REVIEWS

SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I. SELDEN SOCIETY PUBLICATIONS, VOL. 55. Edited by G. O. Sayles. London: Bernard Quaritch, 1936. Pp. clxx, 222. $13.00.

WE HAVE become so accustomed to expect the volumes published by the Selden Society to show a high standard of editing, that no statement as to this particular need ordinarily be made when a volume is reviewed. But volume 55 is an unusually satisfactory piece of work, even for the Selden Society. Mr. Sayles has given us not only some very fine editing—and we may add, also, a model translation—of the cases themselves, but he has prefaced these cases with a series of short monographs, that constitute not so much an introduction to the actual cases as a discussion of some of the more intricate and less understood points in connection with the earlier history of the court of King's Bench.

This preliminary matter is lengthy and excellent, and shows the result of extensive research. It is so heavily documented that any adequate consideration of it is quite impossible within the limits of a review. A not inconsiderable portion of it has to do with matters so technical and controversial, that any profitable discussion of it would require the same sort of detailed treatment which the editor has used. The subject on which there has been the greatest diversity of opinion is the one first taken up—the evolution of the King's Bench before 1272. So many troublesome problems are involved, that a definitive solution of them all would be impossible within the limits of the space Mr. Sayles has allowed himself for a discussion of them. He does not settle, and does not profess to have settled, the many points in dispute. "In view of the division of opinion on so many crucial points, we have been content for the most part, in discussing the early history of the king's bench, simply to reflect the present state of knowledge and point attention to the problems. At times, however, we have ventured to put forward somewhat different interpretations from those generally accepted." We doubt whether all of Mr. Sayles' interpretations will be generally accepted. We are certain, however, that the many new facts which he has assembled to support his general thesis have brought the problem much nearer to a satisfactory solution.

Under The Judges of the King's Bench there has been collected a really large amount of new information, largely of a biographical nature, which the editor himself calls a "patch work" addition to Foss's biographies, but which is decidedly more than that. The Clerks, the Marshall and other Officials makes up the third chapter of the introduction. Here as elsewhere Mr. Sayles has made evident the rewards that come to one who has the energy and conscientiousness to make a thorough-going examination of the vast amount of material in the Public Record Office. Incidentally, he has also given the lie to the often repeated statement that the drudgery of any considerable searching of manuscript records inevitably incapacitates one from doing constructive work of any literary merit.

The Attorneys and Pleaders in the King's Bench is perhaps the best of the introductory monographs. It is certainly the most interesting. Here again there is an array of new facts, derived in no small measure from manuscript sources, that gives us, in fairly full form, a general knowledge of the subject. Many details are necessarily lacking: nor have we yet an answer as to why, when and how there developed in England in the thirteenth century a body of professional lay lawyers. The Custody of the Plea Rolls describes the startlingly haphazard way in which these documents were cared for—or rather, not cared for. Following the introduction are a number of important appendices, the first four giving detailed information about the judges of the King's Bench and Common Pleas during the reigns of Edward I and Edward II (terms, years, fees, etc.), and the others containing documents necessary for a fuller understanding of many of the subjects which have already been discussed.

The select pleas themselves form a group of one hundred twenty cases from sixty-one different rolls. The selection has given us a group of unusually interesting and instructive cases, quite different from the typical run of cases on any single roll. All of these rolls, by the nomenclature of the Public Record Office, are known as Coram Rege rolls, under which term are included also rolls from a much earlier period. The problem of when the court coram rege became the court of King's Bench has been many times considered by different writers. Since normally a plea roll gives its own designation in its heading, it would seem that these headings might be of some value as evidence, especially as they vary from period to period. But with practically no exceptions the headings of the rolls used in this collection are not given. Of the five which are given, three read "*Placita coram domino rege . . .* ", one "*Placita coram Radulpho de Hengham* (and three other justices) . . . ", another "*Placita apud Sanctum Martinum London' coram Radulpho de Hengham* (and three other justices) . . . "[1]

It is perhaps rash to take issue with one who has shown such ability in editing as Mr. Sayles has demonstrated, but we must beg to differ with him on one of his emendations—not because of the emendation itself, which after all is a very minor matter, but because the reason underlying the emendation concerns a matter which is really important, namely the difference between roll and record. In case no. 39, justices in eyre, who had been ordered to forward the record of a certain case, sent word that they could not send their record "without William of Saham who at that time kept the principal roll or without their other colleagues who are present in the king's parliament. *Ideo mandatum est Willelmo de Saham quod recordum etc. habeant coram rege* (at a certain date)." The editor has emended *habeant* to *habeat*, as though William was the one who was to furnish the record—on the thought, presumably, that William was to produce the roll and that in producing the roll he would be producing the record. But the scribe of 1279 was undoubtedly correct in writing the plural *habeant*. The judges distinctly

