BOOK REVIEWS

Internationales Privatrecht (Grenzrecht). By Ernst Frankenstein. Berlin-Grunewald, Dr. Walther Rothschild, 1926. Vol I, pp. xxviii, 616.

Since Bar's famous treatise, which appeared in 1889, no important work dealing with the positive law of Germany on the subject of the Conflict of Laws has been written. An Austrian work, first published in 1921, and now in its fourth edition—Walker's *Internationales Privatrecht,* giving both the Austrian and German law—represents a work of more modest dimensions, which does not deal exhaustively with the subject. Of the more recent theoretical works published in Germany, Zitelmann's *Internationales Privatrecht* was the most important, but this learned treatise was based upon postulates quite out of harmony with the traditional law.

The present work is an even more ambitious undertaking than that of Zitelmann, for it proposes not only to re-examine the fundamentals of the Conflict of Laws with a view of placing the subject upon a more rational basis, but to apply that theory in detail in the solution of the manifold problems raised by the provisions of the German Civil Code. In the first volume the author has developed his theory and its application to the general rules contained in the first book of the Civil Code. It is to be followed by other volumes dealing with the remaining books.

Frankenstein agrees with Zitelmann that each person is controlled by his national law and each thing by the law of its situs. These are his two "primary points of contact." The weakness of Zitelmann's system, according to Frankenstein, rests upon the fact that he seeks to derive it from a theoretical postulate, which has nothing to do with the world of reality. Instead of deducing the rules of the Conflict of Laws from International Law, as Zitelmann does, Frankenstein derives the two cardinal propositions of his system from what he conceives to be the very nature of law and legislation. All law *(Recht),* according to him, rests upon the conviction of a given people of what is right *(Rechtsüberzeugung).* This "raw material" receives binding force through legislation. "Just as law is not something arbitrary, but the expression of man's will to live, resulting from his very nature, so the connection between an individual and his national law is," according to Frankenstein, "not based on mere theory, but is a fact derived from experience, and is new only so far as it is given a psychological justification." To Frankenstein, therefore, the subjection of a person to his national law follows from the nature of things, from psychological necessity.

With equal necessity, it follows, in the estimation of Frankenstein, that things are subject to the law of the state where they are situated.

If the national law, constituting the "primary point of contact" with respect to all legal relations not directly affecting property, subjects a particular question by its positive law to the law of domicil, to the law of the place where a contract is made or where the contract is to be performed, to the law of the forum, or to some other law, which references by the national law Frankenstein calls "secondary points of contact," such direction should be followed everywhere. Frankenstein's fundamental theory thus disposes of the vexed problem of renvoi. In the same simple manner it solves the troublesome question of the "qualification of legal transactions," for the law constituting the "primary point of contact" will in the nature of things determine what is meant by domicil, by capacity, by formality, by the law of the place of contracting where the contract is made by correspondence, etc.

With the disappearance of these formidable problems, which had baffled the jurists of the different countries, but which, according to Frankenstein, have arisen only from a misconception of the fundamental principles underlying the subject, it would seem that the solution of the other problems of the Conflict of Laws should be an easy task. But, though the point of departure is easy, the difficulties multiply tremendously further on in connection with the discussion of public policy. Not only do we meet there all the troublesome questions with which we are familiar and which, according to Frankenstein's terminology, fall under "relative" public policy, but, in addition, there is conjured up what he calls "absolute" public policy, somewhat after the example of the followers of the modern Italian school. This absolute public policy, we learn, may either be unlimited or limited, and if limited, it may be limited from a territorial, personal, or mixed point of view. By the application of the rules so developed the power of the national law of a party to furnish a solution to a given problem is greatly modified, the ultimate result being frequently identical with the one reached in a direct manner by the courts or authors having a different mode of approach. Let us take, by way of illustration, the subject of torts. In determining whether a tort has been committed, the positive law looks generally to the rules of the state where the act in question was done. If A, a citizen of state X, does an act in state Y, the question whether it is wrongful will be determined in state Y with reference to the law of state Y. Frankenstein also would apply the law of state Y. According to Frankenstein's fundamental thesis, state X should answer the question either directly or by reference to the law of some other state. In this instance, however, he does not follow this mode of reasoning, because the act in question is deemed to fall within the absolute public policy of state Y, limited from a territorial point of view, like criminal laws and police regulations, which bind everybody within the state. If the question under the above facts should be presented to the courts of a state other than the one in which the act was done, and whose absolute policy is, therefore, not involved, Frankenstein would determine the case in accordance with his general theory. In other words, he would say that the law having primary jurisdiction in the case is the national law of the person in question, and if that law would determine the character of the act as rightful or wrongful with reference to the law of some other state, the latter should be applied.

