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BOOK REVIEWS

Book Reviews

Select Cases and Other Authorities on the Law of Trusts. By Austin Wakeman Scott. Second Edition. Cambridge: Austin Wakeman Scott. 1931. pp. xiv, 818. $6.

THE orginal edition of this popular casebook is herein thoroughly and skillfully revised. One has the impression that each item—almost every word—has been carefully selected and arranged, not merely in the choice of the cases and the construction of the footnotes, but also in the editing of the decisions printed, which have been vigilantly pruned. Perhaps the study of the subject is thus somewhat over-simplified. Perhaps, however, this is counterbalanced by the increase in enthusiasm for reading that able guidance and absence of irrelevancies may well produce. Variations from the first edition, however, while important, are chiefly in details; no substantial departure from its fundamental assumptions is apparent.

There is some rearrangement of the material, especially of that concerned with the administration of trusts, but the basic structure of the book is essentially the same. The total number of cases included has been slightly increased. About one-quarter of those in the first edition have been abandoned; a little less than one-third of those in the present edition are new. Many, though not all, of the latter have been decided since the publication of the first edition, and important and interesting recent decisions have been included in whole or in part.[1] Preference for cases from certain jurisdictions is again manifest. The percentage of English cases has been reduced from fifty-four to forty-three; a far more drastic reduction would seem desirable in the light of student reactions. Cases from Massachusetts, New York, New Jersey, and the Federal Courts have been somewhat increased. The total result is that in this edition, as in the former one, approximately four-fifths of the cases are selected from the five jurisdictions named. The footnotes have been thoroughly revised. Much important material has been published since the appearance of the origial edition, including Mr. Bogert's text and a mass of significant comment in the law reviews, notably Mr. Scott's own articles. This has made it possible for the editor in many instances to reduce the footnotes into more compact and attractive form, with discriminating references to law reviews, texts, annotations, the notes of the first edition, and important cases. Those who know where to look in this casebook will find very expeditious leads into the authorities.

There are some minor issues, obviously controversial, on which I disagree. I would prefer not to commence the course by attempting to distinguish "a trust" from "a bailment," "a trust obligation" from "a liability for a tort," etc. The enthusiasm of other teachers for this mode of approach is appreciated. And it would be clearly inadvisable to restrict discussion in this field to trust doctrine alone. But this traditional introduction to the subject

[1] For example, Chase National Bank v. Sayles, 11 F. (2d) 948 (C. C. A. 1st, 1926); Wittmeier v. Heiligenstein, 308 Ill. 434, 139 N. E. 871 (1923); Whittemore v. Equitable Trust Company, 250 N. Y. 298, 165 N. E. 454 (1929); Foreman v. Foreman, 251 N. Y. 237, 167 N. E. 428 (1929); Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545 (1928); Fur & Wool Trading Co., Ltd. v. Fox, Inc., 245 N. Y. 215, 156 N. E. 670 (1927).

seems to me to require comparison on an artificial plane of concepts difficult to define in the abstract. There is valuable material in this first chapter, but it appears out of place. Secondly, I disfavor the use in such a course as this of the time-consuming teaching vehicle of the earlier English cases. However, these questions are perhaps comparatively unimportant. There is ample material in this able book for a course on Trusts, and individual instructors can make such rearrangements as they desire.

There is a more important issue. I definitely disagree with the basic assumption that a separate course on "Trusts" is desirable, and propose to experiment with the contrary hypothesis. The great diversity and scope of the decisions employing trust language are familiar, and a major and highly controversial problem of classification for curricular and other[2] purposes is presented. Any very intelligible discussion would require much greater elaboration than seems appropriate here. An attempt will be made, however, to suggest some of the reasons for a change. We are primarily interested in the actual results of judicial action in given situations, and it therefore seems that all available factors relevant to a particular prediction or inquiry should be considered at the same time. The existing arrangement seems to prohibit that and to make incomplete the consideration of particular issues both in the Trusts course and in others. In other words, the basis for curricular classification should be the situation rather than the legal concept. A peculiarly convenient general situation on which to focus is that of gratuitous non-commercial disposition of wealth. It involves closely related legal techniques, and no great upheaval in the curriculum at large need be occasioned. Such a change of emphasis would also make it possible to condense the present Wills material and merge it with materials of higher intellectual content. And I do not believe that an adequate appreciation by the student of the broad existing and potential utility of the trust device need be lost in the process. Signs of unrest with the existing order of things are apparent elsewhere. Mr. Carey's recent casebook is an example. And the proposals referred to here are probably harmonious with some of the hypotheses underlying Mr. Richard Powell's developments at Columbia; the tentative arrangement, however, is understood to be quite different. I would favor including in one course the substantive law of intestate succession, outright gifts, wills, and that large part of the existing course on Trusts that concerns gratuitous transfers; and in another and separate course the problems that arise in the management of decedent and trust estates by executors, administrators and trustees. No change in the course on Future Interests is suggested.

