

BOOK REVIEWS

THE DIVORCE COURT. (Volume One—Maryland). By Leon C. Marshall and Geoffrey May, with the statistical assistance of Elva L. Marquard and Ruth Reticker. The Johns Hopkins Press, Baltimore, 1932. Pp. 359. Price: \$3.00.

The author of an essay in reform of the English Law of Divorce† may legitimately hail the authors of this book as fellow reformers. But in the absence of a qualifying explanation, this description might mislead prospective readers, for the scope and structure of the book admit no scheme of positive reform and contain but little explicit indication of the reforms which are desirable. The bulk of the book consists of a detailed examination of the statistics and procedure of divorce in the State of Maryland, and leaves the reader to deduce from his own study of these details such defects as the present law in Maryland may be thought to manifest.

Of course it is seen clearly that the main cause of matrimonial trouble lies not in the law but in the human material which engages in matrimony; that is, of course, in the education or no-education, the traditions and motives, good and bad, of those who marry. This is matter for the professors of sociology and religion, for whom the help available from Court records is strictly limited. Divorce may be obtained on a ground agreed upon by the consent of the parties, at one extreme of the statistical legal scale; or as the result of an actually antagonistic suit, at the other. The last is likely to furnish more useful material than the first; but in neither case will the evidence requisite for the hearing necessarily tell the sociologist what he needs to know. Indeed at the conclusion of their chapter "Beyond a Reasonable Doubt", the authors go further, when they say with considerable modesty (p. 198) that the requisite legal evidence

"... possesses little of value to the social scientist who wants something more than a classification of the patterns into which the testimony falls. The court records of testimony, at least in Maryland, contain substantially nothing which throws light on the backgrounds of family disorganization, just as the court procedure, as now administered, contains substantially no opportunities for constructive work in the great problems in this field. It may be that this need not continue to be true; but today it is true."

As it was written in the Majority Report of the Royal Commission on Divorce and Matrimonial Causes in England, which reflected unmistakably the hand of the late Lord Gorell, who presided over the Commission, more than twenty years ago, "Divorce is not a disease, but the remedy for a disease". It rests with the sociologist to go further up-stream to the source, where remedy will give place to prevention.

To state this limitation is not to disparage in any way the extremely intensive labours of the authors of *The Divorce Court*. It is but to echo their own admission that their contribution is in some sense a negative one. While it tells the sociologist as much as he can learn from the available material of divorce cases, it tells him also that, for the present, at any rate, the source of most of his desired information lies elsewhere. But if the ultimate solution lies in sociology, which must in some measure involve religion, then whenever the sociologist needs the contribution of court records, scientifically ordered and with a reasoned argument

† *Mischiefs of the Marriage Law—An Essay in Reform*, reviewed at p. 502 of this issue.—Ed.

therefrom, this book will be found to be indispensable. And this observation applies not only to Maryland, whether it be the Counties of that State or the City of Baltimore, whence the material comes, but *mutatis mutandis* to all countries where divorce is an institution. As the Advisory Committee of publication writes in a Foreword (p. 11):

"The problem of divorce is one of the many problems inherent in the institution of marriage itself. Twenty-five years ago it might have been heresy to say that there were any such problems. Today, the biologist and the psychologist, the student of sociology and the divorce lawyer, have joined forces and made us admit that there are problems where we thought formerly that there was "revealed" fixity. The young people of today, all over the world, take nothing for granted. They want to know. Neither religion nor tradition hampers their experimental attitude towards institutions once held sacred. Whether we like it or not, it is paradoxically true that, in America, divorce has become an integral part of marriage."

But while this book ministers to the sociologist, it will prove to be of immense value to the divorce lawyer and the divorce law reformer. Apparently it has already informed the divorce lawyers of Maryland that the law of the law-books and leading cases is far from being identical with the law which functions in practice; and these divergences, one of which will be noted shortly, are found to suggest the course of necessary reform. Yet again, this book is not, even in its legal aspect, a purely lawyer's book. The present reviewer, who claims to be no more than a somewhat academic legist, felt, as he perused the pages of this book, that if his place were taken by a professional statistician, the review would be in much more competent hands. But, since a reviewer is not expected so to summarize a book that it becomes needless for the reader of the review to read the book itself, it may here be serviceable to add to a general impression the treatment of a few selected points which strike a legal reader in England.

Maryland is described among the States as one which is conservative in the matter of divorce. "Her substantive law of divorce has been little amended since its first enactment almost a century ago. Her procedural law is for the most part the same in divorce cases as in the ordinary suits in Chancery" (p. 21). The grounds of divorce *a vinculo*, as distinguished from so-called "divorce" *a mensa et thoro* in Canon Law, or, *Anglicé*, judicial separation, are stated as five in number: (1) Impotence, (2) Nullity of Marriage, (3) Ante-Nuptial Unchastity, (which three grounds account for only a negligible proportion of actions), (4) Adultery, (5) Abandonment for three years, (which last two grounds account for over 99 per cent. of actions). It may be observed that in English law adultery alone is ground of dissolution; and impotence is ground of annulment, not of dissolution, and the effect of it is that of nullity. There has been of late a tendency in England to regard impotence (being ground of voidability) as ground of dissolution; but it does not appear to have been suggested that nullity (when a marriage is void) would ever be categorized under dissolution.¹ The apparent

¹ It is true that Sir Edward Coke in his *Notes upon Littleton* (235a) included the grounds of nullity in the grounds of divorce *a vinculo*; but he was writing in and of a period of confusion when there was no dissolution in the modern sense, when legislative divorce had not become regular, and when therefore, as under the Canon Law, the only means of terminating a marriage was by annulment, or when, irregularly and under Continental influence, decrees *a mensa et thoro* were treated as dissolutions. Nullity means that a marriage is as a fact null and void, whether a decree of nullity is pronounced or not. But in a recent case in the Divorce Division, where impotence was the ground of the petition, the suit was dismissed for lack of jurisdiction on the ground that the petitioner was not of English domicile which is indispensable to a petition for dissolution. Impotence was in this case held to be ground of dissolution in fact, and of nullity only in name.

contradiction between the English decisions is due solely to the issue of domicile, which happily does not arise in Maryland matrimonial causes where residence gives jurisdiction. But it will not seem hypercritical, perhaps, to question the legal precision of the inclusion of Impotence and Nullity (voidable and void marriage) under divorce. Where the grounds are treated at greater length (p. 122 ff.), impotence reappears, but nullity is absent. Presumably the grounds of nullity are those of the old ecclesiastical practice of Europe, and have not been enacted by statute.

