

Reviews of Howard S. Abbott's
"A Treatise on the Law of Municipal Corporations" (1906-7).

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Introduction

By

Douglas A. Hedin
Editor, MLHP

When Howard S. Abbott began work on a treatise on the law of municipal government, he must have known that, when completed and published, it would be compared to Judge John F. Dillon's enormously influential *Commentaries on the Law of Municipal Corporations*, published first in 1872, and reissued in revised and enlarged editions in 1873, 1881, 1890 and 1911. And it was.

The first volume of Abbott's *A Treatise on the Law of Municipal Corporations* came out in 1905, and the second and third followed in 1906 (the texts of all three are posted in the "Treatises/textbooks" category of the MLHP). The set was massive, totaling 3,045 pages. The index had 10,000-12,000 topic "headings." The number of citations doubled Dillon's. The reviewer for the Harvard Law Review estimated that 40,000 cases were cited while the Michigan Law Review put the number at 28,000–29,000. Of Abbott's many law books, this set was his *magnum opus*.

The *Treatise* was reviewed in leading law journals, but its sheer size was a problem for book reviewers. Most took the easy route by describing the format or arrangement of the chapters, topics covered, case cites and the location of the index. Several took issue with Abbott's analysis of a particular matter. Most could not resist the temptation to compare Abbott to Dillon.

Reviews from five law journals follow. They have been reformatted. The photograph of Abbott is from *Men of Minnesota* (1902), and that of Dillon from Edward H. Styles, "Judge John F. Dillon," 9 *Annals of Iowa* 104 (1909). They have been added by the MLHP.

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20 Harvard Law Review 85-86 (November 1906).

A Treatise on the Law of Municipal Corporations.

By Howard S. Abbott. In three volumes. Volumes I and II. St. Paul: Keefe-Davidson Company. 1905, 1906. pp. xix, 1-965; xvi, 966-1979. 8vo.

In writing a book on the law of Municipal Corporations, an author necessarily challenges comparison with Judge Dillon's classic treatise; yet he is not to be considered unsuccessful if he fails to improve on it. To write a law book worthy to rank alongside Dillon is in itself an achievement worth the effort.

Mr. Abbott is to be congratulated on having produced a book which, even if it does not supersede the older and better known work, may be used with satisfaction, and quoted with safety and assurance.

The division of the whole subject differs from the division made by Judge Dillon. The present author's division is logically planned and executed, and is on the whole clear and adequate; but there does not seem to be any conspicuous advantage in the new arrangement.

In his preface Mr. Abbott writes: "An effort has been made to state in the text, concisely and accurately, the general principles applicable to a stated question, and to give in the notes a reference to the cases, considering the subject under which they are cited, with in many instances an apt quotation from the decision of the court." This is certainly an admirable plan to have in mind in writing a law book, and for the most part the author seems to have lived up to it. Mr. Abbott has given us a real text: he has written a treatise and stated the theories underlying the various topics in the law of Municipal Corporations; and he has avoided the pitfall of so many writers of law books in these days of hastily composed books, — the mere compilation of the head notes of cases to serve as a text. In all places, however, the text is not easy reading, due in part to the strain on the reader from the constant use by the author of the periodic form of sentence.

Mr. Abbott also promises, "An exhaustive examination and citation of the authorities has been made, and an index has been prepared unusually full and complete." It is impossible at this time to state absolutely that the promise of an exhaustive examination and citation of authorities has been fulfilled. Only two volumes of the three have been issued, and there is no table of reference to the cases cited, in either of the volumes. It should be said, however, that from a reading of the text and the notes it would seem that a careful collection of authorities has been made. In this connection it seems worth while to call attention to the excellent plan, adopted in recent years by some publishers, of putting in each volume of a multi-volume treatise a table of the cases cited in that volume, and also an analytic index of the subject matter. Such tables and indices certainly add to the value of a book for ready reference.

The citations themselves seem to be arranged alphabetically by jurisdictions, and chronologically within each jurisdiction. The chronological order within the jurisdictions is consistently maintained, but there is an occasional lapse from the alphabetical arrangement. It may also be questioned if the form of citation, 86 U. S. (19 Wall.), is better than the more usual citation to Wallace first.

