BOOK REVIEWS

INSANITY AS A DEFENSE IN CRIMINAL LAW. By Henry Weihofen. The Commonwealth Fund, New York, 1933. Pp. xi, 524. Price: $3.75.

This work had its inception in a grant from the Legal Research Committee of the Commonwealth Fund to the faculty of the University of Chicago Law School, given for the purpose of making a study of the state of the law governing insanity as a defense to crime. The task of gathering and preparing the materials was assigned to the author, who states, in his preface, that he takes to himself the responsibility for any programs or opinions expressed. The study is a noteworthy contribution.

The literature in the field under discussion is vast, and it is a fair question to inquire why the Commonwealth Fund should interest itself in another work. The answer is evident to anyone who reads this book. Its distinctive feature lies in the fact that it contains an exhaustive collection of legal materials. The author has undertaken to cite all reported cases in the United States and the principal ones in England on the main points he has discussed. The work covers the legal tests of responsibility, burden of proof, and pleading and procedure. It also covers, with a full citation of authorities, the question of the defendant's mental condition at the time of the criminal proceedings, *i. e.,* the present effect of insanity on his capacity to plead and be tried, and after trial, to be sentenced and to undergo punishment. The final chapter contains a summary of suggested reforms. Here the author discusses weaknesses in existing law and procedure; he shows the tendencies in the law and suggests various reforms necessary to bring the law into conformity with scientific knowledge. The book also contains complete citations to statutory law in the various states and excellent digests of the statutes.

What is the law in the United States on the test of responsibility where insanity is raised as a defense in a criminal case? The author answers that the "right and wrong test" is the sole test in twenty-nine states and he cites the authorities in each state. Seventeen states have added the "irresistible impulse test". One state alone, New Hampshire, has rejected both of these tests and has taken the position that insanity, when raised as a defense, presents a question of fact for the jury to determine in each case whether the defendant had a mental disease, and, if so, whether it was of such a character or degree "as to take away the capacity to form or entertain a criminal intent." The critical features of the work are secondary. It does not pretend to be critical. Nevertheless, the author sets out the views of criminologists and psychiatrists on the subject, and examines the law in the light of their contributions and criticisms. One finds considerable repetition, but this, in the main, does not mar the work, but enhances, rather, its clarity.

The status of the law on the burden of proof is likewise given consideration. Then follows a chapter on expert testimony in which the author, beyond stating the law as it exists, points out the inadequacies in our procedure for admitting such testimony. Courts have frequently expressed distrust of expert testimony. It is not fair to state that this reaction is brought about through the unreliability of experts as a class. More likely it is the result of bad legal procedure which does not elicit real scientific information, but rather the clashing views of hired witnesses. The result is that the jury is more confused than aided by such testimony. The author lists progressive legislation in a few states aimed to correct some of the evils through the appointment of experts by the trial court.

One chapter is devoted to the subject of "present insanity at the time of proceedings". The literature on the subject of insanity, as it pertains to the topic under discussion, bears, in the main, on the legal test of responsibility which involves the innocence or guilt of the accused. The legal questions arising out of his insanity during the various steps of the criminal proceedings taken against him have been given but slight consideration. Yet an accused cannot be required to plead to an indictment or be tried for a crime unless he is sane enough to make a rational defense and he cannot be punished or executed unless he is sane enough to understand the reasons for the punishment. This chapter contains a comprehensive statement on this subject.

The work, presenting as it does an exhaustive statement of existing law on the subject discussed, should prove to be a very useful tool to the lawyer, the judge and the student of criminal law. It contains a welter of cases and statutes which have been organized and classified admirably. Viewed in perspective, it should have a much wider and more important influence. For, beyond a classified citation of cases and statutes, it shows the patchwork of the criminal law, and it also shows how the patches have been applied as external remedies, when the ailment, in fact, is internal. The ailment with which the criminal law suffers cannot be remedied by these treatments. The solution calls first for a new conception of purpose. We have built the structure of the criminal law on a bad premise. The author is aware of this and gives recognition to it in an all too brief statement in his closing pages.

We have built the structure on the premise of responsibility. We mete out punishment on the theory that man is a free moral agent, and when he digresses, he is blamed. The trouble with this conception lies in its plausibility. It is possible to set up a program with it, which, within limitations, works. The idea of punishment has developed from a desire for vengeance. "The desire for vengeance imports an opinion that its object is actually and personally to blame." In a more cultured civilization the theory of vengeance has been abandoned by the more thoughtful but not by the many. The legal philosopher has substituted the theory of deterrence for that of retribution. This is patchwork with cement which will not adhere to a structure built on retaliation and vengeance. The criminologist and psychiatrist would have us substitute the theory of segregation and rehabilitation, and they have been instrumental in injecting some new laws into the system—excellent laws involving probation, parole, indeterminate sentences, reformatories and education in prisons—but at the present time these are only more patches which will not adhere to the old structure.

