BOOK REVIEWS


During the academic year 1928-1929 the author of this book was Visiting Professor at the University of Leipzig, where he conducted a seminar in American law. The work under review, though published in 1933, owes its origin to that seminar. The immediate object which the author had in mind in writing the book was to provide German-speaking students with an orientation in the materials and methods of Anglo-American case law. Since, however, the orientation provided is of the most inclusive sort, embracing an inquiry into the underlying philosophy of case law, it is a book which will interest all American lawyers who are courageous (or wanton) enough to relish a critical examination of the inarticulate major premises of the precedent system.

The first forty-six pages of the book are devoted to a general introduction to American law. This portion of the book performs, within a somewhat narrower range, the function of a work like Morgan's The Study of Law. The task, much more difficult than it appears to one who has not tried it, is well done. I should like to raise a query, however, whether the distinction taken between dictum and obiter dictum really corresponds to any definite usage of the legal profession. Most lawyers, I think, regard dictum as the elliptical equivalent of obiter dictum. Aside from that, it seems very questionable whether Llewellyn's distinction is a useful one. It is hard enough to distinguish between ratio decidendi and dictum without having to subdivide dictum into two classes: just plain dictum, and downright dictum.

The second portion of the book carries the title, "The Precedent System in its Practical Application". This is by far the most significant part of the book. Its significance is not diminished by the circumstance that it presents what many would regard as a somewhat one-sided account of the workings of the precedent system. Llewellyn makes no attempt to conceal the fact that the picture he throws on the screen has passed through the lens of Legal Realism. He repeatedly warns the reader of his bias and recommends the reading of certain authors as an "antidote" to his views. Throughout the book a spirit of tolerance accompanies a vigorous championship of the "realist" view. Elsewhere in this issue of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW I have attempted to discuss some of the more general questions raised by this portion of Llewellyn's book.

Two of the most interesting sections of this part of the book are devoted to the subject of concurring and dissenting opinions. The author undertakes an analysis of the political and legislative function of such opinions, and presents a discussion of their value for the "descriptive science" of legal method. He points out that specially concurring and dissenting opinions often give a kind of perspective on the "facts" of the case which is otherwise unobtainable. Specially concurring opinions, furthermore, reveal to the attentive student how common it

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1 Erster Teil, Erstes Buch, at 1-46.
2 At 14, see also his Bramble Bush (1930) where he defines obiter dicta, in contrast to plain dicta, as the "wilder flailings of the pitcher's arms, the wilder motions of his gum-ruminant jaws".
3 Erster Teil, Zweites Buch, at 47-122.
4 Supra, at 429.
5 Sections 42 and 43, at 52-61.
is for judges to agree in the decision of cases while entertaining the most divergent views of "legal theory". The frequency of this phenomenon suggests a doubt whether "legal theory" actually causes or controls the decision. As Llewellyn points out, this judicial "diversity in unity" is rendered especially evident in England where separate opinions are more or less a matter of course. He might have added that the regularity with which separate opinions appear in the English cases may explain why the English courts are able to claim a closer adherence to precedent than the American courts. It is easier to pretend you always follow one signpost when that signpost points in several directions at once.

If the rest of the book is never made available in English, I hope Llewellyn will sometime take specially concurring and dissenting opinions as the subject for a monograph. If he does, I should like to recommend the article to the compilers of casebooks. Outside the field of constitutional law the pedagogical value of such opinions seems not to have been sufficiently exploited by casebook editors. Where there are several concurring opinions usually only one or two at the most are printed in the casebooks, and even dissenting opinions are not infrequently suppressed. A particularly inexcusable example of this practice is found in the case of *Pierson v. Post*.

This case appears in all the standard casebooks in personal property, and the erudite and truly awe-inspiring opinion of the majority is generally printed in full. But one looks in vain for the dissenting opinion of Livingston which begins with these devastating words, "This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited."

Llewellyn found some interesting reactions among German lawyers to the Anglo-American system of signed opinions. I translate a passage from his book:

Many German lawyers displayed toward me symptoms of moral indigination at the mere thought of a decision signed by a single judge, and even more so at the thought of a published special opinion. In one case this was given a typically juristic twist: Two men, who practiced before the Supreme Court, admitted quite frankly that they knew who had written the different opinions and generally how the court was divided, and that this knowledge was of great value to them in their work. They proceeded at once to express, however, the expected intolerance toward the suggestion of an official publication of these things, first, because publicity concerning them was needless, and secondly, because it would be dangerous.

The third part of the book consists of a collection of cases and materials. The "materials" include selections from Pound, Holmes, Cardozo, and other writers; reprints of student law review notes; and—an interesting feature—an attorney’s memorandum on the law. Of the collection as a whole it may be said without restraint that it would be difficult to conceive of a set of materials more happily chosen for the author's purpose—that of giving the foreigner, unfamiliar with the details of our legal system, some insight into the way our courts actually work. It is a pity that the collection is not available to American students. A thorough study of these materials would be of immense value to the non-professional student who wishes to get some understanding of the workings of the judicial process. Certainly he would find more of value in such a study than he does in the "law courses" which are generally offered him. There is more

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6 Caines 175 (N. Y. 1805).
7 At 61 n. 2.
real nourishment for him in fifty pages of this collection than there is in a whole
bookful of "business law" or the diluted and third-hand Austinianism which is
mislabeled "jurisprudence".

