BOOK REVIEWS


This is a compendium prepared from lectures for college students on American citizenship as a status and on the constitutional privileges and immunities of citizens and other inhabitants of the United States. It thus combines a discussion of the law of citizenship, naturalization, and expatriation with the constitutional law of the first eight Amendments and the 14th, taking in under the latter a discussion of the police power, eminent domain, zoning, and, even beyond, the so-called federal police power—constitutional law as it affects the individual.

One is inclined to be alarmed at the statement in the preface that "the author does not expect the student or reader to agree with him always, for he sometimes is not in agreement with American doctrine, but presents the world doctrine instead. But he believes mightily in law, a growing thing, not static, and in its enforcement. He believes in property and insists upon its protection. He believes in human beings and sees a vision of their progress." The author correctly speaks of the Expatriation Act of 1868 as sophomoric, so that he seems able to recognize rotarian philosophy. The book, while occasionally racy and journalistic, is more solid than the preface might indicate. Fortunately, "world doctrine", whatever that is, seems to have been neglected. Dealing with so vast a body of material, political and legal, the author has culled the more important facts and presents them succinctly under topical heads. He is on treacherous ground when he suggests (p. 13), "When an American goes abroad on a legal errand, he should know that a hundred million are back of him to give him and his property protection." This reminds one of President Coolidge's remark that the property of a citizen abroad is a part of the national domain. It is dangerous and misleading doctrine, because it is inaccurate and, in most of its implications, false.

Twice after the Slaughter-House Case, in 1874¹ and in 1884,² the Supreme Court gave utterance to dicta that a child born in the United States of foreign parents was not a citizen; and lawyers doubtless so advised their clients, until the Supreme Court clearly decided the issue to the contrary in 1898 in the Wong Kim Ark Case. The conflicting cases on pages 76-77 are partly explainable by the fact that between 1860 and 1907 the Department of State itself exhibited considerable confusion between citizenship, the right to protection and the right to a passport. It is believed that the Department of State does now, contrary to the text (p. 83), admit the heritability of citizenship through an unmarried American mother abroad. In 32 Opinions of the Attorney General 162 (1920), further light is thrown on the effect of legitimation on the citizenship of children born out of wedlock to an American father abroad. The author does not appear to mention the conflicting decisions in the matter of the effort to cancel the naturalization certificates of Hindus after the Thind case (p. 96). The statement of Secretary Fish in 1873 (p. 109) that American women who married foreigners and resided abroad with their husbands lose their American citizenship, comes after a sentence, reading, "If then to this act of voluntary submission of himself to the sovereignty of another power he added a formal renunciation of American citizenship," expatriation would seem to follow; it is

¹Minor v. Happersett, 21 Wall. 162, 167 (U. S. 1874).

(469)
hard to conceive that mere marriage and removal could be regarded as a "formal renunciation of American citizenship", so that the conclusion as to married women is, therefore, a non-sequitur and is, indeed, in conflict with Secretary Fish's own view, expressed in 1871 and on later occasions, that the Act of 1855 applied only to foreign women marrying American citizens, and not to American women marrying foreigners, and cited with approval by subsequent Secretaries of State. Aside from the case of Nellie Grant Sartoris, whom Congress re-admitted to citizenship after the death of her British husband—a circumstance explainable on particular grounds—the great weight of authority, especially in the light of the subsequent action of Congress on July 3, 1930, and March 3, 1931 (after this book was closed), indicates that a native American woman marrying a foreigner before 1907, even though residing abroad, did not lose her American citizenship thereby. The information is not always up-to-date (p. 143). The Departmental Circular of July 26, 1910, expressly holds that mere long residence abroad is not expatriation, and that whether or not protection is lost depends upon the purpose and occasion of the foreign residence. There are at least three other grounds than those mentioned (p. 144) for overcoming the presumption of expatriation. The author may not have seen the Departmental Circular Instructions of 1925.

On the whole, this book is a useful companion to F. A. Cleveland's textbook on American Citizenship.

Edwin M. Borchard.

Yale University Law School.

THE INNS OF COURT AND EARLY ENGLISH DRAMA. By A. Wigfall Green.


Exquisitely composed, but more important for its suggestiveness than for comprehensiveness, this beautifully printed book supplies a long-needed chapter on one phase of pre-Shakesperean drama; the contribution made by the four English Inns of Court to the development of the masque and the emergent classical forms of tragedy and comedy. Within its limits, strictly imposed, it is precise and accurate (qualities which appeal to the scholar) while its choice and fastidious diction and genial tone make it especially attractive to general readers of cultivated and leisurely tastes. Because it is an enlightening brochure on the social and recreational aspects of English lawyers during one of the most alluring periods in the history of British law, it has a professional appeal to modern lawyers.

