BOOK REVIEWS

THE OLD YELLOW BOOK. By John Marshall Gest, Chipman Law Publishing Company, Boston, 1925, pp. xv, 699.

This is a new translation, rearrangement and critical study of the well-known collection of manuscripts and printed arguments that constitutes the documentary source of Robert Browning's poem, "The Ring and the Book." Judge Gest, the translator and commentator, is judge of the Orphans' Court of Philadelphia and an authority on the history of Continental Civil Law in the Middle Ages and period of the renaissance. In another part of this Review (p. 346) the distinguished jurist's work as a most valuable contribution to Browning literature is discussed at some length. Here it is only necessary to add that, aside from its literary interest, the book is a learned contribution to legal history and criminology in an obscure and neglected period. The learned author has spared no pains in his investigation of the law and practice of the Roman Courts of the late seventeenth century. We have then a graphic picture of the courts and lawyers of that day, their methods of argument and the texts and decisions cited. It is, in effect, a review of Italian post-mediæval law, and coming as it does out of real briefs used in a famous trial for homicide, it carries with it a sense of reality seldom present in an ordinary treatise.

Wm. H. Lloyd.

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THE ANATOMY OF THE LAW. By Adolph J. Rodenbeck. Boston, Little, Brown & Company, 1925, xi, 292.

"To the making of books there is no end," says the author of Ecclesiastes, and his statement must be understood to include books on Law. The book under review, though containing only 272 pages of material, has no less than sixty-one chapters, which gives on an average less than three pages to a chapter. It is entitled, "The Anatomy of the Law," and if we translate the word anatomy literally, the title fits the contents. The author "cuts up" the law, he does little more. He leaves the fractions or fragments lying where they are. The titles of the various chapters are amusing if not interesting. They sound like the "House that Jack Built"; "General Features of the Law"; "Theoretical Side of the General Features of the Law"; "Practical Side of the General Features of the Law"; "Formal Part of the Practical Side of the General Features of the Law"; "General Features of Substantive Law"; "Theoretical Side of General Features of Substantive Law"; "General Part of Practical Side of General Features of Substantive Law"; "Simple Elements of Practical Side of General Features of Substantive Law"; "Compound Elements of Practical Side of General Features of Substantive Law"; and so on.

That anything is gained in accuracy or thoroughness or insight, by thus cutting up the subject formally, is not obvious to the present writer. We should be willing to overlook the uncouthness of the chapter headings if there was meat in the chapter contents. But there is not. Each chapter, as was mentioned before, contains about three pages, some have only two, and about half or the whole of the last page of each chapter consists of a diagram, summing

up the contents of the chapter in question. Nay, there are two chapters quite lengthy. Chapter 2 in Part I has sixteen pages, and chapter 4 of Part I has twenty-eight pages. This leaves only one or two pages to many of the other chapters. The consequence is that the great majority of chapters read like general introductions to some thing that one looks for in vain. It reminds the present writer of a player tuning up his instrument without ever playing on it.

The contents of the book show signs of having been hastily put together. Thus speaking of Holland's classification of rights, he says: "Where he (Holland) comes to define his terms, however, he illustrates an antecedent right by the rights . . . while the violation of these rights . . . he calls 'remedial' . . . ." Surely Holland is not guilty of calling the violation of an antecedent right a remedial right!

The explanation of the unsatisfactory character of the book is to be found in the author's own words in the Preface: "This little book," he says, "on the pretentious subject of the anatomy of the law is the work of scattered minutes during a busy judicial life." In the interest of legal book making it would have been better if the author had been more patient and refrained from publication until he had the time, as he says, to "round out each subject in the classification and fortify my conclusions with more discussion . . . ."

Isaac Husik.

University of Pennsylvania.

FAMOUS AMERICAN JURY SPEECHES. Collected and edited by Frederick C. Hicks. St. Paul, West Publishing Co., 1925, pp. vii, 1181.