Llewellyn has intimated that there is a possibility that the book may be trans-
later into English. It is to be hoped this will be done. If it is done, I should like
to add the personal wish that the Teutonic sense of order which seems to pervade
the style and arrangement of the present work may carry over into the English
edition. For the book as it now stands offers an irrefutable demonstration of
the fact that vigor and originality of thought are not necessarily incompatible with
a degree of stylistic discipline.

L. L. Fuller.

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THE THEORY AND PRACTICE OF MODERN TAXATION. By William Raymond
$2.75.

In exactly 250 pages Judge Green handles a very considerable bulk of mate-
rial about the history, principles, and modern practice of taxation. To his pres-
sentation, which is both descriptive and comparative, he brings several capabilities.
As a former legislator, he writes with practical understanding and a pleasing
absence of political partisanship; as a lawyer, with clearness, and without legal-
istics; as a judge, with appreciation for fair statement of rival theories and varied
experiences. A short book done in this manner on a topic of such intense public
importance merits strong commendation to those reading for general information.
It is of less significance to the technicians, whether specialized tax lawyers or
economists.

This characterization points clearly enough to the proper attitude of the
reviewer. Minute criticism is out of place. Occasionally the author can be
picked up on a statement open at least to technical doubt, but without serious
reflection upon the broad utility of his work. A purist might huff and puff at a
leaning to split infinitives and grammatical constructions which could well shed
superfluous words. Yet these cause no real obscurity. Along the same line, and
perhaps more serious, is a good deal of repetition, particularly in the latter half

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1 Pages 7 and 45 contain statements that the Civil War income tax was "adjudged" or
"held" unconstitutional by the Supreme Court of the United States in 1895, years after it
had been repealed. Page 45 contains a sentence which might be interpreted as saying that
only federal courts may declare legislative acts unconstitutional. Page 164 n. 16 speaks of
the tax on electrical energy as "a direct tax"; colloquially, this may be true; but "direct
tax" is a term of art. Page 176 states that the Supreme Court of the United States has
held the federal estate tax to be "upon the succession to or the transfer of property"; in
fact, the court has emphatically stated that this is a transfer rather than a succession tax.
Page 242 states that Massachusetts has abolished "the tax on [tangible] personal prop-
erty"; this is not true. The same page also suggests a method for taxing intangible prop-
erty, which would probably be unconstitutional in several states.

2 E. g., at 26: "to unduly limit"; at 103: "to again arise". See also at 6: "But in any
event, the necessity of a proper system in taxation and proper methods in its application
are now everywhere admitted"; at 69: "Yet for various reasons it is probable that the law
works as smoothly, if not more so, in England as it does in the United States"; and at 171:
"The British death duties do not appear to have affected business injuriously, although there
is some complaint that it is causing the breaking up of large estates." (Italics supplied in
the foregoing.)

3 E. g., at 27: "But there are many that contend that there should be . . ." (Italics
indicate unnecessary words.) See pp. 231, 241, and 247 for similar sentences.
of the book. For parts of this, careless writing seems the only explanation. In other instances, the cause is a double method of explaining foreign taxes for contrast with those of the United States. Judge Green inserts these expositions interstitially, and repeats them elsewhere in more comprehensive accounts of fiscal systems developed abroad. He might with some show of reason contend that such reiteration drives home facts which would otherwise glance off the surface.

But none of the foregoing comment approaches the broad view fitting the volume under consideration. Main topics and proportions should first be indicated. The opening 32 pages outline the classical principles of taxation and its modern trends. Then come 90 pages on income tax, individual and corporate. A very brief chapter on customs duties is followed by an interesting 37-page account of sales taxes. The next 22 pages are devoted to death taxes and the related gift tax. In a space of 34 pages the author then describes the British and French systems, sketches the relative tax burdens of important nations, makes a few remarks about occupation taxes, and inserts some comment upon capital levies. Down to this point, emphasis is directed almost exclusively toward problems of national revenue. Half a dozen pages summarizing federal and state expenditures bridge the way to a final chapter, 20 pages long, discussing state and local taxes.

It may be superfluous to remark that Judge Green does not embrace many of the more radical views now boldly proclaimed. He indicates, for instance, a belief in thrift and in methods of taxation which will not prevent its exercise. His mind harbors no hope of an important and productive tax at once simple and equitable. By the same token, he concedes some truth to the contention that extremely high rates drive taxpayers down various avenues of escape. Nor, on the whole, does he join the common contemporary scolding of all who seek to minimize their revenue contributions. As a rule he distinguishes between avoidance—that is, legally permissible minimization without subterfuge—and evasion properly so-called, to wit, tax dodging which involves pretense and succeeds only so far as the vital truth is concealed. At the same time, Judge Green certainly cannot justly be accused of old-fogyism. He perceives and seems to applaud the fact that modern civilized states use the taxing power not only to sustain the bare framework of government but also to conduct social services, and that taxation is permissible for regulation and prohibition or discouragement of undesired conditions or activities.