From what has been stated, it will be apparent that students of Anglo-American law will be unable to derive any benefit from a work of the character under consideration. Deductive reasoning from fundamental major premises without due regard to the social policies involved in a particular class of cases is apt to lead to erroneous conclusions. This is especially so if the fundamental notions are totally at variance with the traditional point of view of a given legal system.

Many objections have been, and can be raised against Frankenstein's system even from an *a priori* point of view. If the national law of a party has primary jurisdiction in all cases not directly affecting property, what is to happen if the parties have different nationalities? If the law of the state in which the property is situated has primary jurisdiction over the legal relations directly affecting the property by reason of the state's physical control over the res, why should not the state where a person is, because of its physical power over such person, have jurisdiction over him? A lease is regarded in some countries as creating a property right, and in others as creating merely personal relations. According to Frankenstein, the law of the situs of the land should be regarded as having primary jurisdiction. Here we have a departure from the fundamental

thesis that the primary bases of jurisdiction, upon which Frankenstein's structure of the Conflict of Laws is erected, are co-ordinate.

Frankenstein's classification of all legal relations into two categories—those relating to the person, and those relating to things—reminds one of the efforts of the statutists, who sought to classify all laws as "personal" or real." The impossibility of working out a solution of the problem of the Conflict of Laws in that manner led first to the invention of "mixed" statutes, not exclusively personal, nor exclusively real, according to which a contract, for example, was governed by the law of the place where it was entered into, and finally to the abandonment of the entire statutory theory. The history of the statutory school of jurists should have been a warning to Frankenstein that his own fundamental theory rested upon an equally unstable foundation.

The remarkable thing about the work under discussion is that it should have been written by a man engaged in active practice. The author is thoroughly acquainted with the positive law, and theoretical writers of the different countries. With this technical equipment Frankenstein combines a philosophic bent of mind, and an extraordinary power of analysis and logical deduction. The treatise is written in an easy style, and is stimulating throughout. It is a source of great regret from the standpoint of Anglo-American law that a person of such exceptional power should have built up a theory of the Conflict of Laws upon premises so far opposed to those of our own law that it cannot be of aid to us in the solution of our problems.

ERNEST G. LORENZEN

Arguments and Addresses of Joseph Hodges Choate. Collected and Edited by Frederick C. Hicks. With a Memorial by Elihu Root. St. Paul, West Publishing Co., 1926. pp. xv, 1189.

Mr. Frederick C. Hicks has compiled an interesting and valuable addition to legal literature in "Arguments and Addresses of Joseph H. Choate," long the acknowledged leader of the American bar. Mr. Elihu Root, his lifetime friend and successor in that honorable but unofficial position, has contributed as an introduction the admirable memorial prepared by him for the Choate memorial meeting of the Association of the Bar of the City of New York. Mr. Choate was not only a great and persuasive advocate, he was a great citizen concerned with the varied affairs of the city in which he lived, with its government, its museums and libraries and hospitals, with its clubs and societies. He found time and energy in the midst of an active practice to serve on the governing boards of many such organizations and he delighted innumerable audiences with the charm of his wit, humor and happy philosophy.

The artist who appeals to the emotions is short-lived. His art lives only during his own generation. The singer, the actor, the orator, the advocate—how can his emotional effects be transmitted? Who that had never heard Jenny Lind, or Parepa Rosa or Patti or Caruso could possibly realize the exquisite beauty of their singing voices? Who that had not seen and heard the elder Salvini could appreciate the awful horror of his death in Othello—or the witching grace of Ada Rehan or the tragic power of Charlotte Cushman as Lady Macbeth? The printed paper may reproduce the orations of Webster and Chatham and Hamilton—but not the warmth and vigor, the variety and personal charm which moved men's souls in their great orations.

