THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Edited by members of the Department of Law of the University of Pennsylvania under the supervision of the Faculty, and published monthly for the Department by ROBERT E. ANDERSON, Business Manager, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the BUSINESS MANAGER.

NOTES ON RECENT LEADING ARTICLES IN LEGAL PERIODICALS.

THE AMERICAN LAW REVIEW.—March–April.

It is possible that Mr. Larremore did not intend his article to be taken seriously; certainly he can hardly have meant it to be taken so in its entirety. When he assumes that few people are familiar with the history of the "social-contract" theory, and kindly gives the reader a short outline of that history, he must, if serious, ignore nearly all the literature on the subject, including that intended solely for the undergraduate—literature that very few reading persons can have been able to escape. The argument of the paper seems to be that the two documents known as the Declaration of Independence and the Constitution of the United States are "glittering generalities" because

the people of the United States have not lived up to the formulas therein contained, in all respects. That both documents are open to criticism is true; that they were not sent forth to be accepted of all men as the final statement of unerring wisdom; that they were not so accepted by the people, is well known to all students of those documents or of our history. The line of argument here adopted, however, would equally well relegate to the class of glittering generalities and well-worn aphorisms, weak and feeble because not acted upon by those supposed to accept them, the Ten Commandments and the Sermon on the Mount.

Injunctions against Boycotts and Similar Unlawful Acts. James Wallace Bryan. The attempt is here made to answer the question: "Given a combination, are all of its attempts to exclude a person from business dealings with others unlawful as boycotts? Conditions under which injunctions have been issued to restrain combinations of workmen are first examined; then the retaliatory measures commonly taken by employers, and the measures used to restrain them. It may be noted that while it needs eleven pages to examine the cases where injunctions have been issued against the workman, it takes less than two to examine those where it has been considered possible that the court would grant the injunction against the employer. Actions which appear to be open to only one section of the people naturally excite suspicion among those against whom they are used.

THE GREEN BAG.—April.

Employers' Liability as an Industrial Problem. Roger S. Warner. Very clearly and without waste of words Mr. Warner shows us the economic conditions preceding, and the economic changes of the time which produced the "fellow-servant" rule. Since the decision of Lord Abinger, in *Priestly* v. *Flower*, "the fellow servant rule has been a controlling principle of the common law; it may almost be said in view of the change in industrial conditions, that since that day it has been out of place in our *corpus juris*. The attitude of English thought upon the subject is well exhibited by this extract from the memorandum of the Home Office submitted to the Royal Commission on Labour in 1894. "The doctrine (the fellow-servant rule) is an exception to the general rule; is modern judge-made law; implies a contract founded on a legal fiction not in accordance with fact; has been pushed to extreme length by the judges forcing and straining the meaning of the term 'common employment' and in practice leads to gross anomolies and injustice.....the law is an unfair law, operating oppressively against workmen as a class." Wherever statutes have not been passed, this "modern judge-made law" is still enforced. "Statistics in regard to the causes of industrial accidents are startling," we are told. This being so, we have at last come to the knowledge

that for such losses some one must pay. It was thought for a long time that the workman paid, and those who were not included in that class did not worry. Now it is beginning to be thought that this is after all a severe drain upon the community; that perhaps it is not, after all, the workman who pays all the cost. This is causing the other classes who may have to pay, some concern. Why should the employer of much labor impose these burdens upon the members of the community who are not large employers of labor? In Europe this knowledge has already had its effect. In the United States, while other risks are insured against, "no account is taken of the deterioration of the human machine." Mr. Warner does not insist that we shall blindly follow England in our legislation upon this subject, but he says: "It is scarcely to be expected that the problems which we have been discussing can be left to work out their own solution without legislation. They are industrial problems created not by natural and economic conditions alone, but by an artificial regulation of those conditions. It may be that our methods and difficulties differ so far from those of the British that we cannot profit by their example; it may be that there are more effective solutions. But these are the questions to be determined—let us have all the light that discussion can give us."

The Abuse of Personal Injury Litigation. This is a "symposium" by nine writers, who each give us, from their point of view that "light" that Mr. Warner asked for. The first writer thinks that he approves of legislation upon the model of the English act. The second writer shows that the employer is far more wholly to blame for the amount of litigation upon the subject, and he also advocates a "fair workman's compensation act," but fears that corporations will not lend their support to such a measure. The third writer has a large number of simples which he advocates as remedies, but in the long list it seems as if some might be as likely to kill as cure. The fourth writer takes the "legal and professional view," which he seems to consider must be that the greater number of cases for personal injuries are fictitious. The fifth, finds a great injustice in the present state of affairs, and advocates legislation, but apparently not of the workmen's compensation type. The sixth seems to find in co-operative insurance and elimination of the "shyster lawyer" a panacea for all the evils The seventh appears to be an employee of street railway corporations and unfortunately does not bear out the hope that he would take an unbiased view of the situation. The eighth is also an employee of the street railway corporations and he seems to feel that the entire problem is comprised in the endeavor to eliminate "unjust verdicts." The ninth considers the question in the light of workmen's compensation in England. The light we get is that the law and the lawyer will ultimately have little to do with the settlement of the question. It is an industrial problem with which they have already shown they are unfitted to cope. The judges have made the law; they will have little to do with its repeal.

