

REVIEWS

The Austinian Theory of Law. W. Jethro Brown, LL.D., Litt. D.
Professor of Comparative Law in the University College of
Wales, London. John Murray, 1906. pp. xvi, 383.

The form in which the work of John Austin has been preserved has hardly done justice to what that work really was. A law lecturer, like a jury lawyer, must not disdain the practice of repetition. Every man to whom he speaks will not hear everything that is said. Most of them will fail to retain in their minds much that is said, unless it be presented to them from different points of view or, at least, more than once in different forms of words. A good book is seldom written in that way. Austin's lectures were never thoroughly revised for publication. Professor Brown has now taken the most important of them, cut out a third of these, and added over a hundred pages of what is partly a criticism and partly a defence of the Austinian doctrine. He has had especially in view the wants of law teachers and law students, and in notes suggests many questions skilfully framed with a view of helping the latter to test the adequacy of Austin's definitions, by applying them to concrete cases.

Austin was nothing if not logical, and, having adopted his premises, argued from them without flinching, wherever he might be carried. Law came from sovereign power. Sovereign power must be the supreme power. Therefore no government could be at once sovereign and subject, that is, "imperfectly supreme" (p. 139). Professor Brown, differing here from Burgess and Willoughby, says that, as to this, Austin was sacrificing essentials to verbal precision and taking an unhistorical position (p. 141).

In his supplementary chapters, (*excursus*, as he styles them) the author denies that to ascribe personality to a corporation is to adopt a legal fiction. It is a real, though not a physical person. "It is a representation of physical realities, which the law recognizes rather than creates." (p. 264.)

James C. Carter's presentation of the theory that Judges make no law is sharply criticised as a bundle of fallacies (p. 289), in which no distinction is made between the sources from which laws have taken their origin as rules, and the sources from which laws have taken their title to rank as rules which the state will enforce. Judicial precedents find their main office in limiting the power of judges in judgments thereafter rendered (p. 296.) They are parts of a long process of judicial thought, slowly working, in case after case, towards conclusions which, at the beginning, were "felt dimly or not at all." (p. 297).

Occasionally one meets with what seems an unguarded statement, as where (p. 298) it is said that if the House of Lords, on appeal, should construe a statute in a certain way, and Parliament should afterwards declare that it meant the contrary, "the

declaration would be accepted by all courts as final." Such a declaratory act could hardly be permitted to disturb interests vested under the preceding judgment.

Professor Brown gives the American courts credit for inquiring as to the governing principles more than for a governing case. (p. 300.) He recognizes the English tendency towards what Lambert has called *la superstition du cas*, and insists that what the beginner in the study of law needs first is a treatise on elementary law. (p. 370.)

The style of the author is simple and clear. His reading has been extensive, and he quotes from the best words of many men. It is in a friendly spirit that he takes up the Austinian theory, but as one that is "*Nullius addictus jurare in verba magistri.*"

He makes it plainer than Austin himself did; but by putting it in so strong a light that defects are called to the reader's attention which might otherwise have escaped it. S. E. B.

Remsen on the Preparation and Contests of Wills. (With plans of and extracts from important wills.) Daniel S. Remsen, of the N. Y. Bar. Baker, Voorhis & Company, 1907.

As stated in the preface, the purpose of this book is to assist lawyers in three important professional duties, namely: in planning a suitable will; in preparing a will that shall, without controversy and against legal attack, effect the testator's purpose; in determining when and by whom probate may be successfully contested. The chapters stating by whom and on what grounds wills may be contested are elementary and are not a valuable feature of the author's work, in fact, they do not belong in a book primarily intended to guide the professional adviser in the work of *ante mortem* creation rather than that of *post mortem* destruction.

The most obvious duty of the lawyer called upon to draft a will is to put the scheme of the testator into clear, concise and effective language. But equally important, though less obvious, is his duty to assist the testator in forming a complete scheme—in doing which he must call to his imagination every possible event of life, death, change of property and of circumstance during the testator's life and afterwards which may interfere with or affect the testator's plan, and must subject the scheme to the test of every such possibility. He must also, especially if the testator's scheme involves a postponement of complete distribution or title, consider the details of possession and administration so that the scheme may be carried out to completion with the least inconvenience, perplexity and loss to those concerned. When he finally drafts the will, he should be able to express the scheme of disposition and administration in such form that others in future years may not merely understand it but may have no excuse for misunderstanding. The lawyer, at all stages of his work, must know and apply the law concerning the subject-matter, that is, such law as is collated and digested in our several standard treatises on wills.

Mr. Remsen has again collated and digested much of this law and to a great extent duplicated the work of other treatise-writers. But this work has been done consistently with the main purpose of the book, in discussing points about which there has been most frequent doubt and controversy and in suggesting how such doubt may be avoided. He has also, by carefully collating the laws and decisions of different states on many points, given to the draftsman information the lack of which in many a case has in the past caused miscarriage of the testator's purpose. Instances of this kind of work well done by the author are his analysis of the state statutes preventing lapse and consequent failure of a gift to one who dies before the testator by the substitution of the heirs or issue of such legatee; also his statement of the rule against perpetuities as applied in the several states; also the suggestion implied forcibly by his emphasis of the fact that a personal discretion dies with the person to whom it is given and cannot, therefore, be exercised by another in the absence of special provision. The author shows his comprehension of the draftsman's needs when he puts into charted form the different kinds of estates which may be created and materially aids one's imagination when he tabulates the situations which may be brought about by contingencies of death and survivorship within a period of time among a class of beneficiaries and their issue.

