

## BOOK REVIEWS

*Gentlemen of the Jury—Reminiscences of Thirty Years at the Bar.* By Francis L. Wellman. New York, The Macmillan Company, 1924, pp. xv, 298.

Mr. Wellman's main objects are "to acquaint jurors with the profound importance and dignity of their membership in that ancient and honorable institution of Trial by Jury; to lay before them the duties, privileges and prerogatives of a juror, to open their minds to the fallacies of human testimony, the whys and wherefores of intentional perjury, the methods by which truth can be distinguished from falsehood and exaggerations can be reduced to their proper proportions"; also "to impress them with the dignity, wisdom and impartiality of judges"; and "to point out to jurors in some detail the methods by which the lawyers in the case often try to distort or conceal evidence, or to lead their minds to unimportant side issues in disregard of the major points before them." His subsidiary desire is "also to be hailed as a welcome *raconteur*." To what extent are his high purposes accomplished? A few pages of the chapter on witnesses give prospective jurors some sound advice on the evaluation of testimony and the necessity of distinguishing evidence from lawyers' talk, but it is open to question whether it is or can be set forth in such terms as to enable a layman to apply it to a specific case. A portion of the two chapters on lawyers exposes some of the tricks of unscrupulous advocates, and lends strength to the impression, gathered also from other parts of the book, that the American bar adheres to what Dean Wigmore calls "the sporting theory of a lawsuit." Of the two chapters on judges about half is taken up with the careers of trial judges whose conduct of trials has exemplified the worst, the best, and the ordinary performances of the judicial function. The chapter on the verdict is valuable in setting forth the sort of conduct which jurors should avoid, and the last chapter makes some sensible suggestions for securing better jurors. Of the chapter on the history of trial by jury, the less said, the better. It is confused and in many respects inaccurate, and can give to neither layman nor lawyer any adequate notion of its subject.

The first chapter must have been written to further the author's subsidiary desire. It relates the imaginary initial experience with jury duty of an imaginary middle-aged merchant. Its chief interest lies in the absorbing story of the events leading up to the murder of Philip Barton Key by General Daniel Sickles; its most remarkable feature is that it lifts sentences and even whole paragraphs from Chapter XIX of Charles Kingston's "Dramatic Days at the Old Bailey" without the poor acknowledgment of quotation marks. The remainder of the book consists of a hodgepodge of anecdotes, by which the foregoing parts are strung together. Some of these are drawn from the author's own experiences; others are taken from previously published examples of judicial and forensic wit and humor; some are in point, others are dragged in; many of them are entitled to respect on account of their long service and venerable age. On the whole, Mr. Wellman has come much nearer accomplishing his subsidiary desire than attaining his chief ends. The book is well printed on good paper. If one omits the second chapter, it will help to pass a dull evening. As a serious attempt to create an appreciation of the dignity and importance of jury service and respect for trial by jury, it is not worth while.

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*Legislative Assemblies.* By Robert Luce. Boston and New York, Houghton Mifflin Co., 1924. pp. vi, 691.

"Legislative Assemblies" is the title of a well-printed volume of almost 700 pages by Representative Robert Luce of Massachusetts and is the second in the series of four contemplated volumes on the subject of the science of legislation. Mr. Luce is particularly well qualified to write on this subject as he is both a student of legislation and an experienced legislator in a somewhat varied field. Like the volume which preceded it, "Legislative Procedure," the present volume is a work of great value. It is the result of much research and inquiry by one who is not afraid to face the facts of history, or to state them fairly. The author has no pet theory to advance or to establish and while he has ideas of his own as to which of several plans is the best, he does not hesitate to give all the facts that might be accepted as teaching a contrary doctrine.

The work of Mr Luce is timely. When panaceas and quack nostrums are being put forth as remedies for all government ills, it is well to know what experiments have been tried in times past and what the results have been, so far as history discloses.

The treatment of the subject of the bi-cameral assemblies with which the volume opens, is typical of the entire work. The author hews to the line, letting the chips fall where they may. He shows that beyond question the prevailing tendency has been in the direction of having two Chambers instead of one, though the fact remains that the opposite tendency has manifested itself in a number of instances for which there is much to be said. The better of the discussion, however, is pointed out to be on the side of two separate chambers. The principal argument used in favor of two bodies rather than one is still the time-honored one credited to Washington and illustrated by pouring the tea into the saucer to cool before drinking. Briefly stated, it favors the bi-cameral system because it tends to prevent precipitancy as the result of passion or excitement and makes for better considered legislation.

