BOOK REVIEWS

The Law of Unincorporated Associations and Business Trusts. By Sidney R. Wrightington. Second Edition. Boston, Little, Brown & Co., 1923. pp. xlv, 658.

In business, as in almost every other form of human endeavor, the modern tendency sets strongly in the direction of collective action. The group succeeds the individual because men realize that combining resources of property or brain or muscle increases the power of the individuals within the group. It may also offer some other advantage, such as diminishing the individual risk of loss. So business is coming more and more to be done by associates. The operative facts of association, i. e. the terms agreed upon by the associates, their number, their compliance or non-compliance with corporation laws, their methods of doing business, etc., determine the legal relations which arise between the associates and between the associates and outsiders. If the facts give rise to certain legal relations, we call the associates partners. If another set of legal relations are created, we call the associates a corporation. When the association takes the form which has come to be known as the Massachusetts Trust, the legal consequences may be still different.

The principal reason for associating in the form of a business trust rather than a partnership is the desire to limit the risk of loss to the amount of the investment, in other words, to avoid the individual responsibility of a partner. This object can, of course, be attained by adopting the corporate form of association, but corporations have been subjected to numerous taxes and governmental regulations which the business trust has as yet escaped. If by doing business in the trust form the expense and supervision incident to corporate organization can be avoided without sacrificing the advantages of transferrability of shares and limitation of individual liability which are characteristic of corporations, business men may well select the trust form of association. Other advantages may also be found in the trusteeship. The increasing number of recent court decisions dealing with such trusteeships indicate a trend toward this form of business organization. But Mr. Wrightington wisely warns his readers that the trust with transferable shares is not the most efficient medium for the business man to employ in every case. "The corporation strictly regulated by the state must remain the normal expression of large coöperative action when public participation is invited. Too rapid growth of trusts will invite like complicated regulations, which will defeat its purpose."

The line which divides business trust from partnership association has not yet been very clearly plotted by the courts. The most recent decisions in Massachusetts and in the Supreme Court of the United States suggest that the criterion is to be found in the control which the beneficiaries exercise over the trustees, so that if the trust agreement provides for such control there arises a partnership, while if it does not so provide, a trust is created. See *Crocker v. Malley* (1919) 249 U. S. 223, 39 Sup. Ct. 270; see also Hildebrand, *The Massachusetts Trust* (1921) 1 TEX. L. REV. 127. The author reviews the cases on this subject in section 14 and discusses the interesting problem among others whether power in the beneficiaries to change trustees at stated intervals constitutes such control as to make the associates partners rather than beneficiaries of a trust. In the leading cases decided in favor of the trust, it should be noted that the trusteeships have been for investment rather than for the carrying on of an active business; and one distinguished writer has denied that lack of control of the trustees is the sole criterion of trust rather than partnership or that the beneficiaries can avoid personal liability for debts of an active business merely by vesting full control in the trustees. See William W. Cook, *The Mysterious Massachusetts Trust* (1923) 9 A. B. A. JOUR. 763.

On many important problems of the law relating to unincorporated associations and business trusts further decisions by the courts are needed before one can predict with assurance. The law is still in the making, as Mr. Wrightington recognizes. Indeed, this very fact is the chief reason for this volume. Since 1916, when the first edition appeared as the pioneer monograph in this field, many cases have been handed down, supplying material for new discussion and for amplification of the author's earlier discussion. In general the arrangement adopted for the first edition has been followed in the second, but many sections have been completely rewritten and some new sections added. About one third of the book is devoted to an appendix of forms, one of which has been annotated with references to sections of the text where appear discussions of the legal problems involved. The book is primarily intended as a tool for practitioners and as such will be found invaluable.

THOMAS W. SWAN

Yale Law School

Removal of Causes from State to Federal Courts, by James Hamilton Lewis, formerly corporation counsel of Chicago and United States Senator from the State of Illinois. With an introduction by Elijah N. Zoline, of the New York Bar. With forms, one volume. New York, Clark Boardman Co. 1923. pp. 679.

