BOOK REVIEWS


The subject of this book of one hundred and fifteen pages is given by its title. "Seven judges of the Cincinnati Municipal Court, 22 Mayors of cities and villages, and 26 justices of the peace functioning in 13 townships constitute the county's judicial personnel for the administration of the law relating to small civil cases and petty crimes." A map of the county shows the thirteen townships, the municipal corporations within them, and the sites of the 26 justices' courts. Charts, graphs and tables, and numerous quotations from dockets, letters, and official reports evidence the care with which the study has been made and furnish a solid foundation of fact for the narrative and for the critical comments.

We are beginning to recognize that the justice's court is an unsatisfactory forum for socially important litigation. Although this is only the third detailed study of which we know, two or three useful essays on the justice's court in as many of our states have appeared in recent Bar Association journals, and in the past ten years there have been a number of general surveys of the justice of the peace in the United States. They all come to the conclusion stated just above. The counts in the indictment are well enough known to make repetition of them unnecessary in a Law Review. A more interesting inquiry is why improvement is so slow in coming; what can be done to hasten it; and what direction it should take.

Within the necessarily brief limits of this essay we cannot attempt to answer these questions fully. But in even the briefest discussion one controlling proposition demands statement: that the effective administration of justice in any sovereignty requires a single organization, and not a series of unrelated organizations, because, although there are different types of litigation and different social needs to be provided for, there are enough common elements and common needs to make it impossible to provide effectually for all without a unitary system. The organization of an army, or of a railroad corporation, furnishes a true parallel. Subordinate propositions are that each type of need should be served by competent officials; and that there should be flexibility of organization to meet changing needs, and responsible supervision of the conduct of judicial business made effective by broad administrative powers.

When we examine the judicial system of almost any American state with these ideas in mind, we find an agglomeration of independent tribunals related to each other only by provisions for review. Each tribunal has its own judges, who ordinarily may not sit elsewhere, and its own peculiar jurisdiction, which is often a combination of subject-matter and amount in controversy. There is little or no coordination or flexibility, and, except in the so-called "Municipal" courts, no responsibility, that is, no centralized administration. The court, or rather courts, for there are many of them, of the justice of the peace, are a part of this agglomeration. They are perhaps the most antiquated part—that in which the evils of division are greatest. They are also the most neglected: their officials the most poorly trained, the lowest paid and the least provided with proper equipment and clerical assistance. The social damage from their inefficiency is perhaps the most

severe. But there is no essential reason for singling them out for reform, and every reason for reforming the system as a whole and not merely this one part of it.

It is true that schemes for complete, immediate reorganization of any human institution are seldom possible and not always desirable. Changes are usually made one at a time and the machine built over bit by bit. But it remains true that the defects of all the parts of an organization, and not those of one part only, should be analyzed and a general plan devised before changes are made, so that at the end of the process we may have a unitary organization and not a new agglomeration of parts.

The way to go about the reform of the justices' courts is to ask how we should provide for the discharge of their functions in a unitary court system. It would seem that perhaps the only essential local function of the justice is the issuance of warrants of arrest. The preliminary examination in grand jury cases, the summary trial of small offenses, the issuance of process in small civil cases, and the trial of such cases can all be concentrated in selected localities, their number depending upon the territorial area and the density of population: that is, upon the requirements of public convenience. Such concentration of business makes it possible to provide a smaller number of well-paid competent men instead of a much larger number of ill-paid incompetents. It also makes it more easy to relate such men to a well-integrated judicial system.

The learned author of the study here reviewed seems to have these views in mind in his final chapter. He believes however that local sentiment will demand a larger jurisdiction than the mere issuance of warrants, and therefore, after discussing other possible arrangements, he suggests retention of the local justice with his present jurisdiction limited in two respects: first, his writs not to run outside the district for which he was elected, and second, all contested civil suits to be certified to the county common pleas court except where the parties may be willing to proceed under an existing arbitration statute. (In criminal cases, the Hamilton County justices of the peace, as the law now stands, may bind over to the grand jury but may not try summarily unless defendant waives jury trial or pleads guilty). Coordination and improvement of the work of the Hamilton County justices' courts the author would hope to see obtained through a voluntary association of the magistrates of each county under the guidance of the public prosecutor. Costs, he thinks, should be revised and made definite.

We are skeptical of the promise of this plan, and prefer the Massachusetts system, which provides "trial justices" in selected localities and leaves to the strictly local justice's court little more than the power to issue warrants.

The general direction which we believe improvement should take having been thus indicated, it is in order to consider why it is so slow in coming and what can be done to expedite it.

The conservatism of Bench and Bar seems to be one of the primary causes of delay. To this statement it may be objected that Bar Associations, and Judicial Councils composed of both judges and lawyers, have been active in demanding improvement. One reply to this objection is that in truth a few individuals, and particular committees, have been active but that Bar and Bench as a whole have been inactive or in opposition. But a more fundamental answer is that whatever Bar and Bench may have put forward, they have failed to enlist popular support for their programs. The failure to seek and obtain this support seems to be due to a fear that the public may get the bit in its teeth and run away

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toward dangerous bogs and ditches. Changes in the law are not, it is argued, a subject for popular understanding or action. Now this may be true of proposals to abrogate the rule in Shelley's Case, but it is not true of broad questions of organization and administration. Conceding that the public may not now understand these as applied to justice, yet it can understand them if they are explained.