If we could but change the objectives of the criminal law from public punishment to public safety, then the theories of the criminologists and the psychiatrists would have real meaning. With this purpose before us we could segregate the dangerous individual indefinitely or execute him if that seemed more expedient, and we could set up processes of rehabilitation and release freely from confinement when cures are effected. Under this conception we would no longer have use for insanity tests, for we would recognize the fact that insane criminals are dangerous. This transformation will come. Perhaps we are nearer to it than most of us know. So great an authority as Mr. Justice Cardozo has stated it to be the fullness of his belief "that at a day not far remote, the teachings of bio-chemists and behaviorists, of psychiatrists and penologists, will transform our whole system of punishment for crime."

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THE LAW OF THE PRESS. (Second Edition.) By William G. Hale and Ivan Benson. West Publishing Co., St. Paul, 1933. Pp. x, 610. Price: $4.00.

In the preface to the first edition of this work, it was stated that the law of libel follows a journalist "to the grave and lives after him to plague his estate". This phase of the law of torts is not overstressed by such graphic description. It might, however, be more truly said that the plague is usually upon the estate of the publisher or proprietor of the journal. A slip of the reporter's pen in one edition, and his employer may be forced to respond in damages exceeding his year's salary. Therefore the contribution of this book to the field of journalism is substantial. Its style obviously is designated for the layman, not for the lawyer. The book does not—and does not profess to—teach the student of journalism or the reporter the law of libel; but it does give him an awareness of the pen's pitfalls, and this he needs as much as notepaper. Unfortunately, practicing reporters mainly prefer to learn from experience at their employer's expense. Therefore, the publisher will probably find the most effective method of protection in providing his staff with occasional words of admonishment and with an opportunity, while writing a doubtful article, to ask counsel how to minimize the danger of a libel action under the circumstances of the particular case. But for those taking a collegiate course in journalism, and for the reporter who is not too proud to learn from books, "Law of the Press" is highly recommended by the reviewers.

The material has a unique and admirable arrangement.[1] Every section begins with terse statements of general principles, next the points at issue are summed up in question form. Thereafter illustrative appellate court decisions are set forth at length, and often these are supplemented by digests of the facts of decided cases.

Since Dean Hale's courses in journalism are given in Western universities, it is especially interesting to note that the major portion of his work relies upon citation of New York cases. The State of New York is richer in the law of libel (if otherwise poorer in consequence) than any other jurisdiction. The First City's great newspapers give it this questionable distinction. But the Commonwealth of Pennsylvania runs it a close second, largely due to the early development of the local and rural newspaper in this state. It is regrettable that the authors quote and cite a negligible number of Pennsylvania decisions. The law of libel has probably been modernized more in these two jurisdictions—although in somewhat varying respects—than in any other.

The work does not attempt to dispute the time-honored principle of the common law that newspapers as such are no more privileged to defame others than are individuals. In truth, the law itself recognizes so many differences between newspaper defendants and individual defendants that it is time for courts to question whether this is not another of the many fictions which hinder legal progress. The law of libel in many phases, e. g., scope of damages, evidence of motive and liability of principal for act of agent, must inevitably—consciously or not—consider the newspaper *sui generis*. Especially by adhering to the old rule with respect to the doctrine of repetition, courts are visiting upon modern newspapers a vicarious liability which is unjust and unnecessary. The authors tersely sum up the present law in their section on Repetition[2] with "Tale-bearers are as bad as tale-makers". It is such logic which compels a

[1] However, the subject of Privilege should not be sub-headed under the topic of Justification. Despite the colloquial similarity of the words, each is an entirely separate defense in most jurisdictions, so different that evidence of the one is inadmissible as a defense under a plea of the other. Bingham v. Gaynor, 203 N. Y. 27, 96 N. E. 84 (1911); Egan v. DuBois Printing & Publishing Co., 64 Pa. Super. 115 (1915).