So this book, in giving us many examples of the forensic products of Mr. Choate, interesting and valuable as they are, can not and does not

present the inimitable leader of our Bar as we who knew him and loved him and listened to him and watched him in action, remember him. He was essentially an advocate. His great triumphs were in the court-room. He was imperturbable, ingenious, witty, fearless. He never faltered at the hardest jolts, the most unexpected surprises. The book gives arguments of cases which show the wide range of his court work, from courts martial to yacht racing, from constitutional discussion of the income tax to defending against a female adventuress in a breach of promise case.

Mr. Choate was officially Ambassador to the government of Great Britain, but he was more than that—he was Ambassador to the people of England and exercised his charm and his brilliancy in preserving friendly relations between the people of the two countries and undertaking to explain America and its historical character to the English people. In this book are presentations of Washington, Franklin, Hamilton and Lincoln which are gems of condensed history of the men and their times, their points of view and their historical importance. This from the Lincoln address at Edinburgh: "Fiction can present no match for the romance of his life, and biography will be searched in vain for such startling vicissitudes of fortune so great, power and glory won of such humble beginnings and adverse circumstances."

The book contains memorials by him of many of his associates at the Bar. Of James C. Carter he said: "He recognized and maintained the true relation of the advocate to the courts and the community, that it is a strictly professional relation and that either side of any cause that a court may hear, the advocate may properly maintain."

He was devoted to his profession and there are presented many of his addresses to Bar Associations and to students about to be admitted. The following delivered at a Columbia Law School Commencement illustrates his attitude:

"An honorable profession which one of the greatest of its members has declared to be as ancient as magistracy, as noble as virtue, as necessary as justice. . . . It remains only for themselves by their lives and labors to determine whether they shall make of this arduous calling on which they are entering, a noble and beneficent science or a low and degrading trade, for it must be one or the other according to the spirit in which it is pursued. . . .

"The honest and unanswerable voice of history . . . exhibits a learned, a fearless and an independent bar as the pride and ornament of every civilized country. It shows that many great triumphs of statesmanship have been achieved by its disciples. That wherever great blows have been struck for the rights of man some brave lawyer has been in the thickest of the fight. That the champions of popular liberty have been recruited always from our ranks; that whenever the torrents of arbitrary power have threatened to overwhelm and engulf it, some Coke or some Erskine, scorning the wrath of kings and scouting the friendship of princes, has stood forth in its defense, and that, on the other hand, when popular fury rose in a tidal wave for the destruction of innocent victims, some Otis was found standing in the breach. In short, if the personal liberty of all under the protection of equal laws is the end of government and the object of civilization, then lawyers can safely challenge the men of other professions to show a larger share in the whole work of human progress."

There are some political speeches, many after dinner talks, and Harvard addresses, which illustrate the lighter side of his activities well worth perusal.

When the great war came, Mr. Choate realized that the independence and liberty of the United States was threatened by the German grasp for military dominion and with all his vigor and all his skill he sought to

rouse our people to a realization of the situation. He had the satisfaction of knowing that his task was accomplished. His last public appeal was at a great dinner to the British Commission to the United States and one who heard can not forget his last solemn adjuration at the close of his address—"For God's sake hurry up."

He had worked for his country and civilization to the very last and a few days later, at the age of 86, this leader of the Bar, this great advocate, this true American, passed to his reward.

JOHN PROCTOR CLARKE

Cases on the Law of Admiralty. By George de Forest Lord and George C. Sprague. St. Paul, West Publishing Co., 1926. pp. xxxi, 837.