At this point one remarks the survival in Maryland of the old ecclesiastical Absolute Bars to relief, as in English law, accompanied by the difficulty of determining between a legitimate and a collusive agreement; and, under the name of Recrimination, a limited number of those grounds of refusal of a decree which in English law operate at the discretion of the Court. Of the principal bars to relief it would appear to be the case in Maryland, as in England, that they are proper to an actually antagonistic suit, but become irrelevant to a suit which in fact is brought with the consent of both parties. From the statistics so fully furnished in this book it is clear that the really antagonistic suit is very rare, just as we know that it is now rare in England as compared with the days following the Act of 1857, when undefended suits were unknown and reputations were blasted by a decree; and, further, it appears that even many defended suits and some cross-actions are in fact not antagonistic suits in more than form. Therefore it may be hazarded that a limitation of the operation of the bars to relief to their appropriate suits is a desirable legal reform. But this cannot effectively be enacted by statute while all suits remain statutorily antagonistic in form, because in the absence of a distinction between antagonistic and consent cases the corresponding procedural distinction could not be applied.

Two interesting questions in quite different categories presented themselves to the reviewer as he read the text of this book; and it happens that both of them enjoyed a reference in the Advisory Committee's Foreword. The first concerns the evidence of adultery which is requisite, and the evidence which actually is often proffered at the hearing. It may seem strange that the evidence given is sometimes more direct and conclusive than the circumstantial evidence which is in fact sufficient. The authors (p. 195) refer to the English case of *Loveden v. Loveden*² and the *dictum per* Sir William Scott, that "it is very rarely indeed that the parties are surprised in the direct fact of adultery". And they might have completed his words on that issue to the effect that, "In every case, almost, the fact is inferred from circumstances which lead to it by fair inference, as a necessary conclusion; and unless this were so held, no protection whatever could be given to marital rights". The Maryland Court of Appeals expressed the same opinion in 1930 and 1931: "Adultery is usually an act done under cover of darkness and secrecy, and in which the parties are seldom surprised." This doctrine, thus maintained in Maryland,—and still orthodox in England, having been invoked in the Court of Appeal as recently as 1931 by the Master of the Rolls in *Woolf v. Woolf*,³—is now confronted by the statistics of the Maryland Courts. A considerable proportion of the cases shows that the respondent had been

(*Inverclyde v. Inverclyde*, [1931] P. 29, *per* Bateson, J. at 42). Yet in the case of *Newbould v. Attorney General*, [1931] P. 75, which followed soon afterwards, a decree of annulment on the ground of impotence was held, in conformity with the principles and the practice of the old ecclesiastical courts, to have annulled the marriage *ab initio*. When the effect of annulment is, as it must needs be, *ab initio*, there can never have been a marriage. Annulment therefore cannot strictly be an example of divorce *a vinculo*; for, although a voidable marriage is valid pending decree, if the effect of decree is that the marriage is void, there has been no marriage and therefore no *vinculum*.

² 2 Hagg. Con. 1 (1810).

³ [1931] P. 134.

observed *in flagrante delicto* by a witness who readily gave evidence to that effect. To quote the book (at p. 196) :

"If these facts are to be believed, about two-fifths of the adultery, or circumstances associated with it, which leads to divorce in Baltimore City, is carried on with such disregard of privacy as to be physically observed by a witness willing to testify to his knowledge."

The conclusion is that the conditions are seen, and the evidence given, by a friend of the respondent; that this would commonly not be possible if the respondent did not so desire; that, therefore, the respondent desires the divorce no less than the petitioner; and further, therefore, that even in a number of the adulterous cases (apart from abandonment) the married parties are agreed. This testimony to the actual mutual consent of the parties, given in part by the actual statistics of Maryland, and in part by deduction, concurs with what is generally realized without statistical proof by those who know the practice of divorce in England, and probably throughout the civilized world; and it everywhere demands the accommodation of law to the realities of life.

The second of our concluding questions which require attention concerns the effect on divorce of the presence of children. There is a popular notion that if a marriage produces children, it is less likely, than is a childless marriage, to suffer the shipwreck of divorce. Do the statistics bear out this belief? The authors deal very cautiously with their *data*, and conclude in a somewhat negative sense (p. 75) :

"When the presence of children is checked against duration of marriage, it becomes far less clear than popular discussion has it that 'childless marriages cause divorce'. The heavy proportion of childless marriages in divorce actions may have a simple explanation in a tendency of divorces to fall in the early years of marriage, before children have, in natural course, arrived. Of course the real truth is that no one knows what the relationship is between childless marriages and divorce, and no *data* are yet available which enable one to know."

This serves as an answer in advance to the belief quoted on page 90 that "the large proportion of childless marriages in divorce suits is evidence that children are a deterrent to divorce", or that "young children are a deterrent to divorce". To the further view that "the husband hesitates to bring suit where children are present, because the wife is likely to get the custody of these children", their answer is as follows (pp. 90, 91) :

"... the 'common sense' explanation that husbands with children hesitate on grounds of sentiment to bring suit sounds plausible. It may have merit, but the Maryland figures do not establish its merit. It is true that actions filed by husband plaintiffs show a lower percentage of instances of minor children present than is true of actions brought by wife plaintiffs, but there is no evidence that this is a mark of forbearance by husbands; it is quite as readily explained by the fact that wives, *for reasons other than the presence of children*, are more heavily represented as plaintiffs in those suits in which no three-year period of separation is necessary. Furthermore, ... the popular idea that wives secure custody of children needs to be modified quite seriously. They do obtain custody in cases in which they bring suit, quite emphatically—but far less emphatically when husbands bring suit. Finally, in Maryland, when children *are* present, husband plaintiffs have a larger *number* of children than do wife plaintiffs; and this is certainly not evidence in support of the 'common sense' theory."