1. With these may be compared the headings to be found preceding the coram rege cases in BRACTON'S NOTE BOOK, and those in PHILLIMORE, CORAM REGE ROLL FOR 1297 (British Record Society, 1898).

say that they can not send, *i.e.*, compile and send, the record without William *and* their other colleagues. They do not say, because it would not be true, that they can not send the record without the principal roll (*primum rotulum*). The roll was not the recordum, and the record in this case was asked from the judges as a group, so that it would necessarily be that of the group as an entirety, and not that of any single one of them.[2]

Fortunately we have some very definite information in regard to the *rotulum primum* as bearing on the record of the justices. Bracton, on f. 352 b of his treatise, takes up this very point. From his account it is perfectly clear that though the justices as a group had several rolls they had only a single record. Their rolls should agree with the *rotulum primum*. But they, some or all, might not agree. In that case the *rotulum primum* was important, not because it became the record, but because it raised a strong presumption (*praesumptio vehemens*) against the correctness of the others which differed from it. This presumption would be accepted as fact if the *recordum* of the justices (when it was asked for) agreed with the principal roll as against their own rolls. But when the record of the justices went contrary to the principal roll and agreed with the other rolls, the *praesumptio vehemens* of the principal roll was overthrown. Even if the judges in their record differ from all the rolls (*ab omnibus rotulis discordent*), the record will stand.

In the thirteenth century we have not yet reached the time when roll and record became synonymous. In this volume we see many records which are quite evidently copied from rolls;[3] normally the record should agree with the roll; the justices may be told to search their rolls and send the record;[4] but still the roll is not the record; theoretically, at least, it is only "an aid for the memory of the judges."[5] To such an extent is this true that even after the cases in this volume we can find the bare word of one judge accepted as a record though it contradicted the roll of another judge.[6] When the justices are dead and can not themselves send a desired record of a case, their rolls may be searched for the necessary information.[7] Then this individual entry on the roll becomes a recordum, a record of the roll, which may be vouched.[8] But the record of acting, living justices is not the record of the roll; when their record is wanted, they will be asked for their record, not for their rolls. Their record is the account which they forward (usually under seal) on demand. These accounts, as records, will be filed apart from the rolls in the *ligula recordorum*.[9]

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2. For another application of the same principle of the collective record see BRACTON, f. 354 b.

3. As on pp. 116, 158.

4. As on pp. 68, 176.

5. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1905) 670.

6. 1 ROLLS OF PARLIAMENT (1767) 84–5.

7. See pp. 147–148.

8. Pp. 19, 117. *Cf.* the contemporary Y. B. 21 & 22 Ed. I 360, "we vouch the record of the roll."

9. Pp. 28, 118, 129, 173.

Even the record from a private court may be filed in the ligula recordorum, p. 132. But some of the records from local courts were filed in the file of writs (*ligula brevium*), pp. 63, 180. *Cf.* p. 139.

So well have the cases been chosen that it is hardly too much to say that any one of them is worthy of comment, if not from the point of view of legal history, at least because of their historical significance along some other line. Though at least one of the cases brings out a medieval attitude of mind which is almost as foreign to us as the Oriental's desire always to save his face,[10] some of the cases have a touch that makes them seem very close to our own times. There is a very modern ring to the alleged sayings and doings of a certain prophet of evil.[11] A case of encroachment is remedied by orders of removal that might be pronounced by a court of today in a modern action of ejectment.[12] Understandable as any twentieth century escapade is the story of the two sportive chaplains who had visited Gilbert's house—"and when they had left that house Robert son of Gilbert went into a certain room where he was to lie as usual and lit a candle, and the chaplains saw it and threw snow-balls at the candle so that they put the candle out, and for this reason the aforesaid Robert swore at them. And the chaplains on hearing this forcibly entered the room and dragged Robert out of that room."[13] What looks like the case of an individual who, in a spirit not unknown in our own age and generation, insisted on a little more night life when his companions wished to retire, is the story of the parson who would not let his fellow guests put out the candle when they went to bed, but insisted on its being kept lighted for him because he was going out again. Unfortunately the parson stayed out so long that before he came back the candle had burned down, fallen from its support, and started a fire which totally destroyed the house.[14]

As illustrating some of the great variety of material available for the student of legal history, the following cases may be considered, briefly, of course. No. 24 makes very clear how definite and technical must be the proof of birth of live offspring to enable a man to hold as tenant by the curtesy the land of his late wife—"although it was proved by the jurors that there was born of the aforesaid Margery a certain boy, who was called at the naming of the women 'John,' yet because a woman is not admitted to make any inquisition in the king's court, and it cannot be clear to the court whether he was born a living boy or not, and he had not been seen by males or heard by them to cry out and never by such was he seen alive, nor could he be because it is not permissible that males should be present at such intimate affairs, and similarly because it was proved by the jurors that never by any males was he heard to cry out, it does not seem to the court that"

10. P. 28: "They say that the aforesaid Simon was once taken by the friends of the aforesaid Matilda . . . in fornication with that Matilda in a certain room, and in consequence he was compelled to do one of three things: either to plight her his troth or lose his life or kiss her behind."

