BOOK REVIEWS


Quite regardless of whether I agree with the recommendations made, the work done by this Committee is entitled to the highest possible commendation. It is thorough and exhaustive. It is easily superior to any report ever made in the field. It furnishes to any one who desires to be informed with respect to it, reference to all the literature upon the subject. As is generally the case, one member of the Committee did the major part of the work. He was well qualified both by experience and learning. I have had the benefit not merely of the discussion of the recommendations but of Mr. Sylvester's personal review upon the report. When I made known to him what I had undertaken to do, he not only offered to be, but has been, most helpful in furnishing material.

The recommendations of the Committee will be discussed in order.

I. Right of the Defendant in a Criminal Case to Waive Trial by Jury

That the defendant should have this right, if he is of sound mind, is not open to question. If the prosecution is content to go to trial without a jury and the defendant so desires, why should anyone object? Who could complain? Who, besides these two parties, is interested? I do not agree, however, that a trial is necessarily more speedy, more dignified, nor more accurate in result without a jury than with one. I cannot believe, for instance, that the trial of Leopold and Loeb in Chicago could have occupied more time with a jury than it did without. The time consumed in the summation alone in that case was more than the trial could possibly have taken had it been conducted, according to rules of procedure, with a jury. A trial ought to be much more brief without a jury than with one. Nor is it at all certain that the result would not have been more accurate. I do not believe that waiving a jury is an indication that the defendant believes himself innocent, nor that it gives the defendant the opportunity of avoiding the prejudicial effect on the jurors' verdict of sensational newspaper publicity. An accurate survey of juries' verdicts, where there was sensational publicity, indicating a desire on the part of the united press that the jury should render a verdict of guilty, will show that in most instances a verdict of acquittal was rendered. Instances: Samuel Insull, Martin Insull, Charles E. Mitchell, George L. Rickard, Isaac Harris and Max Blanck, and Raymond Hitchcock. These are but a few of hundreds; in these the publicity was so pronouncedly against the defendant that it was believed in the community in which the trials took place that the defendant could not obtain a fair trial. On the other hand, I think it is a great mistake on the part of the defendant in these days to believe that he can benefit by emotional appeals to the jury because of favorable newspaper publicity.

It would be distressing to think that any prosecutor would enter into a trade to induce a defendant to waive a jury trial in exchange for his accepting a plea to a lesser offense. I prefer to believe that such arrangements are made in the interest of justice. I regret that the Committee thought it will "render possible

* Mr. Steuer was authorized by the New York County Lawyers Association to make this review.
corrupt dealings between criminals and various individual judges". If there are such judges in any quantity, I would nevertheless not be opposed to permitting the waiver, so that the judges who saw fit to enter into bargains of that character should have the opportunity to do so, because sooner or later they would be detected; it is of inestimable importance to rid the bench of even one such man.

The conclusion of the Committee appeals to me as being entirely sound. The reasons given for it in this instance might very well have been omitted.

II. The Less Than Unanimous Jury Verdict

The recommendation is that in criminal cases the conclusion as to guilt or innocence, when arrived at by ten of the jurors out of twelve, should be sufficient basis for a verdict. I concur in that conclusion. I fail to see, however, why it should be limited to criminal cases. The trend has been to deprive the accused in a criminal case of rights or privileges that have been accorded him in the past. The impression has been created that it is very difficult to convict and that technicalities stand in the way of the prosecutor. I know of nobody who has not been constantly on the prosecution's side, who has had experience in criminal cases that shares such a view. Every juror is asked whether the fact that the defendant has been indicted in any way influences him or her to the belief that the defendant is guilty, and each juror says, "No"; but in truth the only person on a jury who would not be influenced in that way is one who has himself or herself been indicted and acquitted. The law is, in every state in the Union, that the defendant is presumed to be innocent until it is proved to the contrary beyond a reasonable doubt; actually, with nine jurors out of ten the defendant is presumed to be guilty until he has established his innocence. As the result of actual experience on both sides, I am convinced that to talk about the difficulties that beset the prosecutor when he has a real case is to indulge in nonsense. The difficulties of the defendant cannot be exaggerated. Why the liberty of the citizen should be held cheaper than dollars, it is difficult to understand. If ten out of twelve jurors can determine that a man should be deprived of his liberty, why cannot ten out of twelve jurors determine that the defendant owes the plaintiff some dollars or that he does not? The recommendation should be adopted to apply in all cases.

III. Selection of Jurors by Trial Judges

The trial judge is in no position to select efficiently a jury for either side. He knows nothing of the facts in the case. What is much more important is that he knows nothing of the parties. The attorney knows the party and the witnesses on his side at least. Frequently he knows something of the opposite party, his adversary and the witnesses. Such information is essential in the selection of a jury. The attorney knows the facts, not merely the conclusions as they are disclosed in the pleadings. He knows what is to be controverted, not merely the statement of the controversy as it appears in the pleadings which, in most cases, have not been read by the judge when he proceeds to select the jury. As a matter of fact, the selection of the jury in those instances where the judge proceeds to do so amounts to absolutely nothing. He inquires whether the jurors know the parties and the counsel, and adopts and reads to the jurors a question or several questions submitted by counsel. Lawyers generally have reached the conclusion that this perfunctory performance is useless; I have yet to see an instance where a lawyer submitted questions to the judge to be asked. To the trial counsel, the examination of talesmen is as important as any other part of the trial, if not more so. For illustration, I wish to call attention to what occurred in two recent prosecutions. The examination of talesmen was conducted by counsel and not by the court. It was a searching investigation on both sides, as it should have
been. In one instance, it was concluded on a Thursday evening. The court and both counsel started under a grave handicap. Each had a severe cold. The conclusion of the examination of jurors was at about seven in the evening. The case was adjourned to begin taking testimony on Monday. By Monday morning there was indisputable evidence that some of the jurors had failed to answer very material questions truthfully. From the answers that those jurors made, it became perfectly evident that they knew that if they told the truth, they would not be acceptable as jurors. It is not too drastic to say that they intended from the very outset to favor one side or the other and that they had already formed a conclusion that no evidence would change. The prosecutor and defendant’s counsel were dissatisfied with a number of those that had been accepted. Each juror was informed clearly that if he had made any applications for loans to a certain bank and was refused, he would not be acceptable to the defense; if granted, he would not be acceptable to the prosecution. One of the jurors had been refused not only once but three times in that bank. The suggestion might here be made that the juror could have avoided disclosing the fact if the inquiry had been conducted by the court. The difference is this: the question would probably never have been asked by the court. The court is often not in a position to know that such an inquiry would prove of the utmost importance to the prosecution or to the defense and there would have been no occasion for the juror to disclose the facts, whereas in the manner in which this inquiry was conducted, the juror had no excuse for not having disclosed them.