The sober statistical scientific style of this book will tend to confine its study to serious students; but it represents a new method, which may come to provide the precise justification and direction of reforms which are felt to be desirable but at present remain fluid in conception.

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TRIBUNES OF THE PEOPLE. By Raymond Moley. Yale University Press, New Haven, 1932. Pp. v, 272. Price: \$2.50.

GOOD MORNING JUDGE! By Nicholas Albano. D. S. Colyer, Newark, 1932. Pp. ix, 249. Price: \$2.00.

The police court represents the pathological elements of society brought to focus. As Judge Albano points out, these tribunals "patiently sift and analyze, absorb and neutralize the shock and recoil of the life of cities." They exercise, as Professor Moley suggests, a "veto power over the enforcement of criminal law" and act as the people's means of protection from "a vast bureaucracy" of police. Arrests involving the petty thief, the unlicensed peddler, the professional prostitute, the ordinary felon, and the small-fry bootlegger do not offer a type of practice and financial remuneration commensurate to the ability of even second-class lawyers. Hence the courts of limited jurisdiction function, neglected and often despised by the constructive and intelligent class of attorneys. To be known as a "police court lawyer" is a stigma which few covet and which even the legal interne is anxious to disown as soon as he is professionally able.

The police court has been raised to the level of sustained public attention chiefly by the painstaking work of the universities, with sporadic legislative and citizens' investigations giving impetus to the movement. Unfortunately, the well-organized bar has taken neither the initiative in the work nor a courageous stand to enforce its professional codes.

The detailed inquiry into the organization of the minor courts and into the way law is administered in them, infused with the contemporary sociological philosophy of organic community life, is teaching us some new conceptions of law, a great deal about the enforcement of law, and burning upon our consciousness the tremendous value of taking the police court as a point of departure in diagnosing pathological social factors and individuals and experimenting with treatment which is related to punishment only by the fact that it revolves within the orbit of coercive public force.

Judge Albano holds the mirror before himself and in a seasoned way philosophizes as he sits on the bench as magistrate of the Third Criminal Court, Newark, New Jersey. His volume should be valuable to students of political science and prospective law students as a racy description of a political institution in non-academic style. Interesting to the lawyer, however, are his conception of his job and the casual constructive suggestions which he makes. The Police Court, he says, "must be governed . . . not so much by laws as by the experiences of life; not so much by the strict rules of evidence as by the traditions and characteristics of the people involved and, above everything else, by the rule of common sense." To this magistrate blind and impartial justice is a myth. He sees himself, not as an automaton of reports and code and ordinance books, but as a social doctor. "The influence of kindness and helpfulness is oftentimes more effective than the sternness of legal penalties", he asserts. "Talk will not suffice; contact alone will not do it, but contact with some intelligent and, when needed, sympathetic aid will accomplish more than all the laws on the statute books." Recognizing the police court as a laboratory of unparalleled resources for a "more direct study" of "social cancers and ulcers", he suggests a functional study and

coördination of the efforts of welfare and vice-fighting organizations, so that their potential capacities may be definitely integrated with the court in assimilating the law violator into the social organism in a constructive and systematic way.

Two other suggestions in this volume are worthy of comment. He believes that the committing magistrate should be allowed a wider latitude of inquiry through authorization to hear the defense to satisfy himself that there is truly a case of probable guilt. He also sees the necessity of a federal bureau to supervise the manufacturing of weapons of all types with a view to "following the life of the weapon from the moment it leaves the shipping department of the manufacturer". He would completely prohibit the sale of ammunition, except to meet the "needs of licensed holders of guns".

Professor Moley looks out from his Columbia window upon the magistrates' courts of New York. Recognized since the Cleveland study as an authority on criminal courts, he was selected by Samuel Seabury to gather material for the constructive aspects of the Seabury report. In addition to the wealth of data thus accumulated, his volume has been strengthened by those intimate glimpses into practical politics in the service of the courts which can only be discovered by public investigations and quoted from privileged records. His book is a brilliant study of a political institution and is not so shocking as it is descriptive of political folkways. One of its many messages for the lay citizen is that normal political operations are the activities of those who care. And for those who don't give a hang—well, they have merely to make their little sacrifice offerings at the altars of those who take an active, if selfish, interest.

Implied in Professor Moley's volume is also evidence for the necessity of continuous study by adequately supported and impartial research organizations of the actual operations of political institutions and their systematic adaptation, rather than sporadic and partial adjustment, to social needs and conditions.

While there is much that is academic, and, perhaps, highly debatable to the notion of the busy lawyer, the suggestions for court reorganization which he sets forth demand some very serious analytical thinking. In 1931 the magistrates' courts of New York alone cost the public over \$2,000,000. This expense has trebled in thirty years. "To what end?" Professor Moley demands.

The charges which he brings against the New York courts do not have an unfamiliar ring to anyone acquainted with police courts in general, but they have the special merit of being very fresh and concrete. The courts are administered as a part of the political spoils system. The intervention of a friend in the district political club is much more potent in the disposition of cases than the merits of the cause or the services of the best lawyer. Bail, fixed by a careless rule of thumb, has the actual result of providing "an income for an army of bondsmen, many of whom . . . are little short of criminals themselves. . . . An army of parasites [is] kept alive at the expense of the defendants who come into court". A racket, participated in by the policeman who arrests, the archactor—the bondsman, the regular "steerer"—who has become a part of New York court machinery, the shyster lawyer, the local political leader, and with at least the passive approval of the presiding magistrate, becomes a vicious quasi-legal entity held together by profit sharing of the meager savings taken from their prey, the confused defendant. The "brazen frame-ups of innocent people, stealthy bribery, extortion, ignorance, and inefficiency"—these are the evils lurking in New York courts. "Many of these magistrates were so utterly ignorant of the standards of conduct becoming to a person wearing the judicial robe that most of their activities and associations were wholly innocent". "Three sets of criminal courts within New York's city system handicap the quick and rational disposition of cases." And "underneath, the muddy current of machine practice and policy runs undisturbed".