11. P. 51.

12. Case no. 98.

13. P. 178.

14. No. 120. This case should be compared with that in Y. B. 2 Hen IV. f. 18, pl. 6. The actual facts of the first case fit perfectly the illustrations used for dicta by the judges in the second.

the husband should hold as tenant by the curtesy.[15] No. 25 is an action for deceit brought against a defendant who had showed the complainant a jar of choice honey as a sample and had then sold him a tub of honey which was anything but as good as the honey in the jar.[16] No. 32 is a case of a writ of right of advowson sued for the king, where the tenant puts himself on a jury of the country, instead of on the grand assise, to determine the question of greater right, this jury to be made up of twelve knights, as the grand assise would have been.[17] No. 33 helps to illustrate the well known apartness of Chester from the rest of England; in this case a writ and an assise, both according to the custom of Chester, come in for criticism.[18] One of the longest cases in the book is No. 76, a case as interesting as it is long, and having to do with the escheat of a convicted felon's lands. No. 78 is a typical and instructive case of replevin of beasts.[19] A number of cases gives us first hand information on the law of debt at that period: no. 57, where both the heir and the executors are involved in the debts of the testator—incidentally the king has told the judges to do justice according to the law merchant; no. 74, a good example of the recognizance; no. 87, the record of an action of debt in a local court, without the king's writ; no. 96, where mention is made of the fact that a certain person had been excommunicated at the suit of another for a certain debt—the action presumably having been brought in court christian. Nos. 101 and 114 are two unusual and important cases on the maritime law of the day, the first having to do with the customary law of jettisoning in order to save the ship in time of stress and storm, and the second being concerned with the seizure of a ship for an offence committed at sea.

The above brief resume of some of the cases which have struck my fancy gives but a very inadequate idea of the wealth of information which is available in this collection for historians for whom the original rolls are not easily accessible. From all such, thanks to Mr. Sayles and the Selden Society are due.

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15. *Cf.* p. 81; and see BRACTON, f. 438.

16. Cases of the same type will be found in 1 SELECT CASES ON THE LAW MERCHANT (Selden Society, 1908) 91, 102–03, 105–06.

17. *Cf.* pp. 84, 72.

18. Local custom in matters of law was of very great importance in England at this time. For other cases bearing on this point see pp. 43–44, 63, 65, 82, 105–06, 126, 133, 137, 148, 156.

19. *Cf.* No. 93. No. 99 makes mention of the replevying of a man by the king's writ. Before the introduction of the writ of habeas corpus, the writ of de homine replegiando was not infrequently used.

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THE PROMISE OF AMERICAN POLITICS. By T. V. Smith.[1] Chicago: University of Chicago Press, 1936. Pp. xxix, 308. $2.50.

LEGAL scholars have long been urging that law is instrumental. Some few have asked: instrumental for what? To achieve what social ends should we, can we, shape our legal concepts? Here is an eloquent answer from an author who is both a practical politician and a professional philosopher. From a chaos of competing "isms" he seeks to create a political philosophy — an "invigorating myth," "a moral vocation" — for our "middle-income skill group."[2] He asks himself these questions: What ideals are practicable? How can we use these to improve pressing conditions? How can we come to terms with impracticable ideals? Today multitudinous doctrines beat upon the senses of the common man. Liberalism, socialism, fascism, communism, anarchism — all these have a natural history, have causes like other causes, and hence must have something to teach us. Each must be searched for its practical wisdom.

For his moral base — his ultimate ideal — Professor Smith takes a properly conceived individualism. Politicians and a chosen few are not to be allowed to "realize" themselves in a manner denied to other men through the "rose-colored ambiguity" of the word. "We want to know what *kind* of individualism they believe in, to whom it applies, and on what terms." The kind of individualism they should believe in is that celebrated by prophets and poets: an individuality of the mind, of the imagination; an individuality that finds its chief joy in things cultural. Value is in "the significance and enjoyment of things, rather than in the things themselves." "The more important goods for personality formation are not competitive." They can even be increased by being shared. The ideal of rugged individualism is right, "eternally right" in asserting that the human individual, human desire, is all that really counts. But *rugged* individualism is not a practical ideal. It has provided individuality for too few individuals; it has not meant an equal chance for all; "it concentrates upon competitive goods which for some men to get means for other men to lose." Hungry men cannot achieve individuality. "Life's higher values can be approached only through fulfilling the lower ones." Individualism must not mean "a monopoly by a few upon the concrete means of individuality."

