cases, and by the great weight of authority to the present day, the further opening of a door left ajar, or of a window slightly raised,

is not such a breaking as is essential to the crime of burglary. This being the situation our examination of the cases will have reference mainly to the reasons given for the rules adopted, and the consistency with which the rules have been applied. . . . .

"A man may have locks on all his doors and windows, and if he closes the doors and windows without turning a lock, this is not to be accounted negligence. But if in addition to the non-use of his fastenings he leaves a window sash slightly raised, his negligence becomes a shield to the intruder. This distinction evidently turns upon the theory, prominent in both early and recent cases, that the manifest carelessness of the householder tempts the passer-by to enter. It is doubtless true that a window partly raised or a door standing ajar may attract attention and be a temptation to one who might not be be disposed to try a window or door to see if it was unfastened. But other conditions quite as likely to attract attention and tempt the observer have been held sufficient to support the charge; for instance, a network of twine covering a window space otherwise open, or a chain attached to the outside of a door and hooked over a nail. *Com.* v. *Stephenson*, 8 Pick. 354; *State* v. *Hecox*, 83 Mo. 531. And one court has disagreed upon and left undecided the question of breaking, where the covering of a window opening was a cloth hanging from two nails in the top of the window frame. *Hunter* v. *Com.*, 7 Gratt. 641.

"The word 'breaking' implies the use of force, but it is universally held that the slightest force will be sufficient. It is evident that the question of force has no bearing upon the distinctions affecting this case as they are established by the decisions. The mere lifting of a closed window is a sufficient breaking, but the further raising of a partially opened window is not. The pushing open of a closed but unlatched door is a sufficient breaking, but the pushing back of one found standing ajar is not. And yet the force used in the two cases of either class is of the same character and degree, differing only in the continuance of the effort.

"It is said by way of a general designation that the thing moved or displaced to permit the entrance must be something which is relied upon as a security against intrusion and a means of safety to person and property. The cases show how little this means. No provision for safety is required beyond what is included in the barest construction of a building intended to meet the requirements of civilized life. The occupant may rely upon substances and conditions which are altogether wanting in real security, — provided no opening whatever is left. The requirement, as applied to the ordinary means of entrance, is limited to measures which are about equally adapted to guard against the entering of strangers bent on crime and the unceremonious intrusion of friends.

"It has always been held that an entrance through a chimney is a breaking. It is said that a chimney is as much closed as the nature of things will permit — that it is a necessary opening and needs protection. The pushing open of a closed but unfastened transom, that swings horizontally on hinges over an outer door of a dwelling-house, is a breaking. *Timmons* v. *State*, 34 O. St. 426, 32 Am. Rep. 376. But if it were left to hang slightly away from the frame it would not be a breaking to push it further, — unless it were held otherwise on the ground that the position of the transom was such that the condition in which it was left would not be likely to attract attention. In other words, if such a transom is left in a position to serve in the slightest degree the purpose for which it was put on hinges, an entrance by way of it will not be a breaking. If an upper sash sustained only by a pulley weight is left in position, it will entitle the household to the protection of the law. *Rex* v. *Haines*, Russ. & Ry. Cr. Cas. 451. But if it be left a little lowered, an entrance effected by pulling it down will not subject the intruder to the penalty. As far as the law is concerned, the necessities of convenient, unobstructed and adequate ventilation have thus far yielded to the theories which burden the inmate with the duty of protecting the outsider from temptation. The incongruity of this situation cannot well be overlooked in a time when the necessity of a constant and abundant supply of fresh air is so generally recognized.

"Whatever reasons may formerly have existed for making this distinction, there seems to be none for maintaining it longer.

"The offense consists in breaking and entering with felonious intent; and the real breaking is the removal of the obstruction which, if left as found, would prevent the entering. The fact that a quarter of an inch of the space needed to effect an entrance existed before the intruder commenced operations ought not to relieve him from the penalty. The point has never before been brought to decision in this state. The only cases we know of which directly support the view taken are *Claiborne* v. *State*, 113 Tenn. 261, 106 Am. St. Rep. 833; *People* v. *White*, 153 Mich.

617, 15 Ann. Cas. 927; *State* v. *Sorensen*, 138 N. W. 411 (Iowa). Convenient references to the cases generally will be found in the notes to *People* v. *Richards*, 2 Am. St. Rep. 383; *State* v. *Vierck*, 139 Am. St. Rep. 1047."

Insanity. *See* Wills.

Interstate Commerce. *Excise Tax on Capital of Foreign Corporations — Burdening of Interstate Commerce by State Regulations. U. S.*

In *Baltic Mining Co.* v. *Massachusetts* and *S. S. White Dental Co.* v. *Massachusetts*, (L. ed. adv. sheets, no.1, p.15) the United States Supreme Court by a majority of six to three upheld the constitutionality of a state statute imposing an excise tax upon the capital stock of foreign corporations for the privilege of doing business within the state. The Court (Day, J.) said:

"The examination of the previous decisions of this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the state. In the cases at bar, the business for which the companies are chartered is not of itself commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of the state to tax it by burdening laws. From the statement of facts it is plain, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

The Chief Justice and Justices Van Devanter and Pitney dissented.