The general counts of political corruption are not much different from those which have been revealed in New York inquiries since the New York Times exposed Boss Tweed back in 1871. It is, however, interesting to observe that despite investigations and hot flashes of citizen indignation, conditions in 1932 are just about the same as they were sixty years ago when Tweed asked a single cynical question: "What are you going to do about it?" And according to a contemporary cartoon exclaimed: "Say, young man, ain't you afraid you'll burn your breeches?"

Professor Moley has some practical plans.

1. He advances the Seabury suggestion that the *appointment of magistrates* be taken from the mayor entirely and *vested in the* Appellate Division of the *Supreme Court*, a body of unquestioned integrity and judicial authority. Since the judges of the Appellate Division are elected for long terms, this solution combines an elective with an appointive bench, the former dominating the latter. By this system Professor Moley, looking out upon the skyscrapers from his campus study, envisages a new type of ideal magistrate:

"Common sense must be chiefly embodied in the judge, aware of, although not expert in, a rich variety of knowledge—such a diversity as is enforced by the conditions of a highly specialized scientific age—a judge of knowledge and of scientific expertness as well as a judge of law, possessed, withal, of such initiative, taste, sensitiveness, and sympathy as may in the application of law to fact give meaning and reality to knowledge. This must be what Plato meant when he concluded that virtue and wisdom make justice."

2. The Professor would also create the office of a *salaried public defender*. This official would be assisted by a hand-picked group of promising young lawyers serving an "instructive internship". Such an organization would eliminate the necessity of the defendant's relying on "steerers" and professional police court lawyers.

3. *Responsibility for prosecution would be placed in the police department*. There would be a staff to assist officers in preparing their cases, to aid them in the interrogation of witnesses, to advise them on legal matters, and to arrange with them the order in which they present their cases.

4. *A rationalization of the three inferior court systems in New York into a single organization headed by a conscientious and efficient chief justice* would eliminate overlapping duties and cut the present personnel a third. Salaries alone in these courts now amount annually to \$3,186,452. The chief magistrate has an annual salary of \$15,000; the chief justice of the Children's Court, \$17,500; and the chief justice of the Court of Special Sessions, \$18,000.

Professor Moley would also modernize the probation department into a social clinic with six departments—of investigation, probation, health, vocational guidance, social work research bureau, and research library. He would introduce bail reforms basing the bond on the probability of the defendant's appearance. Severely criticizing the assistance given police by private agencies, he says:

"One of the characteristics of American practice with regard to governmental matters is that after setting up a governmental institution and providing for it through public taxation, we establish private agencies at private expense to watch the public institution and to assist it in performing its functions. . . . Private agencies [which] participate in public law enforcement [are] dangerous and unwise. . . . Private initiative with certain restrictions is commendable, but public law should be enforced by public officials."

One of the most provoking queries of Professor Moley is of wider significance. He challenges the whole conception of the function of the police court. "We do not know," he says, "what we are trying to do in the magistrates' courts, or, in fact, in any criminal court." Punishment, retribution, safety of "society", "social readjustment", "rehabilitation", "reformation"—"all these are words. We do not know whether any of them has reality. The weight of evidence is that they do not. It is like a chorus of many voices, each carrying a different tune, dissonant, meaningless, and apparently, without end."

Professor Moley sees the police court as something more than a tribunal for uttering legal ultimatums. "The task of the magistrate is hopeless unless he uses his position as would a doctor in a clinic." "A clinical jurist" must attack his problem at "its source, in the mood if not the method of science." "It becomes clear that what is wanted, really, is a doctor of human relations, a new kind of lawyer."

In the last analysis, the Professor's program of sociological treatment of pathological social products, as far as the police court is concerned, reduces itself to a minimum of law, chiefly exercised in selecting the specimens to be brought into the laboratory to be examined in the clinic of jurisprudence by doctors of human relations and assigned by the "clinical jurist" to appropriate university-graduated sociological technicians for creative reassimilation into the local community! The new word-labels are of course the way the prevailing school of sociology talks, but in the language we all understand, these are just about the same things which Judge Albano sees himself trying to do in practice as he holds the mirror before himself in Newark, New Jersey.

Professor Moley's book has wider implications than a mere discussion of New York's judiciary. What are the objectives of police courts? What are the best organization and technique for reaching those objectives? What alterations in law school training are going to be necessitated? How has the lawyer to adjust himself to the trend of socialized jurisprudence? These and many other questions must be seriously and widely discussed by the bar, because, if they are not, they will certainly be decided by the sociologists and university theorists.

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SELECT CASES ON EVIDENCE. (Third Edition.) By John Henry Wigmore. Little, Brown & Company, Boston, 1932. Pp. xlii, 1419. Price: \$7.50.

The third edition of Wigmore's Cases on Evidence will be welcomed by many teachers of this subject. In spite of the fact that the law of Evidence has not been subject to the violent and sudden changes that have occurred in some other branches of the law, the period of nearly twenty years since the publication of the second edition has produced some cases and other material that should be considered in any present day presentation of the principles involved.

In size, appearance, and general make-up, the book is very similar to the second edition. This, indeed, is most fortunate, as the charm of the Wigmoreian touch and the extreme teachability of the work are retained intact. In the main, such changes as have been made seem to be decided improvements. As stated in the preface, approximately two hundred cases and extracts have been substituted, and about one hundred and fifty appropriate law review articles have been referred to in footnotes.