Mr. Scott's book is avowedly constructed on different assumptions. The care and skill of the editor cannot be denied. If the validity of its fundamental hypotheses can be assumed, it is one of our best casebooks.

Yale University. ASHBEL GREEN GULLIVER.

Cases on the Law of Taxation. By Roswell Magill and John M. Maguire. Chicago: Commerce Clearing House, Inc. 1931. pp. xix, 950.

NEARLY a decade has elapsed since the subject of taxation began to be fairly generally recognized as entitled to a place in the law school curric-

[2] Compare Arnold, *The Restatement of the Law of Trusts* (1931) 31 COL. L. REV. 800; Scott, *The Restatement of the Law of Trusts* (1931) 31 COL. L. REV. 1266.

ulum on a par with courses of long standing. This was no doubt due in a measurable degree to the widespread interest in the whole matter of taxation resulting from the increasing burden of governmental expenditures of both state and federal governments. The first case-book on the subject had been published in the early years of the twentieth century, but since that time tax systems had undergone considerable changes, including a trend toward income taxes, or taxes measured by income factors, and an increased reliance among the states on inheritance taxes. A vast body of case law interpreting state inheritance tax statutes and federal estate and income tax acts had grown up. There had also been an extensive development of case law on the limitations imposed by state and federal constitutional provisions on exercises of the states' taxing powers. The compilation of a case-book to cover the subject today requires infinitely more judgment than was required at the turn of the century. It is quite impossible adequately to appraise a selection of cases on taxation today without taking into consideration the difficult tasks of selecting problems to be considered and the cases to be chosen to develop those problems that confront those who would essay the task. It is with a full appreciation of those difficulties that the reviewer approaches his task of appraising the present volume of cases.

The case-book under review opens with a chapter on the legitimate purposes of taxation. Here it considers not only the doctrine of public purpose but also the question of the extent to which the taxing power can function as an instrument for attaining objectives other than the raising of governmental revenues. It is here also that the problem of territorial uniformity is briefly treated. The cases illustrating the first problem above referred to are too few adequately to develop the judicial process in dealing with this subject, and to indicate the factors that have achieved judicial recognition as relevant to the issue of public purposes. The material dealing with the second problem is both adequate and selected with excellent judgment and discrimination. The reviewer, however, is inclined to consider the treatment at this point of the problem of territorial uniformity as of doubtful utility. The principal issue in cases of that character is the distribution of the tax burden, even though the principle applied is sometimes stated in terms of the purpose for which a tax in a given tax district can be imposed.

The balance of the compilation is devoted to the treatment of the principal taxes with which lawyers will most probably be called upon to deal. The general property tax is first considered. The general approach is to treat the questions in the order in which occur the steps in the process by which the governmental authority imposing the tax proceeds in fixing the liability. The bulk of the materials in the chapter on levy and assessment deal with the problem of notice and hearing in these connections, and the cases are excellently chosen. The section on jurisdiction in the next chapter contains many of the important cases in which the United States Supreme Court has passed on this problem. The cases, however, do not seem to be grouped in the order best adapted to develop the problem and the law developed in response thereto. The treatment of the problem of exemptions might have merited more cases than have been devoted to it. The section on disproportionate assessment is very well done, but that on classification is not particularly strong. It is in his treatment of the designation and the valuation of property for taxation that the author of this part of the text achieves a high standard. The footnote material is especially well conceived and executed at this point. His material on the collection of taxes and on taxpayers' remedies also achieves an excellent standard. The

cases dealing with it are well chosen and bring out some excellent problems involving matters of fundamental importance.