Wills. *Disposing Capacity of Insane Testator — "Manic Depressive Insanity" — Civil and Common Law Tests. N. Y.*

In one of the first cases to be decided where the issue was the capacity of a testator afflicted with "manic depressive insanity," the Surrogates' Court of New York County decided, in Matter of *Martin*, Nov. 1913, that the burden was on the proponent, to satisfy the conscience of the surrogate that the testator was *capax* at the moment of making his will, and that in case of doubt on that point, the decree by the common probate law must be against the will.

Surrogate Fowler said in his opinion: —

"In countries where the civil law obtains it is claimed that there is observable a greater refinement than is common with us in cases involving legal capacity. It is claimed in civil law countries that the decisions in common law countries are on the subject of legal capacity "variant and discordant," and I fear it is so. In civil law countries it is generally held that the proof of legal capacity in cases of partial insanity is extremely difficult, and that when lucid intervals have to be computed by days and hours courts should be strongly inclined on that ground alone to disbelieve in the restoration of the patient to a state of disposing capacity. In common law countries this is nowhere so clearly stated. As this is the first case, I think, in this state on a will made by one proven to be afflicted with the intermittent type of insanity now known as 'manic depressive insanity,' there is in existence no authority for this very case, and when that is the fact the civil law rule becomes in this court, in the absence of all other authority, extremely cogent (*In re Van Ness's* will, 139 N. Y. Supp., p. 493; *In re Swarts's* will, 139 N. Y. Supp., p. 1113).

"But I will not rest my judgment in this cause on a rule taken from the civilians. There is a well established principle of that probate law, which is part of the common law of this state, and this principle I think is determinative here. I refer to the rule requiring a proponent of a will to satisfy the conscience of a probate court that the will he propounds is the will of a free and capable testator. If proponent fail so to satisfy the conscience of the court, the court may then pronounce against the will. This was a well established canon of the probate law, which, as a part of the common law, became the fundamental law of this state by constitutional reservation, and I have never been able to put my hand on an express and clearly pronounced adjudication in this state changing this old and established principle of the testamentary law. Indeed I find the principle tacitly recognized in cases of late authority in this jurisdiction (*Howland* v. *Taylor*, 53 N. Y., 627; *Rollwagen* v. *Rollwagen*, 63 N. Y., at p. 517; Matter of *Cotrell*, 95 N. Y., at p. 336)."

(Reported *N. Y. Law Jour.*, Nov. 18.)

The Editor's Bag

THE AMERICAN JUDICATURE SOCIETY

AT a time when the largest scientific undertakings of the age are so largely committed to the care of privately endowed agencies, it is surprising that we should have had to wait till the year 1913 for the establishment of a foundation devoted to the cause of scientific reform of judicial organization and procedure. It seems that a great debt of gratitude is due Mr. Herbert Harley for bringing about the creation of such a foundation — a debt the greater because he has not only possessed the initiative to establish it on a basis that promises effectiveness and success, but has also, with admirable discernment, formulated a working program which should command the unqualified endorsement of every thoughtful and candid member of the legal profession.

The American Judicature Society is based on the idea that the most effective preliminary to law reform is a consensus of the best expert opinion on the defects of procedure and the remedies to be applied. Once these expert recommendations have been obtained, in the shape of concrete proposals emanating from the best qualified observers, their adoption and fulfillment may be left to take care of itself, for the proposals need no higher sponsorship than that of the best expert opinion, and may be trusted to exert sufficient influence upon the bar, the public, and the legislatures by virtue of the personnel of the body making the proposals and of their manifest intrinsic merits.

In the absence of any institution so well fitted to undertake this task, the American Judicature Society can accomplish what no other body could hope to do. The undertaking requires a high degree of specialization and is in its nature highly laborious. The American Bar Association would be an appropriate agency, but neither it nor any law school faculty could possibly provide itself with the requisite facilities for the accomplishment of an enterprise of such magnitude. Nor could the work be carried out under government auspices. An undertaking which demands such large resources of talent, time and money can be performed only by some private organization specially constituted to take charge of it, and the plan of Mr. Harley's organization has been so carefully studied in its details that it is hard to see how it could have been improved upon.

It is of course not to be supposed that experts will be in agreement upon every point. But they are likely to be in agreement on most of the cardinal matters, and experience has shown on more than one occasion that the best way to solidify expert opinion on any subject is to prepare a joint draft embodying concrete proposals. Such drafts, through their submission to a council of three hundred of the foremost lawyers of the country for criticism, will be certain to express the ripest con-

clusions obtainable and to provide a satisfactory standard for legislative action.

The first task of the society will be to draft a model judiciary act. In the words of the founder, "under a scientific organization of courts procedure diminishes in importance. Most significant of all are the methods for selecting judges, their compensation and tenure, and independence of every allegiance save only the law." There will also be wide acquiescence in the fact that "experience for over a generation in England has proved beyond all cavil that a unified court with administrative machinery has no stomach for technicalities of procedure."

The society will then submit a model short procedural act supplemented with a model code of rules of court. It also proposes after thorough research to formulate and submit a model act to organize the bar of a state, so that the bar can attain the power to govern itself and discharge its specific responsibilities.