So much of the value of a text-book to the practicing lawyer depends on a good index, rendering the text easily accessible, that if Mr. Abbott really gives us an "index unusually full and complete" as he leads us to hope, his book will be in great demand. For this we must wait until the third volume is published.

The topics of the liability of public corporations for negligence, and of actions by and against public corporations, together with a chapter to be entitled "Some Public Duties," have been left for the third volume.

S. H. E. F.

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20 Harvard Law Review 340-343 (February 1907).

A Treatise on the Law of Municipal Corporations.

By Howard S. Abbott. In three volumes. Volume III. St. Paul : Keefe-Davidson Company. 1906. pp. xvi, 1981-3045.

In November the Review called attention to the first two volumes of this work. As the third and final volume, containing also the analytic index and the table of cases, has now been issued, it seems fitting to add a few words concerning this unquestionably good treatise.

About six hundred pages of this volume are devoted to the completion of the text. The chapter on "Public Property" is finished, the divisions treated in this volume being "Its Control and Use" and "Its Disposition." A chapter of one hundred and sixty pages is given to the discussion of the "Liability of Public Corporations for Negligence." In the chapter "Some Public Duties" division is broadly made into "Educational Duties" and "Charitable and Corrective Duties." The final chapter concerns "Actions by and against Public Corporations"; and such actions as *mandamus*, *certiorari*, *quo warranto*, and injunction are particularly adverted to.

An examination of the table of cases shows that certainly more than forty thousand cases have been cited. The author's promise of an "index unusually full and complete" seems to have been fulfilled. The index covers two hundred pages, and seems to contain roughly between ten and twelve thousand separate headings. One difficulty with the index, however, and perhaps with the scheme of division of the whole work, is that there are not enough intermediate headings, between the chief topics into which the whole subject naturally falls, and the ten or twelve thousand headings. Although with an index of the comprehensive character of the one furnished in this work, any topic discussed in the text can be found, the grouping of the headings into such large and general divisions renders the search for the reference wanted less easy. In the table of contents references are made only to sections. A reference to pages also would have been of some assistance.

The faults that exist in this treatise are such that they can be remedied easily in a second edition, for they are formal rather than

fundamental. Mr. Abbott's treatise may be recommended to the profession as up-to-date, careful, and thorough, — one of the best of recent contributions to text-book law.

S. H. E. F.

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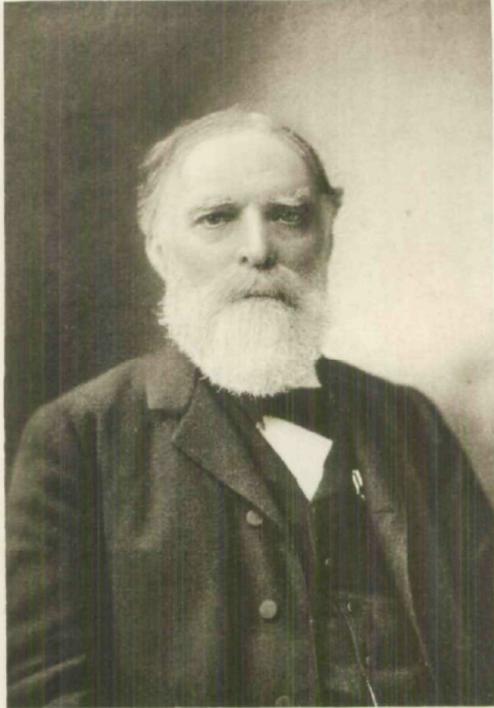
5 Michigan Law Review 226-228 (January 1907).

A Treatise on the Law of Municipal Corporations.

By Howard S. Abbott of the Minneapolis Bar, Lecturer on Public and Private Corporations and Civil Law, in the University of Minnesota. St. Paul: Keefe-Davidson Company, 1905, 1906. Three volumes, pp. xix, 3045.