The manner of choosing the membership of both Houses is also fully treated. In the several states of the Union there has been little real difference in the election of the membership of the two Houses from the beginning, and in the case of the Federal government the last substantial difference was eliminated by the adoption of the 17th Amendment to the Constitution. Along with it has gone one of the weighty reasons for the establishment of a second chamber. Gone also is the idea that the Senate in any real sense represents the states as such in any greater or different degree than do the Representatives. The very general adoption of the primary system of nomination causes both Senators and Representatives to be twice sifted through the same popular sieve in order to secure an election, so that they both equally represent the people, differing in this respect only in the size of their respective constituencies.

The size of the Assembly is the subject of a most interesting chapter. The numbers, past and present, composing most of the Legislative Assemblies of the world are given, and the reasons for the changes, so far as they can be deduced. It is admitted that there is no consistent trend and that the comparative effectiveness of the size of the Assembly depends on such a variety of different conditions that it is difficult to form a conclusion as to the effect of the size of the Assembly. The author makes a bold suggestion regarding the separation of the functions of a Legislative Assembly and argues that while a smaller assembly is better for one kind of duties, the large Assembly is better

for another. The suggestion is very interesting, but he does not expect to see such a scheme become a reality.

As to the comparative size of the two Chambers in the several states of the Union there has been a pronounced tendency in at least one direction and that is that the proportion between the smaller and the larger Chamber should be, roughly speaking, as one to three. Assuming the same degree of audacity as the author, it is suggested that the relation of one to three in the two Houses of the Federal Congress would be about right. In other words, that with a Senate of almost a hundred members, the most workable size for the other Chamber would be about three hundred.

As to the length of term or frequency of election, the prevailing tendency and the argument of the author are clear, sound and convincing. The reasons that prompted provisions for short terms and frequent elections have largely passed away. Frequent elections were at first directed against the danger of recurrence to absolute monarchy. The danger now is the opposite direction. No one longer fears the danger of government by a few. The need now is for a system by which the many may govern themselves without danger of too frequent change. Terms should be longer even if it be necessary to have a part of the members elected frequently.

Frequency and length of sessions is quite another matter from that of frequency of election and length of term. There is much to be said in favor of frequent or at least of periodic regularity of sessions. Appropriations should be regularly and not infrequently made. It tends to keep before the people the fact that it is their funds that are being allotted and that go to the varied expenses of running the government. Likewise it keeps alive the sense of responsibility on the part of legislators.

There follow interesting and instructive chapters on the place and time of holding legislative sessions; the election and qualifications of members, including exclusions; qualities, capacity and training of members; rotation in office, and lobby. There is also a chapter on "Improprieties or Worse"; a special chapter devoted to bribery, in which it is accurately concluded to be becoming more and more rare so far as monetary considerations are concerned; a chapter on privileges; one on contempt; another on salaries, including expenses; and the volume closes with chapters on customs, habits, and decorum of Legislative Assemblies.

The book is a veritable storehouse of instances and illustrations gathered from a very wide field, with careful and incisive comment of which the author is a master. It is altogether a book well worth reading by anyone who feels even a general interest in the way his country is governed, and should be invaluable to those who are engaged in the work of carrying on the government and legislating for it.

JOHN Q. TILSON

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*The Federal Trade Commission.* By Gerard C. Henderson. New Haven, Yale University Press, 1924. pp. xiii, 382.

This book is a product of the program of the Commonwealth Fund initiated in 1920 to encourage legal research. It is an "intensive study" of administrative law and practice. Only such activities of the Commission are discussed by the author as "properly fall within the scope of such a study."