From this moral base the author moves into politics. Liberalism is the political philosophy that emphasizes most the individualism he likes. Pure individualism is romance; it founders on the contradictory psychology of anarchism; it is the form, historically, that anarchy has taken in America. Liberalism recognizes "a social necessity" that must be mastered through organization. How much organization? The test is moving, relative: the less, the better — for individuals need room to grow the pleasures of the mind;

1. State Senator, Fifth District, Illinois; Professor of Philosophy, University of Chicago.

2. The three quoted phrases I borrow from Lasswell, *The Moral Vocation of the Middle-Income Skill Group* (1935) 45 INT. J. ETHICS 127. Professor Smith acknowledges debt to this article and to Lasswell's recent books, WORLD POLITICS AND PERSONAL INSECURITY (1935) and POLITICS: WHO GETS WHAT, WHEN, HOW (1936).

but enough must be had to secure an equal opportunity for all. Before this "deeper right" to equality, the civil right of private property must yield. Liberalism — expanded to its governmental maximum — takes in socialism. Some forms of property are not incompatible with liberty and even enhance personality; but "there is a point beyond which a government devoted to liberty will not let private property alone." The final question is: "Who can do the business best for the greatest number of people?" Here another beauty of liberalism emerges. It seeks to answer this question by means that promote individuality. Its technique is that of consent; it is based on the theory that "each man is the best judge of what he desires." If in a world of competing goods few of us do know what we want, how much less can we know what another wants. "That society is best fitted to fulfil wants which encourages the fullest participation of all men in its processes." It is best because it develops the individual and puts his energy and intelligence at the disposal of all citizens. Such a society must of course preserve as "natural" rights inviolability of the person and freedom of thought and speech.

Fascism — Italian type; the German is summarily dismissed as blood-thinking — comes next. This the author condemns for both ends and means. It has no ethics: ethics is "the theory of the hope for a good life for all." It is not individualism, "but individualism's bastard, pure egoism." To one man only does it permit full individuality. Behind the mystical "nation" or "state" stands Mussolini, "who gluts himself on power and publicly gloats over his glut." The technique of fascism is coercion. It lives on violence; it breeds self-immolation, not individuality. Its only value is in its emphasis upon "solidarity" — community, fraternity — which "enshrines the deepest sense of security known to men." But the form in which this ideal is conceived and the means adopted to secure it must brand fascism "as an ethical pretender of the lowest order."

Communism receives kinder treatment. It is condemned not for its ends but for its means. Communism is in fact a glorification of the ends of liberalism. Its major ideal is the maximum of individuality for all. What liberalism has done for castes, it would do for classes. The root difficulty of capitalism is that most men must gain subsistence in a way that makes a full life impossible. Communism, amidst other blessings, would give every man an opportunity to train himself for anything he chooses and even to shift jobs after choice. Sometimes this is carried to the impossible perfectionism of a "state of society in which every individual can do as he damn pleases." But, however moral the ends of communism, its means are of the grossest immorality — completely divorced from the ends. They are fascist, violent. The hope of an ultimate transition to non-violence is futile. Even Lenin knew that men do not voluntarily renounce power. Men seek safety and deference as well as wealth; the problem of control is not mastered but intensified when their struggle is shifted to such intangibles. Imagine Stalin voluntarily abandoning the broad expanse into which his ego has spread. The Communist leaves unplanned, to luck, the one end — the classless society — by which he justifies violence. The copy theory of knowledge ("as familiar as John Locke") upon which the great dialectic is built is impotent to predict

the future. Pending the promised withering away of a dictatorial state, "power is just sweet power behind the scenes."

In a chapter on Parliamentarianism the author studies techniques for making each voice effective in government. The job is by compromise to create "a general will" where none exists in fact. Here the practical politician in the author appraises in a manner much too detailed for summary a number of concrete suggestions for the improvement of representative government.[3]