This book will be useful to all interested in the Removal of Causes in the State Courts to the Courts of the United States. The subject is one with which few practitioners have had any experience and among such few the greater number not more than once or twice in the course of their practice. So far as we have been able to determine, it contains no inaccuracies.

Like most modern law books, however, it is spread over more pages than are necessary. This as usual is accomplished by a liberal use of printers' fat; and here also by the needless repetition at the head of each chapter of the table of such chapter's contents which is previously contained in the general table of contents. "Form No. 17" is no form; but an opinion of the District Court in a case affirmed on appeal in the Second Circuit. *Venner v. Southern Pac. Co.* (1922) 279 Fed. 832; certiorari denied (1922) 258 U. S. 628, 42 Sup. Ct. 461. There is much matter in the text for which the notes are the proper place.

The introduction by Mr. Zoline is, as are most things that he writes, interesting; but in this book has little practical value.

The reader would have been saved much trouble if the publishers had pursued the usual practice of printing the section number in the caption of each page; since the table of contents, the table of cases and the general index refer to sections and not to pages, and many sections spread over several pages. But these faults are more properly attributable to the publisher than to the author.

ROGER FOSTER

New York City

Handbook of Equity Jurisprudence. By James W. Eaton. Second edition, by Archibald H. Throckmorton. St. Paul, West Publishing Company, 1923. pp. xv, 711.

Illustrative Cases on Equity Jurisprudence. By Archibald H. Throckmorton. St. Paul, West Publishing Company, 1923. pp. x, 611.

Eaton on Equity, first published in 1901, is sufficiently well known to need little if any introduction to the readers of the JOURNAL. In preparing the new edition, the editor tells us that he has confined his work chiefly to "the citation of recent cases" and the "revision and extension of the text in connection with topics con-

cerning which there have been important developments in Equity Jurisprudence during the last twenty years." "Radical changes in the plan and scope of the book" have therefore not been made. For this reason the new edition contains the defects of the old, chief of which is that the text is largely an uncritical repetition of the stock phrases found in orthodox judicial opinions and texts. A typical example is the following statement, made in dealing with the difficult problem of whether in correcting mistakes made in reducing contracts to writing courts of equity violate the statute of frauds: "Equity does not deny or overrule the statute, but it declares that fraud or mistake creates obligations, and confers remedial rights which are not within the statutory prohibition. In respect to them the statute is uplifted." As a rule, the best and most scientifically written portions of the text are those added by the present editor, and it is to be regretted that he did not undertake a more thorough overhauling of the whole work, or, better, the writing of a wholly new work.

The reviewer has been unable to discover that the recent and important cases dealing with the "balance of convenience" doctrine in the law of injunctions have been referred to, or indeed that the problem is adequately discussed anywhere in the book. The reference is to such cases as *Crocker v. Manhattan Life Ins. Co.* (1901, 1st Dept.) 61 App. Div. 226, 70 N. Y. Supp. 492; *Whalen v. Union Bag Co.* (1913) 208 N. Y. 1, 101 N. E. 805; *McCann v. Chasm Power Co.* (1914) 211 N. Y. 301, 105 N. E. 416; *Wilkins v. Diven* (1920) 106 Kan. 283, 187 Pac. 665; and others of like nature. Other important developments, such as the growing tendency to protect interests of personality—frequently by finding a fictitious "property right" to be involved; unfair competition cases; the use of injunctions in labor disputes; are, however, presented with as much fullness as the general plan of the book admits. Within the limits set, therefore, the editor's work has in general been well done. Even so, the book is still in the main an unscientific and inadequate account, even for students' use, of the judicial phenomena which we still group under the heading "Equity."

The collection of cases which Mr. Throckmorton has made is confessedly only illustrative, and not intended to serve as material for the development of legal principles and rules by means of class-room discussion. Taking them for what they profess to be—cases to illustrate the accompanying text—they appear to be well chosen for their purpose. Whether that purpose is a useful one is another question, and one which it is beyond the scope of the present review to discuss.