HARVARD LAW REVIEW.—March

The Genesis of the Corporation. Robert L. Raymond. This article has the rare distinction of originality. Whether its conclusions are accepted or not, they have grown out of real processes of thought, and are not merely the written observations of previous writers. This does not mean that we are not given "authorities" with page and chapter. The writer acknowledges indebtedness to Pollock and Maitland with a generosity and enthusiam which alone would prove him no mere borrower. A quotation or two may give some slight idea of this interesting article. "The unit interest or oneness produced by the association in different ways of several persons became such an active factor in practical affairs that people were forced to recognize it as something independent. The oneness had to be given a place in business and in law as something definite. It happened that the basis of a person was adopted, unfortunately, through the influence of a theory entirely proper where it belonged, namely, in church ownership; this person was called a fictitious person. Unfortunately because the word 'fictitious' or 'artificial' says more than is necessary, connotes something far removed from the practical everyday affairs of life, signifies feigning or make-believe. A corporation is really a collection of flesh-and-blood individuals who have an identity of interest in certain affairs.

"Neither the individuals nor the relation they bear to one another is fictitious. The mechanical necessity of the case requires that these individuals in their group capacity be put upon some definite basis, and they are therefore treated as a single person. But there can hardly be said to be anything unreal about the matter. A nation represents merely the relationship of certain human beings to one another, but we should hardly call the United States or England a fiction." "By the middle of the fifteenth century....it was settled as a matter of positive law that the corporation must be created by the sovereign power.....When this rule of law was established.....it really meant, recognition of corporations cannot continue without the king's express consent. The sovereign's act was not creation but permission.....nevertheless, from the time when this rule of law became established the permission was given in form as though it were creation...Corporations came to be things made according to the ideas of the sovereign....Even so, it was long before the sovereign went in advance of the general opinion, and corporations were for a long time limited to endeavors strictly for the public....A corporation which in business affairs can do practically anything and everything that can be done by an individual and can do it anywhere and everywhere is a long distance from the true corporation which was brought into existence by absolute necessity, which was recognized simply because the progress of events demanded its recognition, which was the result of natural growth, of logical evolution. The modern

corporation is the product of arbitrary legislation struck off at a given time. It does not represent the natural growth of the corporate idea, but rather is a distorted application of that idea. Serving as a buffer between questionable acts and their natural consequences, it has been used to bring about a state of affairs in the commercial world which rests on neither a sound or a just basis. If existing conditions are to be improved, it must be by intelligent amendment of our corporation laws. An exact standard by which to measure proposed legislation is not to be hoped for; but in a clear understanding of what a corporation really is we may find both guidance and authority for action."

MICHIGAN LAW REVIEW.—February.

The Evasion of State Laws by Mail Order Insurance Companies. John G. Park. The sins of the insurance company are many and this is another indictment of a sort of insurance which seems to be sinful from its birth. It offers—through the mail—the benefits of all valid insurance and some additional ones. These companies are said to carry on their business by the evasion and defiance of the laws of the several states. Mr. Park would have legislation to "prohibit the sending by mail of an insurance policy into any state where the insurer has not complied with all the statutory regulations." "By a federal statute the sending by any mail of any form of an insurance contract into a state wherein the insurer was not authorized to do business should be declared a fraudulent use of the mails." "There is no justification for the use of a governmental agency to defy state law. The state and federal courts should take cognizence of the true aspect of mail order insurance companies. They should pierce through the paper contrivances which conceal their methods and hold them to be legally what they are morally, offenders against the law,"

Christian Science and Religious Liberty. Edward W. Dickey. This is an earnest, if not strong, argument in favor of the unrestricted practice of the art of healing by the Christian Scientists, which argument would be quite as forcible if applied to any set of persons, claiming any religious opinions and desiring to perform cures by the methods sanctioned by such opinions. Many well-meaning persons have, under the urging of certain religious beliefs, claimed the right to perform sacrifices, entailing the taking of human life, with the belief that their faith would restore the victim ultimately. Public policy cannot permit the practice of such measures, yet the argument here set forth would sanction them, although they doubtless would be as repugnant to the writer as to any other citizen. So long as the opinion prevails, that the science of medicine as practised by physicians trained in the schools, should be confined to those so trained, however mistaken the opinion may be that life is safer in their hands than the hands of any other set of persons, so long will untrained persons, irrespective of their re-

ligious faith, be excluded from the practice of medicine. It is not a question of religious belief but of physical safety in the minds of the people at large and of the law which has their protection in its charge.

Effect of Ratification Between the Principal and the Other Party. Floyd R. Mechem. This article is adapted from Mr. Mechem's forthcoming second edition of his well-known work on the Law of Agency. It is a succinct statement of the law on the subject, considered from the standpoint of actions based on contract or sounding in tort.

MICHIGAN LAW REVIEW.—April.

The Compensation of Medical Witnesses. H. B. Hutchins. It has heretofore been assumed by text writers, that the medical witness should be compensated for his services as an expert witness, and this attitude has been in some cases supported by the decisions of the courts. There has been vigorous dissent from other courts, however, and it is probable that now "the weight of au.hority in the United States at the present time is....in favor ot the proposition that the expert medical witness is not entitled to compensation in addition to that provided by law for the ordinary witness, when he is called upon in court simply for his opinion as an expert upon assumed facts, and that a refusal to answer, unless compensated upon a professional basis will render him guilty of contempt." The question is different when the medical expert has to make special preparation for his examination, and when he must attend day after day to give his opinions. Fees have been very largely provided for by statute. It has become a general practice for the expert to be brought in by an interested party from whom his remuneration comes. This is a practice which has given rise to most of the evils in regard to the use of expert testimony. Through this custom he becomes, not a disinterested witness to the truth, but an interested party in the case. The remedy seems to be legislation forbidding the private compensation of the expert. This has been recommended by many writers of late years, and has been put into practice by one state, Michigan. It is probable that other states will follow what seems to be a wholesome piece of legislation.