Americanism is the final title. Under this label the author assays our prospects for a liberal democracy and elaborates his invigorating ideal. He finds a "gerontocracy" of judicial review astride our democracy and most of our advantages over other nations lost save "some vague cohesive force of the 'American dream' of general opportunity and individual freedom." What we need to forestall a drift toward either fascism or communism is the ancient Greek ideal: the ideal that exemplifies "the life of the good man and the good citizen as one and the same." The good man is a man who is good for something; he must have that fecund attitude or habit we call skill — "skill achieved through sacrifice and fulfilled in service." The acquisition of skill through sacrifice gives a man integration, "a single self from a body of discordant impulses;" its exercise brings him deference as a reward for producing something of value for himself and others. Here "is to be found the highest human individuality and the deepest happiness of man." Here also is a principle of social dynamics. "Inventions produce and are in turn produced by a public morale (highly potential of deference) which is the very inwardness of good citizenship." Who are to be the carriers of this principle of good citizenship? The skilled middle class — expanded to include some 25,000,000 persons. This group has "at its common heart a great moral romanticism which can become economic realism through concerted action." But for the accomplishment of this end it is imperative that we keep down violence. A revolution to make the world safe for democracy is not likely to achieve more success than did a war for the same purpose. To keep down violence, the American politician must become a specialist, must acquire skill, in the art of compromise. He must be "a man who can compromise an issue without compromising himself." His vocation must be conciliation. It is in our tolerance of this royal, yet elected, breed of politician — our willingness to compromise "as regards all things which must be shared in order to go along together," our common acceptance of a governmental duty to maintain a standard of life, our concept of a private office as a public trust — that the author finds the bright promise of American politics.

Such is a bare summary of a rich and persuasive book. To many its message will appear obvious; but the quality of current discussions — of, for examples, the sit-down strike and the President's Supreme Court proposal — reaffirms the ancient adage that we need education in the obvious. A reviewer bent on violence could of course find much to indict. Some critics

3. To demonstrate the application of his principles to practical problems the author reprints as footnotes, throughout the book, speeches made by him in the Illinois Senate. For wisdom, wit, and eloquence these set a standard of impossible perfectionism for state senates.

may say that the author's approach is not scientific or objective — that he is merely trying to deck out his own errant prejudices as ethical verities.[4] From a logical point of view Professor Smith's ethical doctrines are, to be sure, necessarily circular, that is, ultimately based on faith. But he is frank to confess the old trick of "levitation by bootstraps."[5] And how can any ethical doctrine avoid the trick? Logic offers an infinite regress and science knows no ethical absolutes. This does not mean, however, that talk about ideals is futile. A sound psychology suggests that man has an irrepressible desire to think that he is acting rationally toward preconceived ends and, further, that goal words infused into a culture often become imbedded in "conscience" as preludes to action. By what "objective" standard can a realistic politician be blamed for taking advantage of this propensity of human nature to spread his own ideals? Other critics may suggest that the author nowhere develops his crucial concept of "individuality" into flesh and blood.[6] That is perhaps a valid criticism of this book; but in an earlier volume, *Beyond Conscience*,[7] Professor Smith has tried to fill in his outline as far as our present knowledge of psychology will permit. Revolutionist critics, more violent still, may object that the author destroys his own case when he asserts that men do not voluntarily relinquish power. The question is often asked: How are liberals by democratic processes to dispossess those who control the processes? To answer this, one can only reject its assumption about control; recent history, in England and America at least, shows an increasingly rapid expansion of socialistic liberalism. Finally, gradualist, and hence sympathetic, reformers may complain that the author makes no effort to meet the critical difficulty of drawing a line between what property is to be public and what private. But even an ambidexterous author cannot be expected to overwhelm heaven in one book; and the whole point of his philosophy is that there can be no absolute line, but only a shifting one, relative to time and place, and to be drawn by the political means of compromise.

In sum, I find Professor Smith's Utopia and his methods for getting there practicable. Further knowledge about human nature may require changes in blueprint and methods; but, while we await that knowledge, to law students who want a picture of politics and ethics that is realistic, yet not devoid of hope, I recommend both this book and its complement, *Beyond Conscience*.

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4. Compare the criticisms that were made of the last chapter of Thurman Arnold's SYMBOLS OF GOVERNMENT (1935). See, *e.g.*, Mechem, *The Jurisprudence of Despair* (1936) 21 IOWA L. REV. 669.

5. See his own review of the book, *Two Authors in Search of a Reviewer* (1936) 47 INT. J. ETHICS 105.

6. *Ibid.*

7. SMITH, BEYOND CONSCIENCE (1934).

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CASES ON EQUITY. By Henry L. McClintock.[1] St. Paul: West Publishing Co., 1936. Pp. xxiv, 1286. $6.00.

THOSE WHO have found dissatisfaction with some of the recent trends either in the composition of casebooks or the treatment of Equity in the law school curriculum, will take great comfort in this book. Its style is the soul of good form, its content offends no convention. It is designed for use in two full year courses of two hours a week. It covers virtually the whole field ordinarily thought of as equity—roughly the same field covered in the one volume edition of Mr. Cook's casebook,[2] but with somewhat different grouping of material and perhaps more emphasis on procedure.