An historical background of the Federal Trade Commission is depicted in an introductory chapter on Political and Legislative History. The Sherman Act was such a rush-order-product. Substantial numbers of the electorate were experiencing an economic squeeze not unlike Elizabethans enmeshed in the superimposed system of Crown patents of monopolies. The antecedents, however, were obscured by the complexity of the economic process of modern variety. On the other hand, "corporations," "pools," "combinations," "restraints of trade," "monopolies" and "trusts"—all terms of somewhat precise legalistic significance to lawyers—had become popularized and synonymous. Their connotation of undefined greatness and of concentrated resources made them morally reprehensible. Just naturally by process of over-simplification the complex of many intricate problems requiring scientific study and pragmatic adjustment as continuing problems became one popular problem to be solved finally—the problem of trusts and monopolies. Popular hue and cry to trounce all trusts, monopolies and restraints of trade was too dominant to be ignored by those considerate of political favor; hence the Sherman Act which made criminal "every contract, combinations in form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states." Its equipment was standard: the Attorney General's Office, jails, fines, treble damages—equipment adequate for "busting."

As Lord Coke appears to have rationalized the Statute of Monopolies into consistency with pre-existing common law "principles" (and well-enough, perhaps, had the rule of *Darcy v. Allen*, 11 Coke 84b, been effective) so the Sherman Act was offered to fill a niche in the existing "legal order." But some "contracts in restraint of trade" and some "combinations" had enjoyed the favor of the common law courts while the Act incriminated every such contract and combination. The "rule of reason" was adopted by the Supreme Court restricting the Sherman Act to *unreasonable* restraint of trade or competition.

The technique of the Supreme Court in applying this rule has had its variations. Introspective consideration of the "real purpose" of a contract or combination—whether to promote economies or to eliminate competition—is evidenced with its difficulties in *United States v. U. S. Steel Corporation*, 251 U. S. 417. At other times there is (in form at least) the pragmatic approach of measuring the data of the restraint in hand with given consequence deemed desirable as in *Chicago Board of Trade v. United States*, 246 U. S. 231.

The author finds in these later decisions of the Supreme Court a crystallization of the emotions of the proponents of the legislation of 1914. Should the court be left to determine the application of the Sherman Act according to its notions of economic expediency? There was the fundamental demand that the legislature particularize its dictates of policy and oust judicial usurpation. Business men wanted certainty—the behavior of the Supreme Court was yet unpredictable. They asked for an authoritative advisory governmental agency to which they could submit proposed business programs for approval.

Out of this experience came the Federal Trade Commission Act (1914) a non-criminal statute prohibiting "unfair methods of competition" (section 5) and the Clayton Act (1914) with such specific prohibitions as are contained in relevant sections (sections 2, 3, 7 and 8). But as the author concludes: "The Sherman Law remained intact, nor was any attempt made at a legislative definition or specification of the offences to which it relates . . . the movement of clarification and definition, at least so far as it rested upon the demand of business men that they be appraised what conduct was and what was not lawful had made but little progress."

As an administrative commission, (now nine years old, comprising a per-

sonnel of three hundred persons and expending nearly one million dollars annually), it is authorized to proceed in cases where it "has reason to believe" that the law has been violated if "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." It is written that its "findings" shall be conclusive "if supported by testimony," but such provision has had little effect in the courts due to incomplete and formalistic "findings" that have come up in the cases. Its orders to "cease and desist" are enforceable by application to the Circuit Court of Appeals.

The Commission's most effective work may be referred, perhaps, to its activities in the field of deceptive and dishonest practices. Appropriation of unearned increments in trade values by deceiving the market appears to be a by-product of the competitive system. With the function of "trade practice submittals," whereby those engaged in a given trade gather in conference with the Commission to discuss and study practices in a given trade and to resolve various recommendations to the Commission concerning that trade, the author finds the Commission particularly fitted with these cases.

In thorough constructive criticism the author points out serious defects in the statutes by which the Commission was created and with which it is concerned as well as with its actual carrying-on. Constituted to be both prosecutor and judge judicial impartiality is jeopardized. Actual practices of the Commission warrant the criticism. True to its "judicial" capacity the Commission is slow, some cases dragging over a period of three or four years or more. Likewise is it in arrears in its docket. Its report of cases, its "findings," are too frequently inadequate to serve as intelligible precedents. The author asks for no more than a "descriptive and narrative report couched in simple and direct language" in substitution for mere formal recitals. Promiscuous publication of the Commission's complaints is unduly injurious to respondents against whom the complaints are later dismissed. As a national commission it is handling too many cases of too little importance.