Another manifestation of lawyers' conservatism is to be found in the organization of Bar committees. When it is recalled that the members of these committees are, on the whole, the capable, and therefore the busy, members of the Bar, what they do accomplish is more remarkable than what they do not. But, if they are to get the results they desire, they should follow the example of their Grievance Committees or Boards of Censors in some localities and engage permanent salaried assistance. With a permanent paid secretary and any additional staff which may be needed and can be financed, they can save the motion lost by changes of membership and by the sheer impossibility of giving time from their practice to executive duties, and move forward to results. Instead of being obliged both to determine policies and to execute them, they will then continue to make the policies but will leave the execution of them to supervised full-time assistants, giving themselves more time for the formulation of policies, and attracting to their councils men who are now deterred by the labor demanded of them.

Finally, on this subject of conservatism, is it not time to recognize that fettering legislatures with constitutional restrictions does more harm than good? An examination of the constitutions and statutes of Massachusetts, New York, Illinois, Missouri, and California, from 1789, or the date of admission to the Union, to 1926, made in studying the evolution of petty justice in seven large cities, indicates that the only effect of constitutional limitations upon the power of the legislature to deal with the judicial system is to postpone changes. The changes come sooner or later. And they seem almost never to take the form of deprivation of judicial office. Judges are transferred but not deprived of office. Or look at the Federal government: Congress has power to abolish or alter the jurisdiction of any court but the Supreme Court. Can it be said that the power has been abused? Constitutional limitations on legislatures are chiefly the work of the lawyers in constitutional conventions. Their effect is not only that improvements are long delayed, but that the delay causes such dissatisfaction with our courts as to threaten the stability of the very institution which the limitations are designed to protect.


Spencer Ervin.

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— The Judiciary Article in American constitutions ordinarily states that "the judicial system of the state shall consist of" etc., or that "there shall be" etc., and follows with a list of courts and descriptions of their respective jurisdictions. Permission is not infrequently given to add more units to certain of the specified types of Tribunal, but here provision for changes is apt to stop. When the legislature tries to create new courts or to alter the organization or jurisdiction of existing courts the state court of final appeal then has before it two questions: (1) Has the constitution prescribed an immutable system? (2) If not, what are the limits of change? The first question is usually answered "no", but even so, no satisfactory answer can be given to the second. Any solution attempted can be opposed by as good arguments as support it. Read, for instance, the judicial agonizings in Gotschall v. Campbell, 234 Pa. 347, 88 Atl. 286 (1912); Commonwealth v. Hopkins, 53 Pa. Super. 16 (1913), aff'd, 241 Pa. 215, 88 Atl. 442 (1913); Commonwealth v. Hyneman, 242 Pa. 244, 88 Atl. 1015 (1915); Buckman v. McMichael, 242 Pa. 482, 89 Atl. 573 (1913); Gerlach v. Moore, 243 Pa. 603, 90 Atl. 399 (1914); and see P. & R. Ry. Co. v. Walton, 248 Pa. 384, 384, 94 Atl. 79, 80 (1915). How to get scope for the needs of a new age under the terms of an instrument which did not contemplate the possibility of such needs is a problem indeed!

Mr. Beck uses the term "Bureaucracy" in a broad sense. He means to indicate by it not merely the growth of the national civil service (from some 3000 officials and employees in 1800 to more than 600,000 in 1930); he has in mind also the growth of national power and especially of national executive power, the supersession at points of the judiciary by administrative commissions as agencies for the application of national law, but above all the growth of governmental interference with private activities—particularly those of "Big Business"—which these other developments connote (p. x). As an advocate—one of the most distinguished of living advocates in any country—Mr. Beck is apt to display in his writings the defects no less than the qualities of his forensic training, and he does this in the present volume to the top of his bent. He himself admits that he presents but one side of the case, though the admission was by no means necessary. Let us consider some of the points on which he challenges answer.

Foremost of these are certain opinions which he advances with respect to questions of constitutional interpretation. Thus he early ventures the suggestion (p. 20) that the Sixteenth Amendment, in enabling "the smaller states to impose the greater part of the burdens of taxation upon the few states of large population and considerable wealth", upset a contrary intention of the framers of the Constitution. This of course is the myth which Mr. Choate fed the Court in the Income Tax Cases of 1895,¹ but without offering a shred of historical evidence in support of it; and it must be emphatically rejected in view of the testimony of Justice Patterson, who was a member of the Convention of 1787, in the early case of Hylton v. The United States;² to say nothing of the fact that Gouverneur Morris, who was the outstanding opponent in the convention of the pretensions of the rising West, did his best at the end to get that body to drop the "direct" tax clause. But if the Sixteenth Amendment did change the originally intended relationship of the national taxing power to wealth, then all the more was it justified. Wealth was really local in situs and origin in 1787, but it has long since ceased to be so. "The few states of considerable wealth" today are not so in their own right, but because the principal owners of the wealth of the country at large find it convenient or pleasant to resort thither. The Income Tax Decision of 1895³ meant consequently, not that the wealth of certain states should not be taxed adequately by the national government, but that the wealth of the country should virtually not be taxed at all.

And on a closely related matter Mr. Beck's position is similarly untenable. The Achilles heel of the Constitution, he says, is "the power of appropriation" (p. 20); but it is his contention that as it came from its framers the Constitution did not possess this vulnerability. The issue raised of course is the meaning of Congress's power "to lay and collect taxes . . . to . . . provide for . . . the general welfare." Mr. Beck contends that these words merely intended "to provide that the Federal Government could only expend money in the due exercise of the powers specifically granted" (p. 21), and asserts that "no one can read the history of the Convention" and hold otherwise (p. 22). Yet Jefferson held otherwise, likewise Hamilton, likewise Monroe, likewise Story—not to mention the overwhelming consensus of more recent opinion.