"Famous American Jury Speeches," collected and edited by Frederick C. Hicks, obeys the first fundamental law for any book—it is extremely interesting, for lawyer and layman alike. The variety and interest of the subject matter of the addresses, and the skill with which these great lawyers marshalled their facts and arguments, hold the attention of the reader almost as they did the jurors to whom they were addressed. The charm and wit of Choate, the sarcasm of Ingersoll, the power of Borah, and the suavity of Darrow, to mention but a few, are here better exemplified than in any biography or treatise.

Doubtless also the young lawyer or student can gain much of value in a study and analysis of these addresses and of the methods of argument pursued. But a word of caution is necessary. Masters of eloquence, no less than of dramatics or music, may at times be most effective by departing from the elementary principles of their art. But imitation of such masters is dangerous and often futile. The young advocate, without a keen native wit, would flounder hopelessly in the shoes of Choate. Pathos, borrowed from Darrow, might provoke to laughter rather than tears.

And, in a few instances, departure from the fundamental rules does not seem to have borne fruit. An opening address should be a brief, clear statement of the facts to be proved, without comment; but in the opening of the Barnes-Roosevelt libel suit, departure from this rule gained nothing.

The book, however, or most of it, is thoroughly well worth reading.

Stevens Heckscher.

Philadelphia.

MODERN CONCEPTION OF LAW. By Frank Johnston, Jr. Justice, Illinois Appellate Court. Chicago, T. H. Flood & Co., 1925, pp. vii, 351.

Just as Socrates in reflecting upon the shortcomings of the governing forces in his time concluded that "until philosophers became kings or kings philosophers states will never succeed in remedying their shortcomings" so likewise the editors of the "Modern Legal Philosophy Series" appear to conclude as to present defects in their proposition that "Philosophers must become lawyers or lawyers philosophers if our law is ever to be advanced into its perfect working." With this philosophy of the law Mr. Justice Johnston deals in his work entitled "Modern Conception of Law," treating therein of the Origin and Nature of Law. Recognizing the prevailing impression that a treatise on legal philosophy is without practical value, Justice Johnston is at some pains to point out that the "method of presentation is primarily for the general reader, layman as well as lawyer," and in this he appears to have succeeded, for the work though not free from imperfections, is readable.

The motif of the work appears in the Introduction which deals with the very indefinite idea of law possessed by some lawyers as well as laymen, and points out the need of a proper understanding of law on the part of each on the premise that without such understanding "the State must limp to its duty and sociey suffer."

It is Justice Johnston's concept that the origin and nature of law is to be found in custom. With Blackstone he claims that Equity "is bottomed on the same substantial foundation as the common law" and he quotes freely from Mr. Carter's great work "Law: Its Origin, Growth and Function"; Kocourek and Wigmore, "Evolution of Law"; Sutherland, "The Origin and Growth of the Moral Instinct," and others as well. With the theories of law advanced by Austin, Bentham and Jhering he is not always in accord.

The Justice avoids the position often taken that only ancient customs have developed into law. He, however, argues that custom, founded on equity "formulated originally according to the standards of Justice and Right," has created the standards upon which law is based. Further, he deals with religion as underlying the "standards of Justice and Right"; in this he appears to agree with Thomas A. Becket, a great exponent of equity in law, who conceived the true basis of all law to reside in morality or conscience as expressed in the canons of religion (Bigelow, Legal History of Government, 193).

Nor does the author take the position that custom as such is law. In pointing out that in the period antedating the State, men, in their dealings with each other, were guided by custom; that when the State finally evolved, it enforced, as it still enforces, certain of these customs and that, therefore, the true source of law is now, as it always has been, the standards of custom, which standards are synonymous with Justice and Right, he differentiates between the source of the fact and the fact itself. Although not in entire accord with this viewpoint I believe, generally speaking, that it is reflective of the true origin of law.