[2] At 141 *et seq.*

newspaper to respond in damages even though it obtained the defamatory statement from sources such as the Associated Press. Courts should be made to realize that newspapers are newspapers, not talebearers: it is a far cry from the individual who repeats gossip, to the newspaper which promptly and efficiently serves public demand by contacting with a reliable and highly organized news-gathering agency. With respect to most forms of human conduct, concepts of social justice have changed sufficiently to require a search for culpability before the imposition of liability. Many aspects of the law of libel are exceptions to the new order, for reasons foreign to dictates of logic or necessity. Had the Associated Press and our cosmopolitan newspapers existed in Lord Ellenborough's day, the law of libel would have been cast in more liberal moulds. The reviewer regrets that the authors overlooked *Layne v. Tribune Company.*[3] This decision may mark the beginning of a change in judicial sentiment. But where judges refuse to awaken, legislators must act.

In no other book has the reviewer ever observed such an excellent collection of statutes upon newspaper law. The effect of retraction, punitive damages, liability of editors and many other subjects are becoming statutory in a growing number of jurisdictions. Justice Cockburn, in deciding a famous case,[4] praised the common law of libel as elastic and adaptable to varying conditions of society. This is not entirely untrue. The genius of some courts lies in their ability to muster up one fiction to offset the injustice of another, whereas the genius of others is their courage to dispel fiction completely and seek substance.[5] But this is not as true of the law of libel as it is of other fields in the law of torts: in English history the press and the government have been in conflict more often than in wedlock, and therefore it is not surprising that the common law of libel has developed as a bastard. Although it is not the purpose of *Law of the Press* to focus attention upon the retarded growth of the law of libel, the generous footnotes dealing with the statutory phases of the law are worthy of study by those interested in a courageous, stimulating press. In the majority of instances where legislatures have been induced to act, it has resulted in clarification and justice.

The authors' selection of cases is most excellent, although one may doubt whether the student in journalism will find the same relish as the law student in reading the many long, important opinions which have been fully quoted. Particularly excellent decisions are *Scripps v. Reilly,*[6] *World Publishing Company v. Minahan,*[7] *Castle v. Houston,*[8] *Cowley v. Pulsifer,*[9] *Triggs v. Sun Printing & Publishing Assn.,*[10] *Star Publishing Co. v. Donahoe,*[11] and *Coleman v. MacLennan.*[12] The cases of *Brown v. New York Evening Journal*[13] and *Hoeppner*

[3] 146 So. 234 (Fla. 1933).

[4] Wason v. Walker, L. R. 4 Q. B. 73 (Eng. 1868).

[5] Referring to the requisite of "malice", and to the fact that it is "presumed" to exist, one court has braved reality as follows: "These two useless fictions, the one laughing at and offsetting the other, have been fostered and have come down to us, causing controversy, misunderstanding and confusion all the way." Prince v. Brooklyn Daily Eagle, 16 Misc. 186, 188, 37 N. Y. Supp. 250, 252 (1896).

[6] 38 Mich. 10 (1878); authors' page 71.

[7] 70 Okla. 107, 173 Pac. 815 (1918); authors' page 98.

[8] 19 Kan. 417 (1877); authors' page 111.

[9] 137 Mass. 392 (1884); authors' page 176.

[10] 179 N. Y. 144, 71 N. E. 739 (1904); authors' page 221.

[11] 58 Atl. 513 (Del. 1904); authors' page 253.

[12] 78 Kan. 711, 98 Pac. 281 (1908); authors' page 265.

[13] 143 Misc. 199, 255 N. Y. Supp. 403 (1932); authors' page 50. Defendant newspaper published a contribution stating that "My Song" of Rudy Vallee and George White Scandals fame, had been written by a high school student who had sold it for $200. Plaintiffs, alleging that they were the composers, were held to have stated a good cause of action.

v. Dunkirk Printing Company[14] are especially interesting because they indicate the constantly widening field of subjects which a newspaper must report in order to meet the ever keener demands and newer interests of its modern public. It is paradoxical that the better the newspaper, the wider the front upon which it is subject to attack by litigious persons.

The reviewer admits disappointment that the cases of *Campbell v. New York Evening Post*[15] and *Mengel v. Reading Eagle Co.*[16] were not included by the authors. The first shows error in the text,[17] demonstrating that the case of *Stanley v. Webb*,[18] quoted at length for the proposition that a newspaper is not privileged to report a bill of complaint filed in court prior to judicial action thereon, has been overruled in its own jurisdiction. Both New York and Pennsylvania are now committed to the minority, progressive view.

The reviewer takes exception to the authors' fundamental contention that in both libel *per se* and libel *per quod* "damage should be presumed",[19] and that any distinction "can by no means be said to represent fully established doctrine".[20] It is submitted that the overwhelming weight of authority requires proof of actual damage wherever words are innocent on their face; that such distinction is both logical and just; and that the leading case[21] cited by the authors flatly contradicts their position.