² 3 Dall. 171 (U. S. 1795).
³ Supra note 1.
Elsewhere Mr. Beck ventures the opinion that the United States is rapidly becoming a socialistic state as a result of the use by Congress of its fiscal powers. "Indeed", he asserts, "few States are more socialistic" (p. 85; see also p. 146). No doubt; but it is often a peculiar sort of socialism—socialism by percolation, as it were. As Will Rogers has pointed out, "the bankers were the first to take the dole"; and since then the railroads have followed suit; nor should we overlook the tariff, which moves in a somewhat subterranean way its wonders to perform.

And mention of the tariff draws attention to another of Mr. Beck's constitutional whimsies—his fervent persuasion that the Tariff Commission exists "in violation of the letter, or at least the spirit of the Constitution" (p. 191). Under the present law, he contends, "Congress only nominates a tax, or fixes it tentatively", whereas "the Constitution did not intend to vest the power of taxation in any one man, even though he be President of the United States" (p. 195). It requires no Witch of Endor to conjure up a "spirit of the Constitution" from the numerous dark lacunae of its written provisions; but this particular ghost would seem to have been pretty effectively laid by President Hoover in his statement of September 30, 1929, on the Flexible Tariff, in which he points to the lesson of a half century of experience: that Congress is simply incapable of readjusting the tariff oftener than every seven or eight years—that, in other words, the power which theoretically belongs to Congress is practically unusable except through some such device as the Tariff Commission. On another page Mr. Beck characterizes the Commission as "the greatest potential menace to the protective tariff that could be devised", but admits that this consideration is "wholly irrelevant to the constitutional question" (p. 196)—which indeed is to be hoped.

Mr. Beck's most daring venture in criticism of bureaucracy, however—one which causes him to fairly hold his own breath—is directed against the Interstate Commerce Commission, "The Sacred White Elephant of our governmental system" (p. 160). His objection is first, that the Commission represents "the extreme of governmental interference with business" (p. 155); and secondly, that it exercises—like all administrative commissions—the powers of prosecutor, jury and judge all at once (ch. XII). In the latter connection he quotes extensively from Lord Hewart's The New Despotism, and adds: "To America it can be said of this indictment of arbitrary government: 'Mutato nomine de te fabula narratur' " (pp. 165, 170-72). For so excellent a lawyer as Mr. Beck, this is an almost unimaginable extravagance, as any one can judge for himself who is willing to compare the opinions of the Lords in the Arlidge Case 4 with those of the Supreme Court in The Ben Avon, 5 the Wichita Light and Power, 6 and the Crowell v. Benson Cases. 7 Indeed, to Lord Hewart's mind the consummation devoutly to be wished was the establishment in England of something approximating the kind of judicial supervision which exists in this country of administrative acts—a desire to which the Report of the Sankey Commission offers rather cold comfort.

Even more extravagant, if possible, is Mr. Beck's assertion that "after forty-five years of its (the Interstate Commerce Commission's) operation, the condition of the railroads is far worse than it was when the Commission began its paternal duties." Ignoring the implication as to the Commission's responsibility, what is the fact? It is that between 1876 and 1894—some years before the Commission began functioning effectively—"593 roads with a mileage of 63,000 were sold under foreclosure 8 and that railway management was directly responsible for

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4 [1915] A. C. 120.
7 45 F. (2d) 66 (1930).
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this condition of the lines. In the words of the same reliable authority: "Roads were built in advance of local needs", frequently "simply for strategic purposes to harass a rival by guerilla warfare... An undue amount of capital was diverted into railway securities; many companies were organized on a grossly inflated basis; capitalization... was often many times the actual money invested. The eastern promoter and builder looked to the speculative investor rather than to the shipper for his immediate profit"—and so on. The point needs hardly be elaborated, in view of what has more recently happened in the Public Utility business, and in view of Mr. Beck's own admission that "many a railroad magnate, who died in a grandiose palace, should have died in jail" (p. 156).

Mr. Beck also expresses the opinion that "neither the Congress nor the Commission has any constitutional power to compel such consolidation", that is, "of all the railroads of the United States into a few great systems" (p. 158). Yet on the opposite page he characterizes as "socialistic" the order of the Commission in 1931 permitting certain rate increases on condition that the proceeds therefrom should go to the weaker roads (p. 159)—an order certainly in harmony with the "Recapture Clause", which the Court has repeatedly sustained. What, then, does Mr. Beck mean by "constitutional"? Not invariably, evidently, accord with the decided cases.

Also worth mention is Mr. Beck's view that the decision in the Myers Case, which he successfully argued, does "not necessarily include legislative agents of Congress", such as the Comptroller General (p. 190). Unfortunately the decision in Springer v. The Philippine Islands seems to rule out the constitutional possibility of classifying non-judicial officers as other than "executive"; if the Myers Case is to be gotten around it must be in some other way.