WALTER WHEELER COOK

Yale Law School

The Law of Wills, Executors and Administrators. By James Schouler. Sixth Edition, by Arthur W. Blakemore. In four volumes. Albany, Matthew Bender & Company, 1923. Vol. I, pp. xcvi, 1-826; vol. II, pp. xx, 827-1666; vol. III, pp. xxxvi, 1167-2468; vol. IV, pp. xviii, 2469-3269.

The first edition of Professor Schouler's treatise on Executors and Administrators appeared in 1883, to be followed four years later by his work on Wills. These carefully prepared and scholarly books were given the favorable reception to which their undoubted merits entitled them. Going through several editions independently, they were combined in a fifth edition prepared by the distinguished author shortly before his death, and published in 1915 in two large volumes. Evidently the combination was for selling purposes only, as each volume carried its own table of cases, and the first volume its separate index. The only evidences of unity in the combined work were the complete table of contents at the beginning of the first volume and the general index at the end of the second. The same thing may be said of the present edition. The volume on Wills has been swelled into a two

volume treatise, and that on Executors and Administrators has been similarly enlarged.

From the standpoint of mere bulk the sixth edition is impressive, with its four heavy volumes containing in the aggregate some 3439 pages, nearly double the number in the preceding edition. It is also accurately printed on good paper with clear type, and the numerous heavy black letter headlines, which somewhat offend the eye of the casual reader, will doubtless be a joy to the hurried reference hunter. In the first two volumes the editor has followed Professor Schouler's arrangement quite closely with the exception of those chapters treating of mental capacity to make a will, but in the volumes treating of executors and administrators he has adopted an entirely different method of classifying the case material, probably in order to facilitate the handling of the vast masses of cases as grouped in the prevailing scheme of current digests. The result is that while the original text is used, it is scattered through the books in fragmentary paragraph form with such freedom as to trouble the reader who wishes to know whether a given statement comes from Professor Schouler's brain or from some casual digest paragraph.

The profession will probably find the treatment of mental capacity to make a will to be the most valuable, as it is undoubtedly the most notable addition made in this latest edition of this famous work. This topic, wholly rewritten by the present editor, extends through more than one hundred and fifty pages of the first volume. Using as a basis for his discussion the classification of abnormal mental conditions made by the distinguished alienist, Dr. William A. White, in his recent work entitled *Outlines of Psychiatry,* with occasional reference to Dr. Richard C. Cabot's *A Layman's Handbook of Medicine,* he has arranged the large number of cases dealing with the mental capacity of testators in a manner that is admirable and effective. The natural distrust of alienists as expert witnesses has, perhaps, been the cause why courts in analyzing the mental conditions of testators have made so little use of the undeniably valuable researches of medical men in this field. It is to be hoped the present editor's contribution to the literature on this always troublesome question may help bring medical science more effectively to the aid of the courts.

One does not find quite the same excellence in other parts of the editor's work. He evidently set himself the task of citing all the recent American cases bearing on his subject that were available in such publications, say, as the Second Decennial Digest and subsequent volumes of the American Digest. The table of cases shows some 31,000 cases cited in this edition as compared with 14,000 in the fifth edition. Assuming five syllabus paragraphs on the average for each of the 17,000 new cases, and that each paragraph must be disposed of somewhere between the beginning and the end of the book, the terrifying proportions of the editor's task become apparent. Sometimes, it is true, the digest paragraphs can be herded in great droves. For instance, consider the ancient and never disputed principle that the purpose of construction is to give effect to the expressed intention of the testator so far as the rules of law will permit. This principle of construction is stated with varying phraseology in no fewer than four different places. At page 967 it is supported by citations of cases occupying some 23 column-inches of note space; at page 971 are found 5 column-inches, and at pages 981 and 1031, some 19 and 23 inches, respectively. Thus we have nearly six column-feet of notes, packed tightly with citations, to support a statement that was settled law in Cicero's time and appears never since to have been questioned. One rather prefers Professor Schouler's single statement with its accompanying citation of five cases.