The law of libel is not the sole topic of this work. The law of privacy is discussed in a terse and vivid chapter which does not fail to give *Melvin v. Reid*[22] all the space it deserves. To many persons who witnessed Edward G. Robinson's splendid performance in "Five Star Final", this case will furnish both interest and satisfaction; to many yellow journals it stands as a warning that a person's court record cannot be resurrected without reasonable cause.

The chapters on contempt and on constitutional guaranties of freedom of the press are most excellent studies. The collection of miscellaneous statutes governing the press is both illuminating and practical. The chapter on the law of copyright is admirable; all the cases here are especially well selected.

In the chapter on newspaper contracts, the Pennsylvania case of *Commonwealth v. Matthews*[23] is cited and quoted at length, affirming the defendant's conviction of the high crime of selling newspapers on the Lord's day. It might also be noted that in this State a contract to distribute Sunday newspapers is illegal, and therefore the carrier cannot even recover for services already rendered.[24] There is no reason why a great and necessary industry must be thus handicapped. The publisher of a Sunday newspaper can never tell, for example, when some litigious advertiser may invoke the ancient statute in order to impose an undeserved loss upon the paper. Upon a Sunday in this quaint jurisdiction

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[14] 245 N. Y. 95, 172 N. E. 139 (1930); authors' page 207. Defendant newspaper criticized coach of high school football team, stating that the games lost were due to his inability and that the games won were set-ups. The plaintiff, alleging actual malice, was held to have a valid cause of action.

[15] 245 N. Y. 320, 157 N. E. 153 (1927).

[16] 241 Pa. 367, 88 Atl. 660 (1913).

[17] At 158-159.

[18] 6 N. Y. Super. 21 (1850).

[19] At 49.

[20] At 48.

[21] Sydney v. McFadden Newspaper Pub. Corp., 242 N. Y. 208, 211, 151 N. E. 209, 210 (1926): "As no special damage was pleaded, the plaintiff can only maintain her complaint, which alleged all the above facts, by establishing that this article is libellous *per se*."

[22] 112 Cal. App. 285, 297 Pac. 91 (1931); authors' page 302.

[23] 152 Pa. 166, 25 Atl. 548 (1893); authors' pages 545, 552.

[24] Knight v. Press Company, Ltd., 227 Pa. 185, 75 Atl. 1083 (1910). See also Commonwealth v. Kelly, 250 Pa. 18, 95 Atl. 322 (1915) in which the court is compelled to declare invalid an ordinance advertised in a Sunday paper.

it is legal to stage a professional baseball game,[25] but illegal to publish an account of it. It is high time that the legislatures of Pennsylvania and of other states recognize that neither the public conscience nor the law which expresses it should now ban the publication of Sunday newspapers.

In brief, to students in journalism the book is almost a necessity. To lawyers the work is a real aid although it is not exhaustive or highly technical. To all readers the book is a reminder that the law of the press, not having kept pace with these rapidly changing times, presents a challenge to Bench and Legislature.

Harry Polikoff.

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CASES AND OTHER MATERIALS ON THE AMERICAN BAR AND ITS ETHICS. By Herschel W. Arant. Callaghan & Company, Chicago, 1933. Pp. xiii, 687. Price: $5.00.

Probably the best general appraisal of this book can be summed up in the wholly complimentary statement that it measures up to expectations. A book on the subject of Legal Ethics by the man who has been the *liaison* officer between the American Bar Association and the law school world on the subject was prejudged as excellent before it appeared. The analysis of the subject matter contains few innovations, but it is certainly adequate. No undue emphasis is given any particular sector of the subject. The materials used are extremely modern and the notes are unusually exhaustive.

Much is to be said in favor of a more or less total disregard of historical materials. They would add little, if anything, to an understanding of the subject. Something is to be gained in forgetting the past here and attempting to pattern present ideals wholly in the light of modern experience. The immediate present forms a very excellent point of departure. Indeed whenever one moves over into the field of the ideal the past is quite irrelevant, for the viewpoint is entirely futuristic. At least the past exerts more than its share of influence without any reference to it.

The most pertinent review of the best book on Legal Ethics necessarily points out its limitations. Any teacher can take this book and use it or misuse it to suit his taste. The materials are there for any course, beginning with the one where Ethics is Ethics and ending with the one where substance triumphs over form. The best compliment which can be paid the book after all is that it can be used for what may be called, for want of a better word (and without attempting to be either facetious or too serious) the "right" kind of a course on The Legal Profession and Its Standards.