Outside the field of constitutional interpretation, Mr. Beck's volume contains much of real pith and moment. His attacks on certain expensive but not indispensable activities of the Department of Agriculture, including its cultivation of the Udo (pp. 71-78); on the cost of governmental propaganda (including the broadcstings of the ever optimistic Dr. Julius Klein) (pp. 90, 96); on duplication in government (some seven departments maintain representatives abroad!) (p. 81); on the competition of departments with one another in the purchase of supplies (p. 1061); on the financial irresponsibility of government-owned corporations (p. 186), and so on and so forth, are all to the good, though one does wonder why there is no reference to that cancerous growth, the Veteran's Bureau, except mention that it has over 800 lawyers on its payroll! Some noteworthy reforms too are urged: permanent assistant secretaries of departments and permanent bureau chiefs—such posts to be filled by promotion (pp. 121, 127); the employment by the Appropriations Committee of Congress of data acquired by the Comptroller General concerning the use made of appropriations (203); the reduction of the House of Representatives to 200 members holding for four years (p. 209); a unified disbursing system, which would permit of the reduction of disbursing officers from 3000 to 500 (p. 235); a central purchasing agency for all departments (p. 237); the unification of the Army and Navy Departments (p. 235); an administration of Public Works (p. 236); and so forth. Some of these suggestions may be debatable, but the majority are obviously sound.

Nevertheless at the end Mr. Beck confesses himself thoroughly "pessimistic as to the perpetuity of our form of government" (p. 251). For, whereas the Constitution was framed by men who "thought in terms of abstract political rights", "we today think in terms of concrete economics" (p. 246). The result

9 Ibid. 95-96.
10 49 F. (2d) 230 (1931).
is that "constitutional morality" has ceased to exist; and when "immediate advantage" clashes with constitutional principle the latter goes by the board. That is to say, successful as the men of 1787 were in reshaping the political institutions of that day to suit their own "immediate advantage", they were less successful in forecasting the advantage of an age of steam and electricity.

The publishers of this work have seen fit to print an announcement that "no part of this book may be reproduced in any form without permission in writing from the publisher", except in reviews of it. In the pages that follow there occur eighteen or twenty passages quoted from copyrighted works. It would be interesting to know whether the publishers of these gave their permission in writing!

Edward S. Corwin.

Princeton University.


This book replaces Childs on Suretyship and Guaranty in the Hornbook series. It is divided into four parts: The Contract, which includes the discussion of the Statute of Frauds; The Surety's Defenses; the Surety's Rights; and The Creditor's Remedies. There are eighty-one sections compared with two hundred six in Mr. Child's treatise. In accord with the Hornbook form, at the beginning of each section there appears a summary of the legal principles to be developed in the following text material. These section headings are more complete and more carefully prepared than the average. The text of many of the sections constitutes much more than a mere elaboration of the headings with illustrative cases; there is much thought-provoking criticism seeking a rationale for many of the decisions not appearing in the opinions of the courts. Probably the chief value of a handbook is to present concisely to students a large number of legal rules connected with a given subject; there is much more in Dean Arant's book. The critical discussions of many of the seemingly arbitrary rules of Suretyship will be of value to the practitioner, as well as to the student in the law school.

The reviewer frequently has wondered why, in the order of presentation, the discussion of the Statute of Frauds and the surety's defenses usually precedes any treatment of the surety's rights. So many of the defenses are based upon an impairment of the rights that a reverse order would seem to be preferable. This has been accomplished in the recent casebook by Professor Morton C. Campbell. It may be that Dean Arant's emphasis upon a reasonable interpretation of the surety's contract under the attendant circumstances and in the light of "ordinary business prudence", leads him to prefer the usual order.

The introduction contains a very adequate explanation of the terminology of the subject. It reveals the importance of getting at the substance of the obligor's promise. The pitfalls of relying on certain terms such as "original", "direct", and "absolute" in characterizing the promise are pointed out—for an adjective may be a dangerous word. The fact that the time of making the promise is not a necessarily distinguishing feature between a relationship of surety and one of guarantor is emphasized.

The discussion of acceptance of the offer by the creditor states the Federal, the Massachusetts, and the English views, but goes further to stress the reasonably understood expectations of the offeror as an important element for consideration.

Of particular merit is the chapter on the Statute of Frauds. Twenty-eight pages of this chapter are devoted to the so-called "main purpose" rule. This probably is the most searching discussion in the book. The historical setting of
the statute is presented, calling attention to the rules of procedure and evidence then in force, which excluded both parties to the action from testifying as witnesses, and to the fact that trial by jury was in a transition state. Cases are reviewed which emphasize the particular consideration given the promisor as a reason for taking his promise out of the operation of the statute. Here the author states, "... the opinion is ventured that the real purpose of scrutinizing the consideration is to discover whether the situation presents the dangers from perjury that were inherent in the type of case that led to the passage of the statute." Again, "These cases illustrate the necessity of tempering literal construction of the statute by constant consideration of the type of evil at which the statute was aimed." It is in these pages that the author is seeking a rationale which is not to be found in a reading of the opinions for the cases taking certain promises out of the statute. The discussion of Brown v. Curtiss and Dows v. Swett on pages 127-130 merits more than a passing glance.

The chapter on the construction of the contract by the courts compares the attitude expressed toward the obligation of the compensated surety with that toward the accommodation surety. The treatment of defenses also takes cognizance of the now important role played by the compensated surety. The promises of the surety company are, of course, usually prepared by the agents of the company, rather than by those of the creditor. He emphasizes injury to the surety rather than a technical impairment of the right of subrogation as a defense. In cases involving a compensated surety, the courts find no difficulty in pressing the necessity of an injury to the surety. Not only in the question of construction of the contract, but also in the creditor's handling of security given him by the principal debtor, the author would hold both the creditor and the surety to the standard of ordinary business prudence under the attendant circumstances. A pertinent inquiry would be: What risks have the parties reasonably contemplated? The reviewer suggests that there is reflected in the attitude of the courts in fixing the standard required of trust companies handling trust estates, a feeling similar to the attitude toward the defenses of the compensated surety.