In the second instance which I have in mind, each juror was asked by counsel for the defense whether he was a depositor or a stockholder in a certain institution. After the jury had been accepted, on the following day the defense counsel produced indisputable evidence that one of the jurors was either a stockholder or a depositor in that institution. In that instance, had the court conducted the inquiry of the jurors, that question might not have been asked. In these instances, which came within my personal experience—in one instance representing the defendant; in the other the prosecution—the liberty of the defendant would have been gravely endangered if the examination had been conducted by the court. These examples are not the exception. In examining the jurors, counsel has the opportunity of hearing the juror’s voice to observe his reaction to the question. One inquiry leads to another from which both sides have the opportunity of reaching a conclusion as to whether the talesman would make a satisfactory juror. Of course, even then, many mistakes are made but it is the best process that has been devised for ascertaining whether the individual is impartial and is there only to do justice.

When the court conducts the inquiry, the jurors are jointly interrogated. The ordinary juror does not treat the question as being addressed to him alone. He regards the investigation as most informal—as it really is—as a sort of necessary but very perfunctory matter, whereas the examination of talesmen is a vital matter in any kind of trial. The all-important thing which suggests this change seems to be to save a few minutes. Justice really does not seem to matter. When judges were given the exclusive right to select jurors a terrific blow was struck at fair trial.

The recommendation of the Committee is rather two-sided:

“Eliminating the right of the defendant to select the jury deprives him of one of his most effective weapons and at the same time considerably expedites the trial.”

The word “weapon” in that sentence could only connote opportunity for obtaining a fair trial. So, there is a choice—Should the parties have a fair trial or
should the trial be expedited, and, of course, the decision must be in favor of speed. The recommendation in this regard merely adopts the present trend—speed, speed, nothing but speed. It should be rejected, and wherever the power now exists, it should be withdrawn. In so-called important cases, even in tribunals where the judge has the right to select the jury, he does not exercise it. Why is one case more important than another? To the defendant on trial, his case is the most important, as indeed it should be to the prosecution. The rights and privileges of all defendants should be alike.

IV. Authority of the Appellate Court to Modify Judgments in Accordance With the Proof Where a Lesser Crime Than That Charged Has Been Proved

Here it is presupposed that at the trial the defendant was convicted of a crime that he did not commit. At the trial, he could and should have been convicted of a lesser crime. Should the appellate tribunal send the case back to have the unnecessary task performed of trying him over again to prove him guilty of the crime of which he has already been proved guilty? The answer is necessarily no. The purpose of appellate tribunals is to rectify the errors of the court below. The modification of the judgment and the substitution of a conviction for the lesser crime of which the defendant was proved guilty are precisely the functions the appellate tribunal was organized to perform.

V. Waiver, Limitation or Abolition of the Grand Jury Indictment

The two branches of this proposal should be treated separately. That the defendant should be permitted to waive indictment, if he is advised as to the effect of his action, seems to be obvious. Anything that the defendant and prosecution jointly wish to do, they should be permitted to do. The assumption should always be that the prosecutor is acting in good faith and is protecting the rights of the Government as well as those of the defendant. When the defendant is advised of his rights and wishes to waive any of them and the prosecution is satisfied that no injustice can result to its cause, any procedure that will save time and expense should be adopted.

The abolition of the grand jury would be a step backward. No one has ever suggested a method of inquiry or a body to carry it on that is more desirable than the grand jury. That some inquisitorial body should function is essential. It is difficult to understand, but the fact remains that no matter how honorable a prosecutor is, he is not long in office before he begins to believe that everybody accused is guilty. Or, at least, he adopts the view that to accuse him and put him to trial will actually do little harm. Incidentally, a most remarkable transformation always occurs as soon as the prosecutor leaves office. For the first year or two he is frequently retained by defendants because of his supposed familiarity with the law and the functioning of the prosecutor's office. These ex-prosecutors become virulent in their abuse of the prosecutor's methods though they are often much more mild and commendable than were those of the man who is now complaining.

There is no occasion, however, for bringing to the attention of the grand jury petty or minor offenses. Felonies only should be submitted to their investigation. If, in a rare instance, a misdemeanor is of serious import, provision should be made for application to the appropriate court that in that particular instance the matter should be submitted to the grand jury. Under existing statutes the prosecutor has the privilege of submitting a misdemeanor to the grand jury. This privilege ought to be removed. When either side deems the case to be of such great importance that it should be submitted to a grand jury, provision should be made for an application to the court for leave so to do and the court alone should
have the right to determine whether in a particular instance the application should be granted. The Committee's conclusion should be approved.

VI. Addition to the Summary Jurisdiction of Magistrates

The Committee disapproved this recommendation. Here speed and cost, and improvement in the administration of the law are disregarded. The reason is: "The criticism to which magistrates as a class have been subjected in recent months renders dubious any suggestion to add to their jurisdiction."

A few individuals have been subjected to criticism—very few indeed. Even if all the magistrates had been subjected to criticism, if the criticism was unfounded, that would hardly be a ground for not making a great improvement in the administration of justice which, obviously, the granting of additional summary jurisdiction to magistrates would accomplish. If the criticism is well founded, a method is provided for their very expeditious removal. It has recently been invoked. Nobody has been heard to say that the method was not sufficiently effective. The power to remove is, in New York, lodged in the Appellate Division. I am sure that no one questions its integrity. In every other jurisdiction, the power to remove is lodged in a responsible body. Why should the fact that a few individuals have been criticized and two or three were found guilty of that for which they were criticized, and were compelled to resign or were removed, be a reason for withholding from magistrates summary jurisdiction over petty offenses? The fact is that they now have jurisdiction over some crimes for which serious penalties are very frequently imposed. Jostling (which, as I understand it, is a crime committed by several individuals in a crowd in shoving one person against another so as to afford them the opportunity of picking pockets) is an offense over which a magistrate has summary jurisdiction and for which the defendants, found guilty, frequently are sentenced to six months in prison. And yet, over such a thing as dealing in policy, or being possessed of policy slips, the magistrate does not have summary jurisdiction. If he can be trusted in the one case, why not in the other? Here would be an actual saving in time. And the defendants seem to be much more afraid of the magistrate than they are of the ultimate tribunal, because in nine cases out of ten they waive examination before the magistrate. If there is such an examination, the magistrate is powerless to do more than to hold them for trial in Special Sessions. If the experiences of these policy dealers had not been unsatisfactory before magistrates, they would plead guilty and not demand the opportunity to go to trial in the Court of Special Sessions. In such a case the magistrate cannot even accept a plea of guilty. Every argument is in favor of extension of the jurisdiction. The recommendation should have been approved.