Mine and other pertinent criticisms are made by the author to "make the Federal Trade Commission more effective . . . for despite the many matters of detail which can be justly criticized, and despite the meagre results which have been achieved to date . . . the fundamental policy embodied in the Federal Trade Commission Act is sound and . . . the Commission itself is in a position to render services of great value to the business community and to the country as a whole."

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*International Law and Some Current Illusions and Other Essays.* By John Bassett Moore. New York, The Macmillan Company, 1924. pp. xviii, 381.

Present-day students of international law have noted with more than usual interest the appearance of each new volume dealing with the international legal problems raised during the recent war. The interest of some is inspired by a belief that advances in science and civilization (?) have created problems wholly new and have made the law of centuries an anachronism. Others whose views are less iconoclastic, were nevertheless deeply stirred by the breadth of a struggle which prevented the scholars of almost every land from viewing the problems

raised with absolute pedagogic detachment. It is unfortunate that some who wrote during the unnatural excitement of the war period shared the popular, propaganda-fed state of mind "which assures error against detection and falsehood against exposure," and allowed the pressing appeal of patriotism to obscure the eternal demands of true scholarship. Contrast the intellectual outlook of two post-war authors—one sanely observing that in his book:

"There has been constant endeavor to emphasize the unreasonableness of any rule which, however widely accepted, and although acquiesced in by American statesmen, has appeared through its operation to violate the requirements of international justice," and the other remarking that:

"the views of the German jurists on all questions of international law the rules of which the Germans were charged with disregarding were so distorted and colored by partisanship that it may be doubted whether their inaccessibility was a loss of any real consequence."

Judge Moore is among those who refused to lose his intellectual balance. In his collection of essays recently published under the title "International Law and Some Current Illusions," he makes his introduction thus:

"The immediate object of the publication of the present volume, and particularly of the paper which gives to it its distinctive title, is to contribute something towards the restoration of that sanity of thinking and legal and historical perspective which the recent so-called World War has so seriously disturbed." And further: "There is need all along the line of a recurrence to fundamental principles."

Here is a point of view the antithesis of that of another writer who in 1920 said: "A new world has evolved suddenly out of the world which we knew, and the transformation extends to the foundations of government and of economic life."

The title essay has two general and three specific themes. The former are, first, that "there is nothing new under the sun"; and second, that the breach of a rule of law neither abolishes the law nor indicates the futility of making laws. The specific themes are: the permanence of the distinction between combatants and non-combatants; the sanctity of private property during war; and the distinction between goods absolutely contraband and goods conditionally contraband.

Drawing on an immense store of historical information, Judge Moore demonstrates that the problems of 1914-1918 had their replicas in the past. He compares the most recent struggle with its precursors and strikes home to the reader the necessity of bearing in mind the principle of "relativity"—a theme which the author develops more fully in the concluding essay of the volume. Referring to the breach of laws, in the essay entitled "Law and Organization" Judge Moore shows wherein international law and municipal law differ, sagely remarking that "a vast deal of time has been wasted in controversy over the question whether the international law is law at all" when the dispute has really pivoted around irreconcilable preconceived definitions or a similar divergence in the application of a common definition.

Judge Moore attacks unsparingly the position that with whole nations organized for war there is no longer a distinction between combatants and non-combatants. He notes that there is not a single government to-day supporting such a theory and that it does not reflect the attitude of naval and military men. With gentle irony he points out that soldiers have always had to eat and that farmers had to raise their food, adding "nor is the nutritious and sustaining quality and food diminished by its delivery even by ox-cart." With the con-

vincing logic of a great lawyer, Judge Moore proves his case for the inviolability of private property in time of war, calling the words of Hamilton to his aid, and adding the impressive weight of his opinion to a position already ably defended by Professor Borchard of the Yale Law School.<sup>1</sup> Judge Moore vehemently asserts the necessity for maintaining the distinction between absolute and conditional contraband, a position which he had previously supported in an address delivered in 1912 which is reprinted as the second essay of the present volume. He reminds the reader of the uncompromising attitude of the United States speaking through Jefferson under analogous circumstances in the eighteenth century, and of the equally definite position taken by Lord Salisbury during the Boer War.

