NOTES ON RECENT LEADING ARTICLES IN LEGAL PERIODICALS.

AMERICAN LAW REVIEW.—January–February.

Injunctions Against Strikes. James Wallace Bryan. The literature upon this subject is a constantly growing mass, yet it does not seem that we are much nearer a solution of the questions which were first presented in the earlier cases than in the very beginning of the discussion. We do find, here and there, that the stringent doctrines of such judges as Judge Jenkins, in the *Farmer's Loan & Trust Co.* v. *N. Pac. Ry. Co.,* (60 Fed. 803), are overruled and superseded by more reasonable views, such as those of Judge Harlan in the decision which reversed that of Judge Jenkins. To go so far as to declare the practical slavery of an employee is to make certain that in the swing of the pendulum more ground will be lost to those who promulgate the too-severe doctrine, than they had ever hoped to gain by its means. The discussion on this point throws some new light upon the subject, but in general the author contents himself with what is substantially a re-statement of the leading cases and their doctrines.

Of the Nature of Rights; and of the Principles of Right or Jurisprudence. George H. Smith. To fully comprehend this article it is necessary to have read the article which preceded it, and which formed a sort of first part or introduction to the present paper. The article is divided into four heads: (1) Of the Nature of Rights; (2) Of the Problems of Jurisprudence; (3) Of the Principles of Jurisprudence; and (4) Of the Relation of Jurisprudence to the Law. The author is a close reasoner and he makes a logical demonstration of the theme, ending with these words: "Let us, then, as students, recognize the great truth, received by tradition from the elders, that the Law (or, at least, the Substantive Law), 'is nothing else but reason.' And as practitioners, let us, (with Ashurst J., in *Paxsley* v. *Freeman,* 3 T. R. 62), 'have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or honesty.' Or if, with reluctance, we sometimes find something called law so established for the time being that we cannot disregard it, let us, emulating Galileo, still (at least to ourselves) assert the right, and regard the false principle as only *quasi* law; to which, perforce, we may be compelled, for the time being, to give in our adhesion, but which, we may confidently hope, time will, sooner or later, rectify. Thus, and in no other way, may we remove the reproach to the profession, with which the judicious Burke—in one of the passages cited in the title to this essay—felt himself constrained to qualify his magnificent, but just eulogium on our art."

COLUMBIA LAW REVIEW.—January.

Are Defectively Incorporated Associations Partnerships? Francis M. Burdick. There is something very familiar in the opening lines of this article: "Upon this question, to quote from a learned author, 'There is almost every variety and shade of judicial opinion.'" The writer of articles for periodicals is in the habit of selecting this class of question for study and analysis, most naturally, since in this condition of affairs he finds his chief excuse for being. The settled question no longer calls for argument; scarcely, in most cases, for further exposition. It is the territory not yet definitely assigned to

any one realm of principle, though, perhaps, claimed by several, over which the verbal battles may still be fought. There is not much fighting done in this instance, however, as there seems to be substantial agreement on principle, although there are objections to the formulated doctrine. These objections are stated and combated by Mr. Burdick, who supports the thesis that "where a number of coadventurers assume or attempt, under the provisions of a general statute, to organize themselves into a corporation, and fail to take the steps which that statute makes essential to their becoming incorporate, and assume to contract corporate debts without having taken such steps, they are liable for such debts as partners."

"Agency by Estoppel": A Reply. Walter Wheeler Cook. This is the third paper on the subject. Mr. Cook wrote the first article, to which Mr. Ewart wrote a reply; to this reply Mr. Cook replies. Mr. Ewart's article was in a good-natured and possibly somewhat light style, but Mr. Cook is very much in earnest; he feels that the man who so holds himself as an agent, or in any other way, as to lead a second person into acts or agreements to act which he would not otherwise enter into, has created an agency by estoppel; has estopped himself from denying that agency, whether he mentally intended to create an agent or not. This argument seems to be in accordance with the general law of agency, and it appears as if Mr. Cook left off with rather the better of the argument.

GREEN BAG.—January.

Railroad Rate Regulation. Hon. William E. Chandler. The question is stated as not being "complicated nor does it raise serious legal doubts." It is asserted that the constitutional power of Congress to establish the required methods does not seem to be seriously disputed. We are also given to understand that Attorney-General Moody has answered all legal questions which may arise in a manner which should be practically satisfactory to everyone interested. Mr. Chandler treats the question as one raised by popular desire, and calmly makes the rather startling statement that if they "successfully oppose the legislation now urged by the President the country will resort to government ownership." He adds that this is "a mere question of popular desire."