VII. Grant of Rule-Making Authority to the Criminal Courts

This recommendation is disapproved by the Committee. Apparently, it is believed that the legislature, the majority of the membership of which always consists of lawyers who are in large measure guided in their determination by the best interests of their clients, is in a much better position to make wholesome rules than are the experienced judges of the courts, who in reality write the law. These rules of procedure, most of which are archaic, were all mainly proposed by men who were interested in the defense because they thought people were unduly persecuted. In the period when they were conceived, that undoubtedly was the fact. It was necessary to have rules to protect one against the Crown. That day has long since passed. In the recommendation, the Committee says:

"Irrespective of the merits of these proposals, it is at least doubtful whether they do not involve considerations of public policy and expediency which should be determined by the legislature."
If the proposals, I say, are meritorious, they should be adopted the more readily because they do involve considerations of public policy and expediency. The legislature is surely not more capable than the judges in determining considerations of public policy or expediency with respect to what is or is not appropriate procedure in the courts. The recommendation, in my judgment, should have been approved.

VIII. Privilege Against Self-Incrimination

IX. Right of Comment on the Failure of a Defendant to Testify in a Criminal Case

These two recommendations might well be treated together. I do not find any recommendation of the Committee with respect to "VIII". The argument made is entirely favorable to its approval. By decision in the federal courts, the privilege against self-incrimination has been made an empty shell. It really amounts to this—that the defendant cannot be called as a witness by the prosecution. How many instances are there where the defendant would be called as a witness at the trial by the prosecution? The party that calls a witness is bound by his answers. The instance, indeed, is rare where the prosecutor would be willing to be bound by the answers of the defendant. This privilege against self-incrimination is exercised much more often in civil cases than in criminal. The instances are very rare in which a defendant fails to take the witness stand and nevertheless earns an acquittal. In such cases, it is not because the defendant did not testify that he is acquitted. It is because the prosecution really had no case and the defendant did not voluntarily go on the stand to make one for the People. If the Government has a case and the defendant fails to take the stand, the reason ascribed for that conduct by the jury is that the defendant concedes his guilt and the verdict is in accordance with it. If the jury overlooked the fact that the defendant failed to take the stand, it is only because it recognized that there was nothing which the prosecution proved which required explanation. It would be in the interest of justice to abolish the privilege. In my opinion it would help both the prosecution and the defendant. While the privilege exists, the defendant and his attorney debate, in almost every case, whether the defendant should take the stand or not. The counsel informs the defendant that the prosecution will have no right to comment upon his failure to take the stand. No sensible reason has ever been furnished for depriving the prosecution of the right to comment on the defendant’s failure to take the stand. The prosecution can use every kind of argument, sensible or otherwise, without restraint, but he may not comment on what is vital. Why should he not be permitted to tell the jury that the defendant has the right to take the stand? The defendant, who knows more than anyone else can possibly know about the transaction in issue and about his intentions to commit a crime or otherwise, has refrained from going on the stand to tell the jury the part that he played. There can only be two reasons. The prosecution may have failed to prove any case and there is therefore no necessity for explanation. If the jury believes that, the reason is sound. The only other excuse for not taking the stand is that if he did so, his guilt would be all the more clear. A fair prosecutor would say, if there is nothing that I have established that the defendant ought to meet, he is justified in refraining from taking the stand, but have I not established thus and so; is not the defendant peculiarly the individual who could have disproved that, if it can be disproved at all? Having it in his power, he failed to do it. What motive impelled him to refrain? Why should he not be permitted to make any argument that the proved circumstances justify? And what is better proof in the case than the fact that the man who is sitting here accused, who has been here throughout the trial, who heard all the
testimony, who is more interested than any other individual can possibly be, has deliberately refrained from exercising a privilege which is his? Both recommendations should have been approved. The reasons given for recommending the ninth apply, with equal force, to the eighth, and those which apply to the eighth are equally strong in favor of the ninth.

X. Right of the Trial Court to Comment on the Evidence and on the Credibility of Witnesses

Here again, I find no recommendation by the Committee, but the argument seems to be favorable to it. Trial by jury might well be abolished if that privilege is conferred upon and exercised by the trial court. In my own experience, it has never been exercised. In the state courts of New York, no such privilege exists. In the federal courts, however, within the various districts of the State, the privilege does exist, and in the cases which I have tried in the federal court, not once has the privilege been exercised. It seems to me that the sole reason was that the court recognized how unfair it would be to the defendant and that the function of the jury would thereby be practically abolished. If such a privilege were to be exercised by the judge presiding, it becomes incumbent upon counsel for the defendant, in rebutting the judge's remarks, practically to insult the sitting judge and thereby incur at least his displeasure and, in most instances, unless it be most artfully done, the displeasure of the jury. Why should the defendant's counsel be put in the position of guessing what comments the judge is going to make on the testimony? The judge may intend to make none. The anticipatory remarks of counsel would probably prove most hurtful, if he thought that the judge was going to say: "I do not believe Mr. Jones, the witness for the defendant; I do not believe the testimony of the defendant; my experience on the bench has been such that of necessity I gauge with considerable accuracy the frankness or lack thereof, the veracity or lack thereof, of witnesses; and, based upon that experience over this long period in which I have observed the demeanor of hundreds or thousands of witnesses, from that wealth of experience, I tell you that the witness so and so is unworthy of belief". The jury must reach the conclusion that the judge is either a liar or a jackass, or both, in order to disregard the effect of those comments. That result is not to be expected. What a terrible thing it would be if we were to assume that the jury held the judge in such contempt. Therefore, it simply means that in any case where the judge desires to convict the defendant, he would make his comments accordingly. In a case where he desires him to be acquitted, his comments would run favorable to that conclusion. Then, why have a jury? Why discommode citizens? Why take up time? Just abolish the jury in criminal cases. Hold that they are unnecessary where the liberty of the citizen is involved but, of course, they are indispensable where a controversy over a few dollars is waging. Personally, I would much rather try a case before a judge alone, than before a judge with a jury if the judge intended to comment on the guilt or innocence of the defendant or credibility of witnesses. He might ease his conscience in a case where the jury decided in favor of guilt, even though the testimony was not very persuasive, because after all he did not decide. So, he would tell himself. But if he had to bear the responsibility for the determination reached, he would pause, despite himself, to make sure that the defendant was receiving the benefit of a fair trial. I say it is to the glory and the honor of the federal judges, where they have this privilege, that they so rarely exercise it. In my opinion, no good or strong judge would exercise the privilege except in cases of clear guilt, where no wrong could be done to the defendant, and the possibility of disagreement by the jury would be obviated as the result of the comments. We must bear in mind, unfortunately,
that not all judges are good and strong judges. If they were, the discussion
would be unimportant.

