COMMENT.

The following summary of the effect of the recent Act of Congress creating the Circuit Court of Appeals was given by Professor Baldwin of the Yale Law School in his address, as president of the American Bar Association, at its Boston meeting, in August last.

"That this law will, in a few years, greatly reduce the business of the Supreme Court there can be no doubt, nor can there be any that this result will be accomplished only by serious sacrifices. That great branch or, it might be said, trunk of its jurisdiction, which consists of controversies between citizens of different States, is cut away, except so far as points of special difficulty may be sent up, by the action of the new Court, or called up by the action of the Supreme Court. The Supreme Court loses also, with similar exceptions, its right of review in patent, revenue and admiralty causes, other than prize. It gains jurisdiction to reverse all criminal convictions, whether in the Circuit or District Court, for an infamous offence (that is one for which imprisonment in a penitentiary might be awarded), and is likely to be freely appealed to in cases of this character.

"Hereafter, this tribunal can be asked to review all questions as to the jurisdiction of the Circuit or District Courts (except so far as this may be affected by the statute as to the remand of a cause improperly removed *), decrees in prize causes, convictions of infamous crimes, and decisions on points of constitutional construction. It has also appellate jurisdiction over a narrow class of cases in the Circuit Court of Appeals. Of these, one of the most important would seem to be appeals from Territorial Courts. All these must now be brought primarily to the Circuit Courts of Appeal, but subject to a second appeal from their decision, in cases involving over $1,000.

"Any questions of law arising in controversies between citizens of different States, or any other of the classes of cases within the final jurisdiction of the new Court, may be brought before the Supreme Court, at its desire or if specially certified up by the Court below.

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* 25 U. S. Stat. at Large, p. 435; Act of Aug. 13, 1888.

"How far this extraordinary grant of jurisdiction will be pursued must be determined by the future practice of both Courts, in view of what may be the demands of public sentiment. That the Supreme Court would call up any case coming to their attention where unsound doctrine on matters of general commercial laws had been announced, may safely be predicted, and if they allow counsel for the defeated party to move for the issue of a writ of *certiorari*, without restriction, such applications are likely to be not infrequent.

"This law introduces one new feature into our Federal procedure—an appeal (to the Circuit Court of Appeals) from an order for a temporary injunction.

"The general appellate jurisdiction of the new Court also removes what had become, since the adoption of the $5,000 limit for ordinary appeals to the Supreme Court, a serious grievance,—the absolute power of a single Judge in most cases in the Circuit Court."

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We lay down Mr. Cook's little book, entitled "The Corporation Problem," with a desire to put to the author the question: "What is the corporation problem?" We find problems as to railroad rates, which would be substantially the same if railroads were operated by individuals. We find problems as to combinations of capital and business, which do not require incorporation. We read of strikes, and they are not confined to business under corporate management. It is suggested that there should be some limitation upon the freedom with which railroad franchises, and other like franchises, are granted by the State; such franchises are acquired only by a very few of the many classes of corporations. But there does not remain in our minds, as suggested by this book, any problem which is distinctively the corporation problem in the sense that it is at once peculiar to corporations and common to corporations of all classes. It seems to us that the tendency of Mr. Cook's book is to encourage rather than to dissipate the common notion that many evils not peculiar to corporations, and many others not common to corporations of all classes, are chargeable generally against incorporation. And we venture to say that there is no notion of greater potentiality that this for error in common thought, and so for error in judicial decisions and legislative action.

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A recent case in New Hampshire, *Woodman* v. *Prescott*, considers the question of whether the entry of a *nolle prosequi* is a sufficient

termination of a criminal suit to allow the party prosecuted to commence an action for malicious prosecution. In Massachusetts it is held that such an entry is not necessarily sufficient, and it is said, "that whether a prosecution has been so terminated as to authorize the party prosecuted to commence an action for malicious prosecution is to be determined by the facts of the particular case, of which facts the entry of a *nolle prosequi* may be one of several, may be the only fact, may be a controlling fact, or may be an entirely unimportant one. *Graves* v. *Dawson*, 130 Mass. 78. In *Langford* v. *R. R. Co.*, 144 Mass. 431, Chief Justice Morton says: "The entry of a *nolle prosequi* by the district attorney of his own motion, followed by a discharge of the accused party by the court, may be such a termination of the prosecution as will enable the party to maintain an action for malicious prosecution." In other jurisdictions it is held to be sufficient. In *Apgar* v. *Woolston*, 43 N. J. Law, 57, it is said: "Except to confer on the accused the capacity to sue, the manner in which the prosecution terminated is immaterial. The law requires only that the particular prosecution complained of shall have been terminated, and not that the liability of the plaintiff to prosecution for the same offense shall have been extinguished before the action for malicious prosecution is brought. Consequently the refusal of the grand jury to find an indictment, a *nolle prosequi*, or any proceeding by which the particular prosecution is disposed of, in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*, is a sufficient termination of the prosecution to enable the plaintiff to bring his action." Judge Cooley says: "The reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." The rule in New Hampshire is declared to be that if the proceeding has been terminated in the plaintiff's favor without procurement or compromise on his part, in such a manner that it cannot be revived, it is a sufficient termination to enable him to bring an action for a malicious prosecution.

* * *

Texas furnishes a curious illustration of the conclusions sometimes reached by legal presumptions. Its Supreme Court recently held that inasmuch as in reference to marriage the common law has never prevailed in Texas, neither could it be pre-

sumed, in the absence of proof, that the common law was ever in force in the Chickasaw Nation. It follows that, in that case, if Massachusetts or Connecticut law had been called in question the same doctrine would have been applied: New England doomed to Justinian's Code by a Texas presumption would be an interesting subject to contemplate.

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In *Mellor* v. *Missouri Pacific Railway Co.*, 16 S. W. Rep. 849, decided last June, the Supreme Court of Missouri held that a mail clerk is a passenger so far as a railway company's liability for injury is concerned.