But sometimes a digest paragraph turns up for which no fit lodging place is found. It then becomes necessary to provide one in the form of a text statement which will support the citation. The process of making provision for such vagrant cases sometimes produces curious results. Thus in the case of *Van Ness's Will* (1912) 78 Misc. 592, 139 N. Y. Supp. 485, the Surrogate, in determining an issue

as to undue influence, explained certain citations from the Roman Law by amiably and learnedly commenting on the influence of that great system upon the English law of wills, largely developed by the civilians who presided over the ecclesiastical courts. The industrious head-note writer seizes upon this explanatory paragraph, which he renders as follows: "The modern law of wills being founded on the civil and canon law, such law, in the absence of modern law, is authoritative in probate courts." The digester puts this paragraph under *Wills—Nature and Extent of Testamentary Power*—Sec. 2. *What Law Governs*, among cases principally involving the conflict of laws. At page 19 of the work under review, under the same headings, we find this statement: "It has been said that the modern law of wills being founded on the civil and canon law such law in the absence of statute is authoritative in the probate court." It could hardly be said that the alterations in the language of the head-note diminished its inaccuracy. Five years later, in *In re Lummis* (1917) 166 N. Y. Supp. 936, 101 Misc. 258, the same Surrogate, in considering the admissibility of certain parol evidence to aid in the construction of a will, made similar remarks about the important part played by the Roman Law in the development of the English law of wills. This time, however, the head-note writer produces this more moderate statement: "Occasionally, in the absence of precedent, the civil law may be controlling in the construction of a will." This the digester should have placed under the same heading as the previous case, but unfortunately he put it in an entirely different place. At page 945 our editor, under headings similar in substance to those in the American Digest, though variant in form, makes this statement in his text: "In the absence of another precedent the rules of the civil law may govern the construction of a will"; and to this text *In re Lummis* is faithfully attached. The editor might well enough have made these and many other cases easily found the basis of a valuable paragraph on the influence of the civil law in the history of our law of wills, and placed it in his chapter treating of that topic, but unfortunately neither the Roman nor the civil law is there mentioned.

This method of text writing undoubtedly facilitates quantity production, and probably cuts down the overhead in the process of manufacturing law books, but it has unhappily marred this work by sprinkling its pages with statements so loose in form and so lacking in precision as to have no possible value save as pegs upon which to hang cited cases. Some are so loosely constructed as to appear to be in unexplained contradiction. Thus for example, on page 1392, in the same paragraph we find the following statements: "It is well established that, notwithstanding any formal limitation over, the limitation over is void when the will shows a clear purpose to give an absolute power of disposition to the first taker, for a limitation over after a bequest of personal property with unlimited power of disposition in the first taker would be an inconsistent estate . . . . The rule that a bequest of personalty with power of disposition creates an absolute estate, though there is a limitation over of property undisposed of will not be applied where there has been no exercise of the right of disposition." The cases cited are much more easily harmonized than the text.

In the new parts of this work, notably in that treating, almost anew, the construction of wills, the present reader has been unable to discover any attempt to analyze difficult problems or formulate fundamental principles, or even to reconcile, harmonize or distinguish the divergent and conflicting decisions with which the subject abounds. Rather it heaps case on case in dreary accumulations, arranged and labelled with little regard for order or relevancy. Manifestly the work is intended for the use of the busy practitioner; but one cannot but wonder if the seeker for the law could not make fairer progress by proceeding at once to the digests.

W. R. VANCE

Yale Law School

A Treatise on the Law of Marriage and Divorce. By Frank H. Keezer. Indianapolis, The Bobbs-Merrill Company, 1923. pp. cxxxii, 1079.