The treatment of the general property tax is followed by two chapters devoted to excise taxes. The first of these is devoted to cases illustrating the general nature of such taxes, and this is followed by a very extensive treatment of modern excise taxes on business concerns. This chapter contains a good selection of the cases in which the United States Supreme Court has dealt with impositions of this character in relation to the commerce, due process and equal protection clauses of the Federal Constitution. The mere fact that a considerable part of this subject matter is generally covered quite fully in courses in constitutional law need not detract in the least degree from recognizing that Professor Maguire has here assembled a fine collection of materials for the treatment of these taxes from the angle represented by these cases. It might, however, have been desirable, if these taxes were to be as extensively treated as has been here done, to have raised some problems of their measurement other than those involving points of federal constitutional law.

Inheritance and estate taxes are next considered. The classification of the materials follows approved lines and that which is naturally dictated by the necessity for presenting the law as to these taxes. It would have seemed desirable to illustrate the problem of retroactivity by cases involving more than one type of transfer to which these taxes apply, even though many of the cases involving other kinds of transfer are referred to and briefly discussed in the dissenting opinion in one of the cases set out in full. They do not, however, fully inform the student of the general problems in connection with which the problem of retroactivity becomes significant. In the selection of cases to illustrate the property and transfers subject to inheritance taxes, and the property includable in the gross estate in computing the federal estate tax, the transfer in contemplation of death has been accorded a relative importance not justified by the legal difficulties raised by it. This seems to have been done at an undue slighting of such other types of transfers as those occurring under powers of appointment and those intended to take effect in possession or enjoyment at death, and the complete ignoring of transfers incident to the death of a joint tenant or a tenant by the entirety. The section devoted to deductions contains sufficient material to raise the significant and difficult problems connected with this part of the tax computation, although a case or two involving the problem of marshalling would have added to its effectiveness as a teaching device.

The last part of the compilation is devoted to the income tax. The portions devoted to setting forth the constitutional limitations on both the federal government and the states contain an excellent collection of materials. The problem of the limits imposed on each of these governments by the principle that neither can so use its taxing powers as to impede unduly the functioning of the other has been illustrated at greater length than would seem necessary in view of its treatment in courses in constitutional law. This emphasis would be justified unless purchased at the sacrifice of other problems not treated in other courses, but this is a rather difficult thing to achieve unless publishers will forego their not unnatural insistence that a case-book must be kept within a reasonable length. The authors' treatment of taxable persons is very adequate, and the cases are in general well chosen. The same is true of the section dealing with problems of determining gross income, but here the order might have been changed so as to develop the problems more clearly. The problems of deductions from gross income in arriving at net income that the author has selected cover significant points of the law, but one can only wish that he had made a

wider selection. The income tax part, however, includes sufficient material to form the basis for a sound exposition of this tax.

There remain several features of the compilation that deserve to be commented upon. The authors have adopted the device of setting forth problems at many places in their text, and indicating the cases in which answers can be found. They have wisely refrained from giving the answers. The authors' theory is undoubtedly that the students' curiosity will be aroused more successfully by this means than by the reference to other cases and problems in footnotes. It is the reviewer's sincere wish that experience may prove the theory sound. The resort to this device is much more marked in the first parts of the book than in those dealing with the inheritance and income taxes. The footnote materials are valuable, but do not contain as many references to articles in law reviews as the materials therein found warrant. Nor does the compilation contain as many references to non-legislative and non-judicial matter as the reviewer had been led to expect from the reference thereto in the Introduction. On the whole, however, the compilation of cases that Professors Magill and Maguire have made is of high quality, and fully adequate to meet the needs of those whose curriculum permits them to devote to taxation the time it merits but does not generally receive.

University of Minnesota. HENRY ROTTSCHAEFER.

Adatrechtbundels. Indonesian Customary Law Volumes. Volumes 32, 33. Edited by the Committee for "adat" law at Leiden. The Hague: Martinus Nijhoff. 1930. 1931. pp. vii, 468; ix, 482, £5.50.

THESE two volumes are the latest of the great series on Indonesian customary law, of which the first was published in 1911. Originally begun on a small scale by a few Dutch scholars as a collection of customary law of the Dutch East Indies, the project has grown in scope and in significance and has finally become a study covering the whole area of Indonesian culture, including Formosa, the Philippines, New Guinea, Timor, Borneo, the Malay Peninsula, the Cham States, and Madagascar. The work begun by the Committee on Customary Law in 1909 under the chairmanship of Professor C. Snouch Hurgronge with Professor Cvan Vollenhoven, who originated the idea, acting as his secretary, has grown to international dimensions. Committees on Customary Law in other countries having possessions in Indonesian culture area cooperated with the Committee in Holland and the project has received the sympathy and support of the Union Academique Internationale at Brussels.