The recommendation should be opposed to this extra grant of power where
it is not already possessed, and the power should be taken away where it now
exists.

XI. Admissibility of Prior Convictions on the Prosecution's Direct Case

The Committee disapproves the proposal. It is clear that the Committee's
judgment is wisely exercised. The fact that a man has committed an offense in
no way tends to prove that he has committed the one with which he is now
charged. With a jury it has much stronger probative force than it should have.
It should be excluded from the prosecution's case because it has no material
bearing upon the question in issue. It is an attempt to divert the jury from pass-
ing upon the question before it. On the other hand, if the privilege of self-
incrimination and comment on the fact that the defendant has not taken the stand
are both removed, a very fair result follows; if the defendant determines to go
upon the stand, he is then tendering the issue of his credibility. Upon that issue,
it is perfectly fair that prior criminal conduct on his part should be weighed by
the jury in determining what credit they should give his evidence. That rule
applies to every witness. There should be no different rule in favor of or
against a defendant than there is in favor of or against any witness. All persons
who take the stand should be treated alike. If, on the other hand, the defendant
does not take the stand, the right to comment on that fact will more than make up
for the failure to prove prior conviction. But before the defendant has interposed
his defense or taken the stand, before he asks the jury to believe his spoken word,
the prior conviction has no bearing upon the commission of the instant crime.
The proposal should be rejected.

XII. Abolition of Mandatory Jury Exemptions

The Committee has recommended a very wise decision upon this proposal.
Its argument is perfect. Nothing should be taken from it and nothing can be
added to it. The proposal in the form recommended by it should be adopted.¹

XIII. Notice of Defendant's Intent to Offer a Defense of Alibi or Insanity

The Committee has approved the proposal, and shows that it has considered
every reason for it and which might be suggested against it. Every consideration
of justice recommends it.

XIV. Impeachment by a Party of a Witness Called on His Behalf

The Committee approved the proposal. It points out that some objection to
it might, in rare instances, exist but it makes very clear that the interest of justice
requires its approval. The reasons assigned by the Committee are most per-
suasive. The objections to it are not entitled to much consideration. The proposal
should be adopted.

XV. Admissibility of Evidence of a Previous Identification

The proposal is approved by the Committee. I regret to say that I cannot
agree with the Committee's reasoning. Its suggestion is that if a witness who
has once identified an individual pretends a sudden loss of memory or cannot, at
the instant trial, identify the accused because of a change of appearance, then it
should be permitted to be shown that on a previous occasion he did identify the

¹. The Committee recommended adoption of the proposal abolishing mandatory jury ex-
ceptions other than those granted to physicians and lawyers. With the exception of these
two classes, it was recommended that exemptions be left to the court's discretion.
defendant, and that should be shown merely by witnesses who know nothing about the identity of the defendant but simply say that Jones did, on a prior occasion, identify him. If Jones lied the first time and does not want to repeat his lie the second time, then Smith should be called to say Jones identified the defendant, and the jury is not informed as to why Jones does not identify him now. This reasoning does not require further analysis. The practice would be vicious. The second jury would learn that the identification was acceptable to a former jury upon a different trial. The verdict of the prior jury would be substituted for that of the second. One cannot enumerate all the reasons why such a rule should not be adopted. There are instances where testimony given at a prior trial, upon the same issue, can be read into evidence—if the witness is outside the jurisdiction and cannot be reached, if the witness died and opportunity was afforded at the first trial for complete cross-examination. But where the witness is alive and available, not to require the witness to be produced and subjected to cross-examination, but to permit somebody else who happened to be in the courtroom to go on the stand and venture his recollection that on a prior occasion somebody identified this defendant, opens the door for testimony of the most dangerous character and it is opposed to every rule of evidence that has heretofore been recognized as sound. Why every innovation against the defendant? Why does not somebody suggest that the defendant should be permitted to offer hearsay testimony in his behalf? The answer suggests itself—let us have all the prosecution possible and deprive the defendant of his liberty by any means that can be conceived. This may seem severe stricture but I think there should be a stronger tendency to protect the liberty of the citizen than to destroy it.

XVI. Perjury

The use of the word "perjury" as a reform proposal or recommendation is not very suggestive or instructive. We learn from the discussion of the recommendation that it implies a proposal that a crime denominated "false swearing" should be created and that upon the trial the prosecution should not be called upon to prove that the false swearing was material to the issue which was being contested.

Ordinarily, false swearing which is not upon a relevant matter is like lying. Many doubt that the oath adds any sanctity to the utterance of the witness. The belief is entertained by such that a person who would falsify, not being under oath, would equally falsify being under oath. I have often believed both ways. It is the regrettable fact that perjury is very frequently committed. It is doubtless wrong to swear falsely at any place or under any circumstances, but it is particularly so in a court of justice. There is no very strong reason why that should not be condemned even to the extent of making it a crime. It would doubtless minimize the amount of perjury committed, and that alone should be sufficient reason for the approval of the recommendation.