Test the book by its bearing on pressing problems of the day, and it responds well. The most comprehensively treated single topic is income tax, particularly federal income tax. Congress and the Treasury have put emphatically into the

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4 E. g., at 151 and 153: reiteration of the proposition that foreign gasoline taxes are higher than those in the United States; at 199, 201 n. 3, and 202: reiteration of warning that in calculating tax burdens in the United States both federal and state income taxes must be considered.

5 See 171 and 186: effect of the British death taxes. In general, see 188-203 in connection with preceding pages.

6 See 38, 40, 43, and 44.

7 See 19, 62, 83 et seq., 95, 146, and 215; cf. 69-70.

8 See 59-60, and 157; cf. 111-112, 193, and 227 et seq.

9 However, at 91-92 “avoidance” and “evasion” seem to be used synonymously, and the same is true in the first full sentence at 181.

10 See 4, 15, 16, and 173-174.

11 See 174-175.
field of public debate the problem of depreciation and depletion, treatment of capital gains and losses, reduction of individual taxes through corporate manipulation, recognition of gain or loss on reorganization, tax immune securities, and the consolidated return, alike in its application to allied corporate taxpayers and to husband and wife. All these matters Judge Green treats, and treats with no little helpfulness. Again, newspapers and conversation have been full of confident suggestions that the sales tax is a panacea for sick treasuries. This involves the implication that application and enforcement of such levies involve nothing more than punching cash registers. Alas—but quite properly—Judge Green is compelled to shatter the fond fancy!

One significant aspect of our tax problem, however, the author does seem to neglect. Note has already been made of the brevity of his single chapter devoted primarily to state and local taxation. The explanation soundly enough given is that each state—indeed one might almost say each locality—raises a problem unto itself. Hence a writer must be content with swift sketches of high lights only, or else turn to the composition of several volumes instead of one. Certainly Judge Green does mark the high lights most commonly discussed: the prodigious burden upon real estate, and its inequitable distribution; the nearly complete failure of the "general property" tax as applied to personality, tangible or intangible, except possibly where classification has been practiced intelligently; the hesitant spread of the income tax; and the great stumbling block of poor administration, so slowly being chipped away. But neither in this chapter nor elsewhere does the Judge adequately expound the factors entering the question of keeping states and nation off each others' toes, while still assuring all sufficient sums for their needs.

"Here are involved not alone the matter of rivalry but also that of duplicated administrative expenses and immensely aggravated burdens on taxpayers in wasted time and professional charges of lawyers and accountants. Judge Green might have explained the various proposals for splitting revenue sources between federal and local claimants, "grants in aid" and the like from the United States government, and administration by national officials for the common benefit of all. Thence arise delicate questions, legal, political, and economic, of which we shall hear more and more as time passes and the demands for governmental revenue increase. It is encouraging to believe that by cooperation between Congress and The American Legislators' Association the whole field is being intelligently surveyed and actual results are beginning to appear. But perhaps all the more on account of this the average citizen should be encouraged to acquaint himself with the situation and follow developments.

It is appropriate in closing this review to suggest the significance of a current shift in taxing practices which Judge Green for obvious reasons does not treat in detail. This shift is intimately connected with the present national recovery program. Any author may well hesitate to commit himself on something still

22 The topics listed above are taken from the Preliminary Report of a Sub-Committee of the Committee on Ways and Means entitled "Prevention of Tax Avoidance" (73rd Congress, Second Session; dated December 4, 1933) and the Statement of the Acting Secretary of the Treasury regarding the foregoing report.
23 See 92 and 94 et seq.: depreciation and depletion; 99 et seq.: capital gains and losses; 87-88 and 114-115: holding companies, etc.; 91-92 and 117: reorganizations; 55 et seq.: tax immune securities; 93-94, 97-98, and 47: consolidated and joint returns.
24 See 127 et seq. and 238.
25 See 230.
26 The topic is approached, but not developed, at 178-179 and 229; cf. 167 et seq. and 250.
27 For a running commentary, see the files of State Government, published by The American Legislators' Association.
no more than colloidal. In particular this author, being a Federal judge, is bound
to maintain a definite detachment as to matters which may be litigated before him.
He mentions in passing some of the N. I. R. A. taxes, but does not write about
the processing tax of the A. A. A. Now this last is an extraordinary levy in more
ways than one. Its most striking and, to some eyes, most portentous and alarm-
ing feature is that the tax can be raised or lowered, taken off or put on, from
time to time at the command of an executive official. There are, to be sure,
American precedents for such delegation of discretion, despite our traditional
doctrine of the separation of powers. They have arisen in the much neglected
realm of customs law, and would have been an acceptable addition to Judge
Green's short chapter on that subject. Not so long ago as to have fallen utterly
from human memory, the commons of England fought and won a stern battle
which took from the crown and left in their own hands the power to impose taxes.
Time was when this triumph seemed vital to democratic liberty. Is that concept
vanishing? Does Judge Green leave us at the threshold of a new era of flexible
executive taxation, perhaps often scientifically calculated, but potentially whims-
cical or even malevolent in application? If so, what of future democracy?