The third and fourth essays should be read together. The former is entitled "International Arbitration" and is a reprint of an address delivered in 1914. The latter is an authoritative description of the World Court. The author brings out the rather discouraging fact that "it is now in actual practice more difficult to secure international arbitration than it was in the early days of our independence." Speaking of the Permanent Court of International Justice, Judge Moore does not hesitate to discard the claim that here we have an instrument for preventing the recurrence of war. As he says in another place: "I sound no grandiose strain from the nebular regions nor essay to propound a prompt penacea for the world's ills." Judge Moore likewise rebuts the argument that the fact that the expenses of the Court are defrayed by the Treasury of the League is incompatible with the Court's independence.

In the fifth essay the author also gives us an authoritative account of the 1922 Hague Conference on Aircraft and Radio, over which he presided, with what measure of success another member of the American delegation has elsewhere described.<sup>2</sup>

While Judge Moore has not included in this volume a direct discussion of the League of Nations, one must be content with comparing the sixth essay entitled "Law and Organization" with the Government of the League and particularly with the recently concluded Protocol. This essay embodies an address delivered in 1914 and reveals a remarkable prophetic insight. Limitations of space prevent a detailed comparison here, but the reader's attention is particularly called to pages 302-303 and to the author's postscript written in 1924 on pages 305 and following.

In the sixth essay—"The Passion for Uniformity"—the author stands revealed not only as a lawyer and historian but also as philosopher and scholar of equal rank. In this essay the wise suggestions relative to the codification of any body of law are of peculiar present-day interest. In the eighth essay on "Suggestions for a School of Jurisprudence," Judge Moore speaks as the teacher—a capacity in which he is especially familiar to and admired by many of the present writer's generation.

It is a remarkable feature of this volume of essays that it is also a valuable

<sup>1</sup> See (1923) 23 *COL. L. REV.* 383; (1924) 18 *AM. JOUR. INT. L.* 523.

<sup>2</sup> Admiral Rogers in (1923) 17 *ibid.* 629, 636:

"The acceptance of Article 24 . . . unanimously, was a very great personal success for the chairman of the commission, the Honourable John Bassett Moore, whose diplomatic tact, patience, courtesy and drafting skill were exerted to the utmost to reach a fortunate conclusion upon this article. His success was welcomed by the commission's warm ovation to him upon the announcement of the vote of acceptance."

handy reference book. It contains in appendices treaties relating to contraband, the Statute and Rules of Procedure of the World Court, and the General Report of the Hague Conference on Aircraft and Radio. From introduction through index this book commands the attention of students of international law. But because of its gentle humor, its very readable style, and its intensely human feeling, it is a book which has a wider appeal, repaying the attention which any lawyer or layman may be wise enough to devote it.

PHILIP C. JESSUP

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*The Law of Evidence in Civil Cases.* By Burr W. Jones. Third edition revised and enlarged by William Carey Jones. San Francisco, Bancroft-Whitney Company, 1924. pp. xxvi; 1661.

*Handbook of the Law of Evidence.* By John Jay McKelvey. Third edition. St. Paul, West Publishing Company, 1924. pp. xix; 588.

Neither of these books requires or merits an extended review. A careful reading of the entire text of the former compels the conclusion that in this edition no serious effort has been made at a critical analysis of the subject or at a scholarly consideration of any of the difficult problems in the law of evidence. For the most part the work fits Professor Chafee's characterization of the average law book as a collection of headnotes arranged horizontally. It would serve no good purpose to point out its defects in detail. Its chief merit is that in its rather full footnotes it gives abundant references to notes in the standard series of selected cases and frequently indicates the purport of a decision by a brief phrase or sentence. As a reference book for the practitioner it is probably equal to the average encyclopaedic article; as a text book for use in a law school, it is of negligible value.