A touch or two of philosophy relates it to that humanistic restoral of the study of law for which Dean Pound has been an apostle. Dean Pound's preface completes the arc suggested by the drift of the book: "The Middle Ages, the era of relational organization of society, became significant, not merely as showing us institutions in embryo, as we used to think, but as showing us a society in many ways analogous to what seems to be developing in a new economic and social order." In Dr. Green's text, what lawyer can fail to rise to that limited height of excitement of which lawyers are capable when he reads these words: "The law has ever been the shadow of man's philosophy. As philosophy changes, its shadow, the law, is reflected behind it; sometimes, of course, the servile shadow assumes such grotesque shapes that it seems to be caricaturing its master. But real changes in law can be accomplished only by mutation in the concepts of life. As man introduces new gods into the state, his law tends to conform. Man's religion, then, underlies his law." As one reads these and similar paragraphs, there rises in his mind's eye, the outlines of

*3 Moore's Digest (1906) 459.
that new law building at Yale which embodies in stone what Dean Pound has, paradoxically enough, been long saying at Cambridge.

The popular and prevailing notion that, because the Church nourished one type of early British drama, the sole source of the origins of plays is to be found there long since was corrected by literary scholars, particularly by E. K. Chambers in his *Medieval Drama*. What was later called "the Mystery" play (the miracle and morality) competed with folk mumming and other mimic customs; in time it ran its course and continued through the force of the momentum of habit and custom, while the nascent drama was being invigorated through other institutions. In the crucial period of the development of the British drama in the reigns of the two first Tudors, the taverns and the London law schools competed with the newly established "colleges" or grammar schools, the first fruits of the English classical renascence. These three institutions played equally significant roles: significant because they shifted, by the pressure of the audience and physical environment they provided, the emphasis from religious edification to secular entertainment. Thus they created the social condition for the amplification and intensification of the British drama which was achieved when playwrights ransacked the treasuries of Italian novelle for plots, ideas, and characters in the decade immediately preceding Shakespeare's arrival in London.

Two interacting themes are historically presented in "The Inns of Court and Early English Drama". The first is the history (with citations from sources) of the four English Inns of Court from their establishment as monasteries for crusading knights through the period of their evolution into aristocratic communities for high born members of the Royal Court to their later and continuous function as the law-universities of England. The second theme discloses, in the light of the first, the peculiarly British conditions within these institutions which permitted the appearance and subsequent mutations of the special kind of drama which the Inns of Court fostered; the masque and classical imitations of tragedy and comedy. The discussion makes evident what one may have long suspected: that during the transitional period of the English renascence, the Inns of Court were hardly to be distinguished from Oxford and Cambridge as they later developed; that they were earlier to welcome the humanities at a time when the old universities were still theological seminaries.

Satisfactory as the book is, so far as it goes, it leaves some important matters unsaid. One wonders, for instance, what relation existed between the drama which developed at the Inns of Court and that which developed in grammar schools like St. Paul's and at the universities as extra-mural activities. One wonders, further, if a special genius loci developed at each of the Inns of Court as institutional differentia and what effect, if any, this differentiation had upon the nature of drama developed, say, at the Inner and Middle Temples, and at Gray's Inn. Since the author establishes the fact that the Inns of Court during the renascence in England were training schools of courtiers, he leaves open the question of the relation between the development of the masque there, and that at rural mansions, as for instance, Milton's *Arcades* and *Comus*. Was there, too, some important effects on the nature of the drama at the Inns of Court caused by the indoor and completely roofed performance before these effects can be noticed at the opening of the Blackfriar's Theatre for the children's companies and particularly upon the special form of semi-masque as illustrated by the peculiarly dictional forms of John Lyly's plays? In short, remembering the important words of Dean Pound as quoted above, comment on the complex and relational tendencies of the Inns of Court drama and its analogous forms developing under differing conditional effects of other institutions is rigorously excluded by Dr. Green from his discussion. Readable as the book is then, for the general reader, it leaves much unsaid (perhaps too
much) for the literary scholar and becomes, in effect, a very useful chapter of the development of the British drama.

William S. Knickerbocker.

University of the South.

CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE.

Had case-books existed in his day, Charles Lamb would doubtless have catalogued them along with "court calendars and statutes at large" among those "books which are no books—biblia-a-biblia". Once in a blue moon, however, even one of these work-a-day compilations bears the fingerprints of personality. The present volume unmistakably does. The senior editor for many years, in his writings and in his leadership of other minds in exploration of the field, has brought to the study of our Federal judicial system a fresh and imaginative insight and attitude. No such plowing by a great specialist of any field of law ever leaves that field unchanged, and the development of our national courts will long be colored by Frankfurter's decade or more of teaching in the subject. His co-editor is one of his former students who has supplemented scholarly research with several years of practice with a firm in large Federal business.