When Judge Dillon wrote the preface to the fourth edition of his great work on the law of municipal corporations, in 1890, he thought it appropriate "to justify its size," to explain why his commentaries comprised two volumes with a total of some 1800 pages. The present work is in three volumes of nearly 3100 pages, but its size is amply justified by the great importance of the subject and the extraordinary growth of the case and statute law concerning it, during the last twenty or more years. Mr. Abbott's is the first attempt to treat this subject comprehensively and fully since the last edition of Judge Dillon's work, which was published sixteen years ago, and its publication is therefore timely, and the book is certain to be of great aid to the bar, because of the large amount of new material which it makes available in text-book form. The extent of this new material and the recent growth of the subject are in some measure indicated by the fact that Judge Dillon cites about 13,000 cases, while Mr. Abbott cites upwards of 28,000. How accurately this vast mass of material has been treated, how apposite are the cases to the doctrines concerning which they are cited can only be fully determined by a more thorough use of the work than there has yet been time for. But a somewhat hasty examination would seem to indicate that, in the main, the work has been intelligently and conscientiously done. Judge Dillon has so fully occupied the field of

the law of municipal corporations by the successive editions of his book, that it would be unreasonable to expect any new work to contribute as much, and to influence so greatly the law of this subject. It is not, therefore, unfair to Mr. Abbott, nor disparaging to



John F. Dillon.

his really valuable work, to say that it is not in any such measure, as was Judge Dillon's, an original contribution to the subject. It would be wholly impossible for any present writer on the law of municipal corporations to escape the influence of Dillon's commentaries, unless he should foolishly and deliberately shut his eyes to the light. And this Mr. Abbott has very wisely not attempted to do, as his occasional references to Dillon, and the apparent use of parts of the latter's analysis would seem to show. But this does not indicate that Mr. Abbott has made any improper use of such material or been unduly influenced by it. On the contrary, he seems to have worked out his subject in his own way. The actual writing methods adopted by the two authors respectively are quite different.

Dillon's work is characterized by an easy and flowing style, and the value of his text is greatly enhanced by logical statements of his own opinions on controverted points, opinions which have had great influence upon the recent development of the subject, as hundreds of cases decided since 1872, the date of the first edition, will show. Mr. Abbott's text is not characterized by this style, nor do his own opinions appear to any considerable extent. His text is concise, compact, and consists largely of statements of abstract rules and general principles. Indeed this compression and abstractness of the text would constitute a serious

defect in the book, were it not for the very numerous and copious notes. As before indicated, the author has cited some 29,000 cases in the notes, and this material constitutes much the greater part of the work. A majority of these cases are merely cited, but Mr. Abbott has summarized the holdings, and sometimes the facts of many of them, and from others he makes more or less extended quotations. In most of these notes, the cases are arranged alphabetically by states, and in some of them, the views of the topics discussed in the different states are carefully stated, as for example in the elaborate note concerning the subject of charter, statutory and constitutional provisions affecting the power of public corporations to incur indebtedness (note 275, p. 325).

In his preface, the author states that "particular attention has been given to those subjects connected with the exercise of municipal powers which, in the opinion of the author, are of the present and greatest relative importance;" and again, "The extent and character of their control over public property, their power to incur indebtedness and issue negotiable securities, their right to own and operate public utilities, are questions of the deepest personal concern to everyone." The subjects of the power to incur indebtedness and to issue negotiable securities are, indeed, treated exhaustively, but in view of these prefatory statements, and the recent phenomenal extension of municipal ownership and control of the public utilities and of the inevitable further increase and importance of the problems connected with these matters, it is disappointing that Mr. Abbott has nowhere treated of these vital questions, comprehensively and as a distinct problem. He has considered them, though somewhat briefly, it would seem, in view of their importance, in connection with the different functions, such as the supply of water, of light and of transportation. Possibly this is the most practical way of discussing the subjects. It is to be hoped that in a future edition of his work, Judge Dillon will give us the benefit of his late investigation of, and reflection upon this subject.