Harvard Law School.

THE WAIVER OF JURY TRIAL IN CRIMINAL CASES IN OHIO. By Kenneth J.
$1.00.

The early English law gave the defendant in a criminal case the option of
trial by, or without, jury. Because of this he was asked, "How will you be
tried?" The choice, however, was between an investigation of the facts of the
case and a determination of the matter by "divine intervention" in the form of
trial by battle or by ordeal. When the latter modes of trial disappeared, no
choice was left. The English cases disclose no option granted to one charged
with an indictable offense to have the facts found by the judge sitting without a
jury if the fact-finding body provided by law was not desired. In this country,
on the other hand, it is possible to find instances of the waiver of jury trial in
criminal cases at least as early as 1677. In that year two cases were tried by the
court without a jury in Massachusetts, one of them being a prosecution for
treason. Later this practice disappeared for the time being in Massachusetts, but in Maryland in 1774, in a case in which the defendant waived jury trial and

\textsuperscript{18} See 68 n. 7, 76, and 87-88.
\textsuperscript{19} Hampton & Co. v. United States, 276 U. S. 394, 48 Sup. Ct. 348 (1928), may properly
be considered the leading case.
\textsuperscript{20} Almost the only current writing on this topic is being done by Judge George Stewart
Brown. See his articles on The United States Customs Court (1933) 19 A. B. A. J. 333
and 416; also Judicial Review in Customs Taxation (1933) 25 The Lawyer and Banker
and Central Law Journal (n. s.) 263.

\textsuperscript{1} Grinnell, To What Extent Is the Right to Jury Trial Optional in Criminal Cases in
\textsuperscript{2} Thayer, Preliminary Treatise on Evidence at the Common Law (1898) 60.
\textsuperscript{3} They were the cases of Walter Gendall and John Watts. See 1 Records of the Court
of Assistants, Colony of Massachusetts Bay, 102.
\textsuperscript{4} The Gendall Case, supra note 3.
\textsuperscript{5} Grinnell, supra note 1, at 33.
submitted himself to trial by the court, the arguments indicate that such a submission was in no way novel, or even unusual.

It has been such a common practice in the latter state, that “as far back as living memories go the greater number of all criminal cases have been so tried.” This, however, is true of few, if any, of the other states. In fact, some years ago, the prevailing view was to regard the jury trial in criminal cases rather as a part of the framework of the government itself than a right which might be waived by the defendant. Later there was a tendency to distinguish between the wording of various constitutional provisions, and to permit a waiver if the clause was couched in terms of a right or privilege, whereas the present trend is to reach such a conclusion even where the language is that the trial “shall be by jury.” This trend, together with recommendations in favor of that procedure by such bodies as the American Law Institute, and the President’s Commission, suggest the desirability of factual studies in jurisdictions in which it is permitted.

The Waiver of Jury Trial in Criminal Cases in Ohio is such a study. As explained by the author in the preface, this “consists of an attitude study of the views of a large number of the bench and bar of the state relative to the desirability of waiver; and a comparative statistical study of the use of non-jury trial in Ohio and Maryland during a two-year period.” The information for the first part of the study was obtained by means of a questionnaire which was answered by 199 judges, 82 prosecutors and 400 attorneys having a definite connection with trial work in criminal cases. The questionnaire was framed with a view to securing the opinion of those closely in touch with the administration of criminal justice on the following matters: (1) The desirability of the practice of allowing the waiver of jury trial in felony cases; (2) the effect of waiver upon the criticism of the bench; (3) the advisability of a check upon waiver—that is, whether the defendant’s right to waive the jury should or should not be subject to the power of the judge or the prosecuting attorney to object and insist upon a jury trial; (4) the extent to which three judges should be used; (5) the factors which cause a waiver of jury trial; (6) the reason why jury trial is not more frequently waived in Ohio; (7) the advantages and disadvantages of waiver; (8) the effect of waiver upon the length of trials; (9) the extent to which the judge should advise the jury where it is not waived—that is whether the trial judge should be permitted to comment on the evidence and the testimony and credibility of witnesses; and (10) the effect of waiver upon the work of the prosecutor and the duties of the judge.

The replies are discussed at length, giving the results as a whole; divided according to the answers of (1) judges, (2) prosecutors, and (3) attorneys;

6 Miller v. The Lord Proprietary, 1 Har. & M’H. 543 (Md. 1774).
7 Bond, The Maryland Practice of Allowing Defendants in Criminal Cases to Choose a Trial Before a Judge or a Jury Trial (1921) 6 Mass. L. Q. 89.
8 Ibid.
9 “The weight of authority, as well as the better opinion, is, that in prosecutions for crime other than minor misdemeanors and petty offenses, the defendant cannot waive his right to a trial by jury, or consent to a trial of a less number than twelve.” RAPALJE, CRIMINAL PROCEDURE § 151.
12 Code of Criminal Procedure (Am. L. Inst. 1930) § 266.
14 At vii.
and divided by different groups of counties. The results show, among other things, an overwhelming majority in favor of permitting the waiver of jury trial; a two-thirds majority of the opinion that waiver will not markedly affect the attitude toward the bench; almost an even split on the advisability of a check on waiver, with a slight majority regarding it as unnecessary; and a large proportion in favor of permitting the judge to call in other judges in important trials in which the jury is waived, particularly in capital cases.