The fashion of an older day was for lawyers and even law-teachers to view the Federal courts as a separate group of tribunals with a preordained jurisdiction and an esoteric practice, mysterious to the outsider, but to the initiated, lucrative and delightful. A Federal decision sustaining a plea to the jurisdiction, after limitation has run against the plaintiff, to the traditional Federal practitioner steeped in the niceties of the Judiciary title of the Revised Statutes, carried that faint pleasurable flavor which another's disaster through error in technique, always brings to the technician. The elder judges considered a neat point in jurisdiction with the same relish, with which Baron Parke sent a copy of a special demurrer to a sick friend, to cheer him up because "it was so beautifully drafted".

At the other extreme is the political-scientist-viewpoint of the compilers of this book. They present materials for study of the Federal courts, not as institutions complete in themselves, but as balance-wheels and escape-valves of a larger national judicial machine of which the aggregate of state courts make up the main structure. Implicit throughout is the view that routine litigation should be handled by the state courts and only special strain or dangerous friction should call the Federal control-mechanisms into play. Students who have mastered the materials here presented will when they reach the bench, hardly be able to divorce their interpretation of such phrases as "judicial power", "cases and controversies", or "suit against one of the United States", from the problems of statesmanship incident to preserving a balance between centripetal and centrifugal forces in a federated government.

The cases are chosen and arranged most shrewdly both for guiding the paths of exposition and for evocation of class-room debate. They are hot sparks from the anvil of conflict between nation and province. The reports of the cases are often severely pruned but seldom to the detriment of clear understanding of the situation involved. Occasionally the glint of wit (as in the "New Yorker"—like phrases of Judge Woolsey in the Bankus Corporation case on p. 293) or the thrill of wild west romance (as in Re Neagle, p. 477) add color to the chronicle. Passages from the Constitution preface the case-material, and excerpts from the statutes are inserted appropriately among the cases. The appendices add notably to the user's convenience. They include a “Summary
of Principal Changes in Jurisdiction of Federal Trial Courts”, a list of the Justices of the Supreme Court from the beginning, with their dates of life and service, and a uniquely full and serviceable bibliography which includes a list of some hundred or more unpublished theses—presumably the fruit of Professor Frankfurter’s teaching of the subject—in the Harvard Law Library. These latter offer a mine of suggestions of topics for research which will be extremely valuable to those teachers who desire to assign subjects for individual investigation. The footnotes, likewise, which bring together references to most of the law-review material of value, contain also citations of cases discriminatingly chosen for their question-raising qualities. The editors occasionally look beyond national horizons, as when the Australian refusal (note p. 263) to accept our doctrine of corporate citizenship is noted. Another interesting source, not availed of by the editors, of instructive comparison is the Federal Court System of Mexico, where the unique process known as amparo seems to combine the functions of our writs of injunctions and of habeas corpus as remedies for official actions in violation of the Federal constitution, but with added reach and flexibility. ¹

Given the general plan and aim, the choice of cases leaves little room for cavil. Perhaps, Terral v. Burke Construction Co.² might well have been included as closing a significant chapter of guerrilla raids by state legislatures against Federal jurisdiction over corporate litigation. Again, the material on removal for prejudice and local influence (pp. 392, 418-424) seems slightly misleading in the absence of a reference to Cochran v. Montgomery County³ which denied the availability of that remedy in almost the only situation where it could have any practical value and, thus, rendered it well-nigh obsolete. But these are matters of opinion, and matters of detail.

While the book bristles with controversial points in every juxtaposition of cases and in almost every footnote, only a few general observations may properly find place here. The first is as to the proportions to be observed between “jurisdiction” and “procedure”. The editors follow precedent in placing far greater stress upon jurisdiction than upon practice, and obviously the most important and most distinctive procedural topic in Federal litigation is the distribution of judicial power between states and nation. Of the eight chapters and seven hundred and thirty-one pages of case-material, all deal with jurisdiction except one chapter of eighty-nine pages on “Law Applied in the Federal Courts”. Of this latter chapter nearly one-third is consumed in dealing with the Swift v. Tyson problems of application of state substantive law, leaving about sixty-five pages in which to treat “Procedural Rules: Conformity to State Practice” and “Law and Equity.” There is much of reason to support this scantiness. Both conformity “as near as may be”, and separate Federal equity, are lingering snows of yesteryear, probably soon to melt under the suns of uniformity and modernization. Nevertheless, there are certain distinctive Federal rules of procedure of great importance and tough resisting qualities. Among the more important are those which spring from the “inherent powers” doctrine (such as the limitations on legislative control over the process of contempt), and the rank growths from the dark soil of the Seventh Amendment.⁴ Perhaps some pilfering here from the overflowing bins of the course in Constitutional law would not be unwarranted. The unwillingness of Federal judges to permit