This is no visionary undertaking, no foolish quest of unattainable uniformity. As Mr. Harley said in his preliminary circular, it is not conceivable "that we should ever have one uniform and unvarying procedure for all state and federal courts. . . . It is nevertheless true that the principles involved in the organization and operation of courts are identical in all states." In settling the details of this procedure "there is no panacea. Diagnosis is all-important. When we have correctly ascertained the causes for dissatisfaction we shall be able to formulate the appropriate remedy. We have a wealth of experience in the assorting of which scientific methods are needed."

There is no reason why any jealousies should hamper the work of the society, for it will naturally enlist the services of those most active on behalf of procedural reform in the national and state bar associations; it should therefore tend to unify professional opinion and to strengthen the work of every state bar association committee by bringing it into closer solidarity with committees in other states engaged in similar tasks. It is also a satisfaction to discover that there is at last a satisfactory clearing house for discussion, to which all interested in law reform can look for responsible leadership in the propaganda of the movement. It will be no small advantage to lawyers and laymen to be able to feel, at last, that they can confide in an agency which will substitute concentrated, well organized effort, for the wellnigh fruitless dissipation of energy that has marked the experience of recent years.

A GHOST STORY IN COURT

STROMBOLI, that island volcano which is known as "The Lighthouse of the Mediterranean," once figured in a court of law in connection with a most circumstantial ghost story. In the year 1688 a Mrs. Booty brought in an English court an action of slander against a certain Captain Barnaby, inasmuch as he had declared that she had seen "Old Booty running into the flames of hell, pursued by the devil!"

The words were admitted, but for the defense it was proved that on May 15, 1687, the day of Old Booty's death, the captain with a large party of friends went ashore at Stromboli to shoot rabbits. At about 3.30 in the afternoon, two men were seen running toward the volcano. Captain Barnaby exclaimed, "Lord bless me, the foremost is Old Booty, my next door neighbor." They then vanished in the flames, a fact of which every one took note.

In addition to the testimony of Captain Barnaby and his friends, Old Booty's clothes were brought into court and identified by several witnesses as being similar to those worn by the foremost man who ran into the crater. The judge, Chief Justice Sir Robert Wright, was so impressed by this evidence, that he said: "Lord have mercy upon me and grant that I may never see what you have seen. One, two, or three may be mistaken, but not thirty." Mrs. Booty lost her case, and, it is thought, it remains the only judicially accepted ghost story on record.

EXPEDITING A VERDICT AND SENTENCE

IN THE early days of courts in the western territories, many amusing and often ludicrous occurrences relieved the dull dry-as-dust cases that are inevitable in the law at its best.

A Michigan lawyer recalls that old Judge Markham, or it may have been some other equally versatile jurist, was presiding on the bench in the County of Monroe, in the Wolverine Territory, where an equally original character, Colonel White (or Black, or Gray) was sheriff, a rum case was on trial and the jury were out considering their duty and the evidence, and the law in the case.

They had been out an unreasonably long time and the Judge became quite nervous, and wanted a verdict, because he had some friends from Kentucky whom he was entertaining at home. To his clear and far-seeing mind, one of the most remarkable, in many ways, that ever held jurisdiction in the state or territory, there was no excuse for any prolonged consideration of the case by any jury.

Leaning back in his big chair, seemingly lost in thought, he suddenly sat bolt upright and beckoned to the Colonel, who majestically walked toward the bench.

"Colonel — Mr. Sheriff, I should say, —just see if that respondent won't plead guilty provided his fine is put at $50?"

The sheriff smiled a broad smile, and went over and had a short quiet conversation with the prisoner. It took but a few minutes, and in less time than it could be told, he had retracted his plea, pleaded guilty and had been fined.

Then the Court sent out for the jury.

"Gentlemen," said he, "it seems that some of you are not satisfied in your minds that the prisoner is guilty." The jury looked at each other.

"Is that a fact, gentlemen?"

"It is, may it please the Court," said the foreman.

"Well, then, for your own information and edification I will say that the prisoner has a clearer idea of that question, and is well satisfied that he is guilty, for he has *pleaded guilty and has been fined*. You are excused from further consideration of the case."

CONTEMPT OF COURT

DURING the temporary illness of the Judge just quoted, another Judge from another county was presiding in his place; a "boozer" to some extent, with not much ability and less dignity and respectability. At this session of court, Lawyer Johnson, who had rather a familiar acquaintance with the Judge, called around at the hotel where he was staying and during an entirely informal discussion of things in general, was tempted to perpetrate a harmless joke on the old man. It was not appreciated nor liked, quite the reverse. Throwing down his big odoriferous cigar, he turned around on the lawyer and remarked that he was about to enter up a fine of $5 for contempt of court.

Astonished and completely upset by this turn of affairs, she remonstrated. Court was not in session; it was absurd; it could not be done; besides, "Judge, you will please to remember that this Court is a proper and legitimate subject of contempt at all times!"

Nevertheless he paid the fine.

THE SALIC LAW DEFINED

THE following agreeable lines, which are reproduced from the columns of the *Boston Globe*, were written by a Maine lawyer who has long been one of our own subscribers: —

Salic law was Teutonic,
A statement laconic,
When thought — without mention,
When brought — mere invention,
And from our present view
Like Topsy — "just grew."

