BOOK REVIEWS

Principles of Judicial Administration. By W. F. Willoughby. Washington, The Brookings Institute, 1929. pp. xxii, 662.

The Table of Contents of this work occupies nearly eight pages of fine print. Taking heed of the complaint, voiced by the author of the Foreword, that since the publication of Baldwin's book, *The American Judiciary*, there has been no attempt to bring together in one volume a description of the various agencies of the judicial branch of the government, the author has issued a descriptive catalogue of all the wheels and cogs and spare parts in the machinery of judicial administration. The completeness of the catalogue appears from a glance at the contents.

The author has a long and distinguished record, not only in the field of theory, but also in the practice, of government. Lecturer at Johns Hopkins and at Harvard; Assistant Director of the Census; Professor of Jurisprudence and Politics at Princeton; representative of the Department of Labor at several international congresses; Constitutional Advisor to the Chinese Republic; Acting Governor of Porto Rico; Director of the Institute of Government Research; author of several books and many articles including *The Problem of the National Budget* and *Principles of Public Administration;* these are only some of the many things that lend to his voice the tone of authority.

To lawyers as well as to students of government a catalogue of judicial administrative agencies should be helpful. To have set before him between the covers of one book the whole congeries of agencies now operating in this field is calculated to give the reader a broader view, even if it does not furnish him with some new information. It suggests, too, that, with all its defects, the judicial machinery has already been the subject of some thought and of no little experimentation.

But the book purports to be more than a catalogue. It is, in effect, the report of a survey. It is an attempt not only to list, but to evaluate, the various institutions, existing and proposed, by which the administration of justice is effected.

It deals, first, with the various means for keeping people out of court; with crime prevention; administrative adjudication; arbitration; declaratory judgments; advisory opinions. It then considers preliminary enforcement agencies: the executive, the attorney general, the prosecuting attorney, the police, the coroner, the grand jury. A detailed consideration of the judicial organization, local, state, and federal, follows. And then a series of chapters on legal procedure. Legal Aid is given a part by itself. To quote from the author's preface: ". . . . the effort has been made to resolve the great problem of judicial administration into its constituent elements, to determine the fundamental principles that should govern in handling the conditions to be met, to describe the action that has been taken, to point out wherein this action has failed to conform to the principles that should be observed and, therefore, has given unsatisfactory results, and finally, to indicate the steps that should be taken to correct these mistakes and to point out the extent to which these steps have been taken in one or the other of our commonwealths." Truly an ambitious undertaking.

In this process of listing and assaying the author has brought forward a wealth of information. But the cataloguing is more successful than the evaluation. Notwithstanding the author's long and wide experience both as investigator and as administrator, his book proves that successfully to weigh the merits of so vast a number of complex institutions is beyond the power of any one man. In passing from the field of government to the more technical field of the law he has lost something of the authoritative touch which marks his earlier works. His discussions of procedural problems, for example, reveal a lack of that seasoned judgment a deeper experience would engender.

The author's acknowledgment of the impossibility of attaining personal omniscience is both tacit and express. He has, as he says, "made liberal use of quoted matter." ". . . . the chief claim that the present work has as a contribution to the cause of reform is that it seeks to bring together within the compass of a single volume the conclusions and suggestions of those most qualified to speak on the subject, and to present them in a systematic and coordinated form. . . . the policy has been pursued, in presenting the observations of the authorities drawn upon as largely as possible in their own words."

There is no objection, of course, to the use of paste-pot and shears in the production of a book of this kind. But one feels, somehow, that the author put on a pair of very blue glasses when he went to look for his materials. Giving full credence to the remark quoted from Dean Pound that "Our system of courts is archaic and our procedure behind the times," one has a feeling, nevertheless, that the author has relied too thoroughly upon the postulate that whatever is is wrong. The discussion of suggested, but untried, reforms is frequently left with the inference that anything whatever would be better than what we have.

This is hardly fortunate. Whatever may be the merits of a survey conducted by collecting ready-made opinions, the function of a survey differs from that of a jeremiad.

Perhaps, however, the book was never intended to be a survey, but simply, as the author calls it, "a contribution to the cause of reform." If so, its scope is too inclusive. There is a disposition to crack too many heads at once, and not to hit any of them hard enough. The edge of criticism is dulled when its repetition becomes monotonous.