¹ Benito Flores, The Writ of Amparo under Mexican Law (1921) 7 A. B. A. J. 388.
² 257 U. S. 559, 42 Sup. Ct. 177 (1922).
³ 199 U. S. 269, 26 Sup. Ct. 58 (1905). In requiring complete diversity, it limits the remedy to cases where a removal could be had without the trouble of showing local prejudice.
⁴ Only one case—a choice one, however, Herron v. Southern Pac. R. Co., 51 Sup. Ct. 383 (1931)—and a footnote, to which the perverse Slocum case is relegated, deal with this.
State interference with their power to give oral instructions, to advise the jury on the facts, or to direct a verdict peremptorily, are quite as important influences in the epochal competition between the court systems of central and local governments, as are the land-mark doctrines of jurisdiction proper. The present Chief Justice's approving quotation in the Herron case from Capital Traction Company v. Hof to the effect that trial by jury under the Seventh Amendment means "trial by a jury . . . under the superintendence of a judge empowered to advise them on the facts", bodes ill for the fate of the misguided Caraway Bill should it ever be enacted. If the Federal court now has ascendancy—an ascendancy currently exemplified by the procession of grafters and gangsters, immune from state punishment, going to Federal penitentiaries for income-tax violations—it does not, of course, mean that all this resolute resistance of the Federal judges to the cheapening of procedure, to which most states have succumbed, may not be undermined in future, as for example, by a cheapening of Federal judicial personnel under the influence of the spirit of localism operating through senatorial courtesy. Does Gresham's law or the law of the survival of the fittest, operate in the realm of competing systems of courts and of procedural rules? It is arguable, in the light of these questions, that a casebook on Federal judicial administration might well develop somewhat more fully these characteristic Federal procedural traditions so far at least as to invite reflection upon the question: Should the national courts set a distinctive standard of technical efficiency in procedure, or should they accept in the main the procedural standards of the local courts?

This splendid compilation sets a high-water mark in the collection of materials on this subject. Is the subject itself one of vanishing or of waxing importance? At present only about thirty association schools include it in their curricula. There seems little doubt that law schools should equip their graduates with a working knowledge of the place of the Federal tribunals in the American judicial orchestra. Only a faint adumbration of this is possible in a course in Constitutional law. It may be left to one of the general courses in Procedure. Federal jurisdiction may there be treated alongside the teaching (now much neglected) of the matter of court-jurisdiction in the English, and the state system. The same parallelism may be followed in the teaching of the Federal rules of practice. Such companionate treatment has the advantage of placing before the student the problems of choice between the competing systems of courts. A constant awareness of this possibility of choice is an acquisition of great practical value. It likewise would stimulate, more effectively than compartmental treatment, the student's interest, all important to the future of our schools and profession, in the efficiency of procedural rules as mechanisms of social adjustment. Unless and until the study of the Federal Court System shall thus be integrated into some such wider procedural program, the case-book under review will offer an unsurpassable medium for teaching Federal jurisdiction.

Northwestern University School of Law.


The three latest American editions of Anson on Contracts have afforded a vehicle by which one of our leading scholars in this field has been able to present

---

5 Supra note 4.
6 174 U. S. 1, 13, 19 Sup. Ct. 580, 585 (1899).
7 Directory of Teachers in Member Schools (1931) 153.
in a condensed form to students and practitioners some of the results of his researches and thought. We may hope that some day we may have the benefit of his ideas in a more comprehensive form free from the limitations which are necessarily inherent in the work of a reviser.

The latest edition contains new material on the subject of consideration, a chapter on assignments that is almost entirely rewritten, new or rewritten sections on third party beneficiaries, breach by prevention of performance, time stipulations, and the creation of an agent's authority. Some of the newer cases of interest have been added to the footnotes and references to the American Law Institute Restatement are interspersed throughout.