It should be offered as a beginning course. The beginning student should be inoculated at once. A third year course, of the "right" sort, is impossible. Three years of common law dogma is too large a handicap for the best case book and the best teacher. The closed mind is an impossible receptacle for an ideal in the proper meaning of that word. The philosophy of the cases is the philosophy of Blackstone and the elderly element of the American Bar Association. It is at odds with the answer to Dean Arant's first question: "The Practice of Law—Business or Profession?"

There is no occasion for attempting to teach this course unless it emphasizes the social element in lawyer conduct and the Law. Individualism and professional ideals are at odds. Professional standards after all seemingly call for impossible conduct, for they ask a lawyer to act socially in an individualistic

[25] PA. STAT. ANN. (Purdon, 1933) tit. 18, § 1994.

society. But, of course, it is not impossible. Lawyer *action* inevitably decides the conflict in favor of one or the other of those repugnant forces.

Any successful outcome depends only slightly upon a formal knowledge of established rules governing the battle. The Canons of Legal Ethics are simply a beginning point. Success or failure here depends upon those qualities of character which insure a choice against personal interests. That is strictly a question of substance. One must start to lay the foundation at the very bottom, and before too much debris and the foundation of another philosophy have been accumulated.

In that sense professional standards are taught for three years. The most which can be hoped for is that with this book a proper beginning may be made. On that score it can only be repeated that the book offers a most respectable tool. Can we find the teachers?

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THE CONSTITUTION OF THE IRISH FREE STATE. By Leo Kohn. George Allen & Unwin, London, 1933. Pp. xv, 423. Price: 16s.

This work is the first critical commentary of any length upon the Irish Constitution. But it is far more than an analysis of a document since not only is it concerned with the history of the instrument and the political philosophy underlying its shaping but with the entire constitutional experience of the Irish Free State. The author is a German political scientist whose English usage deserves high praise for clear expression and close reasoning in a field where accuracy of terminology is essential. The treatment is rigorous and critical and the writer's objective standards are authoritative. Indeed his only personal dislike is of the initiative and referendum in legislation. This substantial study should win for Dr. Kohn membership among the distinguished group of foreign critics of Irish affairs.

Sinn Fein was merely the translation of the philosophy of the Irish Renaissance of the early twentieth century into political terms. Its purpose was to attain the substance rather than the external symbols of national independence. Decrying violence it hoped to assume, without infringement of the existing law, the essential functions of government. The failure of physical force in the Easter Week Rising in 1916 necessarily drew into its ranks all the radical elements. By 1919 Sinn Fein had swept the country, utterly demolishing the Parliamentary Party, only to find itself unable to govern the country in the extra-legal manner which it prescribed. The year 1920 saw Ireland reduced to a state of civil chaos. Fortunately at this juncture the British Government instituted *pourparlers*. The outcome was the Anglo-Irish Treaty, promulgated finally in 1922.

It was no easy matter to reach an agreement between a group claiming as a fundamental natural right that of choosing freely for themselves the path of national destiny and another espousing the legitimist argument that permanent reconciliation could be attained only by a recognition of the physical and historical interdependence of the two states. To create an independent Ireland, unrestricted in function and policy, without permitting Ireland to denounce its historical allegiance to the Crown offered an apparently insoluble problem. Fortunately Ireland's representatives were realists, content with the substance where the letter was impossible. Agreement upon countless secondary matters, followed by a *modus vivendi* upon the Ulster tangle, engendered the feeling among the confreres that they *should* not fail to find the constitutional

form in which the Free State was to be associated with the British Commonwealth. The consequent Treaty was the most revolutionary settlement that was ever effected within the framework of the Empire. "In the garb of 'Dominion status'" writes Kohn, "a nationally self-conscious European State was introduced into the symmetry of the Empire."

The Treaty subjected the relationship of the Free State and the British Government to the law, practice and constitutional usage of Canada, the Dominion in which advance from dependency to statehood was regarded as having reached almost complete fruition. The frame of Dominion status was taken over but it was subjected—by the formal enunciation of its actual content—to so restrictive an interpretation as to nullify it both in form and in substance. Herein lay the extra-Dominion status that made it possible for Ireland to accept association in the British Commonwealth. Firstly, Dominion "usage" was translated into terms of positive law in the Treaty; with specific provisions for a law-making body and an Executive responsible only to that body. Secondly, the Parliamentary oath, elsewhere in the Empire one of unqualified allegiance to the King, became one of allegiance to the Constitution of the Free State and only secondarily one of faithfulness to the monarch "in virtue of common citizenship with Great Britain". Thirdly, the Treaty itself, arranged and promulgated scrupulously in the form of an international agreement, implied a formal admission of Ireland's constitutional co-equality with Great Britain.