Mr. Abbott has indicated his opinion, if not his bias, as to the legal and economic aspects of these problems, as shown by the following quotations from his book. "To counteract the modern tendencies of governmental agencies in exercising powers other than those

strictly pertaining to their character, through the construction of many public works and the ownership and maintenance of enterprises usually considered private in their nature, requires an accurate and thorough knowledge of their true character and legal capacities." (Preface, par. I.) "It is the author's belief that the proper functions of a public corporation are to regulate and govern and that it is neither desirable nor legal that it engage in undertakings, to do those things, or transact that business, which properly, should be left to private enterprise. To govern and regulate efficiently and rightly requires complete disinterestedness, a condition which cannot exist where hope of gain or fear of loss are attendant essentials of certain acts or transactions. It is difficult to separate completely at all times the radically different acts of governing and regulating and engaging in a pursuit or undertaking having for its ultimate purpose making of a profit." (P. 1141, Vol. II.) "A supply of pure and wholesome water at a reasonable cost is the end sought to be attained; logically, it would seem as if this were an object for private undertaking and private consideration, subject to the ever present and sufficient power of the government to regulate and control the time, manner and quality of the supply and the compensation charged." (P. 1143)

It is inevitable that some errors should creep into the first edition of a work of the great bulk of Mr. Abbott's book, but in a review as brief as this, it would be unfair to the real merits of the work to put any emphasis upon the few and unimportant ones which have been discovered. The work as a whole is a very valuable addition to the available material on its subject. It gives evidence of careful, mature and intelligent industry, and will surely be well-nigh indispensable to students of municipal affairs, and to lawyers whose practice brings them into contact with the numerous and increasingly important questions discussed in it.

H. M. B.

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55 The American Law Register 265-66 (April 1907).

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS.

By Howard S. Abbott, of the Minneapolis Bar, Late Special Master in Chancery Union Pacific R. R. Receivership; Master in Chancery U. S. Circuit Court; Lecturer on Public and Private Corporations and Civil Law, University of Minnesota. In three volumes. St. Paul: Keefe-Davidson Company. 1905. Pp. Vol. I. xx, 965; Vol. II. xv, 1013.

Two of the three volumes of this treatise on the Law of Municipal Corporations have reached us. The third, which will complete the work, is promised in the near future. While it will treat the very important subject, "Liability of Public Corporations for Negligence," and includes also the subjects "Some Public Duties" with special reference to those Educational, Charitable and Corrective, and "Actions by and against Public Corporations," the volumes which have already been published make possible a fair estimate of the work.

The first volume is divided into chapters on "Corporate Life and Existence," "Legislative Power over Corporations and its Limitations," "Corporate Elections," "The Powers of Public Corporations," and "Public Revenues, their Collection and Disbursement." The importance of these topics is apparent, particularly the subject of the powers of municipal corporations. The treatment throughout is full and satisfactory, but this chapter we believe deserving of special reference in view of its admirable discussion of this intricate and important part of the law. More than half of the first volume is devoted to an elaboration of the principles applicable, but the discussion is in no sense diffuse or unnecessary. It is a logical, clear survey of the subject. The law as to the police power of municipal corporations will, of course, always present a certain uncertainty of definition, due to the uncertain outlines of this extensive power, but the general principles governing its exercise so far as that exercise is, or can be, confided to the municipal corporation forms the first part of the chapter. This is followed by a discussion of the power to incur indebtedness and the various forms in which it may be exer-

cised, subjects to which a lawyer finds constant need to refer, and finally a consideration of the power to contract in other ways than the incurring of indebtedness.

The multitude of questions constantly arising in consequence of the relation of municipal corporations to the persons who compose them, or to others, are only feebly suggested by the general sub-headings which indicate the subject matter of this chapter. We have no hesitation, however, in saying that the author displays a full appreciation of modern municipal conditions and the need of a thorough understanding thereof in order to a solution of the numerous complex problems arising. It is in consequence of this fact, and the thorough-going discussion of the subject resulting from such an attitude, that we believe the book finds a special claim to attention.

The chapter on "The Powers of Municipal Corporations," requires for its adequate treatment profound scholarship. Such treatment it receives, but by this special reference to it we do not mean to intimate that the other chapters are not equally deserving of commendation. It is rather that here the ability of the author in his broad consideration of the interrelation of modern conditions with the rules of law finds special opportunity for its exercise.

In the second volume the chapter on "Public Revenues" is concluded and there are chapters on "Governing Bodies," "Public Office and Officers," and "Public Property." The notes are unusually full and contain apparently complete citation of authorities, including, of course, the recent decisions. The author's purpose has been to state the general principles applicable to a question in the text and then to give the authorities sustaining the statement in the notes adding in certain instances quotations where these are especially apposite.