This is a manual for the divorce practitioner. Marriage, for instance, is treated almost wholly in relation to the necessity and methods of establishing its existence as a foundation for an action for divorce, separation, or alienation. The approach is throughout that of procedure. Emphasis and elaboration fall to points of pleading, variance, evidence, and presumption. Some fifty pages are devoted to a synopsis of marriage statutes, some ninety to one hundred of statutes on dissolution of marriage, and one hundred forty pages to some well chosen and well indexed forms. Sixty-five pages fall to a reprint of *Haddock v. Haddock;* and a satisfactory note on the subsequent history of that decision—the best critical material in the book, and placed where critical material certainly is needed. There are also seventy pages of well-gathered material on breach of promise to marry.

The method used is largely that of the law encyclopedia; the accuracy is at about the level one has come to expect from the better encyclopedias, and no higher; the text and notes lack, however, something of the fullness of fact comparison found, e. g., in Corpus Juris. The notes in the L. R. A. series are regularly cited in the footnotes, to the great advantage of the reader; on the other hand, no other periodical material and few other texts find consideration, even desultory. The arrangement of material is open to severe criticism for scattering related material widely, and sometimes quite haphazard (e. g. at p. 162, where under the heading "delay in bringing suit"—for annulment—the second paragraph deals with estoppels wholly unrelated to delay) with little attempt at even inadequate cross reference. Thus at pages 127 and 128 there is discussed the effect on a continuing, apparently marital, cohabitation of removal of an initial impediment to the marriage resting on one party. But related important material bearing on the point is found on pages 147, 158, 162, 537, with citations in part identical, partly different, and no cross references. The same discussion will serve to illustrate the general uncritical character of the work: *Collins v. Voorhees* is cited; the later New Jersey cases also; but no hint appears that the doctrine of the former case has suffered impairment. Finally, this same discussion shows what is typical of the book, a reasonably accurate discrimination and presentation of lines of divergent authority. Wherein the book lacks chiefly, is in discussion and arrangement; the former occurs infrequently; the latter sprawls. Reasoning, where given, is mainly on points of practice, and none too satisfactory even there. Synthesis of the subject matter there simply is not.

For all that, there is a deal more to the book than what can be accomplished with paste-pot and shears. The practitioner will find this lining up of material wholly from the angle of the law suit invaluable and at times ingenious; the student will find it enlightening. If such was the purpose of the book, (as it certainly is the effect), much is explained. Criminal conversation is omitted, although fairly in the field—is that perhaps because the practice may show plaintiffs to fare better in the action for alienation, with adultery shown as aggravation? The statutes on marriage licenses are only skimmed—is that because no attack on the marriage can ordinarily be based on non-compliance with those statutes? Alimony in all its forms; the rights of counsel; damage questions—these are treated at length. Practical points; useful material. And when the author counsels that "in bringing a libel for divorce on the ground of adultery, it is always better, after naming the *particeps criminis,* to insert 'or with some other person or persons to your libellant unknown,'" he is to be listened to with respect.

On the substantive law of divorce the reviewer may find Schouler more satisfactory, and Bishop, at least for his own day, more philosophical; he may miss legal analysis and functional approach in Mr. Keezer's work. But any one interested in divorce practice will find the book well worth while. On all the points which the reviewer criticizes, save one, the proper answer is: the book was not intended to

do those things; it is enough to do in sober practical decency just what it did intend. The one point left for real criticism is the index. When material is scattered, the index should be excellent indeed. In a later edition it is to be hoped that the indexing will be done according to what the text says, rather than according to the black letter section headings.

KARL NICKERSON LLEWELLYN

Yale Law School

Simon Van Leeuwen's Commentaries on Roman-Dutch Law. Revised and edited with notes by C. W. Decker. Translated from the original Dutch by the Hon. Sir John G. Kotzé. Second edition. Volume II. London, Sweet & Maxwell, Ltd. 1923. pp. iv, 810.

With this second volume concludes the new edition of Judge Kotzé's translation of Van Leeuwen's Commentaries on Roman-Dutch Law. As the first volume has been the subject of review in a previous issue of this JOURNAL, (vol. 31, at p. 568), it may briefly be stated that the present volume covers the fourth and fifth books of Van Leeuwen's treatise, which deal respectively with the important subjects of obligations, including crimes as well as contracts and torts, and with judicial administration and procedure. An exhaustive index of some 180 pages to the entire work is added, which, together with the epitome in the first volume, will largely serve to enhance its usefulness.