The comparative study of the use and results of waiver in Ohio and Maryland, is divided into (1) the extent to which non-jury trial is used; (2) the type of offense in which the jury is waived; (3) the number of convictions and acquittals in jury and non-jury trials; and (4) the effect of waiver upon criminal procedure. The last of these problems was purposely curtailed because the author has in contemplation a more comprehensive study of this subject in the future. The results of the first inquiry disclose that in Maryland, where the practice is old and well established, 85.7 per cent. of trials were without jury, while in Ohio, where it is still in the experimental stage, the practice of waiving the jury was exercised in only 17.8 per cent. of the felony cases during the period studied.

Members of the American Law Institute will recall that when this provision was being considered as a part of its pattern Code of Criminal Procedure, there was an overwhelming majority in favor of the general provision permitting the waiver; a division of opinion as to whether or not there should be a check upon the right of waiver, with a disagreement among those favoring such a provision as to whether the right to insist upon the jury should be lodged in the prosecuting attorney or in the judge, and a slight majority opposed to any such check; and a very decided majority in favor of excluding capital offenses from the waiver clause unless the judicial machinery of the state permits the use of three judges in the trial of such cases. These lawyers and judges will be particularly interested in seeing how closely the opinions of the members of the Ohio group correspond with their own in these regards.

The study has been made with painstaking care, and all who are interested in the field in general, or in some particular aspect thereof, will find these pages entitled to attention.

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With the completion of Professor Powell's Cases and Materials on Possessory Estates, the property series as conceived at Columbia University School of Law has taken final form. The series begins with the book under review and is followed by Professor Jacobs' Cases on Landlord and Tenant, Professor Handler's Cases on Vendor and Purchaser, and the two volumes titled Cases on Trusts and Estates, compiled by Professor Powell.
The book under discussion is intended by the editor to perform the function of introducing the law novitiates to the field of property law. Any book having such a purpose must necessarily be one of the most important in any property series.

What objects should such a book seek to accomplish? Should it attempt to give the student enough material so that he can handle property problems with some degree of intelligence if he elects not to pursue further his studies in that field? Should it serve the purpose of introducing the subject to the student and developing the material in detail so that in the first year he will obtain only a portion of the tools he will need to handle property problems?

The first purpose, stated in the words of Professor Powell, "requires a more rapid treatment of topics than is pedagogically profitable for the first year student of the law, and also involves a superficiality of treatment which gives to the student only that little knowledge, which is dangerous rather than helpful."

The other purpose referred to above is clearly the correct one, in the opinion of the reviewer, and is the one Professor Powell seems to have had in mind, when he collected the materials for his most recent publication. To use again the language of the editor, his book is presented to accomplish four tasks: "first, the painting of a background; second, the development of a segment of the foreground; third, the stressing of the significance of the statutory ingredient in modern law; and lastly, the training of the student in the meticulous reading and contrasting of materials read, for the purpose of making a synthesis of the net content."

The entire property series, of which the book under review is a part, may, when taken as a whole, present a new approach to the development of the subject of property law. Professor Powell's book, when taken by itself, however, does not seem to present any new scheme of covering the subject of possessory estates in land. One gets the impression from reading his book that he was satisfied with Dean Bigelow's analysis of the subject, as found in the latter's pamphlet, The Introduction to the Law of Real Property, but that he thought the pamphlet should be elaborated upon, by the addition of cases and other readings, in order to have the proper teaching vehicle.

The book opens with a chapter entitled "The Historical Background". The material he uses in this opening chapter is made up largely of excerpts from writings on the subject. Bigelow's Introduction to the Law of Real Property, as revised in 1933, appears in this chapter in so far as that work is applicable to the feudal system and to tenure in the United States. Three cases are used, one dealing with the right of tenants in capite to subinfeudate and the others with problems of tenure arising in the United States today. The material is excellently selected and placed, so as first to impress on the student the importance of the historical background, and then to develop it for him in a logical and interesting manner.

Chapters two through seven are devoted to a study of the various degrees of legal possessory ownership in land and their characteristics. The problems involved in concurrent ownership of such estates and in ownership in severalty are developed. The material used in these chapters is characteristic, in its completeness, of all of Professor Powell's books. Statutes of forty-eight states, Alaska, and England are cited in appropriate places throughout these chapters. The practice of suggesting questions to stimulate thought on problems related to a given case, which Professor Powell started in his book on Future Interests and continued in his work on Trusts and Estates, has been followed in the book under review. The editor has used various excerpts from the Restatement of the Law of Property. The balance of Bigelow's Introduction to the Law of

In the fifth chapter a brief discussion of some of the future interests in land is made. This material is not presented for the purpose of giving the student a real understanding of the subject of future interests, but to enable him more completely to understand the problems involved in distributing benefits and burdens between life estates and subsequent interests. In connection with that problem the author presents material designed to teach students how to evaluate life interests. Cases covering the subject of waste are also to be found in this chapter.