But though the book may not be entirely convincing as a final judgment upon the questions raised and the institutions discussed, it should serve a very useful purpose as a compendium of plaintiffs' arguments. Most of the faults that have been publicly adverted to are mentioned in the text. So, again, one is impelled to classify the book as a survey, although this time, as one of a different kind.

As a book of information, rather than as a book of opinion, this work should find its place.

Cincinnati, Ohio HOWARD L. BEVIS.

The Law of Torts. By Sir John Salmond. 7th ed. London, Sweet & Maxwell, 1928. pp. xlvii, 688.

The present edition of this work is the first one for which the late distinguished author is not himself responsible. In preparing the present edition Mr. Stallybrass in his preface tells us that he has guided himself by one general principle, "that the present edition shall be as good a book as I can make it, whilst never forgetting that it is Sir John Salmond's book and not my own." He has kept his word. The result is a distinguished treatise which displays both a praiseworthy respect for the opinions of

Sir John Salmond and a vigorous independence of thought on the part of the present editor.

The original text of Sir John Salmond is very largely retained, with some re-arrangement, subject, of course, to such minor changes as have been made necessary by recent decisions. On a number of occasions, Mr. Stallybrass has expressed his own views, where they differ materially from those of Sir John, by way of excursus or footnote. One excursus in particular, an eight-page essay on the general principles of liability, is brilliantly done. The views of Salmond that there is no general principle of tort liability but only a collection of independent "torts" based, with rare exceptions, upon wrongful intention or negligence is denied with vigor and understanding, and it may now be hoped that this antiquated view has finally been dispatched to that mythical realm from whose bourne no worn-out "legal doctrines" can return to plague us. Mr. Stallybrass in the same excursus emphasizes his disagreement with Sir John's view that negligence is merely "a certain mental attitude of the defendant towards the consequences of his act," and brings out clearly that negligence, as we know it today, is an independent basis of liability resulting from unreasonably dangerous conduct. He emphasizes the point that the law has moved in cycles. "A period of strict liability, and 'unmoral' period, is succeeded by a period of fault liability, a 'moral' period, and then the pendulum swings back again. . . the nineteenth century was a period of moralization, the twentieth century seems likely to be characterized by the backward swing of the pendulum. . . there is a strong and growing tendency where there is no blame on either side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence shift the loss by creating liability where there has been no fault." The last sentence, which is a quotation from Dean Pound, illustrates another outstanding characteristic of the present edition of Salmond on *Torts*, namely, the constant reference to and quotation from the recent writing of American students on the subject of Torts. Professor Bohlen's *Studies* and the *Selected Essays on the Law of Torts* from the pages of the *Harvard Law Review* are constantly referred to and quoted, and in his preface Mr. Stallybrass speaks of the great contribution to the scientific study of the English law of Torts made by "our American friends." He has also kept constantly in mind the historical background of the subject and has made frequent reference to Holdsworth's *History of the English Law*.

This book, it is seen, is something more than a mere new edition of a standard treatise. Mr. Stallybrass has given us a thorough and stimulating revision of what was already an outstanding work. May the day be not far distant when there is available such an excellent brief treatise on the American Law of Torts.

Cambridge, Mass. EDWARD S. THURSTON.

Internationales Privatrecht (Grenzrecht). Vol. II. By Ernst Frankenstein. Berlin-Gruenewald, Dr. Walter Rothschild, 1929. pp. xxxix, 576.

In the review of the first volume of this important work in (1927) 36 YALE L. J. 1030, the author's fundamental theory was briefly indicated. It proceeds from the premise that two "primary points of contact" control the entire conflict of laws—the law of the situs as regards property rights and the national law of the parties as regards obligations. Whatever their laws may provide must be accepted by the courts of other states, subject to their rules of public policy. If they refer the question to the law of some other state, the law of such state must be applied, by way of "secondary point of contact."