The first edition of McKelvey was "the embodiment of an attempt to restate the principles of the law of evidence in a manner easy of comprehension for the student and for the practitioner, easy of application." The present edition, in furtherance of the same object, announces that "it is not for a work which seeks to reflect present conditions to do aught but state rules and principles as they are accepted and applied in actual practice—in short to treat the law as it is, not as it ought to be or as it perchance may be in the future." In other words, this purports to be a book upon which the overworked judge and the busy lawyer may rely, and which the student may readily understand, especially when used in connection with Throckmorton's Cases on Evidence (2d ed.) to illustrate the application of the text to litigated questions. A painstaking examination of the treatise is distinctly disappointing to one who expects to see the purpose of the preface accomplished. At times a rule is stated as if it were universally accepted when it is in fact a minority doctrine, and frequently sharp conflicts of authority are entirely disregarded. In some instances a stray decision is given prominence in the text; in others the majority rule is relegated to a footnote. Since the citations of authority are comparatively meagre and sometime poorly selected, such a text cannot be taken as a safe guide to the existing law. The tired judge and the harassed practitioner must look elsewhere. But the book does contain excellent material for classroom study, if properly handled; for it makes a serious and intelligent effort to solve many of the difficult questions of evidence, and it presents reasoned theories and some reasonable classifications. To use it as a correct exposition of the law, supplemented by cases for illustrative purposes only, would be harmful, if not

impossible. The text should be treated only as a basis for class discussion under the direction of an instructor who has examined not only the authorities cited in the notes but also the general case law upon each topic, and who is acquainted with the writings and theories of Wigmore. None of its assertions should be accepted until shown to be sound after searching analysis and thorough debate. If to be used only with such labor and in such fashion, it may be asked, why use it at all? The answer is, if instruction is to be given by text book, it can be safely and profitably be given only with such labor and in such fashion; and none other of the briefer texts contains matter so suggestive and stimulating.

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*Joyce on Indictments*. Second Edition with Forms, by Howard C. Joyce and Arthur W. Blakemore. Albany, N. Y., Matthew Bender & Co., 1924. pp. ccxii, 1147.

The first edition of *Joyce on Indictments* was published in April, 1908. It was the purpose of the author at that time as set forth in his preface to present the general principles as to the finding, requisites and sufficiency of indictments with special reference to specific offenses and also to compile forms for ready reference. The reception which his work received at the hands of the Bench and Bar seems to have justified the labor that was apparent in the preparation of that volume.

There have been very great developments in the criminal law during the past fifteen years and it is to be hoped that the processes of simplification are to be increasingly extended. It is because of these changes that a new edition of Mr. Joyce's able treatise is of timely interest. That Mr. Blakemore is sensitive to this crying need for less phraseology and more understanding is evidenced in the present volume by the inclusion of a compilation of short forms covering the setting up of almost all the offenses commonly met with in the courts to-day. These forms constitute perhaps the most valuable feature of this second edition. These particular forms are a part of the book through the courtesy of Mr. Justice Cropsey of New York. They have been in use for several years past in the office of the District Attorney of Kings County, New York, and were adopted by the then District Attorney, Mr. Justice Cropsey, as one of the many reforms instituted by him in that office following his incumbency in 1912.

To the very complete list of forms of indictments in the first edition there appear many additions in the present volume and also certain Federal forms taken from the files of the United States District Court in the District of Massachusetts, and these appear to represent fairly the present tendency in United States practice. It is interesting to note that these latter forms are concerned almost entirely with the setting up of offenses under the Eighteenth Amendment. Perhaps it might be fair to say that these particular forms should prove of more practical advantage to the practitioner than Form 138, for instance, which sets up with great solemnity the offense of shooting at the queen with intent to injure her.

Most of the general precedents which reappear in this second edition have either received judicial approval or have been used in cases where their suffi-

ciency has not been questioned. The newspaper student of American Criminal Law will recognize many a celebrated cause such as the Molineux case, the Albert T. Patrick case, to speak of two New York murder trials, and will also once more make the acquaintance of Abe Hummel, a picturesque practitioner in that city a quarter of a century ago.

The first part of the volume is taken up with an historical background regarding indictments and prosecution at common law. The distinctions between indictments, presentments, and informations are clearly set forth. By far the greater part of the text, however, is given up to a discussion of constitutional and statutory provisions, the power and jurisdiction of the Grand Jury, a discussion of specific crimes, and practical suggestions regarding the general methods. The table of cases includes several thousand, and annotations cover the period from the first edition to the present time. Credit is given Timothy Newell Pfeiffer of the New York Bar for much of the preliminary work in editing the present edition and in making many of the annotations.

As a practical book for the lawyer who deals at all in the criminal courts the present volume should prove of distinct value.

KENNETH WYNNE

New Haven.