A survey of the various degrees of ownership is logically followed, in chapters eight through eleven, by a study of the incidents that attach to such interests. Professor Powell uses eighteen principal cases and several pages of text material to develop these problems of lateral support, nuisances, water rights, etc. Eleven of the eighteen cases have appeared before in works covering these topics. Some of the outstanding cases repeated in Professor Powell's book are Embrey v. Owen, Gillis v. Chase, Messinger's Appeal, Acton v. Blundell and Meeker v. City of East Orange.

The final chapter of Professor Powell's book deals with the problem of equitable ownership of land as it developed under the system of uses. He has called liberally on the leading writers on uses for material on this subject. Bigelow's comments along with excerpts from Digby, Maitland, Holdsworth and others appear in this chapter. Cases commonly associated with the subject of uses such as Green v. Wiseman, Van der Volgen v. Yates, Tyrrel's Case, and a few others are also used.

The author devotes approximately 40 per cent. of the space in his book to text material. The cases he has printed in full are picked from twenty states, the District of Columbia, the federal courts, Hawaii, and England. About 35 per cent. of these cases have been decided since 1900. While some of them have appeared before in other works, for the most part they are being used for the first time in the teaching of the topics involved. In the copious foot notes citations appear from practically every jurisdiction in this country.

The reviewer's principal objection to Professor Powell's new book is that, in his opinion, it fails to meet fully the requirements of a book intended to introduce students to the study of property law. Such a book should commence at a different point and should treat comparatively the subjects of real and personal property. Where should the study of property law naturally begin? This can best be determined if we keep in mind that the student learns in the very beginning that we have two types of property, real and personal, and that it is natural for him to want to know the difference between the two before beginning a detailed study of either. It is suggested, therefore, that the student be introduced to the study of property law with a discussion of the distinction between real and personal property. The material on fixtures and emblements should be used at this point to acquaint the student with the situations where the distinction becomes difficult. Certain phases of the historical background should next be developed to familiarize the student with the framework on which the two types of property were built. The development of legal possessory interests should involve a study not only of such interests in land but also of such interests in personal property. The comparison of real and personal property should be continued in the presentation of the material on the char-
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acteristics of and incidents attaching to legal possessory interests. The first year course should close with a discussion of equitable ownership of both real and personal property. The primary object in studying equitable interests at this point should be to present the situations where the degrees of equitable ownership might be said to be similar to the degrees of legal possessory ownership.

Although the reviewer does not agree with Professor Powell as to just what a student should receive in the first year of his study of property law, he has decided to use the book reviewed in conjunction with Bigelow's *Cases on Personal Property* and some mimeographed material of his own. In this way advantage can be taken of Professor Powell's excellent book and at the same time the first year course can be given in the manner preferred by the reviewer.

Those interested in property law are much indebted to Professor Powell for the excellent work he has done in the compilation of his casebooks on *Future Interests* and on *Trusts and Estates*, and for his leadership in the *Restatement of the Law of Property*. His book on *Possessory Estates* can only serve to increase this indebtedness.

A. James Casner.

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Mr. Chang has chosen for the subject of this book one of the most controversial and most frequently discussed topics of international law but his approach to it is refreshingly new. The task he has set for himself was to ascertain the rules guiding courts in interpreting treaties. To accomplish this task, the author undertook the analysis of the decisions of international and of some national courts. He has grouped the cases ingeniously according to the various aspects under which doubts as to the precise meaning of a text might arise. Starting with a discussion of cases which were decided on the principle that courts will respect the "clear meaning" of a text, the author successively analyses cases involving the construction of treaties when the text appears doubtful; constructions interfering with the manifest purpose of the parties; the question of admissibility of preparatory work as evidence of the true intent of the parties; construction where, in bilingual treaties, the texts differ. The last chapter is devoted to dissecting the rule of "liberal construction", frequently invoked by our Supreme Court. The results of his scrutiny of the holdings of the courts, as distinguished from their *dicta*, are stated by the author as follows: "Judicial experiences in treaty interpretation on the whole reflect a general trend leading to the conclusion that the function of the interpreter is simply to discover and ascertain, with the aid of various sources of evidence, the sense in which the contracting parties actually employed particular terms in a treaty."\(^1\) In other words, the so-called classical canons of treaty interpretation offer little, if any, guidance to the judge. The question, in substance, is in most instances that of evidence—its admissibility and the probative force which the court should concede to it.

It seems that Mr. Chang succeeded rather well in writing a useful monograph on a subject about which much confusion exists. Subject to some minor defects, to be noted hereinafter, his book may be regarded as a careful and scholarly contribution. Mr. Chang's chief merit is that he has proceeded to

\(^1\) At 182.
scrutinize case law independently and without reliance on the numberless writings of his many predecessors in this field. Thus, he could approach the subject without prejudice. He drew his material from an unusually wide field; in addition to the decisions of the Permanent Court of International Justice and the Permanent Court of Arbitration, Mr. Chang made extensive use of the decisions of numerous ad hoc claims, commissions and arbitral courts, including those of the Mixed Arbitral Tribunals established under the Peace Treaties. The reviewer considers it gratifying that international lawyers begin to appreciate the contributions of these mixed arbitration courts during the past decide in enriching international case law.