In his preface, Dean Arant states his approach to be more from the contract point of view than from the traditional view of the impairment of an equitable right of the surety. However, where decisions have settled certain aspects of rights and defenses, parties are free to contract in the light of the law, and can protect their interests by the terms of their contract. The reviewer feels that although courts might agree as to the principle of ordinary business prudence, there might develop a difference among courts as to the application of the standard to similar factual situations.

In the chapter on the surety's right of subrogation, appears the following: "If the obligee is the state, the surety's payment entitles him to the state's preference over other creditors, ..." It would have been interesting to have had the author's critical views upon this rule, although he does cite a criticism by Professor T. W. Arnold. The book does not contain a detailed discussion of the surety's defenses upon negotiable instruments.

The author is to be complimented for his clear, readable style. The footnotes contain references to articles in legal publications, other tests, and valuable comments, in addition to decisions of the courts. Dean Arant does not use words in the "Pickwickian sense," as in some instances he intimates courts have done. Since the book will probably be used largely by law students, a bibliography of periodical literature would have been helpful, although such literature has been cited in the footnotes. It was with much pleasure and a great deal of benefit that the reviewer read Dean Arant's book.

Howard L. Hall.

University of Wisconsin Law School.
The Equity of Redemption. (Cambridge Studies in English Legal History).

The law of property is, to an outsider, a fascinating field, both by reason of the scope which it gives to the technical arts of the conveyancer and lawyer, and because of the interplay of economic forces and customs in its evolution. In no field of law has the demand for security and certitude in the formal rule been more clearly evinced or logic so subtly used to authenticate changing conceptions of ownership. Indeed, we may suspect that the most persistent forces in the evolution of the law of property are more directly represented by the forms of the craft, which must needs respond to the clients of the conveyancer, than by the framework indicated in the statutes and the precedents. And the history of such transformations and modalities cannot fail to be informing; for one thing, it cannot fail to throw confusion upon too simple theories of legal evolution that appear to plague us from time to time, such as that law is pure logic or, alternatively, that law is the unpredictable creature of circumstance. Here, at least, is an area of human activity—whether we look for illustration to the medieval law of the land or to the modern law of the corporation—in which concepts undeniably regulate conduct and yet are themselves responsive to human wants and customs. It is a happy hunting ground both for the legal logician and for the student of human affairs—the more happy since both will find that neither the technical language nor the economic institute is comprehensible without the other.

Of all this, Mr. Turner’s study, The Equity of Redemption, which is a revision of the Yorke Prize Essay of 1923, is a satisfying illustration. It deals with one of the interesting stages in the long experimentation by which the lawyer and the business man have endeavored to work out an efficient and equitable arrangement for the use of property as a basis of credit for more or less extensive terms. As the author states, “The best type of security is that which combines the most efficient protection of the creditor, the least interference with the rights of the debtor, and the security of third parties against fraud.” The historical working out of this problem is the more interesting, since the as yet incomplete development in Anglo-American law from the ancient mortgage of land to the charge, offers many analogies and contrasts to the corresponding Roman institutional evolution from fiducia to hypotheca. The special interest of the equity of redemption lies in the fact that, by the assurance of this claim to the mortgagor, the English courts of equity made the first and decisive breach in the scheme of the common law mortgage—a breach which has eventually made possible the conception of a landed security without transfer of title or possession. This movement, as the author suggests, has probably been an unconscious one, nor is it yet complete, as even in England under the property acts of 1925, “the mortgage with its transfer of ownership and its dual system of law and equity” has not been superseded. The wine of the law of landed security in England still has an ancient flavor, though the bottles have new labels. And, in the United States, it may be suspected that even the labels for this branch of the law need dusting.

It is not for the reviewer, particularly if his competence in the esoteric law of real property be modest, to set out a detailed critique of the author’s careful use of materials or even his conclusions. It is of more profit to indicate those features of the author’s study which appear especially suggestive or of general interest. First is the attention which has been given to the comparative study of the Roman and English institutional developments, both by the author in Chapter

1 At 118.
2 At 139. See also 120.
VI, dealing with "The Influence of Roman Law and the Movement towards Hypotheca", and more especially in the introduction contributed by Professor Hazeltine, who is here treating a subject-matter which he has made peculiarly his own. This introduction is a detailed and illuminating comparison of the Roman fiducia cum credito and the English mortgage, the difference between which "in respect of historical development—the difference expressed by saying that while the fiducia, after a period of growth, feel more and more into disuse, the mortgage, modified and improved in the course of centuries, has survived, as the leading form of English security, to our own day—is one of the most fascinating features of comparative legal history." 3 It is to be remarked that both the editor and the author have come to the conclusion that, although in some degree influenced by Roman prototypes, the English evolution of landed security has more or less independently approached the conclusion which the Roman law attained in the hypotheca.

In the second place, the author's results as to the milestones of the development of the equity of redemption may be summarized as follows:

First, the cases in which the Chancellor gave relief to a mortgagee who had failed to pay on a stated day earliest occurred in the reign of Elizabeth, and the relief accorded seems to have arisen out of the relief which the Court of Equity had begun to give against forfeitures of bonds of all kinds. Until about 1625, the relief given was based upon a showing of fraud or special circumstances involving hardships, but thereafter "the relief has soon not only become general in the sense that it can be given apart from special circumstances, but it has come to be looked upon as a definite rule of the Court that such relief shall always be given", 4 subject only to the tender of principal, interests and costs by the mortgagor and to the power of the mortgagee to come in and obtain a decree of foreclosure.