XVII. "Trial by Newspaper": Power to Punish for Contempt

The Committee failed to state that this proposal is approved. Every reason urges its approval and adoption. The power to punish should be given to every court and its exercise should be vigorous in every instance until this jeopardy to fair trial is removed. The newspapers abound in criticism against lawyers because examinations of proposed jurors are lengthy in this country, while they are brief in others. The fact is that the newspapers in this country do not want a defendant tried. The newspapers claim the right to determine the case without a trial. They do, to their own satisfaction, determine every case that attracts publicity. In many instances they formulate, and in many they try to form, the
opinion of the jury. And if perchance the jury does not pronounce the verdict that they have insisted on, they shriek their abuse at the jurors. The newspapers determined Samuel Insull's guilt. The jury sat, listened and decided. The presiding judge pronounced no criticism upon their conduct. The newspapers ridiculed and abused the men who decided as their conscience dictated, and are at this moment demanding a further trial. The Hauptmann case which is now being tried has been repeatedly decided by the newspapers. The juror in that case who has not been made to believe that one cannot be righteous without voting for conviction must be indeed a rare individual. Despite the fact that for months the defendant has been hounded by the press, that same press complains that it is going to take days to select the jury when only the press is responsible for the condition that will make that necessary. In no other country on the globe would such conduct be permitted. To know the extent to which that is carried, particularly by the newspapers published in New York City, one need only to select any case which attracted great publicity to see the outrageous misconduct of which some newspapers were guilty. Nothing is done about it. Most judges seem to be frightened and overawed by the so-called power of the press. One instance will illustrate what some newspapers stand ready to do. In the case of the People v. Charles H. Hyde, a lawyer of high repute, a member of one of the best and most prominent law firms in the City of New York, appointed to the office of City Chamberlain, was indicted. It was maintained by his counsel that the indictment did not state a crime and that the facts set forth therein could, under no circumstances, constitute a crime. Decision upon that question was reserved throughout the trial. There was no proof of the commission of any crime at the trial; but an atmosphere had been created by the press which made positive the conviction which was pronounced. On appeal, the indictment was dismissed first, because it stated no crime, and second, because no evidence of the commission of any crime was adduced. The fact that this man's reputation throughout the country was destroyed, of course means nothing. But the iniquity of the freedom exercised by the press in publishing alleged proceedings before they take place is best exemplified by what occurred in that particular case. The District Attorney supplied the newspapers with a copy of his opening address to the jury. He, however, misjudged the time when he was going to deliver it. Court adjourned on the day that this speech was going to be made before the hour for the making of the speech arrived. Nothing daunted, one of the papers, published in the evening, saw fit not merely to publish the speech but to describe how the defendant squirmed before the jury and paled, and obviously gave evidence of his guilt when he heard the bitter arraignment of the prosecutor. That was called to the attention of the learned trial judge. He conceded that it should not have occurred, but asked what could he do. Nothing was done. These same newspapers scream every day their denunciation upon New York lawyers and their commendations of practitioners in London, the former for being so prolix, the latter for being so brief in procuring a jury. Indeed, recently an article appeared in which English judges were quoted as saying that challenges are most rare. These same papers might investigate what English judges do to any newspaper editor or publisher who dares to comment upon the effect of evidence already given before a verdict is pronounced, let alone commenting upon the obvious effect of a speech upon the jury when no such speech had been delivered. No English judge would have said, it should not have happened, but what can one do. The newspaper publisher and editor responsible would have been before the judge on the following morning and would have been in jail that same afternoon. That is why the power to punish for contempt should be given. Trial by newspaper must be abolished. A cowardly bar produces an equally cowardly bench.
The bar can procure such legislation, despite the opposition of all the press, if it makes a concerted effort, and it is to be hoped that if statute directed the punishment, that courts would exercise the power. I would recommend that it be made a crime to publish proposed testimony before the trial to indicate the accused's guilt or innocence, to publish comments on the testimony before a verdict is given, and severe penalty should be imposed for the commission of the crime.

XVIII. Disposition of Cases by the Prosecuting Attorney: the Nolle Prosequi and the Bargained for Plea of Guilty to a Lesser Offense

The Committee expresses great distrust of prosecutors. The belief is intimated that they accept pleas of lesser crimes because of carelessness or corruption. It is a terrible thing to assume that it is generally true. Nevertheless, the Committee approves the proposal as tending to a desirable end. If prosecutors are generally negligent or corrupt, either or both, the adoption of the proposal would not, in my opinion, tend to a desirable end. I prefer the adoption of the suggestion of the Committee which reads:

"More effective in this respect would be the exercise of a vigorous supervision by the courts or by some administrative agency, created for that purpose."

Indeed, it should be recommended and adopted that neither a plea to a lesser crime nor a nolle prosequi should be accepted or made other than by order of the judge presiding in the particular part to which the recommendation of the District Attorney is addressed.

XIX. The Administration of Bail

The recommendation of the Committee is well reasoned, concisely put and should be adopted. Unfortunately, a few prosecutors and some judges feel that the imposition of high bail is an indication on the part of the court that the defendant is guilty, which will help the prosecution. If that is true, all the more should it be avoided. As the Committee suggests, the question of bail should be determined not by the particular type of crime but a consideration of the character of the defendant, his past record, financial standing, etc. I do not so much care about the financial standing as I do the consideration of the character of the defendant, his past record, his surroundings. The likelihood of his absenting himself from the trial may be somewhat determined by his circumstances. Is he in a position readily to sever himself from his present relations and flee to foreign parts? But, as the Committee says, it should be left in each case to the court's discretion.

XX. The Enactment of a Federal Statute Regulating the Importation of Firearms

XXI. The Establishment of a Federal Crime Bureau to Provide Uniform Statistics for the Aid of State Legislatures

XXII. The Requirement That All Hospitals, Physicians, etc., Report Immediately Cases of Injuries Due to Dangerous Weapons

Any measure calculated to aid the detection or prevention of the commission of crime should be enacted. These three provisions tend in that direction. The Committee has not considered them in the same manner that it did the nineteen prior proposals. It indicates their importance in any well balanced comprehensive scheme of procedural revision in the criminal law. I take it that the Committee means that it favors the enactment of a federal statute, the creation of a federal crime records bureau and the requirement with respect to hospitals, physicians, etc. It has not considered the form. The proposals should be adopted.