What its origin was
Has been frequent cause
Of legal presumption,
And studied assumption;
But as far as e'en heard,
Only guessed from the word.

'Twas not thought of much
Until women, as such,
On reigning were bent
By right of descent,
Which vain man, quite elate,
Invoked Salic law to abate.

It was ages ago,
And woman, although
Assigned quite to the home
Found her way to the throne;
And Salic law had no naming
When women began reigning.

And the law to this day
Men invoke the same way,
Excluding women from voting,
On which many are doting,
And that's how we get
The mad suffragette.

JOB HERRICK.

Camden, Me.

HAPPENINGS IN COURT

A REMARKABLE illustration of how well the 10,000 soldiers at Texas City, Texas, behave themselves may be had from the fact that during all their nine months' stay there, only once have any of them been arraigned before the Justice of the Peace, and that case was summarily dismissed. It all happened like this: There was a lull in the business of dispensing justice to the camp followers through the Texas fee system, so the old Justice turned a wistful eye toward the soldier himself. It had been reported that some turkeys had been stolen by soldiers from one of the hotels, and so, not knowing that the artillery regiment had acquired the reputation of being the toughest, roughest and most quarrelsome of all the outfits, he arraigned four artillery men for the theft. During the course of the trial an argument arose among the four defendants as to whether any of them should testify, and during the altercation that followed the old Justice, feeling himself unable to maintain the dignity of the court, hurriedly disappeared through the back window and called back excitedly: —

"Case dismissed! Court's adjourned!"

The other day at the army camp in Texas City, Texas, an old soldier was brought before a young West Pointer for trial on a summary court charge.

"Now, how do you plead?" asked the young officer with all dignity.

"Not guilty, sir," answered the old soldier gravely.

The young officer looked at him for a few minutes, and then with a puzzled look asked: "How do I know you are not guilty?"

The old soldier smothered a smile, caught himself, and then after an in-

tense silence straightened up and repeated, "Not guilty, sir."

Another intense silence followed, and then the young officer thundered: "Not guilty! All right! Prove it then."

CORNELIUS JOHNSON.

TOO MUCH FORESIGHT

A LAWYER in Kansas City was not long ago retained by an Irish contractor to draw up his will. The task was accomplished apparently to the satisfaction of the Celt; the lawyer's fee was paid; and the latter supposed, of course, that the matter had been concluded. To his great surprise, therefore, he received another call from his client the next day, who expressed his conviction that the affair had not been properly adjusted.

"Why, what's the trouble?" asked the legal light.

"Trouble enough," said the Irishman. "I didn't sleep the whole night through for thinkin' of that damned will. You've fixed it so I've not left myself a chair to sit on!"

CORPORATION COLOR

A CLEVELAND lawyer tells of a case that came before the Ohio courts involving the disposition of certain building lots. Originally sale had been made on the condition that no land in the division should be sold to a negro. One buyer was very much enraged when he ascertained that, later, many of the lots had been disposed of to a corporation composed entirely of negroes.

Suit was immediately brought by this buyer. The defendant sought to justify his action on the ground that the land had not been sold to a colored *person*, but to a corporation. The other side, through its counsel, retorted with the statement that, since a corporation was a *person* in law, then if its members were all negroes, it could with the utmost propriety be termed *a colored person*. It looked as if this argument might prevail, when the defendant came forward with this hypothetical case for the court's consideration: —

"If the corporation had been composed half of white men and half of negroes, could it then have been considered a mulatto?"

This turned the tide, and defendant lost.

A CANDID WITNESS

IN a town of upper New York they tell of a certain Deacon Potter, a man of great eccentricity but high moral character. This deacon would tell the truth and shame the devil. On one occasion a friend was engaged in a lawsuit in regard to some land a few miles from Utica. He held the land at a high price. During the trial he called the deacon as a witness, to prove how valuable the land was. The deacon was sworn and asked if he knew the land.

"I know every foot of it," he said.

"Very good. What do you think of it?"

The deacon paused for a moment as if to make sure that he would return an appropriately emphatic reply, and then said: —

"If I has as many dollars as my yoke of oxen could draw on a sled on glaze ice I would not give a dollar an acre for it."

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

Correspondence

THE MEANING OF "ss."[1]

To the Editor of the Green Bag: —

Sir: I read with interest your article by Mr. Charles Mann, A.M., upon "The Mysterious ss." in legal process and pleadings,[2] and was much disappointed at the outcome, without questioning the erudition of the gentleman. And bearing in mind that English Kings in early days sat in person as Chancellors in a movable court, and dispensed justice, I can give you a better meaning for the letters "ss." placed upon each side of the Chancellor's collar than *scilicet*, or *to wit*, which I gathered from the perusal of a small volume entitled "Courts and Lawyers of England."

In view of the profound reverence the English people pay to their superior judges, and the rule which obtains,with the British bar, that no lawyer, or barrister rather, can be too talented to be a judge, the reason appeals to me, and I believe it will to you when it is disclosed.