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7 Columbia Law Review 296-298 (April 1907)

A Treatise on the Law of Municipal Corporations.
By Howard S. Abbott. St. Paul: Keefe-Davidson Company.
1905-1906. Three volumes, pp. xix, xvi, xvi, 3045.

The field of the law of municipal corporations is so extensive that a writer of a comprehensive treatise on this subject is under the temptation, if not the necessity, to discuss with reasonable fullness many parts of the law to which attention is given in other treatises more monographic in their nature. The law of municipal corporations is the law governing the legal relations of a certain class of persons rather than the law governing a certain class of legal relations. A treatise on the law of municipal corporations is therefore of necessity rather encyclopædic than monographic in its nature.

This is the character of the book before us. It treats quite fully of the law of taxation, of the law of officers, of the police power, and of the law of eminent domain, in addition to giving attention to subjects which relate particularly to municipal corporations. While this fact will probably deter the student of this branch of the law from attempting anything in the nature of a thorough perusal of the work, it rather adds to than detracts from its value for the purpose for which it was evidently written, *vis.*, as a help to the legal practitioner.

The very size of the book makes it impossible in the space at command to enter into any minute criticism. Our attention can be directed merely to the general features of the work. Regarding the work from this point of view, it must be said that it is a most valuable one and one the need of which has been felt for some time. Dillon's great work, which at the time of its publication so fully occupied the field that few, if any, serious attempts to rival it have been made, has not been re-edited for so long that many of the newer phases of the law of municipal corporations have not in recent years received satisfactory treatment, if they have received any treatment at all. For this reason a work referring to the newer as well as the older cases is most welcome.

Further, the exhaustive character of Mr. Abbott's work is noticeable not merely in the number of subjects covered but also in the method of treatment. In the very numerous and voluminous footnotes appended to the text, the cases are commonly arranged in the alphabetical order of the states in which they were decided, while references are frequently made, not merely to the state reports and the national reporter system, but as well to such collections as the American State Reports and the Lawyers Reports Annotated.

Finally, the notes contain in addition to citations of cases, references to statutes and constitutional provisions which are in many instances abbreviated statements of the law, also arranged in the alphabetical order of the states from which they come. The book is thus a monument of patient industry, and as a reference book cannot fail to find a place on the shelves of every lawyer whose practice has to do with municipal corporations.

When, however, we leave the mere form and arrangement and consider the substance of the work our praise must be in some measure qualified. In the first place, Mr. Abbott, particularly in his treatment of such subjects as the police power, the taxing power, and the power of eminent domain, continually loses sight of the fact that he is dealing with a subordinate agent of the state instead of with the state itself, and as continually informs his reader that the state may constitutionally do this thing and that thing and the other thing. Of course it is important to know what the state may or may not do, since what the state may not do one of its municipal corporations may not do. But what the student of the law of municipal corporations has a reasonable right to demand and what he does not always get from Mr. Abbott, is what the municipal corporation may do. Indeed, as a result of this failure to distinguish between the powers of the state and those of its municipal corporations, the reader is apt to obtain a false impression of the extent of municipal powers, and to regard them as larger than they really are.

An instance of such misleading statements is to be found on page 218, where it is said that "boards of health have the power to order the vaccination of all persons not having been successfully vaccinated within a certain time prior to such order during the

continuance of an epidemic of small-pox" and *Morris v. Columbus*, 102 Ga. 792, is cited as his first case in support of this proposition. Now what this case decided was that a statute, authorizing the city to provide for compulsory vaccination, was constitutional.

Indeed one of the most marked defects of the book is a carelessness in the making of general statements as to the law. Thus on page 681 it is said: "It is generally held that for purely local and municipal purposes the legislature cannot require a subordinate corporation to levy taxes." In support of this proposition Mr. Abbott cites the *Chicago Park Case*, 51 Ill. 17, which was decided because of a constitutional provision forbidding the legislature to levy taxes for corporate purposes. Other cases cited are from Michigan which, as every student of the law of municipal corporations knows, has a rule peculiar or almost peculiar to itself on the subject of the constitutional right to local self government.