In the second volume (containing Books III to V) Frankenstein deals with the subjects of property, obligations (contracts, torts, and quasi-contracts), and commercial and maritime law. With respect to each topic the author discusses the prevailing theories and the decisions of the German courts in the light of his own point of view. As the rules of the conflict of laws governing contracts are everywhere in a state of confusion, it may be of interest to use this subject as an illustration of our author's method. Frankenstein starts with the proposition that the science of Private International Law should discover, so far as possible, rules which will give the same solution to a legal problem in whichever country the matter is litigated. This being the primary objective, he is forced to reject both the law of the place of contracting and the law of the place of performance as controlling in the matter of contracts, for both are "legal" terms and defined differently in different countries, and cannot lead, therefore, to uniform solutions. The intention of the parties also will not do as a criterion to determine the validity of contracts, for the intention of individuals can be paramount only within the limits prescribed by law. These limits, according to the general theory advanced by our author, should be defined by the law having primary jurisdiction, that is, the national law of the parties. To the extent that the national law allows full scope to the intention of the parties, it must be followed. This is true also if it applies the law of the place of contracting or the law of the place of performance. If it supports the law of the place of contracting, it will determine also, where the contract is concluded by correspondence, what is meant by the *lex loci contractus*. Again, if the capacity of the parties is ascertained by the national law with reference to the law of their domicil, such reference should be followed, and the definition of domicil taken from such national law. If, as regards formalities, it subscribes to an alternative rule, recognizing the contract as valid if it complies with the formal requirements of the law of the place where the contract was made, or those prescribed by the law governing the contract in general, the contract should be sustained elsewhere if it satisfies either law. Frankenstein follows this mode of reasoning also with respect to matters of procedure. Suppose, for example, that in a suit between two Englishmen brought in Germany on a contract made and to be performed outside of Germany, the defense is that the action is barred by the statute of limitations. The conflict of laws of Germany regards the statute of limitations as substantive and governed by the law applicable to the contract in general. According to English law it relates to procedure and is controlled therefore by the law of the forum. Frankenstein would again apply the national (English) law, as his "primary point of contact"; and as the English law regards the question as one of procedure, he contends that the German courts should so regard it and apply their statute of limitations.

Where the contracting parties have different nationalities, the validity of a contract will depend upon compliance with both laws as "primary points of contact," or with the law to which either may refer by way of "secondary point of contact."

The rights and duties arising out of a valid contract will be governed, according to Frankenstein, by the law applicable to the particular right or duty in question. This accords with the decisions of the German courts. The positive law of Germany, however, would determine each "obligation" in accordance with the law of the place where such obligation was to be performed. Frankenstein again submits each to the national law of the obligor as the "primary point of contact," which may refer the case by way of "secondary point of contact" to the law of the place of contracting, the law of the place of performance, the law of the domicil, or the law in-

tended by the parties. Thus, if an article is sold by a Frenchman to a German, the obligations of the French vendor are governed by French law as the primary law, and by such law to which the French law may refer the case, whereas the obligations of the German buyer would be governed by the German law as the primary law, and by such other law to which the German law may refer, that is, under the positive law of Germany, by the law of the place of performance of the buyer's obligation. The question whether the goods are defective should be determined, according to Frankenstein, with reference to the law governing the seller's obligation (French law); whether the buyer can reject the goods because of the defect, by the law governing the buyer's obligation (German law), that is, under the actual German law, by the law of the place where he agreed to perform. If the buyer was justified by this law in refusing to accept the goods, his remedies against the seller should be governed by the law governing the seller's obligation. If the buyer acted wrongfully in refusing to accept the goods, the question whether the seller can sue him for damages or for specific performance should be governed by the law determining the buyer's obligation. On the other hand, if the French seller wants to "rescind" on account of the buyer's default, the French law should control, for this question relates to the seller's obligation. In this case, the French mode of rescission, namely, by judicial decree, instead of by declaration of the parties (German Law) should be followed even in Germany.

Frankenstein admits that difficulties may arise from the application of different laws to the different obligations arising out of a bilateral contract, but contends that these difficulties are often exaggerated.

New Haven, Conn. ERNEST G. LORENZEN.

Federal Limitations upon Municipal Ordinance Power. By Harvey Walker. Columbus, The Ohio State Univ. Press, 1929. pp. viii, 207.

In this work Mr. Walker presents an analysis of the decisions of the Supreme Court of the United States on the validity of municipal ordinances under the Constitution of the United States. It presents in compact form the general legal limitations on municipal ordinance power throughout the country. It makes no attempt to deal with the special provisions in the constitutions, statutes, or decisions of the several states.

As compared with the voluminous treatises of Dillon and McQuillin, which include both national and state law, this deals with only one part of the problem. But it is an advantage to have these legal rules of general application presented in systematic form. As the author suggests, there is need for a similar study of the law of each state, which would be more useful than the comprehensive volumes containing the great mass of decisions in all the states.