The letters "ss." upon all legal process stand for the words *Sovereign Salvator*, which I construe to mean, in the connection used, a constant reminder to all litigants, and persons having business in courts, that through the discharge of the King's duties, through his judges, alone, shall they have right and justice awarded to them, the English Government always recognizing that there is such a character as a patriot King. Bearing in mind the hard practical common sense of the English people, and their adhesion to reasonable force upon all occasions to enforce established order, this is the most common-sense and reasonable explanation I have ever met. And whether it is the true cause or not, which I certainly believe it is, it should be written as a mystery solved. It accords with our judgment of right, and the eternal fitness of things. As we have discovered a reasonable and plausible reason, further discussion is as useless as the attempt to rob Shakspere of his reputation by certain Baconian fanatics. Shakspere wrote and fathered his words, he was praised and abused therefor, as their author and father. Johnson praised him, his contemporaries Webster, Jonson, Beaumont and Fletcher, recognized his ability and conceded his worth. Voltaire riddled his crudeness with his shafts of raillery. Two hundred years after his death Ignatius Donnelly and Dr. Orville Owen attempt to paint him as a Jackdaw, a futile task. Therefore let "ss." be a mystery no longer, either in America or England. In America the people's power reigns, through that power justice is administered and relief given. In England it is theoretically through the power and good will of the King. With the meaning I assign the letters are symbolical of a proper sentiment. It is to be hoped that they may remain forever upon the court's process as representing something intelligible and not a mere jumble.

JAMES H. POUND.

Detroit, Mich.

[1] *See* 25 *Green Bag* 59, 386. —*Ed.*
[2] September number, 1913, p. 386.

The Legal World

Monthly Analysis of Leading Legal Events

Owing doubtless in large measure to the interest excited in the coming elections, the month was free from noteworthy legal developments. The Sulzer impeachment trial held the centre of the stage, furnishing a salutary example of the tendency to broaden the grounds for impeachment so as to recognize the public character of the conduct of an official from the time he enters upon his candidacy, rather than simply from the moment when he is elected or inducted into office. The Thaw litigation continued to drag itself out without reaching the long awaited conclusive termination. The judicial elections have in the main been free from any sensational results, and notwithstanding the controversy which grew out of Judge Werner's connection with the *Ives* case, in New York State, he missed being reelected only by a majority of about 4,000 votes given his opponent, Judge Bartlett, while Judge Hiscock, the other state bar association's candidate, was easily elected.

It is of interest to note that there is in New York a revulsion against the tendency which aims at the statement of the evidence, in appealed cases, in narrative form, the new rule of practice which has just gone into effect embodying the recommendation of some of the bar associations that the evidence shall be set out by question and answer, at least in statements of case and exceptions as distinguished from bills of exceptions, to avoid the danger of a distorted narrative presentation of the evidence.

In the field of penal reform, it seems likely that the generous action of Thomas Mott Osborne, chairman of the New York Prison Commission, in serving out a week in the Auburn penitentiary to see for himself how prisoners are treated, will tend to arouse public interest in reform measures and to help the movement for the individualization of punishment and wiser and fairer treatment of offenders.

Personal

Hon. Charles C. Craig, newly elected Justice of the Illinois Supreme Court, was for twenty-five years a lawyer in active practice in Galesburg, Ill., and served two terms in the legislature. He is a son of the late Judge A. M. Craig, who served continuously as Justice of the Supreme Court from 1873 to 1900.

Chief Justice George M. Powers, appointed by Governor Fletcher to succeed Chief Justice John W. Rowell, resigned, took his place on the bench of the Supreme Court of Vermont at the opening of the October term. The new Chief Justice is promoted from an Associate Justiceship. His predecessor, Judge Rowell, who is seventy-eight years old, has the honor of having been on the supreme bench longer than any other man in the history of the state.

A portrait of the late John B. Gantt, judge of the Missouri Supreme Court, was presented to the court Oct. 14 at memorial exercises in which several addresses were made in his memory. At this ceremony former Judge John F. Phillips of Kansas City made the remarkable statement that the death of Judge Gantt, which occurred last year, soon after his retirement, had been

hastened by the criticisms of the decision in which he held that the omission of the word "the" from the clause "against the peace and dignity of the state" invalidated a criminal indictment.

The Impeachment of Governor Sulzer

What will doubtless go down in history as the most noted impeachment trial in this country since the trial of Andrew Johnson, came to an end on October 17, when the High Court of Impeachment in New York voted 43 to 12 to remove Governor William Sulzer from office.

Governor Sulzer was found guilty on three of the articles preferred against him. These were as follows:

> Article 1. — That Governor Sulzer filed with the Secretary of State a false statement of his receipts and other monetary transactions involved in his gubernatorial campaign.
>
> Article 2. — That he committed perjury in his statement to the Secretary of State relative to receipts and expenditures.
>
> Article 4. — That he suppressed evidence by means of threats to keep witnesses from testifying before the legislative investigating committee.

The vote on articles 1 and 2 was guilty, 39; not guilty, 18. On article 4 the vote was guilty, 43; not guilty, 14. On five other charges he was unanimously acquitted.