The new material on consideration consists of an excellent brief presentation of the treatment of the doctrine by the courts and the explanation of the rules which have been incorporated into the Restatement. It is recognized that considerable looseness is to be discovered in the court's handling of the concept which is characterized as "nebulous and uncertain from the time of its invention" (p. 123). The attempt on the part of the editor, at least in these sections, is rather to interpret the action of the courts than to state the "correct" rule. For the editor, the explanation of judicial action and the creative force behind rules of law lies in the mores of the community. And to keep decision in line with the mores courts have found it necessary to extend the concept of consideration beyond the limitations of agreed equivalence. It is not entirely clear that the author is enthusiastically in favor of the Restatement treatment whereby consideration is so defined as to be no longer the test of enforceability but only one concept to be used in stating the rules of enforceability. But he accepts it. To the reviewer it seems that this treatment needlessly complicates the doctrine. There is virtue in a general testing concept that brings into focus some very significant elements to be found in contract cases, and yet is sufficiently nebulous to permit courts with reasonable skill in doctrinal manipulation to avoid scandalous results when the significant elements can not readily be brought within its focus. It is to be noted, however, that whatever the Restatement treatment may lose by its precise complexity, it gains by the beautiful safety valve contained in Section 90 to the effect that a promise reasonably inducing substantial action is binding "if injustice can be avoided only by enforcement of the promise." (Quoted p. 134).

In view of the footnote on page 4 in which Professor Corbin asserts that "it is certain that a conscious intention to affect legal relations is not necessary" to make an agreement binding, it is surprising to find retained here the statement of the older text that "we need some means of ascertaining whether the maker and receiver of a promise contemplated the creation of a legal obligation" (p. 126). It is also difficult to see how, as suggested here, a mere doctrine could be a "criterion" to determine the customary notions of justice prevailing in the community. Of course it might be a vehicle for making those notions effective.

The chapter on assignments has been much improved in the rewriting. Statements in the older text that were misleading have been clarified. The question of what performance may be delegated is much more adequately handled and enriched by apt illustration. The assignment of successive rights and the defenses to which the assignee is subject are treated more comprehensively. It might have been well in dealing with assignment of future wages to mention the statutory provisions on the subject which are found in a large number of states.

Section 283a is new and sets forth a summary of the very illuminating study made by the editor in which he shows that the English courts, although they say they do not recognize the right of a third party beneficiary to sue on a contract, have been able on a theory of trusts to reach about the same results as American Courts.

Another section has been added in the chapter on breach of contract which sets forth a rule to the effect that unjustified action by one party to a
contract preventing another party from earning the agreed compensation constitutes a breach. (Section 388). Doubtless there is no objection to this form of statement. If the act of prevention is regarded as dispensing with the performance of the condition and its repudiatory effect used as a basis for permitting an immediate action under the doctrine of anticipatory breach, the same results might be reached. In either form of statement there is a fictional element. Under the latter treatment, however, it might be a little clearer that in a case where an employer prevented performance but promised nevertheless to pay the compensation, the possibility of bringing immediate action would depend upon whether the giving of the opportunity to work was a part of the employer's undertaking.

There are much needed changes in the discussion of time stipulations. (Section 400). The distinction between delay as a breach and delay as the failure of a condition was not made in the older text. In the revision, also, the difference between law and equity is properly discounted. A discussion of the treatment of provisions that time should be of the essence might have been included.

This book will be of value to students and attorneys for its able description of the conceptual structure upon which contract cases are hung. There is, however, need for no end of study of the more inarticulate factors at work in such cases and for a comparison of the operation of contract concepts in the various fields in which they are employed.

Harold C. Havighurst.

Northwestern University Law School.


This is a timely volume. Five years have elapsed since the United States Department of Commerce under the powers conferred upon it by the Air Commerce Act of 1926 undertook to regulate and promote civil aviation in the United States. The book is taking stock of what has been accomplished. It discloses the defects and advantages of the system which has been improvised. The author has had the co-operation of the aeronautics branch of the department and therefore is in a position to know what he is writing about. He naturally reflects, at least to some extent, the viewpoints of the department, particularly in regard to state control of intrastate (as distinguished from interstate) aviation. He says in the preface: "It is fortunate that Congress has enacted a law that permits flexibility of regulation. It is unfortunate that Congress did not appropriate the entire field of licensing aircraft and airmen to the Federal Government and thereby bar the States from such activities. But let us withhold our lamentations and rejoice in the fact that the forty-eight states have pursued only five different policies in regulating intrastate aviation."