The reader's attention should in addition be directed to the notes of the translator, the more extended of which are as in the first volume inserted in an appendix. Of these the most interesting deal with stipulations on behalf of a third party, p. 598, with suretyship by women, p. 616, with the right of a pledgor to recover from a bona fide purchaser, p. 621, and the pledgee's right of sale, p. 647, with the doctrine of common employment, p. 640, and, more especially, with the civilian conception of *causa,* p. 604, which latter topic has recently been given exhaustive treatment in a special monograph by Judge Kotzé. (See review in [1923] 23 COL. L. REV. 85). It should also in fairness be added that in the two valuable notes on recusation of the judge, p. 654, and on specific performance of contractual obligations, p. 654, the doubts which the undersigned expressed in the review of the first volume as to certain generalizations on these topics therein stated, have been laid quite at rest.

HESSEL E. YNTEMA

Columbia University

Outlines of the History of English and American Law. By William F. Walsh. New York University Press, 1923. pp. xiv, 533.

Long as this book is, it is of not large enough compass to cover in detail the field surveyed in anything but outline form. That it is in one volume makes it of convenience to those whose interest is in the details of the subjects treated. Professor Walsh does not lay claim to any original work in the fields covered. Taken entirely from secondary sources already published, the book is largely a restatement, usually in briefer form, of what has long been available in print to those interested in English law.

G. E. WOODBINE

Yale Law School

BOOKS RECEIVED

The Equality of States. By Julius Goebel, Jr. New York, Columbia University Press, 1923. pp. 89.

The American Revolution. By Charles H. McIlwain. New York, The Macmillan Company, 1923. pp. xi, 198.

The History of English and American Law. By William F. Walsh. New York, New York University Press, 1923. pp. xiv, 533.

The Constitution of the United States. By Robert Livingston Schuyler. New York, The Macmillan Company, 1923. pp. viii, 211.

Cases on the Law of Bills and Notes. By William E. Britton. Chicago, Callaghan and Company, 1923. pp. vi, 938.

The Art of Cross-Examination. By Francis L. Wellman. New York, The Macmillan Company, 1923. pp. xiv, 371.

Outlines for Review. By William L. Clark. New York, The American Law Book Company, 1923. pp. xcii, 364.

A Treatise on the Law of Corporations. By William W. Cook. Eighth Edition, Six Volumes. New York, Baker, Voorhis & Company, 1923. pp. xiv, 997; xii, to 1960; x, to 2860; xi, to 3822; ix, to 4819.

Stock Exchange Law. By Samuel P. Goldman. New York, The Ronald Press Company, 1923. pp. x, 497.

Labour in the Coal-Mining Industry. By G. D. H. Cole. New York, Oxford University Press, American Branch, 1923. pp. xiv, 274+11.

The Ordinance Power of the Japanese Emperor. By Tomino Nakano. Baltimore, The Johns Hopkins Press, 1923. pp. xviii, 269.

Judicial Review of Legislation. By Chief Justice Robert von Moschzisker. Washington, The National Association for Constitutional Government, 1923. pp. 183.

The Constitution of the German Republic. By Heinrich Oppenheimer. London, Stevens & Sons, 1923. pp. vii, 260.

Solidarity and Correality. By J. Kerr Wylie. Edinburgh, Oliver & Boyd, 1923. pp. xvi, 365.

Legal Foundations of Capitalism. By John R. Commons. New York, The Macmillan Company, 1924. pp. x, 394.

The British Year Book of International Law. 1923-24. New York, Oxford University Press, American Branch, 1923. pp. xv, 264.

War Finances of the Netherlands up to 1918. By M. J. Van Der Flier. New York, Oxford University Press, American Branch, 1923. pp. xv, 150+11.