Of the nine judges of the Court of Appeals, Judges Cullen, Bartlett, Chase, and Werner voted not guilty on articles 1 and 2, and Judges Collin, Cuddeback, Hogan, Hiscock, and Miller voted guilty. On article 4 Judges Cullen, Hiscock and Miller voted not guilty, and Judges Bartlett, Chase, Werner, Collin, Cuddeback and Hogan voted guilty. But in the final vote all the judges were recorded as for impeachment, except Presiding Judge Cullen, who was excused from voting.

Contrary to expectation, the Governor did not take the stand in his own defense. The reason given by the newspaper correspondents was that he wished to keep his wife from being brought into the proceedings.

Impeachment was decided on on August 13 by the Assembly, by a vote of 79 to 45. The beginning for the trial was set for Sept. 18, the court to consist of the entire Senate and the judges of the Court of Appeals. At the trial the Governor was represented by D-Cady Herrick, Austen G. Fox, Louis Marshall, and other prominent counsel, the prosecution being conducted by Alton B. Parker, and other counsel. A motion to quash the proceedings was made on the score of illegality. Judge Cullen, in deciding the matter, held that although the state constitution forbade the legislature in special session from passing on matters other than those named by the Governor in his call, he nevertheless felt that the clause should be given a reasonable construction. He said:

> So construed, these subjects all relate to what the legislature as a body can do, and not to the power vested in one branch of the legislature.
>
> The constitution gives the assembly power to impeach. It was in regular session. I use regular session in the sense that it was regularly convened, in response to a call by the Governor. Now, having the power of impeachment, it could exercise that at any time.

The evidence secured from Henry Morgenthau, Allan A. Ryan, and Duncan W. Peck by cross-examination had much to do with securing the impeachment, as it related to conduct while in office, rather than before election. Mr. Morgenthau, the new Ambassador to Turkey, testified that Governor Sulzer had requested him to treat the campaign contribution as a private affair between Sulzer and himself and to be "easy" with him in his testimony before the investigating committee. Ryan said

that Sulzer had urged him to ask Senator Root to use his influence with William Barnes to get Republican members of the Assembly to vote against impeachment, and to ask DeLancey Nicoll to persuade Charles F. Murphy to call off the legislative investigation. Peck testified that Sulzer had asked him to deny his campaign contribution, even if he should be under oath. The testimony of these three witnesses was not contradicted.

Foremost among the questions involved in the trial was that whether the Governor could be impeached for acts that had occurred before his official term began or that did not constitute misconduct in his official capacity. The members of the Court of Appeals divided by a vote of five to four on the question whether the court of impeachment could take cognizance of the offenses charged in articles 1 and 2, that is, the filing of a false sworn statement of the defendant's receipts and expenditures in the gubernatorial campaign. "It is interesting," says the *New York Law Journal* (edittorial, Oct. 22), "that on these questions Judge Werner voted for acquittal because, after considering the arguments pro and con, he was in doubt whether offenses occurring before the term of office began could be considered, and gave the Governor the benefit of the doubt." On the other hand, some of the other members of the Court of Appeals took the position that these acts furnished proper ground for impeachment, because, in Judge Miller's phrase, they "reached into the Governorship."

Criminal Law and Criminology

Judge Harvey Baker of the Boston Juvenile Court, speaking before the Rhode Island Congress of Mothers at Providence, Nov. 5, said that trained probation officers sufficient in number so that none of them shall have more than seventy-five boys under his care, and all under the charge of a specially trained, well-paid chief, are the most essential part of a juvenile court. Of that new feature, the clinic for juvenile delinquents, he said: "The feature of the court next in importance to the probation department is the clinic for discovery of any physical or mental difficulties or deficiencies which may be the cause of the child's delinquency. Thousands of dollars and thousands of hours are being wasted annually for the lack of such clinics. This clinic should be presided over by an especially qualified man. He should first of all be a well-trained all-round physician with a winning personality. Superadded to his medical training he should have a good knowledge of psychology. Experience shows that this clinical function cannot be adequately performed for the court even by a group of experts in a psychopathic hospital, much less by any dispensary. The expert service must be close at hand and must be embodied in one person."

After voluntarily spending a week as a convict in the Auburn penitentiary, Thomas Mott Osborne, chairman of the New York State Commission on Prison Reform, left the prison on October 5. His experience included, not only the ordinary daily life of a convict, but punishment for infraction of rules, including 16 hours in the dungeon. He had been reprimanded for looking around on the first day of his imprisonment. He had been put in the dungeon during the afternoon of October 4 for refusing to work longer. On being released, Mr. Osborne declared the prison system to be a form of slavery and subject to the same objections as any other form of slavery. It deprives the convict, he

declared, of individual initiative, makes him an automaton and sends him out on his release unable to become the guider of his destinies. Among the faults of the system he mentioned the like treatment of all convicts, regardless of difference in offenses, and differences in personal characteristics, also the needlessly cruel and severe rules, such as those which restrict a convict to the writing of but one letter a month and deprive him of the right to use his senses of sight and speech. In summing up the result of his experiment, Mr. Osborne said: "I hope to translate this experience into something of great value to the convicts, to myself, and to every citizen of the State of New York. I have gained a new knowledge of human nature, a new faith in human nature, a new altruism, because I have seen so much in Auburn prison that was gracious and brave and splendid in every way."