The book discloses that the author has made a thorough study of the Air Commerce Act, the air commerce regulations, and the numerous pamphlets which the Department of Commerce has published dealing with the various phases of its activities in regulating aviation. These are now very numerous and overlap to some extent so that a study of them with a view of assimilating the information contained therein is a task of no small proportions. Such a task is much simplified by the present volume. Five of its chapters are devoted to summarizing and harmonizing the contents of these pamphlets and of adding to what they contain. These chapters are entitled: "The Regulation of Air Commerce", "Functional Operation of the Air Regulations", "Aeronautical Development Service", "Physical Aid to Navigation and Safety". In addition there is a chapter on state legislation and on legal problems, as well as other chapters of less importance.
BOOK REVIEWS

It is quite apparent from the chapter on legal problems that the author is not a lawyer. In connection with the problem raised by the ancient maxim "Cuius est solum eius est usque ad caelum" he discusses at length two lower court decisions arising in Minnesota and Pennsylvania and decided in 1923 and 1922 respectively, but dismisses the important Massachusetts case of Smith v. New England Aircraft Company, with a page and mentions Swetland v. Curtis Airport Corporation merely in a footnote. The question of trespass is the other matter, which is, however, rather well discussed by him in this chapter. The table of cases on pages 277 and 278 contains no reference to the pages in which these cases are cited and therefore this table loses most of its value to lawyers.

A fairly complete bibliography and an index are features which will interest the user of the book. On the whole it is a worthwhile effort and should be of considerable interest to pilots and to the aviation industry as well as to lawyers who represent the industry or otherwise take a special interest in aviation.

Carl Zollman.

Marquette University Law School.


One who has had but little experience teaching Insurance, upon undertaking to review a book like the Second Edition of Vance's Cases on Insurance must proceed with some hesitation.

It is a splendid job. Although the book contains about 1000 pages, Mr. Vance has succeeded in limiting the number of cases reported to 285. For schools in which only thirty-six class hours are devoted to the subject there is undoubtedly more material than can be covered, but by working through the material before using it one should be able to make up an omission list conformable to his own idea of teaching the subject. This will serve to bring down the number of cases chosen for class discussion to a suitable compass. Some teachers may prefer to select particular topics for omission. For example, the last chapter dealing with construction of the policy might be omitted entirely, since it touches so many varieties of insurance that none can be exhaustively examined. It would be the present writer's preference to expand this portion of the book at the expense of some other chapters. Probably some of those using the book will choose to omit all special references to marine insurance. This would eliminate about 100 pages.

Acknowledging Mr. Vance's preëminence in the field of Insurance Law, the writer submits with deference his suggestions with regard to the choice and arrangement of the material in this book. They are intended to involve no more than the writer's personal reasons why he would prefer to use as teaching material a book organized on a somewhat different plan.

Mr. Vance has set apart his material relating to the question whether Insurance is commerce and its affectation with a public interest. Perhaps even more cases than Mr. Vance has included could profitably be taken up, but would it not be interesting to discover and to allow the students to discover in a group of cases having various factual environments, whether the courts, in solving the particular problems before them were obliged to resort as they did to generalizations about commerce or public interest. It is unfortunate that Mr. Vance did not have available for inclusion the case of O'Gorman & Young v. Hartford Fire In. Co., decided in January, 1931, by the Supreme Court of the United States, holding

\footnote{270 Mass. 511, 170 N. E. 385 (1930).}

\footnote{41 F. (2d) 929 (D. C. N. D. Ohio 1930).}
valid a New Jersey statute regulating commissions paid by fire insurance companies to agents.

The footnote on page 51 suggests an excellent array of collateral material dealing with the matter of public regulation and control in the insurance business. The writer looking for Terral v. Burke Construction Co.1 was interested to find it developed in a footnote on page 54. This is the case in which the United States Supreme Court, speaking through Chief Justice Taft, overruled its previous decisions and disapproved of state statutes revoking the license of a foreign corporation to do business within the state because such a corporation while doing only a domestic business within the state removes actions brought against it in the state courts and arising out of such domestic business to the Federal courts.

One notices that Mr. Vance has reduced the amount of material devoted to the problem of “Insurable Interest” as compared with his previous edition. This is a welcome change. The writer ventures to raise the question whether this could not have been omitted as a special topic or at least have been so labelled that the student could have been left to discover for himself how this concept is employed by the courts in dealing with various types of risk-shifting contracts.

The conceptual arrangement of material has been preserved. As one speculates as to how it might have been classified so as to place more emphasis upon function he realizes that helpful constructive suggestions in this regard must be the product of a long and painful working over of material beyond what one is likely to undertake as a preliminary to preparing a short review. Mr. Vance tells us in his preface that his selection of content has been largely determined by the fact that modern insurance litigation in America reveals a shifting of emphasis from the historical background to the economic setting. As one glances through the cases selected by Mr. Vance it is at once apparent that many of them, particularly the more recent (which are the larger portion) demonstrate this changing emphasis. This appears even more plainly in the actual results reached in the decisions than in the formulae of rationalization employed in the opinions. The law of insurance presents an attractive and fertile field in which to stimulate the student's interest to look behind the apparent symmetry of the conceptual structure and to find out what a lively performance is going on inside.