Volume 32 is devoted to South Sumatra. It contains illustrations of agrarian and riparian law and gives samples of the rights of individuals in the commons and the waste of the village communities. Marriage customs and family law are well represented and there are several sections on what might be called public law, dealing with the appointment and selection of village chieftains and their relations to the prince.

The most interesting section of the book, if one is permitted to be entertained by so weighty a volume, is the section dealing with titles of nobility, rank, honour and distinction. For the people who seem somewhat worried about possible connections between large contributions to party campaign funds and the subsequent acquisition of title by the patriotic donor, it is delightfully refreshing to find a country where everything is open and aboveboard and where there is in existence an official price list enumerating in

careful detail the exact cost of each and all of the honours which the state has to bestow. The simple citizen has the knowledge that financial success will enable him to buy honour and distinction, and he can be certain that he will get his money's worth. There is no danger that the party to which he contributes may fail in the election. There is a wide range of desirable honours to choose from. The state does not only cater to the masculine element of its citizenry, it also offers a wide range of bargains to the ladies. For the payment of one buffalo and ten dollars she can choose between the right to wear a yellow or a white shawl or the right to fire two guns either simultaneously or in succession. There is an appeal both to the sporting young flapper and the vamp of older vintage. To the latter the state offers the right to dance on a tray under two umbrellas in payment for one slave, one buffalo and thirty-two dollars.

This recognition and acceptance of the fundamental human desire for honour and distinction ought to be an inspiration to the modern taxation experts. If the gentlemen in Washington who are straining their ingenuity in thinking up new taxes to cover our billion dollar deficit will copy this excellent practice of selling honours our financial worries would soon be over. There must be thousands of middle aged matrons in this country who would be willing to pay round sums for a federal authorization to dance on tea trays.

Volume 33, which is not devoted to one area, but which contains a miscellaneous collection from different countries, contains a chapter on the agrarian law in Hawaii and some very interesting information on primitive forms of cooperation.

These volumes, like their predecessors, contain data of the utmost importance to the ethnologist, socialist, and the student of primitive law. One is impressed by the numerous cases which suggest similarities to the early law of Europe. This mass of material therefore provides enough ammunition to keep the family fight between the diffusionist and the evolutionist going for fifty years. But what is perhaps of more interest to the student of law is the fact that these books clearly convey that the assumed stability of primitive society is not as great as we have thought. This means that the problem between the rigidity of legal rule and the ever changing social setting is eternal and universal. Primitive customary law, contrary to many opinions, is an instrument of marvelous flexibility, but the moment there begins statement in writing or simple codification, there arises the problem of rigidity and of the relation between law in the books and law in action. The problem of how to adapt legal norms to changing social life is a problem which even the savages are not spared.

Yale University. N. J. SPYKMAN.

The Main Institutions of Roman Private Law. By W. W. Buckland. Cambridge: The University Press. New York: The Macmillan Co. 1931. pp. xii, 410. $5.

THIS book with the *Text-Book of Roman Law* (1921) and the *Manual of Roman Private Law* (1925) forms the third of a series of handbooks which the eminent Cambridge Romanist has prepared and which justify the statement of M. Georges Cornil that Mr. Buckland's work on Roman law is *hors pair* among works on this subject in English. It takes the place of his *Elementary Principles of Roman Private Law*, a book which gave many of us the uneasy feeling that if that is what Mr. Buckland believed to be elementary, very few scholars indeed would qualify for the position of

advanced students. The matter is completely reorganized. The expression is clear, definite and precise. Theories are presented, criticized and approved or rejected and the whole is suffused with the full learning and the judicial temper which Mr. Buckland has accustomed us to expect of him. It is an admirable summary of Roman law, supplementing the Text-Book somewhat, just as the Manual did, and differing from the latter chiefly in the tone and general purpose. It may be said that the "Main Institutions" reaches out a little further into the contacts of the law with history than the "Manual" did, and is less directly didactic.