The first 559 pages are devoted to a General Survey of Equity, the remainder to Equitable Protection of Particular Interests. Chapter one contains interesting and well chosen historical material. Then follows a chapter of over 200 pages on the Nature of Equitable Relief. This treats such things as parties, pleading, kinds of relief, the consequences of the notion that equity acts in personam, the place and limit of discretion, and the fusion of law and equity. Lack of equity jurisdiction is then distinguished from a court's want of power, and the manner of raising the former defect is dealt with. The next chapter explores the requirement of inadequacy of legal remedy. There follows a consideration of incidental or substituted legal relief, interpleader, bills of peace, bills quia timet, discovery and the perpetuation of testimony.

The subjects of the first part of Book Two are specific performance, rescission, and reformation of contracts. The second part, entitled Property, includes such matters as equitable conversion of land by contract, equitable liens and servitudes, the prevention of injury to property (real, personal, intangible) through tortious conduct, and quieting title. The two remaining parts are short, taking up the protection of personal interests and public interests (injunction against crime, etc.) respectively.

There is little unanimity of opinion as to whether a casebook editor should try to be selective or exhaustive in presenting his material; witness the divergent reactions to the monumental work of Messrs. Chafee and Simpson.[3] No one could doubt to which of the warring camps the present editor belongs. He says in his preface: "The value of the case method of study of law is lost unless the casebook contains for each case enough of the facts and of the reasoning of the court to enable the student to see the problem as the court saw it and to understand the process by which the court reached its conclusion, so far as that process is revealed in the opinion. When the required number of cases is so presented, there is very little room for anything else. That limited space has been mainly devoted to problems which illustrate the application of the principles already considered to different facts, and to footnotes which have been devoted mainly to the citation of law review material, because of a belief that such material is the most valuable commentary on the cases and is also the least accessible." And indeed there

1. Professor of Law, University of Minnesota.
2. COOK, CASES ON EQUITY (2d ed. 1932).
3. CHAFEE AND SIMPSON, CASES ON EQUITY (1934).

is very little of "anything else" beside cases: A few historical selections from texts, a few of the Federal Equity Rules, a very few statutes, (of all the foregoing not more than a dozen or so pages), footnotes, and problems comprise the lot. The editor has fairly described his footnotes—and seldom do they go far afield into collateral questions. The problems follow each section. There are usually about four or five of them, and they consist in a short statement of facts taken from an actual case (cited after each problem) and end with a question as to the holding. Like the footnotes the problems stick pretty closely to the material which has preceded them. There are no explanatory or introductory parts in the text, very few in the footnotes. A reasonably industrious student would be well able to cover all the material cited in the footnotes and problems without devoting an undue amount of time to the Equity course.

The cases themselves are well chosen and edited. Many recent ones appear —a lot of them decided in this decade. Further, the cases are arranged according to patterns which it is easy to follow — even without resort to the editor's recently published textbook on Equity.[4] Its almost severe simplicity of design and execution will commend this casebook to those who agree with the notions of Mr. Chafee and Mr. Simpson about a separate place for equity in the curriculum, yet are awed by the ambitious proportions of their excellent work with its inevitably great demands upon a teacher. For my part I came to this task predisposed to favor the fusion of law and equity in the law schools as well as in practice. In the light, it may be, of my predisposition, I find aid and comfort for my view in the present very adequate application of the opposing one. The editor says:[5] "Courts, even in code states, are still drawing the line between actions at law and suits in equity, and our students must be prepared to practice before such courts . . . Whether the application of [equitable] principles to the various divisions of the law is to be taught in connection with the common-law rules applicable to the same field, or in a separate course in equity, is not of great importance, but it can hardly be doubted that the principles themselves ought to be taught, before an attempt is made to apply them." That the material should be taught is clear. But it is all taught—and incidentally almost every one of the component parts is given at least as much attention—in the Yale Law School, where there is no separate course on Equity.

The grouping of the material in the present book seems to me, moreover, to have certain defects. It does not present problems in the way they actually appear to the modern practitioner, judge, or law reformer. True, the ancient dualism has left its mark—perhaps indelibly—on our legal system. But no common thread binds its various manifestations today—at least in the code states. One will have many an occasion in practice to think of equitable doctrines, but it will be as a part of such problems as the availability of jury trial, the joinder of parties and causes, the appropriateness of certain forms of relief, or the existence of certain legal relations in various connections scattered over the whole field of the substantive law. And the equitable aspect