Many statements of the law as such are so condensed that they can be fully comprehended by the keen mind of the specialist only. Some of the treatment is so elementary that it may be useful to any, however inexperienced, but as a whole, the book is to be commended for the suggestions it makes to the specialist rather than for the guidance it offers to the inexperienced. The author might have added much to the value of his book for all by more concrete suggestion. Take for instance, the subject of substitutional and original gifts, so-called, the discussion of which the author closes by saying that it is better practice to make a gift original. This is well so far as it goes, but definitions do not take the place of clear suggestions. Suppose a testator gives property "to my brothers and to the issue of any dying before me." If a brother be dead at the date of the will, are the issue of such brother intended to share in the gift? Why could not Mr. Remsen have said that if it is intended that such issue shall take, the gift should be "to my brothers and to the issue of such brothers as are now or may then be dead." To illustrate the confusion in definition, we note that in a gift to one of his heirs, the author says the heirs take by substitution (see page 232), whereas it is said by so good an authority as Judge Simeon E. Baldwin that in such case the gift to the heirs is original (*Conn. Trust. etc., Co. v. Hollister*, 74 Conn., 228). In another instance, the author says that it should clearly appear at what period of time the testator wishes members of a class to be ascertained, and adds, "Failures in this respect cause much litigation." The author would have done us all a service if he had given concrete instances of expression which would prevent such failures.

The last half of the book contains synopses of and extracts from wills of wealthy and eminent decedents taken from the records in all parts of the country. Very few of them are models of simple and concise expression, yet nearly all are good specimens of the will-making art and are consequently of great interest and value. They are full of suggestion and aid, especially in the detail of administration; for instance in the provisions authorizing executors and trustees to continue the testator's business, to compound and adjust claims, to invest and re-invest, to rent and repair property, provisions against anticipation and incumbrance of equitable interests, also against liability of executors for default of co-executors. They are also a valuable lesson to all draftsmen in the exact care taken in most instances to foresee and cover every contingency which might cause partial failure of the testator's scheme or doubt and controversy. The will of William Astor is especially notable for its exact provisions for all contingencies and emergencies of administration of the trusts created. That of William M. Evarts is a model will in form and in its exact provision for contingencies. That of Marshall Field is a studied prolongation of trusts to the limit of the rule against perpetuities, even going so far as to direct equitable conversion of lands situated in other jurisdictions where a different rule of perpetuities might be applicable.

This part of his work might have been made much more valuable if the author had made original comment and explanation with references to the law as stated in the first part. He states in his preface that he deems it an impropriety to do so. But he has thus left the real merit of each will to be appreciated by those only who by training and skill are enabled to recognize such merit, while the faults may be followed by those who may be in need of instruction. Let us note a few of the many instances in which original comment would have been instructive. One is in the will of John Jacob Astor, where a tenant for life was given power, with the assent of either of the executors, to sell and convey land to the extent of one-half of the value of the total lands devised to such life tenant. Such a provision might raise practical difficulties in compelling a purchaser to assure himself of the value of lands devised to his grantor and of lands previously conveyed away by such grantor. Another instance is in the will of William E. Dodge, where a sum of money is left to executors to be divided by them among employees of the testator in such proportion as they, on consultation with his wife, might decide. A careful examination of the text in the other part of the book fails to reveal whether such a delegation by the testator of the power to select the objects of his bounty is or is not valid. The gift by Eugene Kelly to his executors to be divided among charities chosen by them is one which has been held invalid in some jurisdictions.

Surely the author might with propriety have called attention in many cases to extreme verbosity and repetition and have explained some points of expression. We might, for instance, like

to know the vital importance and operative effect of a phrase frequently occurring in Rhode Island wills quoted by the author, where ultimate distribution among remote issue is directed to be made *per stirpes*, "and equally as between brothers and sisters."

Mr. Remsen has made a valuable addition to the library of any one interested in the subject of wills, but those led by the title to hope that the material has been especially worked to suit the needs of the inexperienced will be at least disappointed.

Federal Power over Carriers and Corporations. By E. Parmelee Prentice. The Macmillan Company, New York, 1907. Cloth, pages 244.

This work is an examination of constitutional history to ascertain the extent of federal power in reference to carriers and corporations, a survey of the modern tendency toward a most liberal construction of this power and the evils which must necessarily result therefrom. A summary of the leading decisions from *Gibbons v. Ogden*, 9 Wheat. 1, to those of the present day leads to the conclusion that as a matter of law the application of federal power in this regard has reached its limit and that as a matter of policy a greater centralization of such power would be both unwise and disastrous.