The New York State Prison Commission, of which Thomas Mott Osborne is chairman, recommended on October 24 to the State Superintendent of Prisons a number of reforms in the management of the Auburn penitentiary. The recommendations are to allow convicts to read newspapers and magazines and to send and receive letters oftener than once a month. They furthermore provide for abolition of the policy of enforced silence, for better food, for a system of punishment graded according to offense instead of the same punishment for all offenses, for better sanitary rules and for more humane treatment generally.

The Law's Delays in New York

At a meeting of the New York County Lawyers Association at the Hotel Astor Oct. 9, Franklin Pierce, a member of the association, attributed the law's delays in New York to the indolence of judges, and said that if they would conduct their courts as business men would conduct them, half of the law cases of the United States could be tried in New York City with the number of judges now sitting. He recommended that the judges sit from 10 a.m. to 5 p.m. daily, instead of a few hours a day.

Supreme Court Justice Giegerich, commenting on this statement in an interview furnished the *New York Sun*, said that any one interested in finding out the truth could do so by sitting in court during the calling of the calendar.

"It is amazing to listen to the variety of excuses the lawyers interpose to have the trial of the cases in which they appear delayed," said Justice Giegerich. "Often it is not advisable to force these dilatory attorneys to trial when it is apparent that they are not prepared, if for no other reason than that the interests of their clients would suffer. The result is that judges are forced constantly to adjourn their courts in the middle of the day because no cases are ready for them. I had to adjourn my court earlier than I wanted to today for that very reason.

"Even after the cases have been heard the attorneys often delay final action and judgment through failure to file briefs, findings or other necessary papers. A year ago I caused to be published a series of memoranda in cases tried before me in which I called the attention of the lawyers to the fact that in some instances briefs had not been filed although the time had expired, and in other cases where I had rendered decisions they had failed to submit findings and proposed judgments."

A somewhat different view was expressed by Justice Seabury, who was also interviewed by the *Sun*. "The judicial force of the state," he said, "is not economically distributed. In some

sections of the state there are a comparatively large number of judges who have comparatively few cases, whereas in other sections there are comparatively few judges who have a great many cases. We have carried our appellate system to unreasonable lengths and the discretionary power originally intended to be exercised in the court of first instance is exercised by the appellate courts. Our system is top-heavy. One-half of the judges of the state sit in review of the action of the other half. Every act of the court of first instance is appealable. Our appellate courts are overburdened with work, much of which is wholly unnecessary. The law reports are full of opinions which have no permanent value upon points of practice and the powers of the trial and special term judges are unduly limited."

Mr. Justice Seabury also referred to the Code of Civil Procedure as an abomination and urged the need of a short simple practice act.

Bar Associations

Maine. — At a meeting of the Maine Bar Association held Oct. 14, at Augusta, the following officers were elected: President, George W. Heselton of Gardiner; vice-president, L. T. Carleton of Winthrop; secretary and treasurer, C. L. Andrews of Augusta; executive committee, George W. Heselton, Gardiner; Joseph Williamson, Augusta; William H. Fisher, Augusta; Will C. Atkins, Gardiner, and C. B. Perkins, Waterville.

Vermont. — Attorney-General James C. McReynolds was to have been the guest of honor at the annual dinner of the Vermont Bar Association, but could not leave Washington to be present. Clarke Fitts delivered his annual address as president of the association Oct. 8, discussing court procedure in Vermont and deprecating reversals for insubstantial error. The Committee on Jurisprudence and Law Reform made nine recommendations, with respect to (1) enlargement of the duties of the Committee on Professional Conduct; (2) proposed approval of the Uniform State Acts; (3) drafting of a workmen's compensation law; (4) passage of a law requiring the Supreme Court, in ordering new trials, to file their opinions a sufficient time before the case is remanded to enable counsel to ask for a rehearing; (5) adoption of certain resolutions similar to those of one of the county bar associations; (6) bills of exceptions stating the evidence in narrative form; (7) assignments of errors, restricting the questions which may be considered in the Supreme Court; (8) legislation looking to uniform municipal courts throughout the state, and (9) revision and consolidation of the general laws of the state. Most of these articles of recommendation were laid on the table for further consideration by committees to be appointed by the president. The association, however, approved of the proposed consolidation of statutes and of making municipal courts uniform.

On the next day the *Burlington Free Press* published an editorial approving of these reform proposals, and urging greater expedition of procedure. We quote one paragraph: "As a matter of fact Vermont has reached a point where we have not the time formerly available for long drawn out processes. Vermont lawyers who visit some of the New York courts, for example, are impressed by the way in which time is saved in the handling of civil cases. So many important matters are pressing for consideration there as to force brevity, although in some other directions New York might well learn from Vermont."

A somewhat sensational interest in the meeting of the association had been aroused by the action of its secretary in sending an indiscreet letter to Governor Fletcher expressing disapproval of his selection of Associate Justice Powers as Chief Justice of the Supreme Court, ignoring "the twenty-four years' faithful service of Judge Munson." The secretary explained his action in writing this letter and offered the association a straightforward apology, which was accepted.