Second, the subsequent adaptation of this institute of equity was chiefly controlled by three conceptions, the first two established by Lord Nottingham and the third by Lord Hardwicke; namely, that a mortgage is a security and the interest of the mortgagor an equitable interest in land rather than a chose in action; that in the construction of the equity of redemption, "Equity follows the law", that the equity of redemption is an estate in land and the mortgagor is conceived as the owner of the land in equity. Of the significance of these constructions, the author remarks:

"Having established a general principle from the particular rules already in force, the law is able to take a further step forward and work out other rules from this general principle to suit a variety of difficult situations. If these new rules are just and equitable when applied to new cases, and, where they come into conflict, more just and equitable than the old rules which do not fit in with the new principle, that principle will stand the criticism of the age and be a stepping stone in the law of the land. This is the way in which our common law and equity have been built up, by a process of trial and error. Just as the invention of a new and simple symbol in the place of a long mathematical formula simplifies the calculations to be made, and, when all the ideas involved can be carried in the head mechanically by means of that symbol, the mind is able to make a further advance into unknown realms of mathematical speculation; so, a new and simple explanation of a number of closely related, yet complicated series of juristic ideas, put into a single commonplace legal phrase, which conveys the whole, leads to a great advance

3 At lxii.
4 At 27.
in jurisprudential thought, which must result in a corresponding advance in practice.

"This was certainly true of Hardwicke's new formula for the equity of redemption. It enabled the Court of Chancery to reject some subsidiary technical rules followed by the preceding Chancellors in their administration of the doctrines of Nottingham. The Court then proceeded with the settlement of the equity of redemption unhindered by these technicalities, following a new, clear, fundamental principle wide enough to cover the whole field, and thus formed a fair and rational system, a system which would prove durable despite the changing conditions of life involved in the last two centuries."

Third, reference should also be made to the analysis of the idea of the "estate", a conception which, owing to the inability of early lawyers to grasp the idea of a legal right distinct from the thing subject to the right, made it possible to divide up interests in land in a far more flexible and fanciful way than would otherwise have been conceivable. Of equal interest is the seventh chapter in which the defects and ambiguities of the Austinian classification of rights as in rem and in personam are thoroughly demonstrated. As the author suggests, the application of this Roman distinction, highly useful as a description of Roman types of remedies, to rights considered as interests protected by common law remedies, is confusing and perverse.

Fourth, it is worth noticing a general suggestion made by the author in considering the effects of the doctrine that "Equity follows the law":

"It is sometimes suggested that the analogy of the legal estate, though under Nottingham it proved a ground of settling many principles relating to equitable interests on a firm and rational basis, led to the destruction of many opportunities for the Chancellors of the succeeding century to introduce desirable reforms and checked the growth of those already established. This is scarcely correct. Doubtless it prevented the systems of law and equity from becoming too widely separated; which seems advantageous rather than the reverse; but the Court of Chancery was a great reforming influence in the civil law all through the eighteenth century, and only ceased to be so on the application of the theory of precedent under Lord Eldon and his contemporaries. There are no Acts of Parliament of first-class importance in the civil law to be found in that century, as in that immediately preceding; viz., the Statutes of Limitations, Tenures, Frauds, etc.; and it was not until equity had ceased to be an active reforming agency that the reformed legislature of 1832 took up the task."

In concluding, note should be taken of the discussion of the nature of the mortgagor's possession in the fifth chapter and of the analogies between the equity of redemption and the trust in the eighth chapter. These, as well as the chapters referred to above, are, as the editor states, "based upon much laborious, pains-taking, and scholarly research". They deserve the careful attention of all who are interested in the legal and economic history of England.

Hessel E. Yntema.

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* At 70.
* At 60.
BOOK REVIEWS


The distinguished author of The Roman Law of Slavery (1908), A Text-Book of Roman Law from Augustus to Justinian (1921), A Manual of Roman Private Law (1925) has again placed students of the Roman law under deep obligation by this more recent book, which is, indeed, an excellent piece of work. The extensiveness of the treatment is reflected in the headings of the several chapters: Sources of law; the chief surviving sources independent of Justinian; persons; the family; res, property, possession; acquisition of ownership; iura; representation in acquisition and alienation; acquisition per universitatem; intestacy, bonorum possessio; legacy and fideicommissum, family settlements; obligations; contract; pacts, quasi-contract; incidental rules of obligatio; the law of security; delict; litigation, legis actio, real actions under the formula; actions in personam under the formula; the cognitio of later law. The exposition of these topics is executed with rare good judgment in the selection of material and with unusual clarity of expression. In his account he has given much more than a digest of the older views; the more recent literature on the subject has also been carefully examined. The difficult task of mastering a wide field has been performed in admirable fashion. Even in this handbook the reader is afforded an opportunity to appreciate the controversial character of much of the material. English students will be more than glad to see this long needed, up-to-date treatise. Perhaps somewhat more copious references to detailed studies of the several topics would have contributed to the usefulness of this volume, for which all students of the Roman law will feel truly grateful.

Edward H. Heffner.

University of Pennsylvania.


This is an excellent presentation of the subject of Civil and Criminal Malpractice, written by a lawyer of wide experience who was the attorney for many years for the New York County Medical Society. This gave him full opportunity to try these cases and to learn at first hand the problems of law as applied to the physician. This book meets squarely the problem of what the doctor should know.