After a discussion of the place of municipal ordinances in our legal system, there are chapters on municipal ordinances under the commerce clause, the contract clause, the Fourteenth Amendment and other clauses of the United States Constitution. Each chapter is subdivided into specific topics, and the cases under each topic discussed together.

As a whole, Mr. Walker concludes that the limitations upon the exercise of municipal control over commerce do not bear harshly upon the cities, though he comments on the inflexible character of the rule against the regulation of agents and solicitors for non-resident companies, and the denial of the right to tax foreign imports in the original package.

Before the adoption of the Fourteenth Amendment, the contract clause

was the chief bulwark of property and business against government interference. It is still important, but has fallen during recent years to a place secondary to the due process clause.

Mr. Walker finds little to criticize in the opinions of the Supreme Court under the due process clause in so far as they deal with municipal ordinances. "The strict attitude which can be discerned in the earlier cases seems to be giving way to a more liberal view of the police power needs of large cities."

The final chapter deals with cases involving the prohibition of tonnage duties, implied limitations, ordinances in conflict with treaties and statutes, and attempts to attack the validity of municipal ordinances under provisions of the first eight amendments which the Supreme Court has consistently held to apply only to the federal government.

The study has been carefully done, and should be of service not only to those who prepare municipal ordinances, but to students of municipal government and constitutional law.

Urbana, Ill. JOHN A. FAIRLIE.

Selected Cases on the Law of Taxation. By Henry Rottschaefer. Chicago, Callaghan & Co., 1929. pp. xviii, 601.

Although Professor Goodnow published a casebook on taxation in 1905, the subject was not generally given individual attention in law schools until after the appearance of Professor Beale's first casebook in 1922. The publication of two subsequent editions of Professor Beale's book, of two casebooks on federal taxation, and finally of this collection of cases, indicates the growing interest in a separate taxation course.

Professor Rottschaefer prefaces his development of particular taxes with chapters dealing with the power to tax; the purposes for which taxes may be levied; the distribution of the tax burden; and exemptions. There follow separate chapters on each of the principal kinds of taxes: persons and property (137 pages); inheritance and estate (135 pages); income (143 pages); and franchise and excise (25 pages). In general questions of jurisdiction to tax, and of assessment, are taken up in connection with each chapter. The casebook concludes with chapters on the remedies of the government to collect unpaid taxes and of the taxpayer to recover overpayments. The cases deal for the most part with state taxes, except those involving the income tax, which are almost wholly federal. The notes are not extensive, but there is a good working collection of citations of additional cases involving related problems. Citations of law review articles and of notes in L. R. A. and A. L. R. are assembled in a bibliography in the front of the book under chapter headings; they are not tied to the individual cases in the text, digested, or otherwise commented upon. Curiously enough, only two law review notes are cited out of the many excellent discussions which have appeared.

A considerable part of the materials of taxation has been presented for years in the courses on Conflicts of Laws and Constitutional Law; several hundreds of pages of taxation cases appear in the leading casebooks on those subjects. Since the present tendency in legal education is to combine and reorganize rather than to multiply courses, what, then, is the justification for separating this particular subject from its accustomed setting? Doubtless many teachers are not convinced that there is any justification. Several possible bases do, however, appear. A study of the administration of tax laws, usually not elsewhere considered, affords the student an excellent insight into the mode of operation and the utility of administrative bodies, as well as their relation to the judicial system. Again, most modern cases, particularly perhaps in the field of income and

inheritance taxation, pay much attention to statutory interpretation. The study of statutes has been a good deal neglected; discipline in the manipulation of statutory provisions does not find as large a place in law schools as it should. Further, the field provides an almost unparalleled opportunity for the study of the development and adjustment of business devices to meet and to avoid taxing provisions. The creation of revocable trusts and corporate reorganizations to avoid income taxation; the rise of subsidiary corporations in the endeavor to circumvent state privilege taxation; the varying types of *inter vivos* transfers, designed to eliminate inheritance taxation, are only a few manifestations of a general movement, having great interest for any one concerned not merely with rules of law, but with the actual effect and operation of rules of law in the business community. Finally, not to labor reasons, it is conceived that the study of particular tax cases in their relation to other tax cases and to the system of taxation as a whole gives to the student, as it does to the lawyer, a better-rounded understanding of the problems of the field.