In dealing with the nature of law Justice Johnston has given considerable attention to the Function of Legislation, contending that law by legislative enactment, like the unwritten law, "should be based on Right and Justice" and that "custom establishes these standards." He argues that "if custom is not

recognized in legislation the statute may be, strictly speaking, a law; but it will be an unwise one and probably an ineffective one." He does not, however, take the position that only those enactments are law which appeal to the individual as such. There is no suggestion of that in his work. In considering the bases of law today we cannot of course ignore economic and social conditions, nor the fact that there is never anywhere near unanimity on any proposed radical economic or social legislation. And yet many such enactments violently attacked at the time as an invasion of personal or property rights are now accepted without question. (See Dwight W. McCarty, in January and February, 1925, numbers American Bar Association Journal.) These questions, however, appear to be outside the scope of Justice Johnston's work.

The maxim, "everyone is presumed to know the law," receives attention, as do the causes for the uncertainties and conflict in judicial decisions. Codification of the law finds little favor "because from its nature it cannot and should not be confined to a code." In discussing the Jury system Justice Johnston concludes: "The Jury being judges of the facts and the facts being determined by custom in the sense of Justice and Right, the Jury may be presumed to know the customary conduct of men. The Jury are, therefore, obviously qualified to pass upon the facts."

With the concept that there is so-called "Judge Made" law, and particularly with Professor Gray's views thereon, the Justice sharply dissents, saying: "The Judges do not make the law or declare it according to their own notions. They find it in constitutions, the statutes, the precedents, the particular customs, and in the absence of these standards they find it in the principles of Right and Justice which are created by custom." It must be conceded, however, that this proposition gives much latitude to a Judge to put his own construction on "the principles of Right and Justice which are created by custom," and the influence of conflicting economic and social forces cannot be disregarded.

That portion of the work presenting the results of the author's investigation of the nature and origin of custom from the earliest time of primitive man is of unusual interest, and equally so is the table he presents from Guizot of the resemblances of customs among different people.

In challenging the theory of Austin and of Blackstone that law imports a command from a superior, the Justice points out that Kings and Autocrats in their decrees as well as codes, such as that of Hammurabi, have not and could not have acted arbitrarily, but of necessity have followed the standards of Right and Justice as developed by custom, not only substantively but procedurally as well.

Reflective of the whole work is the language in which the Justice concludes: "From the outline of the origin and nature of law which I have endeavored to indicate, it will be seen that Custom was originally the only lawmaking force, and that it unconsciously created Customary Law, or, as it is termed in the Anglo-American system, Unwritten Law or Common Law; that at the present time, in the sense of being synonymous with Justice and Right, as applied to law, Custom is still the only law-making agency of the Unwritten Law or Common Law, except when legislation is expressly employed in his domain of law; that now Custom does not operate unconsciously to create law as formerly, but that it is consciously appealed to and used by the Judges in the sense

previously explained to formulate their decisions. In its early stages law was the 'common property of the collected people' and the actual customs themselves constituted the law administered. Later, by reason of the complex development of life and the consequent increase in the number of customs, the administration of the law passed from the people collectively to a special class, the Judicial class, and was administered for the people by that class. As new conditions arise for which there are no actual existing customs applicable, rules of law must be framed by the Judges to meet the changing conditions. These rules are not arbitrarily created but are formulated by the standards of Custom, which standards are synonymous with Justice and Right. Custom, therefore, today within the meaning and limitations that I have defined, shapes and determines our Unwritten Law or Common Law, which is the great body of law regulating the affairs of life."

But this brings us to the specific inquiry as to how far custom should now control, an inquiry which, since Justice Johnston deals with it no further than to point out in his concluding paragraph that it is not within the content of his work, is not fairly within the scope of this review. Obviously it is to be hoped that the Justice will, at some time, feel impelled to specific treatment of it in order that a satisfactory basis for further consideration of so vital an inquiry may be laid.

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