The Constitution, provided for in the Treaty, was the work of the Dáil sitting as a Constituent Assembly. It was endorsed by the British Parliament without much comment and late in 1922 was announced by Royal Proclamation. The Irish were bound by a repugnancy clause not to legislate in violation of the Treaty contract, yet the Constitution in at least five instances sanctions usages not permitted to the Dominion of Canada. In other words the conflict between English formalism and Irish dogmatism was transferred to the technical sphere of constitutional detail and the end is not yet. Indeed Dr. Kohn has been constrained to devote his entire conclusion to a consideration of *The Constitution (Removal of Oath) Bill, 1932.*

In the formulation of their Constitution the Irish strove to escape from the empirical framework of the British Constitution. They examined carefully the political experience of others, being guided to some extent by the French and American models and more strongly by the instruments of the new states of Central and Eastern Europe. Irish distrust of governmental authority coincided with the skepticism of the new states to attribute to the forms of Parliamentary government nothing more than the assurance of a formal democracy. The Irish were willing to experiment, and so provided that amendments be carried by legislative majority rather than by Constitutional Referendum for a period of eight, later extended to sixteen, years. The Referendum and Initiative loom large in the original instrument, yet in 1928 when Fianna Fáil attempted to utilize the machinery of the Initiative to sponsor the abolition of the Parliamentary oath, these devices were stigmatized by the Government as crude and devoid of authoritative deliberation, and were duly abolished. The Constituent Assembly provided the second house, the Senate, not only with the traditional power of delay but with the power of initiating a Referendum where it thought the policy of the Dáil out of harmony with the wishes of the electorate. The Senate was intended to provide for the representation of minorities, the Southern Unionists particularly. Its members were to be elected from a panel submitted to the country by both houses. Abolition of the Referendum, however, reduced the Senate to the status of a deliberating body; hence the Constitution was amended so as to provide for the election of senators by both houses.

The Constitution provided for the setting up of elective Vocational Councils, to be associated with the technical departments of the government. They would have the power of recommending Extern or non-Parliamentary ministers, important because the Extern ministers might comprise a majority of the ministry. The article never went into execution, nor did another providing for Regional Devolution, by which subordinate legislatures with fixed competence could be created. This last was to pave an easy entrance for Northern Ireland should she see fit to avail herself of the privilege of entering the Free State.

Revolutionary Ireland had a fixed hatred of a strong Executive and attempted to associate with the responsible Cabinet of four a standing ministry of eight, who would be responsible only as individuals to the Dáil and who would not be members of the legislature. These Extern ministers would head the technical or permanent services; hence would carry on regardless of the numerous political shifts arising from a multiplicity of factions to which it was thought Proportional Representation would give rise. In the Constitution, however, the whole device was made optional, and in 1927 it was abandoned. Administration upon the principle of "pure reason", even in the technical departments appeared impractical. Thus Ireland, on second thought, has tended to repudiate her experiments and to slip back to a comfortable adherence to the canons of ministerial responsibility.

The judiciary system was of eminently practical inspiration. The house had to be cleaned thoroughly, but the hierarchy of courts remained essentially unchanged. The Supreme Court has "final" appellate jurisdiction, but the Constitution formally provided that nothing "should impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council". In spite of the fact that the Irish confreres were assured that "the preservation of the prerogative would be very much more of a theory than a fact and a practice", appeal to the Crown has been allowed. This the Free State has regarded as an interference with its sovereignty, and has escaped its consequences only by the use of the most ingenious methods. The High Court, second in status, exercises among other matters exclusive original jurisdiction in all questions relating to the constitutionality of legislation. The actual scope of its application, however, would seem to be more restricted than in the United States, first because Ireland is a unitary state, and secondly because its constitutional provisions are less abstractly stated than those governing the American state.

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CASES ON THE LAW OF AGENCY. By Roscoe T. Steffen. West Publishing Co., St. Paul, 1933. Pp. xxix, 836. Price: $5.50.

It is difficult adequately to appraise a casebook as a teaching tool without actually trying it out in class. There are, however, a number of new features in this work which might become apparent even to the most casual observer. The Introduction, containing factual material on the structural organization of business units, is an addition of some value, which unfortunately vanishes from the text after the twelfth page.

The author has also offered an innovation by raising at the beginning of each Section the problems which he intends to bring out in the following materials. While this may prove useful to the unitiated it seems that such material might well be left to the judgment of the teacher, to be given in an introductory lecture if he desired. It is hardly necessary that it appear in the casebook.