An illustration might be found in the difference between the discussion of family settlements in the Manual [p. 225] and that in the Institutions [pp. 232-233]. In the former, Novel 159 is directly referred to, but the enormous range of influence of the family settlement is not alluded to. In the latter, the Novel is not specifically mentioned, but the case itself, as stated in the Novel, is set forth, and with it, its fruition in the "family fideicommissum," *esta institucion funesta,* as old Escriche called it—as well as its probable bearing on the famous statement of Bereford in Belyng's case.[1]

It is unnecessary to speak of the accuracy of the book under review. Mr. Buckland differs from other scholars on a number of specific questions. In most of them, I am persuaded that he is right and in all of them his authority would equal that of his opponents, *si auctoritatibus contendendum est.* And, in my opinion, the sanity and balance he has always observed on the matter of interpolations—most explicitly set forth in his article, "Interpolations In The Digest"[2]—far outweigh the brilliant ingenuity with which the pontiffs of the interpolation theory have dazzled the imaginations of a laborious and misled generation. It is hard to see how a statement like that of the preface [p. xi] that "the period from A. D. 180 to A. D. 280 was far more constructive and the 'Byzantine' age far less constructive, in private law, than is commonly supposed," can fail to put the issue, as it should be put, on the basis of historical probabilities, and shift the onus of proof where it belongs.

Mr. Buckland's few references are sign-posts rather than full citations, as he indicates in advance. Obviously, in a book intended to give a conspectus of a whole legal system, full citation of authorities is impossible. But the citations in crucial cases are sufficiently numerous to indicate to the student where he must look for complete information.

It is likely enough that some readers will find the "Institutions" a hard book, just as they found the "Elementary Principles" a particularly hard one. But it certainly will not be for the same reason. The earlier book was hard because it presupposed considerable familiarity with the subject. This one will seem hard to a Latin-less generation, not merely because Mr. Buckland uses the Latin terms for the Roman institutions—he could scarcely do otherwise—but in part because he uses Latin phrases and tags which are left untranslated. Doubtless he assumed that those whose crass unfamiliarity with the ancient society implied makes them unable to understand these phrases would do well to leave the Roman law alone.

Otherwise the book is hard only because it is crammed with matter. We are accustomed to getting our food in a more diluted form. But it can certainly be no reproach to Mr. Buckland that he rates our capacities highly. We might learn to deserve it.

University of California. MAX RADIN.

[1] Y. B. 5 Ed. II.

[2] (1924) 33 YALE L. J. 343.

Constitutional Law. By E. C. S. Wade and G. Godfrey Phillips. New York: Longmans, Green and Co. 1931. pp. xxii, 476. $8.

An Introduction to British Constitutional Law. By Arthur B. Keith. New York: Oxford University Press. 1931. pp. xii, 243. $2.50.

CONSTITUTIONAL LAW is an elaborate digest on the English Constitution prepared by two experienced tutors for the use of university students. As the work is designed primarily for teaching the subject, the authors make free use of outlines, of marginal notations, of references to topics treated in other sections, and to cases and statutes. All these devices give the pages at first sight a somewhat repellent aspect to the layman. But if he will persevere, he will find that the book contains a clear, interesting, thoughtful and stimulating discussion of the present constitution and its underlying principles, and the changes which have developed during the past fifty years since the appearance of Dicey's *Law of the Constitution.* They bring out sharply the astonishing expansion of the administrative system during that period, in complexity, in number of officials and in power. To such a degree has it grown that Dicey's dogmas concerning the Rule of Law, for example, need considerable modification. This is the "new despotism" that has arisen. The book also contains abundant citations of secondary works that the authors have employed, which those who care to go more deeply into the subject may study, and numerous references to cases and statutes, particularly those in the period since 1900.

While the treatment of the subject is thorough and comprehensive, the work can be used to advantage by the beginner as well as by the advanced student. It is a notable case of textbook-making in the best style.

Professor Keith's little book, called an "introduction," is a brief text which aims to present "a preliminary view of the doctrines which are set out in detail in the classical treatises." It omits local government (a notable defect in such a work today), but as we would expect, it devotes justifiably considerable space to imperial topics. An "introduction" to a difficult subject is the hardest kind of book to write and the author has hardly devoted enough attention to the problem of presentation. While the book has much merit, it is for a beginner not clear, omits essential details and explanations, and contains sundry incorrect or doubtful generalizations; broadly speaking, it is a volume with a great variety of observations somewhat casually thrown together into chapters. It is really of more value to the advanced student than to the beginner.

