## NOTES ON RECENT LEADING ARTICLES IN LEGAL PERIODICALS.

AMERICAN LAW REVIEW.—March-April.

*Lincoln and Douglas: The Great Freeport Debate.* Seymour D. Thompson. (This article was apparently written shortly before the death of Mr. Thompson.) Mr. Thompson has been added to the number of those who, having seen and heard the leaders of the "historic Sixties," have passed over to the other side. On the anniversary of the day of Lincoln's birth he lived over again in memory that great day when he heard the two great leaders debate. It is no vague, half-remembered report which he gives us, but he tells of the day as he lived it, and so he makes us live it again with him. For this reason he has produced a picture of Lincoln more alive, more vivid, more natural, and therefore more like the man, than almost anything we have had about him. So spoken of we can believe in "the intellectual power and moral elevation" that vanishes for us under the studied and affectedly sympathetic phrase of the ordinary biographer.

*Federal Control of Insurance.* Edwin Maxey. In the discussions upon the Federal control of corporations it has been asserted that insurance companies cannot be included in those corporations to be controlled, as insurance has been declared not to be commerce. Mr. Maxey concedes that this declaration has been made by the courts, but contends that it is an antiquated doctrine and that if insurance does not come within the term interstate commerce, neither do the other matters which have been declared subject to the provision. He states that insurance contracts "are now, to a very considerable extent, subjects of trade and barter." After declaring that Federal control of insurance would be constitutional he welcomes the idea of such control with enthusiasm.

*The Proper Scope of Scientific (so-called expert) Testimony in Trials Involving Pharmacologic Questions.* Solomon Solis-Cohen, M. D. Dr. Solis-Cohen notes, as do all writers on the subject, that the "expert witness is not summoned in his theoretical capacity of impartial teacher and adviser. He is called, apparently, and often in reality, as a partisan and an advocate." Dr. Cohen is inclined to be more than usually fair to his legal brother, saying, "It will not do to abuse the lawyers (for this evil), however much they may abuse us when we are on the witness stand. Use, abuse, or misuse what and when they will, they cannot make use of us for any purpose for which we refuse to be made use of." We are shown the extreme difficulty the expert pharmacologist may have in making definite answers based upon certain facts. This indefiniteness is probably the point where most of the irritation between the expert witness and the lawyer begins. One insists upon a short and certain response such as he requires in other matters of fact; the other cannot give what from the delicacy of the facts concerned he cannot have to give. So they learn to dislike and distrust each other. The remedy suggested is that of preliminary stipulations with the attorneys in the case, which he thinks could be secured with little difficulty.

*Law and Literature.* A. E. Wilkinson. This pleasant paper is written, not to show what lawyers have done in literature, but what literature has done to lawyers. As it is written by a lawyer it naturally gives a kindly view of the much-abused members of the profession, who, nevertheless, generally win so great a share of the honors that the world can give that they can well afford to smile with those who smile at them. Mr. Wilkinson does this, at all events; he has given us many of the best witticisms against us and asked us to genially smile with him over them as not coming near enough to the truth to injure even the tender feelings of the most honest practitioner.

*Of Actions Old and New.* George H. Smith. This paper is a continuation of articles in prior numbers of the *American Law Review* dealing

with the "Historical Development of the Law." The subjects are considered in this paper under the several heads of: 1, Actions Generally and Their Several Kinds; 2, Of the Old Legal Actions; 3, Of Equitable Actions; 4, Of Actions Under the Codes; and 5, Of Law and Equity as Constituent Parts of the Law. Mr. Smith has a definite intention in the writing of these articles. In concluding he says:

"Of the doctrines expressed here, and in preceding essays, it will be understood that their effect and operation will relate principally to reforms in the study and exposition of the law; and though, undoubtedly, a true conception of the nature of the law will lead also to reforms in the practical administration of justice, yet our theory will be in no respect inconsistent with accepted doctrines as to the force of statutes and judicial precedents. All agree that these must be preserved; and all that is here asserted is simply that the distinction between *rights* and *actions*, and between the true law and the *quasi* law, is essential to the integrity, at once, of the law and of the jural conscience of the student, and that without it jurisprudence cannot be either scientifically studied or systematically expounded. Which is but to say—the instituted law being composed of *rational* principles as well as of arbitrary and accidental rules, that the former cannot be successfully studied otherwise than by segregating them provisionally from the latter. To the neglect of this fundamental truth, and of the systematic study of the principles of jurisprudence, is due, more than to any other cause, the existing incoherency and consequent incognoscibility of the law."