It is evident that the author did not frame his task on such broad lines. There seem to be no reports of decisions of administrative bodies, nor references to their existence. In the section on income taxes, for example, there appears to be no citation either of a Board of Tax Appeals decision or of a Treasury regulation, although these decisions and rulings throw light on hundreds of important questions which have never come before the courts. The provisions of the taxing statutes are not given, except as they appear in the cases. None of the footnotes seems to give any clue to the problems of business readjustment to tax statutes. Finally, the author has designedly attempted to avoid most problems which would involve a duplication of matter treated in other courses. In consequence, there are only seven cases on the subject of franchise and excise taxes, one of the prime battle fields of the present day. If the student took Constitutional Law as well, perhaps he would come away with a fair idea of this part of the subject; but this course would give him quite inadequate material. In any event, he would not, in this particular, get the benefit of that correlation of tax cases which he will need in practice, and which is essential to any satisfactory understanding of the subject.

To include such materials as are here suggested would, of course, lengthen the book. But it is conceived that this objection is not too serious. In the first place, since a good deal of instruction in taxation is now being given in other courses, there is not much point in giving the subject separate treatment, unless some distinctive contribution can be made. In the second place, much of the suggested material could be brought into footnotes, without unduly lengthening the casebook, or even the course. Certainly the use of such materials will give the subject that vitality and reality which is one of its important characteristics.

Professor Rottschaefer attempted to assemble a brief collection of material which could be wedged into a curriculum without disturbing the vested interests of other established subjects. In that he has succeeded; the book presents a useful collection of well-selected cases. Since it is quite likely that most law schools will not wish to give a more extensive course at this time, Professor Rottschaefer has effectively met the existing demands. When taxation obtains the attention it deserves in view of its importance in law and in business, his book will surely warrant a second edition, amplified to include more of the fundamental tax decisions which were assigned to other courses in days when taxation had little standing as a separate course in law schools, as well as the vital materials of statutes and of the regulations and decisions of administrative bodies, which are the foundation of tax law in practice.

New York, N. Y. ROSWELL MAGILL.

John William Sterling, Class of 1864 Yale College. By John A. Garver. New Haven, Yale University Press, 1929. pp. x, 113.

The author of this informing and readable book was the professional associate of John W. Sterling for twenty-five years, during sixteen of which he was his law partner. He is uniquely qualified, therefore, by contact and experience to serve as legal adviser of the Trustees of the Sterling estate in their administration of it for educational progress in accordance with the wishes of the testator. The magnitude and importance of this task may be realized by recalling that to Yale University alone Mr. Sterling's benefactions, with accruing income, may exceed $35,000,000. Already eighteen professorships have been endowed, large sums have been set aside for scholarships and fellowships, and the following Sterling buildings have been constructed, or are planned or are in course of construction: the Chemical Laboratory, the Hall of Medicine, the University Library, dormitories, a graduate school, and the Law School.

The last of these, the Sterling Law School building, will be not only an unusually beautiful memorial to John W. Sterling the lawyer, but at the same time a home for legal education lacking no essential for comfort and efficiency. Occupying an entire city square it will contain, besides the necessary offices and class rooms, reading rooms and bookstacks with shelving for 400,000 volumes, an auditorium, dormitories, and a dining hall. Its completion, in July, 1931, will be a signal event in the history of American legal education.

Mr. Garver's biographical sketch is significant to lawyers not alone because it gives an intimate picture of an outstanding benefactor of education in general and of legal education in particular, but because of the light which it throws on the conditions of law study and practice beginning in 1865. Much of the story is told by means of verbatim quotations from Mr. Sterling's diary. In these quotations may be read their author's account of his successes and failures, his foibles and peculiarities, his opinion of his legal associates, and the stages in his progress from a clerkship to the headship of a great law firm. Because he shunned all publicity, taking no part in the race for professional reputation through advocacy in the courts, and because of the great news value of his benefactions, he is probably popularly remembered to-day chiefly as a multimillionaire. Emphasizing the fact that "the foundations of his fortune were the results of his professional labors," and illustrating by example the single-minded devotion that he gave to a great law practice, Mr. Garver's book is a salutary corrective to possible misconceptions concerning Mr. Sterling's status as a legal figure.

New Haven, Conn. FREDERICK C. HICKS.

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