One feature of the second edition has seemed to the reviewer to be open to criticism. Many short extracts from cases, also certain text and other his-

torical matter were inserted into the principal case material, but were printed in fine print. Much of this material is highly instructive and valuable, but there seems to be a tendency on the part of the average student to feel that its importance is indicated by the size of the type, and to pass it by with a glance. The third edition corrects this defect by printing this material in the same type as is used in the principal cases. Although this adds to the size of the book, there is a saving otherwise of about twenty-five pages by reason of the consolidation of the table of cases and of the topical cross references and principles decided.

The table of contents, or outline of the book, is retained almost intact (including the terms "autopic proference," "prophylactic rules," etc.). There are a few minor additions and changes, but, on the whole, the former outline is followed very closely. A considerable change, however, is found in the appendices. Appendix I of the third edition consists of a program for a course in Evidence. It is interesting to a teacher of Evidence, as a method adopted by a master of the subject, but the reviewer doubts if it is a method to be adopted by many, or perhaps any, other teachers; for teaching methods, after all, are merely outlets for the personality of the individual teacher. A rapier in the hands of one may be a club in the hands of another, if we may be permitted to change our figure of speech. The program does, however, present certain ideas which may, perhaps, be adopted with benefit by any progressive teacher of Evidence. In Appendix II, the review questions are grouped under definite headings, a distinct advantage over the arrangement in the second edition.

Mr. Wigmore is to be congratulated upon his success in doing a most difficult task, the compilation of a new edition of an outstanding case book without ruining it.

In only one respect are we disappointed in the work, even though this disappointment is not entirely harmonious with the reviewer's general approval of the lack of decided change in the make-up of this edition. A number of years ago Mr. Wigmore expressed himself to the reviewer as hopeful that sometime some genius would present a program, "the desideratum being a group of principles representing the fundamental prudence and fairness of our judicial system, which could be so applied as to retain their essential value without being enforced to their present extreme of impractical logical refinement." Every teacher of Evidence and every trial lawyer realizes the need so aptly expressed by Mr. Wigmore, but if this desirable end cannot be accomplished by Mr. Wigmore, the possibilities of progress in this direction seem very remote. Perhaps a case book is not the medium through which to approach such a revolutionary aim, but one may be pardoned for entertaining a vague wish, even if it be a bit fantastic, when the need is so apparent and so real.

Scott Rowley.

Drake University Law School.

CARSON THE ADVOCATE. By Edward Majoribanks. The Macmillan Co., New York, 1932. Pp. vii, 455. Price: \$3.00.

If it be true, as we are told, that the evil men do lives after them while the good is often interred with their bones, then it well behoves those who play an important part in public life to see that some portion of the good they have done, if any, be recorded for the sake of their future reputations. The most courageous way to face this issue is to write one's own memoirs or autobiography and frankly explain the motives for one's conduct. Unfortunately not everyone has a talent for this sort of writing, which to be entertaining must disclose its kinship to gossip, and lawyers, who are trained to keep secrets not to disclose them, are

usually deadly dull as biographers. Perhaps for this reason Lord Carson, better known to the American public as Sir Edward Carson, sought a substitute in Edward Majoribanks, whose "For the Defense", the life of Sir Edward Marshall Hall, had such a success in 1929. Owing to the lamented death of Mr. Majoribanks last spring, cutting short a career of great promise at the bar, in Parliament and in literature, his new work was left unfinished. Fortunately it was completed to a point in Lord Carson's career that forms a convenient stopping point for one volume, the year 1910, when Sir Edward assumed the leadership of the Ulster party. Up to this time, although he had served conspicuously in Parliament and had filled the office of Solicitor General, it was as an advocate and leader of the bar that Sir Edward was chiefly known to fame. Yet to come were the years of Ulster's sullen resistance to home rule under his guidance; the years of the World War with his return to high office and its heavy burden of responsibilities; finally his retirement from politics in 1921 and appointment as lord of appeal in ordinary with a life peerage. Throughout his political career Sir Edward sturdily upheld the Union of England with Ireland and when home rule became inevitable led the opposition to the inclusion of Ulster. To his leadership more than to that of any other man is due the present separation of Northern Ireland from the Free State with what consequences for the future of Ireland no one can tell. The published volume is concerned with the earlier and less tragic years of its subject's career, yet there was tragedy enough in the Ireland of the tumultuous days of the Coercion Acts and the Land League, when young Carson was rising from obscurity to dangerous eminence as crown counsel for the prosecution of offenses under the Crimes Act. It was Arthur Balfour who induced the young Irish barrister to enter Parliament, and it was Charles Darling, afterwards the famous judge, who offered him a desk in his chambers when Carson with much hesitation decided to practice in England.

His phenomenal success needs no comment, and his biographer presents a graphic account of his career as a leader, with interesting summaries of some of the celebrated cases in which he took part, among them the trial of Oscar Wilde, the Jameson raid case, the Chapman poisoning case and the Alaska Boundary Arbitration. That Sir Edward deserved his reputation as a great advocate and relentless cross-examiner no one would dispute, and the animosities of his political career have contributed to his reputation as one of the strong, hard men of his time. This picture his biographer would soften by many references to the kindlier side of his character, his popularity with his colleagues, and the respect with which he was regarded even by his political enemies. These assurances remind one of the way in which the owner of a savage and faithful watch dog will point out his amiable traits; it is inevitable in a biography coming from an intimate and friendly hand. There is, however, in the story much to encourage the ambitious young lawyer. Here was an unknown Irish lad, without wealth or influence, who by sheer ability, untiring industry, and rigid integrity rose to the very top of a highly competitive profession. These are the things that count in the long run wherever justice is properly administered.

William H. Lloyd.

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CASES ON THE CONFLICT OF LAWS. (Third Edition.) By Ernest G. Lorenzen. West Publishing Company, St. Paul, 1932. Pp. xxx, 1118. Price: \$6.00.