Until the appearance of this volume, the only available collection of cases on admiralty was Professor Ames' uncompleted case book of 1901. Since then the admiralty law has been under high pressure from changing environment and from legislation. Many of the distinctive fictions which contributed to make the admiralty an independent system of law have been left without any secure basis for continued existence by the impending annihilation of that inaccessibility which first necessitated the personification of the ship as contractor or tort feasor, and by logical sequence gave to maritime liens their proprietary character and their inverted order of priority. Perhaps for this reason the modern statutory trend is toward alignment with the law of the land, as evidenced in this country by the Seamen's Act of March 4, 1915, by the Wrongful Death Act of March 30, 1920, by the Merchant Marine Act of June 5, 1920, which dealt a death blow to materialmen's liens by its ship mortgage provisions, and finally, by the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, which gives promise of consigning *Southern Pacific R. R. v. Jensen*,[1] *Knickerbocker Ice Co. v. Stewart*,[2] *and Washington v. Dawson*[3] to unwept oblivion. When we add to these innovations the increasing volume of commerce regulated by the admiralty law, the larger recognition of its place in the legal curriculum and the number and importance of our own judicial decisions since 1901, it is difficult to over-estimate the value and the timeliness of this new case book. If I were to venture a difference of opinion rather than a criticism, it would be that there are some minor omissions. There is, for example, no case on bottomry or respondentia, and but one which bears directly on the division of damages due to collision by mutual fault—a deficiency not wholly remedied by the explanatory footnote citing *The Chattahoochee*[4] but not the needed elucidation of that decision by Mr. Justice Holmes in *Erie R. R. v. Erie Transportation Co.*[5] Moreover, I had expected, in view of the international aspect of the topic and the strong influence of English authority on our own law, to find more than two English decisions printed in the text and more than one case touching the Conflict of Laws. Apart from these omissions, if they be such, the book seems admirably suited to the exposition of the admiralty law as the student is likely to encounter it in the courts. From the utilitarian point of view the book is more than a success; it is a necessity wherever the subject is taught.

JOHN K. BEACH

[1] 244 U. S. 205, 37 Sup. Ct. 524 (1917).
[2] 253 U. S. 149, 40 Sup. Ct. 438 (1920).
[3] 264 U. S. 219, 44 Sup. Ct. 302 (1924).
[4] 173 U. S. 540, 19 Sup. Ct. 491 (1899).
[5] 204 U. S. 220, 27 Sup. Ct. 246 (1907).

Cases on Code Pleading. By Charles A. Keigwin. Rochester, The Lawyers Co-operative Publishing Co., 1926. pp. xxii, 856.
Cases in Code Pleading. By Archibald H. Throckmorton. St. Paul, West Publishing Co., 1926. pp. xiii, 899.

The respective appeals of these most recent case books on Code Pleading will depend in part upon the instructor's view as to the proper character and extent of the use of text material in connection with the cases. Professor Keigwin has prepared a combination text and case book, in which most of the topics are first developed in a short but scholarly text, with apt references to and occasional quotations from the cases which conclude each chapter. It is a departure from the usual type of text book in that a liberal number of well selected cases progressively arranged are printed in full, making it possible for the student to see how the points covered in the text have arisen and how the courts go about the solution of them. There is also much teaching material in the cases not developed in the text. Aside from a short introductory chapter and some scattered footnotes there is no text matter in Professor Throckmorton's case book. It is not, however, devoid of textual references. The introduction is an extract from the first chapter of a forthcoming text on the same subject by Professor Clark, to be printed by the same publishers, and the footnotes call attention to the various chapters of this text which have thus far been published in the law reviews. Other references to legal periodicals are also made but, with a few exceptions, they present a single viewpoint. In some instances the selection of cases, and their arrangement, suggest that the compiler has in mind the development of a particular point of view. Attention is called to these features without argument as to their merits or demerits with a view to pointing out that the student is expected to use some text material in connection with the cases in preparing for class recitations, and that the difference in pedagody between Professor Keigwin and Professor Throckmorton is one only in the character and extent of the use of texts. Both realize there is a historical and critical approach which is most difficult to bring out through the cases alone, and that it would be wasteful of time to make all of the connections in a progressive development through cases. Professor Keigwin feels that procedural subjects warrant more textual treatment than those in substantive law. He points to the example set by Langdell in writing a short text on Equity Pleading to supplement his cases, a text which was avowedly prepared for the benefit of his students. He might have referred to the indifferent success of Ames in teaching Pleading with cases, and to the lack of enthusiasm of practically all teachers who have tried to teach the subject with Ames' cases as a medium. Whether the difficulty is one inherent in the subject or in the character of the case material selected, whether the student should or should not be encouraged to read a considerable amount of text material, and, if so, what kind of text material, are matters upon which teachers are apt to have varying opinions. Professor Keigwin believes in direct methods. He writes his own text, and relates his cases directly to it. The method is concise and forceful. Professor Throckmorton prefers the indirect method, leaving the text material to a companion book by another author under separate cover, and to other scattered repositories in the law library. The student will be required to use mental as well as physical energy in relating the two materials, and more is left to the imagination. The instructor may rely on the fact that many of the students will not have read the texts before the cramming for final examinations, and that his lectures will be the only substitutes some will have.