Yale University. SYDNEY K. MITCHELL.

Derecho Internacional Privado. By Antonio Sanchez de Bustamante Y. Sirven. Three volumes. Havana: Carasa & Co. 1931. pp. 453; 508; 551.

IN 1896 Dr. Bustamante published the first volume of a treatise on private international law containing, in addition to the history of the subject, what he called certain "preliminary notions" dealing with the nature of the subject and current doctrines. This treatise was never completed. Special monographs by the same author have appeared on various subjects, the most important ones of which are *El Orden Publico,* published in 1893, and *La Autarquia Personal,* published in 1914. In recent times Dr. Bustamante published various volumes relating to the codification of private interna-

tional law. These efforts culminated in the "Code Bustamante," adopted by the Pan-American Conference at Havana in 1928, and in force today in Brazil, Costa Rica, Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, and Peru.

The Code itself consists of a preliminary title and four books containing four hundred and thirty-seven articles. Book I, entitled International Civil Law, deals with the Law of Persons (Articles 1-104), the Law of Property (Articles 105-139), Various Modes of Acquisition (Articles 141-163), and Obligations and Contracts (Articles 164-231). Book II (Articles 232-293) is devoted to International Commercial Law, Book III (Articles 296-313) to International Penal Law, and Book IV (Articles 314-437) to International Law of Procedure.

The first volume of the present work covers substantially the same ground as Dr. Bustamante's Treatise, *El Orden Publico* and *La Autarquia Personal.* The second volume deals with the subject matter contained in Books I and II of the Code Bustamante, that is, with international civil and commercial law, and Volume III, with Books III and IV of the Code Bustamante, that is, with international penal law and procedure. In the second and third volumes, the order of the subjects is identical with the one followed in the Code.

According to Dr. Bustamante, the scope of the subject of private international law is a two-fold one. It should indicate what foreign laws should be recognized as operative within a certain state or country, but in addition it should set out the limits within which, from an international point of view, the legislation of such state or country should be confined. With respect to nationals residing in their own country, the local laws, according to our author, are either supplementary or imperative. With respect to foreigners residing in a country, the local laws are either imperative, supplementary or inapplicable, and with respect to nationals living in a foreign country, the laws of his country are either inapplicable, personal, supplementary or voluntary. With respect to foreigners not residing in the country whose laws are in question, such laws may be either voluntary or supplementary, imperative or inapplicable. All laws may be divided, therefore, into three classes. First, those applying to persons by reason of their domicil or other nationality and following them even when they go to another country—termed personal or of an internal public order. Second, those binding alike upon all persons residing in the territory, whether or not they are nationals—termed territorial, local, or of an international public order. Third, those applying only through the expression, interpretation, or presumption of the will of the parties or of one of them—termed voluntary or of a private order. Dr. Bustamante's ideas regarding this classification were fully developed in *El Orden Publico* and *La Autarquia Personal,* and set forth in a more summary form on pages 187 to 285 of Volume I of the present work.

Dr. Bustamante has given us a new approach to the solution of the conflict of laws, which is important, not only because of the preeminence of the author in the field of public and private international law, but also because it is embodied in the Code Bustamante, which is in force in many of the Latin-American countries. To have written a code of private international law in accordance with his own ideas on the subject, and to have had it adopted as law by so many states is indeed an accomplishment which will give to Dr. Bustamante at all times a unique place among the writers on the conflict of laws.

Volumes II and III are devoted to an exposition of the Code Bustamante. In his previous publications relating to the Code, considerable light was thrown upon its provisions, but no commentary upon the Code as a whole

existed until the publication of the present work. Volumes II and III indicate why, from the author's point of view, the rules laid down in the Code are the proper ones. The precise meaning of the rules and their application to concrete cases do not, however, always appear sufficiently, at least to a reader trained in Anglo-American law. Very frequently he is left in doubt, and this is almost universally the case when a particular law is said to be "territorial," "local," or "of an international public order." Does it refer to the country in which the act was done, or to the country in which the property is situated, or to the country in which suit is brought?