Miscellaneous

Several new rules of general practice adopted by the Justices of the Appellate Division of the Supreme Court last June went into effect in New York Nov. 1. The most important change is that made by amendment of Rule 34, requiring that a case and exceptions on appeal, as distinguished from a bill of exceptions, shall contain all the evidence by question and answer, the rulings of the court and the exceptions of all parties taken upon the trial, "but shall not contain the opening and summing up or the remarks of counsel unless ordered by the judge or referee. . . . . The Appellate Division, on rendering final judgment on appeal, pursuant to the provisions of section 1317 of the Code . . . without granting a new trial, may reverse any finding, and shall make such new findings of facts proved upon the trial as shall be necessary to sustain the judgment awarded by the Appellate Division. The facts as found by the Appellate Division shall be inserted in its order for judgment, and the facts as found by the Special Term or referee before whom the case was tried, which are reversed by the Appellate Division, shall likewise be specified in such order." On this substitution of question and answer form for narrative form in cases on appeal, which follows the recommendations of several of the bar associations, the *New York Law Journal* comments as follows (editorial, Oct. 10): "Such general change of form as to cases on appeal is highly desirable, if not actually indispensable, for justice where the Appellate Division is to deal with the facts and render final judgment. It sometimes happens, through clever unscrupulousness of one preparing a case on appeal and dullness of apprehension or inadvertence on the part of his opponent, that a record thrown into narrative form conveys an incomplete or even erroneous idea of the substance of the testimony."

Remarkable proceedings have occurred in the court of Superior Judge John E. Humphries of Seattle, leading to a severe arraignment of him by the president of the Illinois Lawyers' Association on Oct. 4, and the adoption by that body of a denunciatory resolution. Judge Humphries sent thirty-one men and six women to jail for contempt in signing a protest against his injunction forbidding street speaking at certain places by Socialist orators. On the eve of the arrival of Governor Lister, who was on his way to Seattle with a view to securing the release of the prisoners, Judge Humphries hastened to release them and afterward he asserted, after a conference with the Governor and the other Superior Court judges, that he would not resign—"they couldn't pull me off the bench with a hook." Glenn Hoover, attorney for the Free Speech Defense League and former assistant Attorney-General of the state, was among those imprisoned, and he had also been fined and "forever disbarred" by Judge Humphries. Thorwald Siegfried, counsel for Hoover and others, who had previously asked the prosecutor of the Seattle Bar Association

to investigate Humphries' conduct, was cited on this ground to appear before Judge Humphries and answer to the charge of contempt. Siegfried asked for a change of venue on the ground of prejudice, which was refused. On Sept. 30 Acting Chief Justice Parker of the state Supreme Court enjoined Judge Humphries from sitting as judge in contempt proceedings against Siegfried. Judge Smith of the Superior Court, who proceeded to grant Siegfried's application for the release of Hoover on habeas corpus, was publicly denounced by Judge Humphries.

Obituary

Bishop, Henry W., a prominent member of the Chicago bar, and a native of Lenox, Mass., where he had a summer residence, died on Sept. 28, at Seabright, N. J., aged 84.

Cole, Chester G., twice Chief Justice of Iowa, for twelve years Associate Justice of the Supreme Court, and founder of law schools in Iowa, died at Des Moines, Oct. 4, aged 89.

Cross, Joseph, Judge of the United States District Court for the district of New Jersey, died Oct. 29 at his home in Elizabeth. He was graduated from Princeton in 1868, and after leaving Columbia Law School began practice in the office of William Jay Magie, who became Chief Justice of the Supreme Court of New Jersey and later Chancellor. He was sent to the New Jersey Assembly in 1894 and was Speaker in 1895. He was elected a state senator in 1899, and was appointed federal District Judge in 1905.

Glasscock, John R., former mayor of Oakland, Cal., died Nov. 10. He had received the honorary degree of LL.D. from the University of California.

Howland, Henry E., formerly a Justice of the Supreme Court of New York, and president of the University Club and the Yale Alumni Association, died Nov. 6 at New York, in his seventy-ninth year. He was a noted after-dinner speaker and author of the epigram, "the best thing out of Boston is the 5 o'clock train." Aside from his professional duties in the firm of Howland, Murray & Prentice, Mr. Howland found time to make frequent contributions to magazines and to interest himself in charitable and civic work.

Lothrop, Thornton K., before his retirement a few years ago one of the leaders of the Boston bar, died at his home, in Boston, Nov. 2, in his eighty-fourth year. Being graduated from Harvard in the class of 1849, in 1861 he was made Assistant United States District Attorney. He was the author of "The Life of William H. Seward."

McKenney, James H., Clerk of the Supreme Court of the United States, who died on Oct. 13, had served as clerk from 1880 to his death, a period of thirty-three years.

Snodgrass, Robert, formerly a president of the Pennsylvania Bar Association, died in a Baltimore hospital Nov. 8, aged 77. He had served as prothonotary of the Supreme Court of Pennsylvania for the middle district for twelve years, and later as Deputy Attorney-General.

Stafford, Charles Morton, who had practised for forty years in Brooklyn, died Oct. 22. He was considered one of the foremost and most brilliant lawyers of Brooklyn and had handled many of the legal transactions of the large banks. He also served as a United States Marshal for the Eastern District of New York under President Cleveland.

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