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COLUMBIA LAW REVIEW.—April.

*A Misapplication of the Doctrine of Estoppel.* Thadeus D. Kenneson. The misapplication complained of is made by the New York courts, and has been consistently maintained by those courts for sixty years. The point Mr. Kenneson makes is that these decisions cause a principle to be estopped "by a representation of his agent which is concededly false and unauthorized." He claims that the doctrine of estoppel is unnecessary and inapplicable to such cases, but that the action should be one of deceit and that the falsity of the agent's representation is an essential element in such an action.

*Insanity and the Law of Negligence.* William B. Hornblower. That the question of the liability of an insane person for conduct which would be considered tortious in a person of sane mind should still be an unsettled one in our courts of law is certainly "a singular fact." We are shown that there is abundance of *dicta* to the effect that an insane person is liable for tort in like manner as a sane person. Treatise writers have asserted this to be a fact and cases have been cited in support of the assertion. An examination of the cases, however, leads Mr. Hornblower to the opposite conclusion. None of the cases support the theory other than by way of *dictum*. The question seems to be one of those that at first glance looks as if authority upon one side or the other would be immediately obtainable, but which prove—apparently from their very simplicity—to have escaped actual adjudication. In conclusion the writer very truly says: "It seems, indeed, most extraordinary that the question of the liability of a lunatic for negligence should be, at this late date, still an open question in this state. One would suppose that the question would have arisen frequently and would have been frequently the subject of adjudication. Similar instances, however, are constantly recurring, in the experience of every practitioner, where questions which lie at the very threshold of our jurisprudence seem never to have come before the courts for consideration, or, at any rate, have never received adjudication by the courts of last resort."

"The true rule, and the only rule consistent with justice and reason, and the rule towards which the authorities are evidently tending, is that a person who is *non compos mentis* cannot be held liable for negligence."

*The Concurrent Power of the States to Regulate Interstate and Foreign Commerce.* David Walter Brown. The article notes first the elementary distinction in which, while Congress has the power to regulate commerce, the states still have the power to regulate the incidents of that commerce. The meaning of the latter phrase is elucidated by the cases which have established the distinction. The Sherman Anti-Trust Act is noted as deciding the question whether direct or indirect restraint was obnoxious, with the result of holding that only the direct restraint was meant. At the end of the article a tabulated list of the cases which uphold the power of the states to regulate the incidents of commerce is given.

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THE GREEN BAG.—April.

*The Perpetuation of the Open Market.* Bruce Wyman. Mr. Wyman says: "The issue involved is whether there is a difference between the methods in competition which may be employed by an individual and the course of action that may be taken by a combination in competition. More precisely, the question is whether a combination engaged in competition may refuse to have any business dealings with those who continue to have commercial relations with its rivals." It will be seen at once that we have here the capitalistic equivalent of the open shop and the boycott. While the courts, however, are declaring against the boycott and the closed shop, "the combinations at the present day defy the courts to declare such a course of action to be illegal, however oppressive it may be." The well-known cases deciding these points are given, including those where the court has decided that there is no legal wrong committed by the members of such combinations and the reasons given for the decision. One judge, "Lord Kincarney," thought "It may be regrettable that they happened to have so much in their power," but that they were within their legal rights. Another line of decisions is that where the decision is that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications. Our writer agrees with the decisions in the latter line of cases.