The books give internal evidence that Professor Keigwin and Professor Throckmorton belong to different schools of thought, the former believing there are many more remnants of the former systems of pleading in the codes than does the latter. They both believe the code is a blended system, but Professor Keigwin, like the analytical chemist, keeps calling the attention of the student to the parts of the blend, while Professor Throckmorton places the emphasis on the new flavor, and would have him forget the parts. The preparation of each book shows the careful thought of a scholar. Had Professor Keigwin's book been off the press when Professor Throckmorton was preparing his footnotes he would have done well to have given references to it for a different point of view on some subjects. That lack can now be supplied by the instructor.

The excellent features of Professor Throckmorton's book are many. The great variety of cases, new and old, present a wealth of teaching material, affording much latitude to the instructor. On the whole the arrangement is good and enough material on each topic is presented. In a few respects the reviewer believes the book might be improved, but realizes he may be prejudiced by some of his own hobbies, and warns the reader accordingly. The material on the theory of the complaint is scanty, is not classified, and is scattered between a chapter on the complaint in general and one on the prayer for relief, with three intervening chapters. References are given to some law review articles which likewise fail to classify the material, and which make general deductions of much the same character. The subject needs the study of more material than the cases given and the references made.

In developing the problems in joinder and severance, Professor Throckmorton is orthodox in following the order of the code sections, dealing first with the joinder of parties and then with the joinder and splitting of causes of action. The reviewer is unorthodox, and believes that the student is brought to a clearer understanding of the interrelation of the sections by not attempting to keep the problems so distinct, and by making the approach through the expanding single cause of action, seeking for the factors which lead the courts to hold that when interests take on a certain character they cease to be interests of various parties in one cause of action and become interests in different causes of action. A comparison of the different types of actions may prove illuminating. The section authorizing the split form of judgment should be moved up and considered in connection with the development. A detailed treatment of catalogued segments of such interrelated material is likely to cause the student to lose perspective. However, sufficient material to meet the wants of most instructors is present, and a shift in the arrangement will make possible any desired development.

It is impossible for the compiler of a case book to please everybody. He is to be congratulated if he succeeds in providing a working tool which a goodly number will find usable. Different types of books, with different arrangements of material, serve a useful purpose in stimulating the thought of instructors. Both Professor Keigwin and Professor Throckmorton have made valuable contributions to the working tools in a difficult field of teaching.

O. L. McCaskill

Law Office Management. By Dwight G. McCarthy. New York, Prentice-Hall, Inc., 1926. pp. 386.

Lawyers who have had occasion to consult any of the numerous and widely read Prentice-Hall publications dealing with efficiency methods in various fields of business and accounting will be interested in a book

which these publishers describe as "The first manual on 'running the law office.'"

This is a subject which to the recent law school graduate is entirely mysterious. Indeed, it is extraordinary how few even of the older practitioners have mastered or to any great extent studied this vital feature of their daily professional life. So far as the young lawyer is concerned he usually initiates his career, at least in the large cities, as a member of the staff of a long-established firm. He finds an inherited and too often archaic system of office management, representing the evolution of years. Innovations are rare, and looked at askance. Modern methods of commercial systemization somehow seem to offend the professional much as they do the artistic spirit. Lost motion and poor co-ordination often result. Yet there is something to be said, at least from the professional standpoint, against highly intensive systemization. After all, the daily work of the lawyer, hardly less than that of the priest and the poet, should preserve and foster some affiliation, if not with things spiritual, at least with things human. When the atmosphere in which that work is carried on becomes over mechanistic, something is lost in the process that is none the less valuable because imponderable. As in everything else, it is the middle of the road that is so greatly to be desired and so difficult to find.