It is written in simple language and the case references are wisely relegated to the appendix. The limitations of the book are both as to subject matter and to content. While it is more up to date, it does not cover the subject as fully as does Taylor, who wrote on the subject ten or fifteen years ago. For example, the fees which are part of the implied contract between the doctor and the patient are not touched upon.

It is not surprising that a book which is so definitely personal and expresses the experiences of the author, should in many ways refer to many New York laws and leave to the reader, if he be a resident of some Western State, the problem of looking up the law for that particular state. No mention is made, for example, under Privileged Communications, that in many states the privilege does not extend to civil cases. The same is true of the subject of the Statute of Limitations.

In some parts of the book there is confusion as to terms with rather disastrous results to the content. In more than one chapter the use of the word "expert" gives rise to confusion. He states definitely both in the chapter on Civil Malpractice and also in the chapter on Negligence that the "expertness" of a doctor in a court of civil law must be proven by an "expert".
Judge Hare in Pennsylvania ruled that every doctor was an expert. Any doctor, and this includes the general practitioner, may qualify as an expert, although he may not be a specialist. The general practitioner may have a very valuable point of view as to the capacity of any specialist. He would be a "dumb" doctor, indeed, who did not understand whether an operation was well or badly done. The work of any surgeon done so carelessly as to constitute negligence on his part, would be perfectly evident to any good general practitioner, who should witness the operation, or review the case.

In another chapter, the question of professional experts is considered. A long quotation from a case is inserted to show that a man who is young (26 years of age) and who testified frequently in courts of law, should have been disqualified as an expert. Every doctor who reads this will immediately realize the reasoning is faulty. The fact that a man is young need not in the slightest degree disqualify him as an expert. Expertness does not depend on age, or on medical degrees, which Mr. Stryker thinks is necessary. A young man beginning at eighteen years of age, who for over eight years devotes himself exclusively to a study of blood and its biological relations, could very well be a greater expert than the usual hoary expert who testifies on such subjects. That he need not be a Doctor of Medicine is evident.

The qualification of an expert, if properly done, should settle this question. The trouble is that most attorneys do not know how to qualify, or rather disqualify, a would-be expert. In all my experience, it has only been done when a medical expert sits at the elbow of the cross-examiner as assistant counsel. This matter of qualification appears very simple to the medical mind.

In the Thaw case, for example, an attempt was made to qualify an eminent internist as a specialist in nervous and mental diseases. The cross-examiner was not concerned with how often he appeared in court, or his age. The questions at issue were:

(a) Whether he was connected as a physician or consultant to any institution for mental diseases.
(b) Whether he had ever been connected with such an institution in either capacity.
(c) How many mental cases had he seen and treated in the preceding year and the preceding month.
(d) How many mental cases had he at the actual time of the trial under his care.

He was permitted to testify, but his answers to these questions completely disqualified him as an expert in mental diseases.

Mr. Stryker objects to the appointment of a commission of experts by the court to determine the responsibility and mental conditions of a man to be tried for murder. Page 145 rests upon the same idea. He states that the Judges who appoint such experts are poor judges of medical men. They might also be influenced by politics or other considerations in the appointment of such commissions. The attorneys for the accused would have the right in any of these proposed laws to regulate any expert testimony; to examine the experts for their qualifications; they would also have the right to present their own experts independently of the commission appointed by the court.

On page 153, the author agrees with Professor Wigmore that the hypothetical question is one of the few purely scientific rules of evidence. To a trained scientist there is nothing quite so unscientific in legal procedure as the hypothetical question. I have never seen a hypothetical question framed that included all the fundamental and proved the facts in the case. It is true that the hypothetical
question presents in a general way the culled facts from the proceedings of the court. It is perfectly evident to the expert who has watched the trial that a great many of these so-called facts or near facts are opinions and many of them may be the statement of evidently biased witnesses, so biased at times as to amount to perjured statements. The only hypothetical question that is of any value is that which includes the entire stenographic work of the case. It is quite evident that the only scientific procedure is to insist that the expert listen to the entire evidence, read the record and then state his opinion. Any other method is not only unscientific, but may lead to false conclusions.

Two clever lawyers on the opposite side of the case can each frame a hypothetical question according to the rules of the evidence produced, and yet these two questions can be so framed that the same expert can honestly reply to the one in the affirmative and the other in the negative. It is surprising that this very method of procedure is not often carried out.

In Chapter 21 the matter of forcing an expert to give expert testimony on a simple subpoena without previous arrangement for compensation quotes decisions in several states which support this rule. An expert would never be placed in any such predicament.

The expert's evidence is always opinion evidence. If he has not seen or examined any of the parties involved, his reply to any question that the court might ask would be that he does not know. He may also decline to have an opinion. If he chooses to have an opinion, he may choose to have an opinion against the party calling him against his will and interest.

Any book that merits a review as long as this is a book well worth reading and worthy in a future edition of an extension both as to subject matter and quotation of cases.

D. J. McCarthy, M. D.


The Succession of States to Obligations—A Reply to Prof. A. N. Sack.

To the Editor:

If it can be accomplished without wearying your readers, the writer would like to be permitted to say a word in reply to what Prof. A. N. Sack urges in his review of Public Debts and State Succession in your February number 1—to the effect that I attribute to him sentiments the direct opposite of those which he entertains. Professor Sack has advanced this contention elsewhere, and it seems only fair to him that I should either retract or maintain my position.

It would give me great pleasure to retract it, but I find myself bound to maintain it. It is a little difficult to reduce to simple language these recondite matters which arise when we try to dig down to the underlying principles of law; but I shall try to be as brief and clear as possible.