Max D. Steuer.†

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BOOK REVIEWS


A reviewer’s conclusions about a book can no more escape a touch of color from the reviewer himself than can a judgment about anything else. This will be true of the reviewer’s evaluation of both the author’s workmanship and of his ideas; to some extent even in a field like that of negotiable instruments, obviously far more in the less tightly bound considerations of constitutional theory and constitutional law. It seems to me that this little book is a highly admirable piece of work. It is a credit to its distinguished author and to American scholarship. It seems to be well written, careful in analysis, convincing in its conclusions. If there were a book of the year prize for legal writing and I had a vote in its award, I should cast mine for Mr. Corwin as the 1934 candidate. On the other hand, it is entirely possible that one who looks at the Constitution, national policy and public welfare from a widely different point of view from that of the author may find Mr. Corwin’s discussion heretical and the conclusions intolerable. If he does so find them, he will not be moved from his position by shouts of acclaim for this book from the opposite camp. But such a reader will be compelled to go through some intellectual, as well as emotional, uneasiness. While the sum total of Mr. Corwin’s pages is not large—indeed the whole book would fit in an overcoat pocket—there is no wasted space or wasted words. It is closely reasoned exposition, based upon a thorough knowledge both of case law and the literature of constitutional theory and history. The language is clear, the ideas are clear, and his conclusions are not to be shaken by unsupported denial of their validity.

The Twilight of the Supreme Court contains the 1934 Storrs Lectures, delivered by Mr. Corwin at the Yale Law School. The title is alluring but misleading. The author comes neither to praise nor to bury the Court, but to trace and analyze our constitutional theory. That the Supreme Court is in twilight need not be the conclusion; this very time may be the dawn of a golden age.

There are four divisions to the treatment. The first is dual federalism versus nationalism; the second, property right versus legislative power; third, the government of laws, not man, theory; finally, the spending power. The outstanding impression I got from the discussion in the first three divisions was that upon most of the questions which can arise thereunder the Court is still free to decide as its present judgment dictates. Then, in the introduction, which I read later, Mr. Corwin puts the point tersely and clearly: “Its own freedom of decision is the outstanding product of the Court’s exercise of the power of judicial review.” The most exciting discussion is that on the spending power, where the constitutional theory governing the use of the taxpayer’s money under the general welfare clause has had a minimum of judicial restraint. One of the author’s observations thereon has added interest because of legislative developments at this very time. The vital question here, he says, is not judicial review, “but that of the proper relationship of the executive and the legislature in this field of power.” All this is developed with sufficient fullness to establish the points, never to the extent of over-elaboration or repetitions.

Professor Corwin’s style makes good reading; not like a story in the Post, but good straight-forward exposition which one can follow without difficulty if he keeps his wits about him. The book is well and attractively made. Its cost, in present currency, is two and one-half dollars. It is a recommended investment for lawyer or layman who seeks to understand what is happening to the Constitution in these stirring days.

Herbert F. Goodrich.†

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In the science and practice of business, a great many of the functions are legal, and this is the reason and justification for including in the curriculum of a business school the course in Business Law. The Business Law course is in reality not a course in law at all, any more than a course in Production Management is of necessity a course in Engineering. It is a course in business in which the activities of business are examined in relation to the rules of law which control them.

The relations between law and business are obvious, although there is no relation between law as taught in a law school and the manner in which it is taught in a business school. Lawyers consider persons and things in the light of abstract rights and duties, and ordinarily with the idea of restoring to a person something of which he has been deprived, or a damage in substitution for a performance of some promised advantage. This is law in judgment and as remedy. It is after the fact.

In Business Law, or the law as it relates to business, the man of commerce has little interest in damages, in judgments, or in precise legal rights. He is essentially interested in having his business return him a profit. He has little need of lawyers, but he has a great need for the law. The principles of buying and selling of goods are in great measure a matter of promised advantages and payment. In fact, the whole business order rests on contract. Problems of credit, commercial paper, security of transactions are all matters of law—law in action or law in business practice.

It was Professor Nathan Isaacs, who in 1921 first clearly announced the foundation postulates of law in business in his book, *The Law in Business Problems*. This book attracted wide attention and provoked great discussion. Earlier, law was always examined methodically and under sections in a digest. It came as a great surprise, particularly to lawyers, to find this book sectionalized into such groupings as “Engaging in Business,” “Legal Status of Business,” “Limitations on Trading,” “Contracts in Relation to Buying and Selling, and Operation in Business,” “Contract in Relation to Creditor and Debtor,” “Contract in Protecting and Facilitating Credit,” and “Laws of Business Organization.”

In this early book, Professor Isaacs placed emphasis on the function of the law in the business transaction. He made a pattern of the processes of business and indicated the place and function of law in it.

This past year he has offered a revision of the earlier work. In basic theory it is the same book—the function of law in business—but in this later volume there is a shift in emphasis. The original chapter on Engaging in Business is now *The Law of the Market*. In it is a most complete analysis of the forces and factors—economic, social, and legal—that find expression in the market place.

In the chapter on *The Formation of Contracts*, Professor Isaacs examines the greatest commercial device—the contract. In two very penetrating sections, he shows the contract in legal principle, after which he traces it through all the possibilities that may arise in business. The most valuable point in these two sections is his clear demonstration that the substance and the operation of the contract is a matter entirely within the province of the business.

One of the most valuable things in the book is the discussion of the relation of business to government. Dr. Isaacs considers legislation as a source of the law and also the problems of unfair competition and codes to regulate trading. This phase of the work should have a strong appeal to the active man of business as well as to the student, both of whom are wondering as to the result of the “ship of state” overhauling the “privateers”.
In the chapter on Credit, the most significant advances have been made. Of all the subjects in modern business, credit is the least understood of any of the practices, and with the present limitations that are imposed on banks, some of the other possibilities this work suggests as to raising funds will prove helpful and most valuable. Few merchants realize to the full all the possibilities of credit.

In conclusion, reviewing a book is not a difficult task. All that is necessary is to go through the text making such comments as please the writer. But to attempt in a few comments to account for all the thought and experience that has gone into this book surpasses the possibility of a few pages in a law review. Dr. Isaacs has done a great deal more than write another book. He has given the man of active affairs, and the student alike, a carefully worked out study of a great subject. It has been done intelligently and brilliantly.

It is a good Scripture and possibly good reviewing to take the position “the first shall be last”. After having gone through the entire book and noticing at all points the fine scholarship and effort, the reviewer was continually drawn back to the introduction. It is not a bow for approval. It is a narrative—The Purchase of an Automobile. In this opening, he explores all the relations and factors—economic and legal—that enter into the transaction. It is a fitting introduction that genuinely introduces.