Warranties, representations, conditions, exceptions, waivers and estoppel, these are some of the tools which have been forged in the long struggle between insurers' counsel and the courts in order to control decisions to the end that insurance may be moulded into a social institution able to serve as a risk-distributing agency in an increasingly complex society. The carefully labelled and detailed subdivisions of the chapter dealing with these various doctrines, rules and formulae indicate their variety and complexity. Perhaps the subdivisions may lead the students to believe in an exactness of distinction which does not work out in all cases.

Many teachers will probably find greatest satisfaction in that portion of the book dealing with “Construction of the Policy” and will wish to give it particularly thorough treatment. It will be found to contain more than its proportionate share of problems most frequently involved in current insurance litigation.

The judgment shown by the Editor as to the extent and nature of footnote material seems excellent. It well serves to lead the reader to the most useful notes and articles in periodicals and to the more significant cases not reprinted as a part of the text. The footnotes very properly do not purport to serve as an abbreviated treatise or as a digest. A useful appendix of insurance forms and expectancy tables is followed by one of the most satisfactory indexes one meets with in any casebook.

L. W. Feezer.

University of South Dakota School of Law.

1257 U. S. 529, 42 Sup. Ct. 188 (1922).

This new handbook furnishes a timely abridgment of that branch of jurisprudence wherein changing social mores and diversity and contrariety of legislative enactment and judicial opinion especially require recency to keep abreast of the law. The book is designed primarily as collateral reading for law students. It presents them with an enlarged view of legal principles and rules which cannot be secured from the ordinary casebook and its footnotes. The essentials of common law, the present majority and minority rules, and the trend of authority are stated with pleasing clarity and preciseness. The historical summaries are excellent in scope and diction, and reveal a keen appreciation of the needs of the prospective practitioner as contrasted with the desires of the student of legal history.

This new book is essentially an enlarged revision of the earlier volume by Walter C. Tiffany as redited by Roger W. Cooley, to both of whom Professor Madden acknowledges his debt of foundation endeavor. While the majority of sections are either altered or rewritten, the greater part of the text material is taken verbatim from Tiffany's third edition on the same subject, published ten years ago. Recent developments in the law are noted with creditable completeness. Where such developments are pronounced, the entire topic receives a new, enlarged treatment, illustrative of which are the topics on fraud as grounds of annulment (p. 13), the construction of statutes relating to invalid marriages (p. 45), injunctive relief against alienation of affections (p. 174), an historical sketch of divorce and judicial separation (p. 256), alimony and suit money (p. 319), and juvenile courts and custody of children (p. 379). Where a paragraph or statement covers the growth in the particular subject, such additions are found, illustrative of which are the topics on marriage by proxy (p. 63), and the husband's restraint of the wife (p. 152).

Part V of the earlier volume, devoted to the treatment of the law of master and servant, is properly omitted. Chapters 2, 3, 4, and 5, dealing with the legal effect of coverture, are completely rearranged. Instead of beginning this phase of his book with the lesser miscellaneous rights, duties and disabilities resulting from coverture, such as the right to determine family domicile, the duty of support, and others, Professor Madden begins with the greater changes of the wife's resulting disabilities regarding property and contracts at common law. Then follows a chapter upon the resulting historical development of her equitable rights and powers. These disabilities and rights are next considered as affected by modern statutes, and lastly, he treats the miscellaneous effects of coverture. The reviewer, while recognizing that some may not prefer the reorganization of subject matter as presented, readily finds justification for each rearrangement in its more clear-cut impression upon the reader. An even more valuable improvement is the addition of numerous periodical citations in the footnotes, although occasionally an important law-review comment is missing.¹

As in the earlier volume by Tiffany, a concise statement of law precedes each subdivision of the subject, which is followed and amplified by the subsidiary text. In general, all statements are worded with a restraint and caution which makes them unassailable even by the most critical reviewer and not infrequently leading cases are nicely distinguished with classical brevity (pp. 143 and 144).

Writing legal handbooks, however, requires the utilization of an extremely terse style in order to summarize the law in one volume of ordinary size. The coiner of succinct generalizations can avoid omitting some important exceptions

¹ Note (1911) 25 Harv. L. Rev. 556, on husband's right to alimony (p. 325) not cited.
to the rules stated only at the price of extraordinary vigilance. Professor Madden's careful endeavor in this regard is well rewarded but occasionally his book reveals brevity at the expense of accuracy.