The object of the work being an elucidation of the Code Bustamante, no reference is made in Volumes II and III to the views of other writers; nor are comparisons made between the rules laid down in the Code and those prevailing in other countries. The author, however, does point out, wherever possible, the operation of the rules of the Code in his native country, Cuba.

The work contains no notes. At the end of each chapter there is a brief list of the special literature in the different countries bearing upon the subject, and at the end of the third volume, there is a general bibliography of the principal works on the Conflict of Laws. The Code Bustamante itself appears as an appendix to the third volume.

Yale University. E. G. LORENZEN.

What Price Jury Trials. By Irwin Stalmaster. Boston: The Stratford Co. 1931. pp. 143. $2.

IF a preface is permissible in so simple a thing as a book review, I desire to say that I hesitated to accept the invitation to review this book on the ground that I disagreed with the author so thoroughly as to make it certain that I would be neither sympathetic nor ordinarily critical, but controversial.

Failure to agree with distinguished professors, as for example my friend Mr. Leon Green, recently professor at the Yale School of Law and now Dean at Northwestern, has not greatly disturbed me, for I felt that I had had superior practical experience and that my conclusions were based on actual knowledge, while theirs smacked just a little of cloistered seclusion. But here is an author who has had a wide practical experience with juries, and I confess to having seen the horrid spectre of doubt stalking rough shod over what I thought I knew. (It was but an apparition!) In such a time of doubt I turn for help, by force of habit, to that most engaging and delightful of all philosophers, he who took his name from the breadth of his shoulders, but his fame from the breadth of his knowledge, the depth of his culture, the spread of his imagination, the width of his vision. Plato points out that argument is both futile and unnecessary because it is born of a failure properly to define the question and to state the issue. And when I do so I find that we are not in hopeless disagreement. I will however follow the advice of Mr. John Keats: "Never argue,—whisper your conclusions." First, what are we discussing? Then my whisperings.

The title of the book is "What Price Jury Trials." I have spent many years with juries, as practicing attorney, as prosecutor, as a judge of our highest trial court, and I have never seen a jury trial. If the author means trial by judge and jury, I have seen plenty. This may seem captious, but a review of the book makes me believe it is somewhat fundamental. A trial by "the first twelve men we meet on the street" [p. 6] uncontrolled by trained legal minds, would be all he claims; a trial by a properly selected

jury of substantial citizens, directed and advised and supervised by a well qualified judge is quite another thing. And if the issue is trial by court and jury in some distant jurisdiction then I am to be counted out, for I am qualified to discuss it only as it exists in Connecticut and nearby states. He says a sleeping juryman is a common experience. That jurymen may be tempted to sleep through some of the cases we have (and how about the judge?) is admitted, but that they actually do so is rare, not common, and the judge sees to it that such a nodding is of a second's duration. And he constantly talks of the judge as a mere umpire. Well, he ought not be, and is not, here.

The author begins with a chapter "Dissipating the sacred aspect of the jury trial" and he says much that is good sound sense. He seems to retain juries in criminal trials, but thinks conditions have changed so that we have outworn them in civil cases. I view the law and legal procedure as a living growing thing, and desire to discard precedent when it ceases to be helpful. But I am still convinced that History is a great teacher, and that the wisdom of the ages is not lightly to be discarded. I am quite willing to reject the jury system "if it no longer meets the present day requirements of our complex life"—provided we substitute something better.

It seems to me that the book's argument as to remedy discards reform or betterment and adopts the proposition that all judges are perfect, all juries utterly bad. Now of course being human beings, there is no perfection and no utter badness in either. They each approach a happy medium between these extremes. Each has its separate function, and each is, I think, good in its own way. I shall discuss this again in my closing paragraph.

The book discusses, "Civil Jury Trials—Past and Present," is satisfied with the past, but thinks this "primitive machine" has broken down. A chapter is devoted to the question whether an untrained person is competent to try cases; another, the judge with and without the jury. It is true, as he says, that a judge gets along very well alone in certain classes of cases involving equitable matters. He argues that he would get along equally well where he had to find the facts. He discusses "Jury Personnel" and is displeased with what he finds, and in another chapter thinks the jury system has had a harmful effect on the lawyers themselves. He describes various attempts at reform and thinks abolition is the only remedy.