The entire work is sound, well done, and will be a substantial addition to Dr. Isaacs's already well established reputation.

E. S. Wolaver.†


This is a 1934 Hornbook. However, it is not an altogether new treatise on Criminal Law, but is, in the author's own words, “based on Mikell's Edition of Clark's Criminal Law”. That was the third edition of Clark, and so this may properly be considered a revision of Clark, or the fourth edition. Perhaps it is just as well that the dynasty is no longer continued, for Dean Miller's book is a great improvement both in style and content, and takes its place among the better Hornbooks.

In many instances paragraphs from Clark are taken over bodily, but generally there are additions and omissions, and very often the language is wholly new and decidedly more satisfactory. The black letter approach is retained, but in greatly modified form, with the resultant elimination of a great deal of needless and deadly repetition. The main purpose of the book is, of course, to present concisely the substantive law of crimes as expounded in the cases, but the author fortunately does not hesitate to relieve the monotony by venturing to express his own ideas with reference to the desirability of certain rules and proposed changes therein, “particularly with reference to new concepts arising out of new economic and social conditions.”

Particularizing some of the representative improvements, we note that, whereas under Misconduct in Office Clark has six paragraphs in black print, loosely arranged, followed by a discussion of all six in two paragraphs of regular text, without division or caption of any kind, Miller's Misconduct in or Regarding Public Office has one brief black-letter paragraph which serves as an introduction to the six following paragraphs of regular text matter, each of which is

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1. P. 450.
2. P. 475.
properly captioned, as (a) Malfeasance, (b) Extortion, (c) Oppression, (d) Fraud and Breach of Trust, (e) Nonfeasance, (f) Exceptions.

Another striking instance is Chapter 19, Offenses Against the Existence of Government. Here the treatment of Treason, Sedition, etc., is far more comprehensive and more satisfactory and contains several times as many citations in the notes. Also, the anomalous inclusion of Forestalling, Regrating, and Engrossing by Clark in this chapter was avoided by Miller, who logically places them with Monopolies, Restraints of Trade, etc.

It is interesting also to compare their treatment of State v. Scates. Speaking of a case where \( A \) mortally wounds \( C \), and then, acting independently, \( B \) also mortally wounds \( C \), accelerating his death, Clark says: "In such case the person who struck the first blow, though it would have resulted in death, is not liable for the homicide." He cites State v. Scates as authority without comment, following it up with an excerpt from People v. Lewis, contra, but expresses no opinion himself. Miller, on the other hand, after pointing out the uncertainty in the cases as to whether or not \( A \) is on such facts guilty of the homicide, and the theory of the cases holding that he is not, quotes the following from State v. Scates: "If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice." The author then adds: "Of course the absurdity is that the Judge can speak of a 'mortal wound' previously inflicted and in the same breath of another person killing the deceased 'by an independent act'. If, in fact, the first wound was a mortal wound, then it would seem that it must have been contributing to the death at the time of its occurrence. There is no difficulty or absurdity involved in finding that the acts of both persons contributed to the death, and that both are guilty thereof, even though they were not acting in concert. The better reasoned cases so hold." He then cites, inter alia, People v. Lewis in support of his position. This is not only a vast improvement on Clark's treatment, but so far as this reviewer recalls, it is the best treatment of this interesting case to be found in any book of similar scope.

The most noteworthy new features of Dean Miller's book are his fifteen-page introductory chapter on The Scope of Criminal Law, and Chapter Six, The Criminal Act. The preface says: "An introductory chapter has been used to indicate the wide scope of the criminal law in its larger aspects and an effort has been made to suggest a variety of approaches to the administration of criminal justice which may be used for its improvement." In addition to general statements therein concerning criminal law and procedure this chapter introduces such matters as Probation, Parole, Pardon, Penology, Juvenile Courts, Crime Prevention, etc., the text being richly garnished with notes containing citations of key-number sections in the Decennial Digests, law review articles, books, surveys, etc. The chapter on The Criminal Act contains five sections: 22—Generally; 23—Causation and Criminal Law; 24—Sole Cause—Contributing Cause; 25—Intervening Acts; 26—Unintended Consequences; 27—The Corpus Delicti.

As suggested above, there is much reorganization and rearrangement throughout the book, with a great deal of new material added in many chapters. Perhaps the most notable instance of re-grouping is the gathering and consolidating into
one chapter of all the materials on Justification, scattered by Clark through several different chapters. It includes sections 63—Generally; 64—Acts in Furtherance of Public Justice; 65—Acts Done in Furtherance of Domestic Authority; 66—Justifiable and Excusable Self-Defense; 67—The Nature of Self-Defense; 68—Defense of Others; 69—Defense of Property; 70—Justification—Miscellaneous; 71—Alibi. An instance of added material is the four-page treatment of Criminal Contempts at the end of Chapter 17, Offenses Against Public Justice and Authority.

There are 544 pages of Miller's text as against 503 in Clark's, and there would seem to be about 15 or 20 per cent. more material on a page in Miller's book. Also, the new book cites some six thousand cases, an increase of about 50 per cent. over the old. The notes are greatly improved, containing, besides the vastly larger number of case citations (one might wish the dates of the cases were included), references to other materials of many kinds. The author concludes his preface with this statement: "In view of the fact that it is designed in part for use in law schools, generous use has been made, particularly by way of citation, of material from the law reviews and journals." Judges and lawyers may not relish the implication! The index is much fuller and more useful than its predecessor, but, like most indexes, has faults of omission. For instance, the so-called third degree methods of the police are discussed briefly but interestingly, but one would at least have great difficulty in locating this matter by using the index.

Remembering that this is a Hornbook, whose primary purpose is to present a concise statement of the general principles of Criminal Law, the reviewer thinks that Dean Miller has given us a very excellent and useful book, and would recommend it heartily to students for use in connection with their casebooks. Also, it should prove a very good medium of instruction in schools where text-books are used as the basis of class discussion. Lawyers and judges too should find it refreshing and helpful, especially in view of the extensive and varied citations and references in the notes.

Paul E. Bryan.


The book is divided into two parts, the first of which consists of 284 pages. More than a hundred of these deal with the common law forms of action. The remainder of this portion treats the steps in pleading and the rules relating thereto, with brief chapters on attachment and garnishment, and service and quashing of process. Part two has 164 pages devoted to specimens of declarations, pleas, demurrers, motions, etc., adopted from precedents in use in the District of Columbia, Maryland and Virginia. There are separate indices for the two divisions of the work.