One of the topical statements reads in part as follows: "A marriage is not invalidated by ... false representation or concealment as to chastity, except where the woman was pregnant by another man at the time of marriage and the husband was ignorant of the fact, and had not himself had intercourse with her" (p. 9). This statement gives the idea that if the husband had pre-marital intercourse with the wife, the fact of her pregnancy by another will not constitute a ground for annulling. Later in the supporting text, the author points out that such has been the rule but that the recent cases (apparently the majority of states having decided the question) are contra and grant an annulment of the marriage based upon fraud where the husband married in the bona fide belief that he was making proper amends and intending to father his own child (p. 15). The reader, however, has to span six pages before the erroneous idea secured from the topical statement is modified by the text.

Another illustration is furnished by the sections on responsibility of an insane person for crime (pp. 633 to 637) which have not been revised nor reannotated in this new volume. The text statement is made that the right-and-wrong test of insanity "is universally recognized" (p. 634). This not only is an inadequate statement of the law but is misleading. It should be pointed out that a proper instruction upon the right-and-wrong test which would be good law in the majority of states, would nevertheless, be bad law in that minority group of states which allow irresistible impulse as a good defense. In the latter jurisdictions, although the prisoner had the mental capacity to distinguish between the rightness and wrongness of his act now charged as being criminal, he may be found not guilty by reason of insanity if he committed the act under an insane irresistible impulse.²

The paragraphs on insane delusions indicate that the rule of McNaughten's Case, which applies the ordinary test of mistake of fact to this assumed situation of insanity, is "recognized as the law in this country" (p. 635). No cases contra are cited although they exist, and no criticism is made of this legal rule which shocks by its "exquisite inhumanity".³ While these sections on insanity form only a small fraction of the main work and are really collateral to the main subject, they should have been rewritten or omitted.

As already noted, conflicts and trends of judicial opinion are regularly observed and, with but few exceptions, clearly stated. However, the bases of these conflicting opinions are regularly slighted, and apparently purposely so; and herein the reviewer feels a real opportunity has been neglected. It should be observed that this new handbook does not depart from the general purpose of ordinary legal handbooks. It is a basis chiefly for memorative activity and for finding appropriate citations for a given rule of law. The reviewer knows no reasons why such a volume cannot and should not be made a fitting supplement to casebooks as a means for the stimulation of legal thinking—an avowed primary purpose of our modern casebook teaching. With the addition of a very few pages required for making summary statements of conflicting and varying law review arguments, supplemented by brief personal criticism of the author as a master in his particular field of jurisprudence, these handbooks in law could be made much more valuable. They could then be utilized for guiding and stimulating research and legal thinking of law students. A recent handbook in the field of bills and notes accomplishes this added purpose admirably without detracting from the former purpose of legal handbooks.

² Clark and Marshall, Crimes (3d ed.) 121.
Where a vigorous, well-reasoned dissent of the United States Supreme Court is so important as in the case of Thompson v. Thompson (p. 223) that it becomes the basis for a considerable number of subsequent state decisions, surely the divergent reasoning of the respective majority and minority opinions deserves to be briefly pointed out and criticized.

Occasionally illogical reasoning is mentioned (p. 15). In one instance at least, it not only is not mentioned but is apparently overlooked. Professor Madden states the majority rule to be that under the modern statutes a wife can contract with her husband, convey to and receive property from him, and be a partner in business with him (p. 252). This result is reached by the statute granting to the wife the ordinary rights of legal personality. It must be conceded that the husband's power in this regard is enlarged by necessary implication from the legislative grant to the wife of a separate legal status since no statutes were passed enlarging his powers in this regard. Yet, Mr. Madden writes concerning the husband's disability to sue his wife in tort: "But where the right to sue is found only by implication from other statutes as in the wife's suit against a husband for a personal tort, it is difficult to find any basis for implying a right in the husband. He had none in common law and his rights have not been enlarged but diminished by the married woman's statutes" (p. 225).

Here Professor Madden adopts the illogical reasoning of the courts which the same courts have refused to follow where the question is one of the husband's power to contract with his wife or to convey to or receive a conveyance from her.

The book should have contained a chapter or subdivision on the law regarding the contract to marry and the breach thereof to have logically rounded out the subject undertaken. In at least two instances statements are made concerning some changes in the law by implication arising out of the general legislative enactments emancipating married women (pp. 124 and 219). Just when such implications arise, the reasons supporting them, and the extent of their adoption, are not indicated, as it appears should have been done.

In all, however, this newest contribution by a teacher of the law will be found of valuable assistance to students, teachers of the law, and general practitioners.

University of Utah School of Law.

Adolph Ladru Jensen.
BOOKS RECEIVED