The generally received doctrine is that neither changes in the political constitution of a given state nor changes in its territorial area have any effect on its obligations. They are personal to itself, and another state which takes over (by whatever means) part of its territory, no more takes over with it a share of its liabilities than a purchaser who buys a watch at a shop takes with it a liability to contribute towards payment of the watchmaker's debts. Professor Sack's main proposition is to deny this: to treat a state's obligations as primarily a charge on its inheritants and territory (if not on its other possessions also), and consequently to hold that any state which takes any of its territory and population takes it cun onere, and is bound to assume some part of its obligations.

1 Book Review (1932) 80 U. of Pa. L. Rev. 668. It is to the reference in footnote 34 on page 623, in particular, that Mr. Baty refers.—Ed.
So far, Professor Sack may probably agree that his thesis is not unfairly (though very roughly) stated. It is not my business to criticize it here. It will only be observed, in passing, that state obligations are of many various kinds. They are not liquidated debts. They may be promises of future support which are totally incapable of present estimation in dollars and cents, yet the promisee relies no more and no less on the territorial resources of the promisor for their due fulfilment than is the case when a definite sum of money is in question. It would be next to impossible to effect a fair repartition of the weight of obligations between transferor and transferee—and it may be difﬁdently suggested that the field of Professor Sack’s vision is unduly occupied by the simple article of cash debts; though I hasten to recognize that he takes full account of the existence of other obligations. However all that may be, it is beside my present purpose.

The argument against Professor Sack’s view—whether that argument be right or wrong—is really one and indivisible: the obligations of a state are personal to it, and do not affect its possessions, territorial or otherwise. But it can be presented, and has been presented, in the form that the transferee of territory is exercising his own sovereignty there, and not the transferor’s sovereignty, and is consequently not trammelled by any share of the latter’s obligations. Professor Sack retorts in his monumental work on State Succession to Obligations that this argument against his theory either proves too little or too much. He says that it would equally prevent a new government from being saddled with the old government’s debts, provided that it looked to a different theoretical source of power—for instance, to God instead of to the People. Professor Sack appears to insist that the present writer imputes to him the patently impossible proposition that a new government really can repudiate the engagements of a former government, if only it affects to derive its power from a different occult source. Certainly I could never, in the face of his plain statements and clear argument, have imputed to him such self-contradictory statement. His whole reasoning, in the passage in question, is a reductio ad absurdum, and a reader must have been dense indeed who supposed him to be all the time maintaining the soundness of the absurdity!

What I did say was to deny the analogy of a change of area with a change of government. To make the analogy plausible, Professor Sack has to say that in each case there is a new sovereign. In the case of a change of area, Sovereign A takes over, in a particular region, from Sovereign B: Britain is succeeded in Heligoland by Germany. In the case of a change of government, Sovereign X is, he says, succeeded in just the same way by Sovereign Z—provided that Z relies on Providence and X on another invisibility called The People. Therefore, if you say that Z has to pay the debts incurred by X—as everybody does say—you must equally say that A has to pay (pro tanto) the debts incurred by B—Q. E. D.

The present writer never said, nor could have said, nor could anyone of the intelligence of a four-year-old child have said, that Professor Sack was of opinion that Z is under no obligation to pay the debts of X. In point of fact, as the reader has already noted, Professor Sack’s argument is a play upon words. Sovereign A and Sovereign B are sovereign states. Sovereign X and Sovereign Z are the “sovereign” rulers of states: and the fact that they affect to derive their ruling powers from different sources does not alter the fact that it is one and the same sovereign power in exercise—that which is exercised by Z over the same people over whom it was exercised by Y.

It is the Professor’s attempted reductio ad absurdum, necessarily involving the assumption that there is something inherently alien between a sovereignty

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2 Except, of course, in so far as they have been expressly and overtly made to “run with the land”.

SACK, LA SUCCESION AUX DETTES PUBLIQUES D’ETATS (Paris, 1929).
which looks to one invisible source and a succeeding sovereignty which looks to another invisible source, in one and the same country, to which I objected. That assumption is a necessary part of his argument: if it is not granted, the entire *reductio ad absurdum* falls to the ground. And it was this alone that I ventured to urge against the validity of his proposition. It is not his absurd, and intentionally absurd, conclusion that I try to fasten upon him, but the assumption which he invokes as an undeniable step in arriving at it from the premises.

I did not object that he arrived at an absurdity—because it was what he set out to arrive at. I did not object that he did not see that it was an absurdity—because he proclaimed with emphasis that it was. But I objected to the steps by which he proved that it was an absurdity and deduced the untruth of the premise. If I say—

\[
\begin{align*}
\text{Ducks are birds;} \\
\text{But birds are dragons;} \\
\text{Therefore ducks are dragons,–}
\end{align*}
\]

I am not at liberty to say that because this is an absurd result, therefore ducks are not birds. The true inference is that birds are not dragons. It is essential to a *reductio ad absurdum* that all the steps in the argument be sound. You can make anything absurd by introducing falsities in the intermediate steps. And I venture to maintain that the step which says that successive rulers of the same country, provided they invoke different theories of politics, exercise a different sovereignty in the same sense in which the rulers of different states exercise a different sovereignty, is one which carries its own refutation on the face of it.

It is a pleasant duty to acknowledge the generous good feeling with which Professor Sack speaks of my old review of his wonderfully thorough and stimulating book.

*Th. Baty,*

*D. C. L., LL. D.*

*Foreign Office,*

*Tokio, Japan.*

*7 May, 1932.*
BOOKS RECEIVED


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