Another instance of this tendency to general and inaccurate statement is found on page 724, where it is said that the Federal courts have the right to compel by mandamus the levy of taxes by corporate powers. It is true they have, but only to enforce a judgment obtained in these courts against the corporation. The statement made by Mr. Abbott, when taken in the connection in which we find it, gives the impression that the Federal courts have the same right of control over the exercise of the power of taxation by municipal corporations as the state courts have. This, of course, is not the case.

Finally, Mr. Abbott is himself such an ardent believer in the right of municipal corporations to local self government, and the inexpediency of anything in the nature of municipal ownership that he hardly states the law fairly on these subjects. He is apt to regard the legislature, even in the absence of specific limitations in the constitution, as more limited in its dealings with municipal corporations than it really is, and states with altogether too much positiveness the rule that municipal corporations may not without legislative authorization engage in such undertakings as municipal lighting. This is a part of the law which as yet is by no means settled, but the courts would seem — an impression which one does not get

from reading Mr. Abbott's book—to be gradually adopting a somewhat more liberal view as to municipal powers. Indeed whenever Mr. Abbott makes an excursion into the field of political science he leaves the impression of one who has read little written since the early part of the nineteenth century. Wayland, Paley and De Toqueville, whom he cites, are hardly to be regarded as the exponents of the best political thought of the present day. His concrete plea on page 1480 for more elective offices in our system is one that does not appeal to the modern student of municipal government.

But after all Mr. Abbott is to be judged as a lawyer rather than as a political scientist. In this capacity he has done much to lighten the labors of his co-students, and, apart from the defects to which attention has been called, has written a book which cannot fail to be most useful

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11 The Virginia Law Register 1058-59 (April 1906).

A Treatise on the Law of Municipal Corporations.

By Howard S. Abbott, of the Minneapolis Bar, late Special Master in Chancery Union Pacific Railroad Receivership; Master in Chancery U. S. Circuit Court; Lecturer on Public and Private Corporations and Civil Law, University of Minnesota. In three volumes. Keefe-Davidson Company, of St. Paul. 1905.

The subject of these volumes is one of great and growing importance. The marvelous growth of the city population and the great enterprises now being undertaken by municipalities, far in excess of what was dreamt of a decade ago, renders especially timely the appearance of this work. The author discusses the subject under eleven general heads. His first chapter is devoted to Definitions and

then follow chapters on Corporate Life and Existence; Legislative Power Over Public Corporations and Its Limitations; Corporate Elections; The Powers of Public Corporations; Public Revenues; Their Collection and Disbursement; Governing Bodies; Public Office and Officers; Public Property; Liability for Negligence; Public Duties; and Actions by and against Public Corporations. Only two volumes have yet appeared and the last three subjects referred to will be discussed in the third volume. The author has successfully attempted to state concisely and accurately the general principles applicable to the subject and has spared no pains in collecting and presenting in accessible form the numerous decisions bearing upon the subject.

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13 The Virginia Law Register 584 (November 1907).

A Treatise on the Law of Municipal Corporations.

By Howard S. Abbott, of the Minneapolis Bar, Late Special Master in Chancery Union Pacific Railroad Receivership; Master in Chancery U. S. Circuit Court; Lecturer on Public and Private Corporations and Civil Law, University of Minnesota. In three volumes. Vol. III. Keefe-Davidson Company, St. Paul, 1906.

We have heretofore had the pleasure of reviewing volumes I and II of this most useful publication. The rapid growth of the cities of this country and the ever-widening scope of the governmental functions exercised by municipalities, makes the appearance of this work most timely. Fifty years ago the law of municipal corporations was comparatively unimportant, but now that the cities are operating water works, gas plants, street railways, and other public utilities involving the expenditure of millions upon millions, this branch of the law is of large and increasing importance. No library, therefore, is complete without a modern work on municipal corporations and so far as we know Mr. Abbott's treatise is the only work that meets the demand.

Volume III deals with Public Property, The Liability of Public Corporations for Negligence, Public Duties, and Action by and against Public Corporations, thus completing the work of an author whose training and ability is in itself a guarantee of the accuracy and usefulness of his treatise. •

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