Discretion and self-restraint seem, however, to have deserted Mr. Chang in one respect at least. His excursions into European Continental case law are not happily chosen and the results are, consequently, unconvincing. He discusses a single French case, decided by a trial court. This seems to be singularly out of proportion—certainly from the point of view of authority—when he could have made use of decisions of higher courts. Leading cases decided by the highest court of France, such as the cases of Min. public v. King or In re Thyssen should have been given preference over a decision of a court of first instance. It may be remarked parenthetically that Mr. Chang's statement about the "consistent refusal" of the French Court of Cassation to interpret treaties affecting "international public order" is, in the broadly phrased form, somewhat inaccurate and misleading. Mr. Chang should have indicated—especially when he desired to make a comparison between our Supreme Court and the Court of Cassation—the role assigned to the latter which is quite different from the task entrusted to our Supreme Court. Moreover, the disinclination to interpret treaties is not peculiar to the highest court of France but is characteristic of the French judiciary in general which adopted a policy by which the court's power of interpretation does not extend beyond construing such provisions of a treaty as relate to or affect private interests involved in the issues which are submitted for determination to the court.

Again, while discussing the rule of "liberal construction" advocated by our Supreme Court, the author makes a cursory reference to some decisions of the German Supreme Court in which extradition treaties were strictly construed. The reference to these cases may be misleading because the Reichsgericht adopted the rule of strict construction in other than extradition treaties. Moreover, once resorting to German case law, the author should have taken into consideration a few leading decisions of the German Supreme Court the contributions of which to this branch of international law are by no means negligible. It is

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3 Cass. Crim., Feb. 23, 1912, 40 Clunet (1913) 182, involving the interpretation of the consular treaty of 1853 between the United States and France.
5 At 159 n. 1.
6 At 180 n. 53.
7 See the important decisions of Feb. 6, 1924, reported in 107 Entscheidungen des Reichsgerichts in Zivilsachen (R G Z) 407, and of Nov. 7, 1925, 112 R G Z 81—both involving the interpretation of the Treaty of Versailles.
8 See for instance the decision of May 20, 1922, 104 R G Z 352, involving the interpretation of the gold-mortgage treaty of Dec. 9, 1920, between Germany and Switzerland, where the court laid down the rule that in ascertaining the intent of the parties, the applicable texts should be construed in the light of the whole treaty; decision of July 1, 1926, 114 R G Z 188, involving the interpretation of a provision in the Treaty of Versailles which, the parties contended, was doubtful as to its meaning.
hard to escape the conclusion that these random references to Continental European practice are neither particularly convincing, nor do they do justice to the judicial practice of the countries involved. Unless Mr. Chang was as conversant with European case law as he doubtless was with the decisions of international courts and of the Supreme Court of the United States, he would have done better to refrain from impairing the otherwise scholarly quality of his monograph by haphazard citations. The book, however, fully merits its inclusion in the Columbia Studies in History, Economics and Public Law.

Francis Deák.

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This periodical is another and most important result of the growing interest in comparative law manifested on the one hand by the scholar, to whom the comparison of the various legal systems is a fascinating study, and on the other hand by the general practitioner, who finds it increasingly desirable, or even necessary, to have at least a bowing acquaintance with the legislation of foreign countries.

In the Annuario the scholar will find articles by leaders in juridical thought all over the world on the topic of comparative law in general and on new or proposed legislation in particular. Many of these articles may also be of practical interest to the ordinary lawyer, but his problem is often not only what the law of a certain country is, but where to find out what it is. In this search the Annuario and the Repertorio should be invaluable, as the analysis to follow will show.

The librarian should also be mentioned as one who will welcome these publications. The Repertorio and the bibliographical sections of the Annuario supply him with important new tools in his special field, where scholar and practitioner constantly seek his aid.

In each volume of the Annuario Part I comprises the doctrinal articles. Volume 7, Part I contains a series of articles commenting on proposed amendments to the Italian Civil Code relating to private international law. One of these articles is by Professor Giulio Diena of the University of Pavia, another by Professor J. P. Niboyet of Paris and a third by Professor Lorenzen of Yale. The reader thus has an opportunity to compare the attitudes toward the same subject of three men of widely different education and experience. Another article is by Professor Guido Tedeschi on the application of civil law. It is the introduction to a course of lectures given by Professor Tedeschi at the University of Rome for which he drew material from English, French, German and Italian writers. It happens that the articles in volume 7 deal chiefly with Italian law, particularly with the draft for a new Civil Code, but the publication is by no means confined to Italian law. Scanning the volumes we find articles on the law of Germany, France, Greece, Hungary—in fact practically every European country, and others as well. Volumes 4-5 contain a series of articles
comparing the proposed Joint Code of Obligations for France and Italy with the Soviet Civil Code, the English law of Contracts and the German Civil Code.