The outline of the work is new and seems designed for the purpose of offering an introductory course for later instruction in business organization. The cases on the last one hundred and seventy pages, attempting to cover risks arising from the business of joint ventures, partnerships, joint stock companies, de facto corporations, parent and holding companies, seem much too sketchy and assume a legal knowledge beyond anything that can be expected in the second semester of the first year, which is the place chosen by the author for the use of his casebook.[1] The rest of the body of the book, some six hundred pages, covers the usual agency material in a sort of nebulous outline which is based on the business unit rather than legal concepts of agency. In some instances the arrangement cuts keenly across the usual courses which are standard in the legal curriculum. For example, section V [2] covers problems, usually found in the second year equity courses involving equitable relief on contracts of employment.

The novel arrangement also creates situations which many law teachers would regard as anomalous. For example, irrevocable agency and the theory of power coupled with an interest is discussed in the early part of the book,[3] and it is not until four hundred and fifty pages later that the author takes up the question of termination of agency, which seems to involve the fundamental facts underlying such irrevocable powers.

Within the outline the cases are well chosen and seem to be descriptive rather than controversial. The reader has a feeling at times that although the material offered for analysis raises many excellent business problems it fails to demand a sufficiently searching legal analysis. Nevertheless, the cases are well chosen for class discussion and are set out in an interesting fashion to encourage analytical and synthetic reasoning. Like many good modern casebooks it contains a large amount of abbreviated case material scattered through the body of the text rather than confined to footnotes.

On the whole it seems to be a useful common-law casebook in agency, with an attempt to reach for a more modern outline. The author has also offered an appendix which contains a large amount of statutory material, but has left to the teacher the problem of integrating it with the cases. Like all casebooks it seems based on the assumption that the law and the class materials for developing the lawyer's technique are to be found almost entirely in the cases.

Although it is a mere coincidence that this casebook appears in the same year as the final draft of the *American Law Institute's Restatement of Agency,* nevertheless, it is a striking commentary, not only on this book but on the law teaching field in general, that although the Restatement and the fourteen statutes in this field alone, which the author has placed in his appendices, are certain to create important changes in the lawyer's technique, the chief tools for teaching that technique continue to ignore this material or to reduce it to a mere appendix. Is not the time now ripe for the teaching profession to take account of the new materials which it has itself created and incorporate them, to a substantial degree, into the material which is being used to train future members of the bar?

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APPELLATE COURTS AND APPELLATE PROCEDURE IN OHIO. By Silas A. Harris. The Johns Hopkins Press, Baltimore, 1933. Pp. xvi, 181. Price: $2.00.

This report is part of the general study of judicial administration in Ohio conducted by The Institute of Law of The Johns Hopkins University working

[1] At vi.
[2] At 66: Negative Covenants and Trade Secrets.
[3] At 40.

in conjunction with the Judicial Council of Ohio and the Ohio State Bar Association. It is impossible to estimate the general interest in these reports or the value outside of the state of Ohio. One of the announced objectives of the entire study was to institute a permanent system of judicial statistics which would provide automatically current information concerning the operation of the courts. Professor Harris's report on the Appellate Courts in Ohio does not reach this objective. Indeed it was not intended to reach it. The objective can be attained only after the entire study of all the courts is completed and the material contained therein properly digested and consolidated.

Professor Harris's work includes a statistical study of the cases in the Appellate Courts in the state including the Supreme Court, the intermediate Courts of Appeal and the appellate business of the Courts of Common Pleas. Consideration is given to the problem of opinions and reports. The second part of the work considers the problems of appellate procedure in general and in particular those presented in the system of Ohio. An appendix includes a proposed bill for reform of the appellate procedure of the state.

The study of the business of the Supreme Court is based on a detailed consideration of the cases for a two-year period, July 1, 1927, to June 30, 1929. This gave a sample of 1226 cases. To check the sufficiency of this sample a tally was made of all cases in the court for a six-year period. The method of analysis of the cases is clearly explained in the text and many tables are set forth showing the results of the study. Much of the material gathered is not used in the report and it is regrettable that Professor Harris does not comment upon this more extensively. For example it would seem to the reader that certainly a study of the case of Appellate Courts should include data concerning the *legal* questions involved. Professor Harris indicates that such an attempt was made but that very little use of it was made in the study. If some explanation of the method attempted had been included a more adequate ground work would have been laid for future investigators.