The current proposals for trust regulation by means of licenses or compulsory federal incorporation, in the opinion of the author, mean that eventually complete centralization is to be substituted for local self-government. It is maintained that now more than ever governments should be kept close to the whole people and that all should participate. Therefore no policy should be adopted which will tend to lessen the importance of our state governments.

The book is clear, interesting and convincing. It is a most timely contribution to the literature upon this subject at a time when proposed remedies for existing evils seem to be framed and advocated without regard to fundamental principles.

G. S. V. S.

The Law of Homicide. Wharton. Third Edition by Frank H. Bowlby. Civi. pp. 1120.

A perusal of the third edition of this standard work is very helpful in this day of "brain storms" and an evident return to dependence on the principles of the much maligned "unwritten law." Since the second edition of Dr. Wharton's work appeared in 1875 so many old-time illusions have been dispelled and so many unique pleas interposed by ingenious counsel that, were the practitioner to depend on the authority of general text-books on criminal law, he would be sadly handicapped. The latest edition is, as far as the limited space permits, an elaboration of common law principles as adjudicated under varying modern conditions. To style a work of this kind a text-book would be rather misleading as it is in reality more in the nature of a digest of

cases. Over 7000 cases are cited, including the most recent decisions and the editor is to be congratulated on having effectively boiled down so much valuable and interesting matter while giving a pretty thorough exposition of this most important branch of the criminal law. The subjects are well arranged and a complete index covering fifty-two pages makes the work invaluable for ready reference to specific matter. The chapters on Conspiracy, Defenses to Homicide, Evidence, Instructions to Jury and Trials, are particularly interesting. *F. P. M.*

Military Law and the Procedure of Courts-Martial. By Edgar S. Dudley, LL.B., LD.D., Colonel, Judge Advocate, U. S. Army, and Professor of Law at the United States Military Academy. John Wiley & Sons, 1907.

As stated in the preface this book "has been prepared to meet the existing necessities at the United States Military Academy for a text-book which would give a clear and thorough outline of the science of military law, including all recent changes and developments and yet be contained within such brief compass as to be adopted for use in the instruction of Cadets within the limited period assigned to the study of the subject."

The book is admirably adapted for this purpose and the subject is also treated in such a manner as to make it a text of practical use to the service at large as well as to those interested in any way in the application and enforcement of military law.

The work, after two or three chapters relating to military jurisprudence as a science, takes up military tribunals and their formation, composition, function, jurisdiction, etc., both as to general and inferior courts-martial, and is followed by chapters on the conduct of the trial of the accused, step by step from the arrest and confinement, through to the discharge, conviction, review or pardon, as the case might be, not forgetting a very instructive and important chapter on the rules and classification of evidence as applied to courts-martial, and as to the competency and credibility of witnesses, etc. A chapter is also added on the laws of War, including Military Government; Martial Law; the Military Commission; Employment of Troops in the Enforcement of the Laws and the Relations of Military Persons to Civil Authority. The articles of war are separately considered and annotated in a very instructive and useful manner.

An appendix is added to the book which includes the Articles of War, Act Establishing the Summary Court, Act to Prevent the Failure of Military Justice, Executive Order Establishing Limits of Punishments and a list of twenty-six forms used in the conduct of a court-martial.

In short, the work, while not exhaustive, appears to be complete and is not only a text-book for the student, but will without a doubt prove useful and instructive to those interested in the presentation and conduct of cases before courts-martial. It is also written in a very readable and entertaining manner. *E. C. S.*

Powers of the American People, Congress, President and Courts.
Masuji Miyakawa. Wilkens-Sheiry Co., Washington, D.C.
pp. 254. Cloth.

The title of this volume is comprehensive and imposing. How it is possible to treat it adequately in two hundred and fifty-four pages is a trifle difficult to understand. It is rather usual to find that the author of a volume of this kind is neither an American nor an Englishman. If he had been reared under the influence of the institutions of the latter country, he might have been in a better position to understand the institutions of our country. By the preface the reader is lead to believe that he is about to enter realms of political wisdom hitherto unexplored. Before long he is brought to a standstill by a singular subject with a plural verb or some other monstrous construction, showing a remarkable unfamiliarity with the English language. These mistakes may be the result of some original work by the proof-reader. However, they certainly give the volume the appearance of the superficial variety.

C. H. H.

Regulation of Commerce Under the Federal Constitution. Thomas H. Calvert. Edward Thompson Company. Northport, Long Island, N. Y., 1907. Cloth, pages xiv, 324-380.

The author of this work by confining himself strictly to the title matter has furnished not only the lawyer and practitioner but also the reading public a conservative analysis of the relative position of our Federal and State governments on this important topic. Two criticisms might be made, the first of which is that not much effort seems to have been made to furnish a connected work by needed cross-references. The second is that the work lacks originality. Except for a few lines in the preface, which are more apologetic than positive, the author makes no comment or ventures no opinion on the validity or wisdom of recent Federal Legislation. The work is well arranged and divided and the valuable elementary principles laid down are backed up by references to well-chosen citations from our leading cases.

F. P. M.