The principal value of the book is, it seems to me, that it is written in a practical way by a man who has had much actual experience. He offers many specific facts and draws interesting conclusions. In his closing chapter he quotes Mr. Charles E. Hughes and Mr. Elihu Root and seems to conclude that they agree with his conclusions. I cannot find anything in the quotations which remotely suggests such an agreement. It occured to me to go over volume 112 of our Connecticut Reports, the latest one at hand, and see what it revealed as to reversals and new trials, which are in the book scored as an evil, and then laid by the author at the door of the jury system. I find twenty-seven reversals of cases tried by judges alone, fifteen reversals in so called jury cases. I haven't any idea what these figures mean. Surely it would be ridiculous to say that they point to a conclusion that juries are better than judges; *a fortiori*, that judges are better than juries. I am just a little bothered to know whether it isn't possible that some of the other conclusions arrived at in the book are equally far fetched.

John and Will were discussing legal matters. "Will, have you read about the new machine just invented, which will infallibly tell when a man is lying?" And Will replied, "Have I read about it? Bless your heart, I married one of those machines." Many long years ago our Anglo-Saxon legal system married just such a machine, the jury system, and taken by

and large, it is still a happy marriage. It is not infallible, but as a fact finding agency it is still the best machine we have. Facts are found by weighing evidence, by deciding which witness is telling the truth—telling what actually happened. A good jury is a fair cross section of American life. The composite ability of twelve hard-headed, intelligent citizens to size up a witness and decide what manner of man he is, in my very humble opinion, surpasses that of a single man called a judge, splendidly trained though he may be in the law. The jury system has many faults. It can and should and will be improved.

Superior Court of Connecticut. ARTHUR F. ELLS.

The Great Mouthpiece. The Life Story of William J. Fallon. By Gene Fowler. New York: Covici Friede. 1931. pp. x, 403. $3.

So long as we retain the jury system as a means of solving the criminal problem of society we shall have "great mouthpieces." The term Mr. Fowler uses is the gangster's current slang. It connotes great criminal lawyers. The line reaches back to Cicero, comes down through Erskine and Rufus Choate to the present. It is no ordinary calling. It is one for which men are born and not made.

For many years the Positivist school in the field of criminal scholarship has urged the abolition of the jury system and trial before judges especially equipped in criminology. They urge that the jury system was successful in England because of the public attitude against crime and that it has no logical place in the effort society makes to protect itself against those who may not adapt themselves to the social unity. Any change in the United States is remote in view of our constitutional tradition, the increasing intrusion of politics into our legal system and the increase of laws of universal application which are not in accord with the habits and customs of some geographical parts. So by every prospect the great dramas will go on and men with the ability to direct them will follow.

William J. Fallon was not least among those who have been great at the criminal bar. He had the keenness of mind to explain everything; the ready, confident assurance and especially the power to see the details as a whole and their influence as a whole upon the twelve human beings who were to decide his failure or success.

His methods in these respects did not differ from those of Rufus Choate. We have forgotten Choate's contemporary reputation. Was it not said by Wendell Phillips that Choate made it safe for thieves to steal, and that murderers drank to his health before executing their violent deeds? A ship captain, turning state's evidence against his subordinate officers, when pressed as to a conversation with the other defendants, replied: "He told us there was a fellow in Boston named Choate who could get us out if they found the money in our boots." Like Choate, Fallon had the great faculty of squaring the whole evidence with a theory he could get the jury to accept. In judging these men we often forget they are the necessary products of the system we follow in administering the law in criminal cases.

Mr. Fowler is successful in making clear this brilliant, impulsive and generous personality. He does not gloss over the faults and we are left at the end with a feeling of tragedy. It was not tragedy for Fallon because he touched the points he sought to reach. His brilliancy and skill with juries was a great talent of authentic worth. We must judge him there and not by the faults which do not overshadow his strength. Perhaps if

he had seen life differently and had been spared from so early a death he would have brought his great gifts to a more altruistic use and devoted them to social ends instead of individual needs. But Fallon never escaped from the boy. Greater thoughtfulness might have come with years which were not given to him.

Mr. Fowler gets the drama of the events and he brings in a general view of the time. The life was worth writing as Fallon was of his time and responded to it and was a part of it. Mr. Fowler was not able, as a layman, to give an analysis of the trial lawyers' art as Fallon practised it. This remains to be written.

New York. P. P. FALLON.