Doctrinal dissension pervades the ranks of both law professors and swimming instructors: there is the one faction which advocates casting the pupil into the deepest part of the stream, leaving it to instinct (if the word is still permitted) to make the pupil swim to shore; then there is the other faction which believes in

immersing the pupil slowly and only after a great deal of instruction in how to meet the situations with which he will be confronted. There are some of us teaching law who proceed upon the theory that the pupil may well survey the field of endeavor, may well pursue a course of preliminary instruction, take a ground course, as it were, before plunging into the cascade of decision constituting private international law. This new and third edition of Professor Lorenzen's well-known casebook upon the subject heralds the editor's conversion to the sink-or-swim technique. Gone is his introductory chapter, ever too brief, upon The Nature of the Subject. Dismembered and banished to the remote parts of the book is his excellent chapter on Domicil. Dismembered and scattered throughout the book is his chapter upon Procedure. This last is a happy change. The futility of the effort to build up a theoretical dichotomy of substance and procedure is apparent to all who have scratched the surface of the problem, as well as to those who have made a closer study of the field.¹ It seems clear by now that progress will be made only by studying the procedural difficulty in relation to the particular substantive right sought to be enforced. In placing this material in the chapters upon Torts and Contracts, preponderantly in the former, Professor Lorenzen has made a real advance.

Unfortunately, however, the reviewer is unable to agree with the treatment accorded the material on domicil. This chapter has in the past afforded an excellent medium for the introduction of the pupil to the problems which lie ahead: herein has been its greatest value. It served well the same purpose as Professor Beale's chapter on jurisdiction in general,² and Professor Humble's ninety-page introduction.³ In the new edition, the pupil is deprived of this preliminary instruction, unless the instructor resorts to introductory lectures, and must start at once with the problem of jurisdiction of courts. It is the reviewer's experience, using the new edition in the present semester, that the class because of this changed approach takes much longer in its preliminary orientation, and is unnecessarily delayed in getting into the swim of the subject. Aside from this issue of teachability, which after all may rest upon the shoulders of the reviewer and not of the editor, there seems to be further objection to the treatment accorded the subject of domicil. The change is due to the editor's announced intention "to develop all rules of the Conflict of Laws in connection with the particular fact situations to which they relate" (vii). With this intention no one can quarrel, but the difficulty inheres in finding with what fact situations domicil should be treated. The editor's solution is to assign the material to the chapters upon Family Law and Administration of Estates, principally the latter. We thus find that certain notions of domicil which would greatly assist in the understanding of the problems of marriage and divorce, are to be found in the subsequent section on Inheritance. Certain questions of domicil are raised in connection with the topic, Jurisdiction of Courts; it is present in slight degree in a study of the Workmen's Compensation cases; it is disappearing from but has not been completely eliminated from the field of Sales and Mortgages of Movables; its theory crops up in the chapter on Business Organizations. In each of these instances the unsureness of the student as to the meaning of the term must result in some confusion. Where a single legal concept appears in so many different parts of a subject, is it not ordinary industrial efficiency to

¹ McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933. See the following: (1927) 41 HARV. L. REV. 254; Note (1930) 43 *id.* at 1134; (1926) 24 MICH. L. REV. 501; (1928) 26 *id.* at 573; (1926) 24 *id.* at 499; (1927) 25 *id.* at 456; (1931) 29 *id.* at 105; (1930) 78 U. OF PA. L. REV. 421; (1932) 80 *id.* at 911; (1932) *id.* at 449; (1931) *id.* at 126; (1931) 15 MINN. L. REV. 703; (1932) 16 *id.* at 586; Note (1930) 14 *id.* at 665; (1931) 31 COL. L. REV. 158.

² BEALE, CASES ON THE CONFLICT OF LAWS (2d ed. 1928) 25.

³ HUMBLE, CASES ON CONFLICT OF LAWS (2d ed. 1929) 1.

separate it out and master it, rather than learning a little here and a little there in the hope that by the end of the process all salient features will have been noted?

In accord with the same announced intention to present the material functionally, the editor has made other changes. The chapter upon Foreign Judgments has been brought forward and appended to the chapter on Jurisdiction of Courts. This of course is a common sense solution. The section on Torts has been lifted from the chapter labeled Obligations, and set up as an independent unit. This also seems sound. The section on Workmen's Compensation Acts has been removed from the section on Contracts and appended to the section on Torts. This again seems a vast improvement, although it appears imminent that we will have to disentangle this material from both Contract and Tort and recognize its existence as an independent category. A new section upon Insurance has been created. There is much of interest in this section, but with the possible exception of *National Union Fire Insurance Company v. Wanberg* (445), there seems to be little which could not have been presented equally well, in less time and space, in the section on Contracts in General. A section on Arbitration Agreements has been added. The chapter formerly labeled Property has been rearranged and tagged Sales and Mortgages. The result of this has been to give the presentation of the subject of Mortgages and Conditional Sales of chattels increased effectiveness, but there has been some diminution in the effectiveness with which the matter of intangibles is presented. A new sixty-page chapter on Business Organizations has been created, and well justifies its existence. The material on Carriers has been largely abandoned, as well it might in view of the slow absorption of this field by the laws of the United States. The material on Penal Laws has been divided between the sections on Foreign Judgments and Torts, where it is better discussed. There has been some internal rearrangement of the chapter on Family Law, but no real change has been made. The chapters on Inheritance and Foreign Administrations have been combined into a single chapter titled Administration of Estates. To this has been added material dealing with Probate and with Trust Estates. The treatment of this part of the subject promises to be most effective.