This enumeration of the subjects treated suffices to show that the editors propose to deal concretely with problems and to avoid vague generalities, often difficult or impossible of application to actual problems. That all these articles are published in Italian will prove a severe handicap to the American reader.

Part I of each volume also contains notes and reviews of recent publications on legal topics.

In each volume there is a section devoted to legal bibliography, but the editors have not adhered consistently to any system of subdivision in successive volumes. In volume 1 the bibliographies are in section 3 of part I, in volumes 2-3 they are in sections 3 of part 2, and so forth. This is unfortunate but perhaps volume 7 represents a final decision; in it subdivision into sections has been abandoned; part I contains articles and book reviews, part 2 bibliographies and part 3 digests of decisions in various countries.

The bibliographies are compiled by countries and year by year. In each one the titles are grouped under appropriate subject headings. They now cover publications from 1925 to 1930. In the later volumes titles are given in Italian as well as in the original language.

Volumes 1 to 4-5 contain titles or summaries of legislative acts in various countries arranged according to subject matter. In 1932, however, the Institute started a new publication, Repertorio della Legislazione Mondiale, and dropped the section on legislation from the Annuario. The Repertorio is not divided by countries but by subject matter only. Under each heading are listed citations to the legislative acts of each country bearing on the subject. A glance at the index shows that the British Isles and possessions, the United States, Japan, the countries of Europe, South and Central America are all represented. The title of the act appears in the original language and in Italian. A full table of abbreviations enables one readily to locate all citations.

Returning to the Annuario, each volume contains a digest, in Italian, of court decisions in various countries. In volume 7, Part 3, we find a digest of German decisions of 1928, French decisions and Belgian decisions of 1929. They are, of course, grouped according to subjects.

Finally, copious indices make the work really usable; in some volumes they are in Italian, French, English and German.

That the need for the study of law from the comparative angle is being increasingly felt is evidenced by the number of institutes and conferences now devoted to the subject. Among these the Istituto di Studi Legislativi has, perhaps, taken the leading place by virtue of these publications. They show the Institute working constantly, systematically and intelligently upon the problem of unifying and harmonizing the laws of neighboring countries, toward the goal of a better understanding among nations.

Edith T. H. West.


The writer was privileged to be associated with the author of this book, Mr. George E. Worthington, while in service with the Fosdick Commission
during the World War. The report which he has prepared regarding the Men's Misdemeanants Division of the Municipal Court of Philadelphia is typical of his painstaking efforts in connection with many phases of the work of the Fosdick Commission.

Mr. Worthington outlines the origin of jurisdiction and objectives of this Court in a manner to be understood both by the members of the Bar and the laity, and therein recognizes that the Court itself, in order to enlarge its sphere of usefulness, should be a happy medium between a judicial tribunal and a social laboratory.

The author analyzes at some length a variety of cases brought in the Misdemeanants Division; and in passing, pays his compliments to a certain class of attorneys practicing therein, who could readily be dispensed with. In the main, Mr. Worthington finds a real niche for this Division of the Municipal Court on its social welfare side; but mixes his praise with some very pointed criticisms of the method of investigating the cases, the degree of probationary supervision and the outcome of such probation. He concludes that the "work does not measure up to standards that are generally agreed upon as desirable and practicable. But there is a graver indictment. The work does not measure up to standards set by the court itself."

The most interesting suggestions of the writer have to deal with the matter of Crime Prevention and its possibilities in a court of this kind. Mr. Worthington points out that between three and four hundred boys, sixteen to twenty-one years of age, pass through this Division each year; and that in the intelligent handling of this group lies the real possibilities of preventive methods capable of training these young men away from a career of crime and into the paths of law abiding citizenship.

He quotes the trenchant phrase from Raymond D. Fosdick, who has stated that a court of this kind can do its bit "to prevent crimes from being committed and people from becoming criminals".

Since the publication of this book, the Crime Prevention Association of Philadelphia has entered actively into the field of preventive work among boys from the age group of sixteen to twenty-one. Mr. Worthington's friendly and constructive analysis of the work of the Men's Misdemeanant Division is a helpful contribution to the many efforts that are now being made along the lines of Crime Prevention.


"The purpose of this book is to give the young practitioner a more comprehensive grasp of trial work and a fuller understanding of its requirements," says the preface.

The plan adopted is to comment upon the happenings of a trial in their chronological order. The dust wrapper asserts that the book is "A Complete Treatise on Trial Procedure." The contents do not quite bear this out: twenty-three pages are devoted to preliminaries; fifteen pages to direct examination; some 150 to cross-examination, with copious examples; some sixty pages to
forensic oratory and summation; and no less than 272 pages to composed examples of summations in frequently litigated cases.

The authors, happily, make no claim to profundity, or to the possession of an historical sense. The text is thickly larded with quotations. A good half of the citations, estimated by counting three pages of the table of cases, are to New York cases. The first three subjects of the index are Abrasions; Abuse of Adverse Party; and Additional Instructions to Jury (sic).

The book is plainly addressed to the beginning New York practitioner or law student; and may prove to be of use to him.

Ira Jewell Williams.