4. McCLINTOCK, EQUITY (1936).
5. P. v.

will be only one phase of larger problems, so that the mental habits and trains of association inculcated by a separate treatment of equity will cut through the most fruitful ways of thinking about them. The training is horizontal, so to speak, while the approach to actual cases will perforce be vertical. There is much in the first book, for instance, that bears on the question of joinder of causes and parties, but it must be culled from under a number of variant headings, such as Equitable Procedure, Incidental or Substituted Legal Relief, Bills of Peace, where its really significant implications for the practitioner are not always even suggested. On the other hand there is no mention of the early code provisions as to joinder, no indication of their debt to equity or of how the old distinctions were invoked to defeat the intent of the codifiers so manifest in the light of the former practice, no recounting of the way the more modern provisions reflect the scope given by liberal courts to bills of peace. Later courses grooved to present day problems may, to be sure, gather up appropriate loose ends, recapitulate, tie them together, lend them an historical continuity and a unity in terms of existing institutions. But the duplication which would be involved is regrettable. Nor does it seem to be offset by the possibility of schooling another generation of lawyers in the caste of thought which bred the "cold, not to say inhuman, treatment which the infant Code received from the New York judges."

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A TREATISE ON THE TAXING POWER, WITH PARTICULAR APPLICATION TO THE STATE INCOME TAX. By Walter K. Tuller.[1] Chicago: Callaghan & Co., 1937. Pp. xvii, 460. $8.00.

THIS IS no ordinary manual from which lawyers may discover how to advise their clients to keep their taxes down. Nor is it a study of the decided cases made merely for the purpose of drawing forth general principles and of indicating the probable course of decisions. Mr. Tuller has written with strong feeling to establish a thesis. The thesis is that the income tax laws of almost all the states are void under the Fourteenth Amendment because they tax income from sources outside the state, because they do not permit proper deductions, and because they tax at graduated rates. The author seeks to prove the soundness of his views by a series of propositions: An income tax is a tax on the source from which the income is derived. To the extent that the income taxed is derived from property, the income tax is a property tax; and the right to conduct a lawful business or profession is a property right as much as the right to receive income from tangible or intangible property. Since no state may tax property outside its jurisdiction, the state may not tax income from such property. And since

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no state may levy a graduated ad valorem tax on tangible or intangible property, no state may levy a graduated tax on income from such property.

Of course, Mr. Tuller recognizes that the courts have not wholeheartedly accepted all these propositions. But in support of some of them Mr. Tuller cites a number of cases, particularly recent state court decisions declaring graduated income taxes void as violating state constitutional provisions requiring uniformity.[2] The centerpiece of the argument is the *Pollock* case;[3] in this case, he correctly reminds us, all the justices agreed that the income tax had the effect of a tax on property.[4] Unfortunately for the argument, everything but the holding in the *Pollock* case has since been explained away. And *Lawrence v. State Tax Commission*,[5] in upholding a tax levied by the state of the taxpayer's residence on income received from a business conducted in another state, implicitly recognizes that income taxes are not subject to the rules applicable to other taxes affecting business or property. Mr. Tuller calls the decision "simply wrong." But the recent *Cohn* case,[6] sustaining the taxation of income derived by a resident from foreign real estate, has clinched the argument against Mr. Tuller.

It is evident that the author of this interesting though repetitious book dislikes the prevalent theories of taxation and writes with an eye to the courts to protect those who have income to be taxed. He speaks eloquently of the courts as protectors of our liberty — with no glance at the fate of unpopular minorities[7] — and wishfully assumes that the Constitution was written to protect the individual from the government's power to affect him by taxation. Apparently he forgets that the limitations upon the power of taxation actually found in the Federal Constitution do not touch the problems with which he deals. While it is true that in the early cases before the enactment of the Fourteenth Amendment the Supreme Court restricted state power to tax when it reached matters not subject to its jurisdiction,[8] the words of the original Constitution do not require this result, and in the later cases we are dealing principally with the elastic due process clause of the Fourteenth Amendment.

The difficulty with the writer's position is the assumption that the matter is settled by defining an income tax as a tax *on* property. The income tax, Mr. Tuller maintains, has no distinctive qualities. It is not an excise tax;

2. *E.g.*, Bachrach v. Nelson, 349 Ill. 579, 182 N. E. 909 (1932); Kelley v. Kalodner, 320 Pa. 180, 181 Atl. 598 (1935); Culliton v. Chase, 174 Wash. 363, 25 P. (2d) 81 (1933).

3. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601 (1895).

4. But see Mr. Chief Justice White's distinction of the *Pollock* case in Brushaber v. Union Pacific R. R., 240 U. S. 1, 16 (1916), approved in New York *ex rel.* Cohn v. Graves, 57 Sup. Ct. 466, 468 (1937).

5. 286 U. S. 276 (1932).