Apart from this matter of arrangement, we find that the substance of the book has been little changed, and that the bulk of the change has been for the better. New and well selected material relating to Jurisdiction of Courts over corporations has been introduced (73-93). Very suggestive material dealing with the question of jurisdiction over partnerships is made available (93-102). The merits of Professor Scott's well-known critique of *Flexner v. Farson*⁴ (93) are made apparent. *Weidman v. Weidman* (140) and *Redwood Investment Company v. Exley* (170) constitute interesting additions to the chapter on Foreign Judgments. The material dealing with Torts has been greatly improved, although *Walsh v. Railway* (203) at the beginning of the section seems to strike something of a false note. Many interesting additions have been made, including *Buckeye v. Buckeye* (207), *Precourt v. Driscoll* (237), and what may be a monumental case, *Fitzpatrick v. International Railway Company* (234). As in the second edition, it seems that the study of the masterful opinions of Cardozo and Holmes in *Loucks v. Standard Oil Company* (251) and *Slater v. Mexican National R. R.* (259), respectively, is too long deferred. The reviewer is conscious that his high opinion of these cases is probably not shared by Professor Lorenzen. In the same manner, the reviewer thinks it unfortunate that the majority opinion in *Baltimore & Ohio R. Co. v. Baugh* (227) should be included without reference to the dissent of Mr. Justice Field

⁴ Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 HARV. L. REV. 871.

in the same case, or the dissent of Mr. Justice Holmes in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*⁵ In the section on Workmen's Compensation Acts we find that the pioneer case of *Kennerman v. Thames Towboat Company*⁶ has given way to the less instructive case of *Pettiti v. J. T. Pardy Construction Co.* (300). One serious omission from this section is *Smith v. Heine Safety Boiler Co.*⁷ Included of course is the recent case of *Bradford Electric Light Co. v. Clapper* (309) which promises to throw into the discard the basic theory of both the *Kennerman*⁸ and *Gould* (294) cases.⁹ The equally startling case of *Home Insurance Co. v. Dick* is found in the section on Insurance (455).

Similar changes are to be found throughout the book. Occasionally one misses a landmark case, but finds inserted most of the important recent material. On the whole it may be said that the selection of cases within the different subdivisions is an improvement, if possible, upon the preceding edition.

To the conscientious teacher it is an ever-recurring problem how much of the prevailing doctrinal dispute among teachers should be passed on to the student. Teaching cases without reference to disputes in underlying theory is a sterile process. Teaching underlying theory to such an extent that the cases are pushed aside is to fail in the law school's principal purpose, teaching the student the practice of the law. An understanding of fundamental theory is essential to the understanding of the cases themselves, to the development of the critical faculty which every lawyer should have. It is particularly useful to him in performing the most valuable function of the lawyer, that of predicting with some accuracy the course of future decision. The extent to which theoretical discussion will achieve these ends is the measure by which we are to determine the extent to which it is to be introduced into the classroom. Professor Lorenzen and others have contributed much to this discussion, and have served to make us verify at every point the principles which at an earlier day seemed unquestionable. In the second edition of his casebook Professor Lorenzen maintained an admirable balance between precedent and theory. One teaching the book felt that both sides of the problem had been presented with the maximum of effectiveness and fairness, and that neither was allowed unduly to overshadow the other. In studying and teaching the third edition of this book, one senses, without being able to put a finger on definite items, that somehow this balance has been lost, that the teacher must be particularly alert to prevent misunderstanding on the part of the student as to where decision, sound or unsound as the case may be, leaves off, and where critique, merited or unmerited, begins. The teacher is confronted with this problem in any course and with any book, but it appears to be more than ordinarily evident in this collection. The reviewer agrees wholeheartedly with Professor Lorenzen in some of his innovations, but disagrees sharply in others. This is to be expected, else there would be no fun in study and teaching. Still, one must try to maintain proper balances in all things, and in this case must occasionally put his shoulder to the casebook, the framework around which his course is built, in order to maintain its equilibrium.

In this new edition Professor Lorenzen has made an increased use of law review material. The teacher will appreciate greatly the fact that the leading articles upon the field are collected in a bibliography of some eight pages. Listed in this bibliography one will find almost everything of real value, with the ex-

⁵ 276 U. S. 518, 48 Sup. Ct. 404 (1928).

⁶ 89 Conn. 367, 94 Atl. 372 (1915).

⁷ 224 N. Y. 9, 119 N. E. 878 (1918).

⁸ *Supra* note 6.

⁹ See Note (1932) 80 U. OF PA. L. REV. 1139; (1932) 32 COL. L. REV. 131; Note (1932) 19 VA. L. REV. 64; Note (1932) 42 YALE L. J. 115.

ception of two textbooks, published upon the Conflict of Laws in the United States. Incidentally, the wealth of material here collected suggests that the Association of American Law Schools might well do for the field of Conflict of Laws what it has done for the field on Contracts, and arrange for the publication of this material within the covers of a single volume.

The format and typography of the book are of the high standard uniformly associated with the American Case Book Series.

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MISCHIEFS OF THE MARRIAGE LAW—AN ESSAY IN REFORM. By J. F. Worsley-Boden. Williams and Norgate, Ltd., London, 1932. Pp. 427. Price: 21s.

This is a radical and dangerous book. It is radical because it proposes the abolition of the Christian doctrine of marriage as incorporated into English divorce law. It is dangerous because it makes this proposal seem a sensible solution of present difficulties. Strangely enough, it emanates not from an untrained advocate of the "new freedom" but from an Anglican divine, a specialist in ecclesiastical law.

In support of his suggestions Dr. Worsley-Boden presents an extended and well-integrated history of our legal tradition of marriage. He shows how the impact of Christian teaching on civil law shattered the broad doctrines of pagan Rome and created the narrow tenets of the canon law. These tenets survived the Reformation and the abortive *Reformatio Legum Ecclesiasticarum* and were incorporated into the temporal law of England in 1857. His careful analysis of the present English statute law and case law leads him to the conclusion that the current legal doctrines are far less liberal than those which preceded the Norman Conquest. The present doctrines of divorce require, in theory, a basic antagonism between the parties and a penal expression of it. Social maladjustment rises out of the fact that modern society, though doing lip-service to the medieval theory, is not constrained in practice by the limited grounds for divorce or by the bars to dissolution.