*Agreements of the United States Other Than Treaties.* Charles Cheney Hyde. The article is written to show "under what circumstances our government has deemed it not unconstitutional, and therefore lawful, to enter into international compacts which have not been submitted to the Senate for approval, and to ascertain what has been the actual scope of the exercise of the agreement-making power of the President as distinct from the treaty-making power which is shared by the Senate." We are shown quite clearly that the "agreement-making power" in the first place is exercised only in accordance with some act of Congress previously passed authorizing the action contemplated; in the second place the acts noted have been presented to the Senate for ratification, and the power has been shared by the Senate. With the exception of certain acts which may by their constitution be called ministerial, we really find no acts of the executive, which have been upheld, which can be properly cited as justifying even the phrase "agreement-making power of the President."

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HARVARD LAW REVIEW.—April.

*How Far an Act May be a Tort Because of the Wrongful Motive of the Actor.* J. B. Ames. Mr. Ames states his case very clearly, and defines his issue without undue preliminary. The wilful causing of a

wrong by one man or by several acting together is a tort, and the question is, was there justification? and this will depend in most cases upon the motives of the actor. This question has been examined lately almost entirely by those discussing the trade and labor cases or other industrial questions. In regard to these cases Mr. Ames gives us in a note the best statement of the question at issue we have as yet seen: "As a rule, however, the ultimate object of a labor union in excluding an employee from work by pressure upon the employer, or in injuring the business of an employer by the persuasive or coercive boycott, is not the damage to their victims, but the advancement of the cause of labor. This motive, of course, is commendable. In the great majority of labor cases, therefore, the question whether the members of a labor union are guilty of a tort is a question not of motive, but of the legal validity of the means adopted for effectuating their motive; and this question must be answered by a careful weighing of considerations of public policy." The only objection to this may be in the use of the word "ultimate," which would cause some to reject the alleged motive altogether, as they refuse to consider what they term the "ultimate motive." The benefit to the unions is the acknowledged motive in these cases; the other motives can be alleged and sometimes proven. Mr. Ames has given us so illuminative a paper upon a point where judges and writers seem only to succeed in confusing us, that it is well that Mr. Ames's name will be of sufficient weight to cause his paper to be read by everyone.

*Interference with Contracts and Business in New York.* Eugene Huffcut. We are given first the "Results of Interference with Contracts," where the New York courts are shown in a conservative attitude. In discussing "Unlawful Means" we come again to the trade and labor cases, where we are given the very broad statements of some of the courts, but find that in effect the tendency in New York is to be less rather than more severe. Thus the early decision (*Gilbert* v. *Mickle*, 4 Sandf. Chan. 357), 1846, that picketing and placarding constitute a nuisance "must be regarded as no longer law," while boycotting *per se* is not an unlawful means, and even "combined picketing and persuasion or combined boycott is not unlawful means, but can be made so by threats to do, or by doing, an unlawful act." The question of motive or justification is that last treated, and in the light of Mr. Ames's article some of the decisions treating motive as immaterial seem illogical. The trend, however, according to Mr. Huffcut, is "towards regarding the question of motive or purpose as a material one."

*The Closed Market, the Union Shop, and the Common Law.* Wm. Draper Lewis. The third in this series of articles which treat, each in its own way, of the present status of the law in what may be called the industrial cases, and which all cite the same line of cases, or cases in the same class of legal development, brings in a new note in the treatment of the "refined boycott," as it is termed. This term is applied to those cases in which trade unions attempt to confine those who work at a trade to members of a particular union, or to attempts to control conditions under which a particular trade is carried on. The method of approaching the question which leads the questioner to regard the "refined boycott" as legal is considered to be fundamentally wrong and liable "if it should gain any foothold in our law, to destroy any ability on the part of our courts to meet efficiently the new problems which the rapidly changing industrial conditions are crowding upon us." The concluding sentence seems in line with the quotation from Mr. Ames, in making the decision rely ultimately upon public policy: "He who injures his fellow man is liable for that injury, unless he can show that the community regards his act as conducive to the public welfare."