In the preface the author pays tribute to Stephen but expresses the hope that he can offer to American law students a less difficult text than the learned Serjeant produced over a hundred years ago for use at Oxford. By the use of simple language and blackletter paragraph guides, Mr. O'Donnell presents a volume which is easier to read than that of his English predecessor. While he has included considerable historical explanatory matter, he has certainly lived up to his determination to omit much of the earlier background material found in Stephen's work. This is a long way from saying that the result represents any

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11. § 164.
notable achievement. We have a right to expect that a text written today would be greatly superior to Stephen's, not only because of the great advance of legal-historical knowledge in the last century, but also on account of the more honest and undogmatic modern approach to legal propositions.

One looks at the book under review in vain for signs of improvement in either respect. Mr. O'Donnell delights in quoting Maitland to the effect that the forms of action are still important, though they may have been abolished. However, in the main he neglects and, by his adherence to old-fashioned views, contradicts the discoveries of the great master of English legal history as well as the contributions of Street, Ames, Woodbine, Plucknett and others. For example, we find the following astounding statement at page 10: "At that time [1258] it was not possible to obtain original writs except for the following actions: Account, Covenant, Debt, Detinue, Trespass and Replevin." Again, the explanation of trespass as well as of the other damage actions suffers a great deal from want of attention to Professor Woodbine's writings on the subject. To mention but one more instance, we find the traditional theory of the origin of case from chapter 24 of the Statute of Westminster II (pp. 11, 12, 64, 66, 89) in spite of the showing by Professor Plucknett of the unsoundness of the old doctrine. Omission of historical details may be permissible or even commendable but the offering of discredited explanations, when the truth is readily available, seems unfortunate indeed.

Other shortcomings of the book are the results of superficial or faulty analysis of the materials considered. The statement (pp. 4, 5) that the *si te fecerit securum* form of original writ was used in tort actions and the *præcipe* type in actions *ex contractu* is without excuse. Anyone who has examined the writs would see at a glance that the *præcipe* form was used in the older actions, while the *si te fecerit securum* style was confined to trespass and its offshoots. No practical reconciliation is attempted of the doctrines that time must be pleaded and yet does not have to be proved as alleged (pp. 178-179). The distinction between conclusions of law and facts (p. 199) could have been clarified by adoption of Professor Cook's explanation. The distinction between pleas by way of excuse and by way of justification is made (p. 248), but there is no discussion of any practical reason for the differentiation. The doctrine that pleas *pus darreign continuance* constitute a waiver of other defenses is stated (pp. 253-254), but the basis of the rule, *vis.*, to facilitate the adjustment of costs, is not mentioned, and of course it is not pointed out that this rule is not applicable to present American practices regarding costs. The foregoing are only a few examples of many similar defects occurring throughout the work.

For a modern student text, emphasis is frequently misplaced. More space and prominence are given to new assignment (pp. 263-265) than to amendments (pp. 212-214), though the situations formerly calling for the former can and probably would be handled now by the much broader device of amendment. Much attention is given to the special traverse (pp. 240-246), which even Stephen called a relic in comparative disuse. Contrasting with this and immediately fol-

1. Cf. 2 Pollock & Maitland, History of English Law (1895) 562, 563, declaring that there were thirty or forty different forms of action and perhaps hundreds if minor variations are counted.
5. Cook, Statements of Fact in Pleading Under the Codes (1921) 21 Col. L. Rev. 416.
lowing it, is the extremely brief treatment of plural pleas (pp. 246-248), with no mention of the necessity of consistency thereof. In connection with trespass, *wergeld* (p. 53) and the criminal aspects of the action (p. 53) are mentioned, but not a single word is said concerning the necessity of a re-entry before recovery for injuries to realty while in the adverse possession of a defendant. This is a subject of present day importance even in a code state.\(^8\)

Finally, little attention is given to the growth of the law and to its changing concepts. Common words such as pleading, appearance, and debt have had different meanings at different times. Mr. O'Donnell has often failed to take this into account, but nowhere more than in his treatment of the forms of action. In the main, he conveys the idea that the forms of actions are unchanged verities which have come down from time of Moses (see p. 227 note), Anglo-Saxon antiquity, the Conquest, or at the latest the date of the Statute of Westminster II. Nothing is farther from the truth. Our history shows clearly the transition from many forms of action to a comparative few with the survivors performing the functions of the abandoned ones and with a constantly increasing overlapping between those remaining in common use. This tendency has continued in America both with and without the aid of legislation. In a sense, the code abolishment of the distinction between the forms of action was simply an abrupt change and different only in degree from what the courts and the profession had been doing gradually for centuries. In any Anglo-American system of procedure the real and lasting importance of the forms of action is that they give us our substantive law theories. Even when their use is preserved we do not need to go to the extent of adhering to the "theory of the case" doctrine, which is so strongly insisted upon by the author, and which he does not distinguish from the variance difficulty or from the shift from one form of action to another.\(^9\)

Part II is definitely superior to the text material. The individual forms are modern and yet are cast in the molds of the forms of action. While they are taken from three middle Atlantic jurisdictions they could be used—with a little modification—even in code jurisdictions. The collection is a well-rounded one except that there is no declaration in trover. This section could be made more valuable by specific citations from the text to particular forms rather than by the general cross-references which are found at the bottom of each appropriate page of the text.

The printing and binding of the book are excellent. There are a few typographical errors, the most serious of which are a persistent misspelling of *précipce* and reference to non-existent pages at pages 280 and 283. Sparkle is added by occasional passages from Warren's *Ten Thousand a Year*. The work is lightly documented. There is very little reference to text books and none at all to legal periodicals. The footnotes consist very largely of quotations from, or summaries of, about 250 opinions found in current case books on the subject. While the author's statements are often accurate and at times particularly lucid, the reviewer questions many other passages than those mentioned above. Perhaps some of these objections might turn out to be groundless if citations had been given for the various statements. At any rate this much can be said in alleviation of this rather unfavorable review. The shortcomings of the work, whether historical, analytical or of emphasis, are usually the traditional ones. In some jurisdictions this book, inadequate though it seems, might be better material for bar examination preparation than one closer to the heart's desire.

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BOOKS RECEIVED