6. New York *ex rel.* Cohn v. Graves, 57 Sup. Ct. 466 (1937), *aff'g* 271 N. Y. 353, 3 N. E. (2d) 508 (1936), (1936) 46 YALE L. J. 148. But *cf.* New York *ex rel.* Whitney v. Graves, 57 Sup. Ct. 237 (1937) (a tax on profits from the sale of an interest in a Stock Exchange membership treated as localized at the Exchange).

7. Mooney v. Holohan, 294 U. S. 103 (1935) is cited, but in connection with the argument that graduated taxes violate fundamental conceptions of justice.

8. Hays v. Pacific Mails S. S. Co., 17 How. 596 (U. S. 1855).

in constitutional law a tax is labelled an "excise" only in order to differentiate it from a "direct" tax. But otherwise the only question is whether the tax is *on* property or *on* a privilege. The judges' careless use of the term "privilege" is misleading:[9] a tax on the exercise of a lawful right is a tax on property; only when the legislature may take away the "right" altogether is it proper to speak of a tax as on a "privilege." Hence inheritance tax cases are not precedent for graduated income taxes.[10]

But under the due process clause the question always is whether the tax is reasonable in view of the circumstances conditioning its imposition. If it is necessary to have a theory, we may say that the tax is levied so that those who benefit most by the protection of government may contribute according to their abilities; income is the measure at once of benefit and of ability. Perhaps logical consistency does not result in all cases; but the law of taxation has never been distinguished for its adherence to logic.

In his conclusion Mr. Tuller expresses the hope that the states will abandon the income tax to the Federal Government and that the Federal Government will leave the death tax to the states. He realizes that to accomplish this end for all time the Constitution would have to be amended; but in the meanwhile he expects the courts to do their duty and enforce the Constitution "as it is written." Since there is nothing "written" in the Constitution on the subject, Mr. Tuller really means that the courts should interpret the document in accordance with his desires and those of others who oppose all the principles of recent tax legislation. However, the matter appears to be concluded, at least for the present, by the *Cohn* case in which the Supreme Court indicates an unequivocal preference for the opposite view.

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REGULATION OF PUBLIC UTILITIES IN NEW JERSEY. By M. C. Waltersdorf. Baltimore: Waverly Press, 1936. Pp. 225. $2.50.

PROFESSOR Waltersdorf's study of utility regulation in New Jersey begins with a brief historical sketch of the beginnings of utility service and the development of commission regulation; devotes successive chapters to service standards, valuation, depreciation, the rate of return, accounting, security issues, and rate schedules; and concludes with a consideration of the special problems of electric railways and motor busses and of the holding company in New Jersey. The statutes and the formal reports of the commission and the courts provide the basic materials for the study. The treatment throughout is descriptive, the presentation is compact and concise, and the critical appraisal and recommendations are based on an acceptance of the system of commission regulation of the privately owned and operated utility. The

9. See Mr. Justice Cardozo, dissenting, in Graves v. Texas Co., 298 U. S. 393, 405 (1936).

10. *Cf.* Bromley v. McCaughn, 280 U. S. 124, 138 (1929).

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picture that emerges is one of regulation in a typical state, for New Jersey has never been a leader in its approach to the problems of utility regulation.

Dr. Waltersdorf finds that regulation in New Jersey has "fallen short of attaining its full objective." The reasons for this failure are various: "the laxity of public interest, adverse court decisions, inadequacies of the existing laws, lack of Federal control to supplement state regulation, and the general inability of the system of control to cope effectively with the new conditions,"—the most important of the "new conditions" being the development of the holding company system In New Jersey as elsewhere adverse court decisions have presented serious obstacles to effective rate regulation. But the Commission itself does not wholly escape responsibility for the ineffectiveness of regulation; its quasi-judicial procedure and its lack of initiative in inaugurating investigations are said to have left the public interest without adequate representation; and its slavish adherence to the reproduction cost method has crippled rate-making at the start. In results, as well as in regulatory methods, New Jersey's experience is unfortunately typical.

Dr. Waltersdorf's recommendations remain within the accepted regulatory framework: public ownership and operation is undesirable because it is characterized by serious "inherent" weaknesses; the modernization of the statutes is essential; a definite standard for the determination of the rate base would be helpful; commissions should become a professional group, free from political interference, and should normally be reappointed when their service has been satisfactory (only two of the seventeen Commissioners appointed to office were reappointed at the expiration of their terms); and as in all states adequate financing of the commission is necessary.

Reasonable as the conclusions and recommendations may be when the situation in a single state is considered, the cumulative evidence from studies like this must lead those interested in effective control of private monopolies to two conclusions: regulation has seldom had an opportunity to demonstrate whether it can be made effective in the states; and, if regulation cannot be made effective, the time has come to scrap the old forms of commission control and to institute new methods of control that promise more satisfactory results for consumers and investors.

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