To discuss specifically the book itself, in spite of the manifest industry and enthusiasm of the author, one is left with a feeling of discouragement. In the first chapter it is proclaimed that "simplification is, of necessity, a primary process." As the subject is developed, however, by the very multiplication of records, charts, ticklers, schedules and office machinery generally, this cardinal principle of simplification is obscured, if not wholly lost sight of. For example, the efficiency tickler and dispatch board, card index tray with its set of twelve monthly guides, two sets of day cards and its tickler memo slips, so strongly advocated in chapter four as an indispensable adjunct to the desk of every practitioner, is a device of such intricacy as to suggest that in most cases after a brief trial it would either be utterly abandoned or maintained, if at all, by the lawyer's secretary if he is fortunate enough to have one, in which case he has little need of the device. To select at random another illustration, the minute and complicated form of stenographer's daily report, of which a sample is given on page 59, is entirely too elaborate for the usually overworked stenographer. And if, indeed, the latter could spare the necessary time, the employer could ill afford to devote sufficient of his more valuable time to the requisite analysis and criticism of these daily reports, without which they would serve no useful purpose.

Chapters 25 to 30, inclusive, deal largely with book-keeping, accounting and billing. The system advised would be unnecessarily complicated in the case of a small office, and burdensome even in the case of a large office. It is difficult to take seriously the suggestion of entering under invested capital, in addition to cash, furniture, law library, etc., the cost of the lawyer's education and training and the dollar value of his personal talents, the latter being compared to the "good will" of a commercial house, all to be capitalized for the purpose of determining what his annual earnings should be.

On the other hand, much of what is said about the necessity of lawyers' time sheets, the importance and homogeneity of the filing system, telephone call slips, reception of callers, care of supplies, etc., as well as certain of the matter contained in the chapters on "Modern Office Appliances" and "Simplifying Correspondence Details," is of distinct practical value.

The author's difficulty, on the whole, lies in his failure to recognize that an over infusion of factory and commercial methods into the daily life of

an association of professional men must inevitably diminish if not possibly destroy that *esprit de corps* without which all else is but of little value.

HENRY ROOT STERN

Studies in the Law of Torts. By Francis H. Bohlen. Indianapolis, Bobbs-Merrill Co., 1926. pp. viii, 699.

Everyone who has occasion to do anything in Tort law must welcome the appearance of this book. The author of the studies has an eminence in the field covered by them which cannot be brightened by a reviewer. For many years at the University of Pennsylvania, now at Harvard, Mr. Bohlen has been one of our foremost scholars in this branch of the law. Through his teaching, his case books and his extensive writing upon nearly all the various phases of interesting Tort law, and now through his work as Reporter for Torts in the work of the American Law Institute, we all appreciate his sound judgment, his keen insight, his thoroughness in tracing the historical development of the law's growth, and his excellent appreciation of the problems of the law as applied in practical every day operation.

The essays in this book are well known to law teachers and students, whether in school or out of it. They have appeared in the various legal periodicals over a good many years. It is an immense advantage to have them now in book form where they are available generally to would-be users. No attempt has been made by their author to bring his material down to date; the essays are reprinted for the most part, as they originally appeared. If, as the author says, the law as expressed in some of them has been changed since their publication, the work of Mr. Bohlen has been one of the contributing causes of the change. We are glad to have them as they are, though we should have liked it even better had the author had time and opportunity to make them the 1927 expression of his views and research. Both Mr. Bohlen and the publishers are to be thanked for placing this material, indexed and accompanied by a table of cases, in an attractive form where we can get at it.

HERBERT F. GOODRICH

THE REVIEWERS IN THIS ISSUE

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