The report presents a clear picture of the operation of the selective jurisdiction of the Ohio Supreme Court. Of the 1226 cases studied, 898 came before the court on motions to certify; 21.8 per cent. of these motions were allowed and the cases permitted to come before the court on their merits. Professor Harris says: "These data do, however, show that a very large part of the court's time is taken up with the determination of questions without making any contribution to the law of the state or giving counsel or litigants any answer to the inquiry they may make with respect to disputed matters of law. The only result of the court's action is the termination of the litigation. To this extent the court is not fulfilling its chief function of making the law uniform and unambiguous throughout the state." A question involving the fundamental purpose of a court of last resort is presented. The device does tend to keep the docket of the court clear and Professor Harris thinks this justifies the retention of the scheme. He suggests however that the court might make its rulings on motions to certify more valuable by publishing its reasons for overruling.

A student will find much in the report of significance and suggestive of further research even though it is not commented upon therein. The study of the original jurisdiction of the court indicates that over a period of six years an average of thirty-nine cases per year was filed. In 1931-32, however, sixty cases came before the court. Does this indicate a trend? It is evident from the data that the increase is largely due to mandamus cases. Do they arise as a means of control of administrative bodies? Many interesting problems are presented thus incidentally.

The study of the intermediate Appellate Courts presented a problem of great difficulty. It was necessary to secure data in nine districts including the

eighty-eight counties of the state. The method used is clearly described and the appendix includes specimen data sheets. 1259 cases filed in a six-month period are studied in detail. These cases are analyzed in four groups; civil error, criminal error, appeal, and cases of original jurisdiction. In the consideration of the civil error cases it was impossible to secure data as to the *legal* question involved, but some indication of this was possible where the court reversed the trial court. Here again a ground work for future research is laid. Error in directing verdict and verdicts against the weight of the evidence comprise 41.3 per cent. of reversals. Does not this suggest possibilities for study of the operation of the scintilla rule to which Ohio clings so tenaciously?

An Ohio lawyer must point with pride to the record of the Ohio Appellate Courts on promptly disposing of the cases; 80 per cent. of all cases are terminated within nine months, and 90 per cent. within a year. The author suggests various schemes whereby this period might be materially shortened.

Professor Harris recognizes that one of the difficult problems is the reporting of the decisions of the appellate courts. Under the present system there is much duplication and many decisions are reported which really add nothing to the body of the law. A lengthy dissertation is only necessary in cases involving new or intricate questions. The author suggests a central reporting agency where opinions could be sorted over before final publication.

Part II of the report sets forth a scheme for reform of appellate procedure in Ohio. It is not intended to be a model but merely a suggestion for logical development. It is unfortunate that Professor Harris does not make it clearly appear to what extent he made use of the statistical data in Part I in arriving at these suggestions for change.

Professor Harris has made a distinct contribution to legal science. He has shown the possibilities of application of the statistical method to the study of a difficult problem. He has enabled us to see the whole problem, to gain a conception of appellate practice which heretofore was impossible.

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KEENER'S CASES ON CONTRACTS. Third edition by I. Maurice Wormser and John F. X. Finn. Baker, Voorhis & Company, New York, 1933. Pp. xxxi, 818. Price: $6.50.

The latest edition of Judge Keener's collection of cases on contract appears in greatly condensed form. The chip presents few similarities to the old block. The new volume should permit the essentials of contract law to be covered in two semesters of classroom discussion. The process of reduction has been well done, though the editors have carried it nearly to the point of inadequacy in the text material.

The leading cases have been retained, conservatively supplemented with not too many of the more recent decisions. Much of the material abandoned has been replaced by decisions which provide factual situations illustrating the application of principle and the operation of policy, though in a treatment so limited in scope as this one it is questionable whether the decisions not relegated to the footnotes are sufficiently numerous to afford the average student much more than a knowledge that the authorities are divided.

The footnotes contain material sufficient to permit the more thorough student a fairly complete grasp of principle. Copious references to the *Restatement of Contracts* and to law review articles and comments are made throughout the book.

The order of treatment possesses the advantage of introducing the beginner to the contract concept by placing emphasis upon the intention to contract. Enforceable promises are contrasted with offers made in wrath and jest, and motive is distinguished from intention. Following this valuable but all too brief introductory material there are presented the conventional formulae of continuing offer and manifested meeting of the minds, and a sensible if brief treatment of the doctrine of consideration. Illegality, fraud, duress, impossibility and mistake are relegated to Part III of the book, under Discharge. Little is done with damages and remedies for breach.

The book is not unorthodox. The design of its editors is, apparently, to tread a middle ground between the orthodoxy of the older collections in the historical mode and the institutionalism of the more ambitious modern treatments, and to tread it in seven league boots. The editors have chosen to give emphasis to current doctrine and established law with some historical development of principle, rather than to give space to business practice, usages and rules and other background of an explanatory nature.

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