The American Judiciary. Everett P. Wheeler. This article is written as a review of Judge Baldwin's new book on the American Judiciary, which is highly praised. The first point on which Mr. Wheeler speaks is the effect of the codes, as adopted in New York, and followed by a number of other states, upon the practice upon appeals. It is well known that the New York Code has not had in every way a beneficial effect upon the practice of that state, and Mr. Wheeler points out some most serious defects. Mr. Wheeler confines his article to this one point, and gives us no further glimpse of the book he took for his text in his first sentence. But in calling the attention of the legal world to the defects in the law which he has noted he has doubtless rendered the profession a great service. The points he makes should also be noted by those who are interested in the codification of the law, whether they are for or against such codification.

The Spirit of the Common Law. Roscoe Pound. The tenacity of the common law is first noted. After celebrating its triumphs and its

ascendency over all forms of law with which it has come into contact, Mr. Pound says, "Superficially, then, the triumph of the common law seems assured." But he fears that there are dangers to be met; the first is that of legislation, and he cites Maitland and Brunner as sounding the cry of danger from over-legislation. He does not think their fears, from this cause, well founded, however, but the danger he foresees is a new one. The people have in all times in the past been with the common law; now they are against it. Recent decisions uphold the freedom of the individual to contract; deny the rights of the people to "stand between a portion of our people and oppression." He cites decision after decision to substantiate this statement, and he succeeds. But the cases he cites are all cases in which the lines are drawn with great distinctness between labor and capital. Is this not where the trouble lies? Is it the common law which is against the people, or is it that the courts for a time inevitably interpret the sentiments of the class from which the judges are drawn? To say "by which the judges are influenced," might be too severe. The people were with the common law because the common law was with the people, and the common law has not changed. It has been contended, and with ability, that in the common law we have a weapon with which to defend every right of the people which has of late years been assailed. Mr. Pound himself asks, "What is the spirit of the common law?" And he finds it to be, in effect, the spirit of the people, and that it has within itself the means of bringing it in touch with the spirit of the people. He finds the weapon at hand to be the police power. If the police power were not at hand, there would be some other weapon. For the common law is the breath of the people, and while they live and breathe the common law will survive. It seems not so much the protection of individual rights, as Mr. Pound contends, that is so securely safe-guarded to-day, as the sacred rights of property; it is the subordination of the individual, singly and collectively, to the accumulated power of property, against which the people revolt. When the courts remember, what they temporarily seem to have forgotten, that laws were made first for the protection of the individual, secondly for the protection of property; that a man or a collection of men have supreme rights, and that the property they own has only secondary rights, the people will have come to their own again, and the spirit of the common law will once more be one with that of the people.

HARVARD LAW REVIEW.—January.

Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of it, During that Period. C. C. Langdell. Mr. Langdell objects to the obscurity of the title of Mr. Dicey's book on "The Relation between Law and Public Opinion in England during the Nineteenth Century." The title to this article seems to be Mr. Langdell's attempt to clear up this obscurity. The article is practically a review of the book mentioned. It is interesting to find here, as in Mr. Bryan's article in the *American Law Review* for this month, an opinion that the extreme doctrine regarding the freedom of the individual to contract, leads, not to freedom, but to slavery. That doctrine is a part of that era of individualism which Mr. Dicey thinks has passed, in England at least, and he believes that she has now entered upon an era of collectivism or socialism. The commentary

which Mr. Langdell gives us on the book and its theories, is most appreciative of Mr. Dicey's work.

Congress, and the Regulation of Corporations. E. Parmelee Prentice. After stating the general tendency to an impatience with the Constitution, and the feeling that new powers should be assumed by the federal government—a tendency with which he is not in accord—Mr. Prentice examines the nature and extent of the federal power over commerce. He finds that the federal power over this subject has not developed sufficiently to authorize such legislation over corporations as has lately been proposed. He then notes two express limitations upon Congress which prevent its assumption of these powers. The first of the two is the liberty to engage in commerce. This liberty is held to be a right which neither the states nor the United States may deny. "Some rights in every free government are beyond the control of the state. 'A government which recognizes no such rights, which holds the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.'" The second limitation is that of taxation of imports and exports. The constitutional provision in regard to exports and imports is considered to prohibit federal regulation of interstate commerce. The Constitution is considered to give no sanction to the assumption of the desired powers; it can only be construed to do so by abandoning the principles of construction which we have hitherto followed. Mr. Prentice closes his article with these words: "Should these principles of constitutional construction now be abandoned, should the Constitution be made as broad as the results which federal power may accomplish, and then in turn these powers be extended to serve the needs of the new government thus created, it is obvious that the Constitution has ceased to exist."

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