Since "divorce is not a disease, but a remedy for a disease," Dr. Worsley-Boden proceeds to draw up a prescription. Though framed in detail to cure the ills of British law, its ingredients apply in part to American ills as well. In addition to widening the grounds for genuinely antagonistic cases, they involve a reversion to the Roman-law grounds of incompatibility (as a contestable issue) and mutual consent (incompatibility mutually admitted), new editions of the old *repudium* and *divortium*. But they go beyond the Roman law in carefully defining incompatibility and the means of proving it and in providing safeguards against the unsocial use of mutual consent. The ecclesiastical-law bars to divorce—collusion, *et al.*—would then apply only in the few really antagonistic suits. As parts of his reform Dr. Worsley-Boden wishes to abolish permanent separation (divorce *a mensa et thoro*), because of the undesirable condition of celibacy it imposes, and wishes to substitute nationality for domicil as a basis of jurisdiction.

In all this there is nothing new. And yet it is refreshing because of the thoroughness with which the foundations are built up. The emphasis is not on Russian experiment but on Roman experience. The large outlines are not hurriedly mapped out; each proposed detail of substantive law and procedure is made to fit into the present terrain of English law.

From the point of view of American experience the book has two weaknesses, however: its absence of statistical evidence and its reliance on judicial omniscience. The argument rests entirely on the thesis that the theory of

antagonistic action does not work out in fact, that in most cases both parties want the divorce. To prove this thesis the author can command only the statements of publicists and of judges generalizing from their legal experience. The point would be infinitely stronger if it were proved by statistical data, as it is now being proved for two American states by the Johns Hopkins Institute of Law. The second weakness lies in the administrative proposals. The author puts on the judge himself the duty of ascertaining the elusive fact of incompatibility and (because "guilt" is largely eliminated) of making new and more subtle decisions concerning the custody of children and awards of alimony. It is submitted that no judge, regardless of his wig, is able to elicit the facts, let alone their family backgrounds, during the relatively brief court-room hearing. The reviewer is not urging for Great Britain the American type of family court—the jurisdictional changes would be too great to be presently practicable; but he does think that an extension of the powers of the King's Proctor as an investigator of each divorce case before it comes to hearing in court would be in harmony with other English practice (*e. g.* the King's Bench Masters) and would go a long way toward making Dr. Worsley-Boden's suggestions legally palatable.

For American students of the family, however, the value of the book lies not in its administrative proposals but in its spirit. In this country cranks and publicity-seekers rush in with new ideas on family institutions where careful students fear to tread. Dr. Worsley-Boden, though a scholar, has not awaited conclusive proofs but has expressed himself on the basis of the best existing evidence. He has written the sort of book that some of us in America have felt tempted to write—and have not dared.

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BOOKS RECEIVED

- AMERICAN DOCTRINE OF JUDICIAL SUPREMACY, THE. (Second Edition.) By Charles Grove Haines. University of California Press, Berkeley, 1932. Pp. xviii, 705 (vol. i).
- CASES AND MATERIALS ON THE LAW OF ADMINISTRATION OF DEBTORS' ESTATES. By Wesley Alba Sturges. West Publishing Company, St. Paul, 1933. Pp. xiv, 1141.
- CASES AND OTHER MATERIALS ON PRIVATE CORPORATIONS. (Third Edition.) By George F. Canfield and I. Maurice Wormser. The Bobbs Merrill Company, Indianapolis, 1932. Pp. xxxiii, 1132.
- COMMERCIAL CODE OF JAPAN, THE. Translated by the Codes Translation Committee of the League of Nations Association of Japan. Maruzen Company, Ltd., Tokyo, 1932. Pp. iv, 400.
- DEVELOPMENT OF THE JUDICIAL SYSTEM IN OHIO FROM 1781 TO 1932, THE. By Francis J. Amer. The Johns Hopkins Press, Baltimore, 1932. Pp. 45.
- DISCOVERY BEFORE TRIAL. By George Ragland, Jr. (University of Michigan Legal Research Institute Series.) Callaghan and Company, Chicago, 1932. Pp. x, 406.
- DROIT MARITIME FRANÇAIS, LE—Supplement Mensuel à la Revue de Droit Maritime Comparé et au Journal de la Marine Marchande. By Léopold Dor and René Moreux. Le Droit Maritime Français, Paris, 1932. Pp. 481-526.
- EQUITY RECEIVERSHIPS IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO, IN THE YEARS 1927 AND 1928. By Thomas Clifford Billig. The Johns Hopkins Press, Baltimore, 1932. Pp. xiii, 159.
- ERFÜLLUNG DES STAATSGEDANKES, DIE. By Wilhelm Glunger. Fritz and Joseph Voglreider Verlag, München, 1932. Pp. 48.
- GOVERNMENT OF THE METROPOLITAN REGION OF CHICAGO, THE. By Charles E. Merriam, Spencer D. Parratt, and Albert Lepawsky. The University of Chicago Press, Chicago, 1933. Pp. xxii, 193.
- HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW. By H. F. Jolowicz. Cambridge: at the University Press, 1932. (New York: The Macmillan Company.) Pp. xxi, 545.
- HUNDRED YEARS OF QUARTER SESSIONS, A—The Government of Middlesex From 1660-1760. (Cambridge Studies in English Legal History.) By E. G. Dowdell. (With an Introduction by Sir William Holdsworth.) Cambridge: At the University Press, 1932. (New York: The Macmillan Company.) Pp. lxxv, 215.
- PROBATION AND CRIMINAL JUSTICE—Essays in Honor of Herbert C. Parsons. Edited by Sheldon Glueck. The Macmillan Company, New York, 1932. Pp. viii, 344.
- STORY OF THE CONSTITUTION, THE. By Howard B. Lee. The Michie Company, Charlottesville, 1932. Pp. xii, 292.