

# Book Reviews

CASES AND MATERIALS ON TRUSTS AND ESTATES. By Richard R. Powell. St. Paul: West Publishing Co. 1932. Vol. 1, pp. xliii, 1027. 1933. Vol. II, pp. xxxvii, 1040.

THIS important and novel casebook by an experienced authority has already received, both before and after final publication, the widespread attention which it clearly deserves. It is obviously the product of intelligent original hypotheses, tested by classroom experience, and of much careful and constructive thought and industry. The difficulties usually inherent in casebook construction have been greatly increased by the ambitious magnitude of the task. One may imagine the expenditure of time and effort required by the formulation of the plan, the writing of text material, the construction of the unusually extensive and detailed notes, and the briefing of many of the cases used. At least those who have written casebooks themselves will appreciate the significance in this respect of Mr. Powell's statement that "fully three-quarters of the thirty-five hundred cases referred to in these two volumes have sufficient given of their facts and results to enable the student to appraise their contributions."<sup>1</sup> The book obviously deserves respect. Beyond that, it is alive and significant in its novelty. It is too early to predict its influence upon instruction in the field. The value and utility of any casebook of course depends in large measure upon the instructor using it, and upon the objectives and curricular arrangements of his school. It will be interesting to see how many will wish to follow in the classroom the trail that Mr. Powell has blazed; I am not at present convinced that I would want to do so. But this book, even if it is not actually adopted by a teacher, should at least interest or disturb him and provoke reexamination of his own existing postulates. And the teaching profession should welcome such a constructive attempt to demonstrate that there may be a route through this particular area of the law that is more lifelike and stimulating than the carefully cultivated paths of the traditional scheme. For the present, however, a reviewer can only state his personal reactions.

I am heartily in accord with Mr. Powell's discontent with the usual curricular arrangements in this field in so far as it is caused by the courses in Wills and Trusts. I found<sup>2</sup> the traditional course in Wills and Administration unsatisfactory for at least two reasons: First, much of the material in it seemed to me too simple to provide proper intellectual fare for mature students. Such matters as the details of the execution, revocation and revalidation of wills, granting their obvious practical importance, can be greatly condensed without serious loss. Such condensation is more likely to occur if the material is merged and therefore contrasted with other matter of higher intellectual content. I personally deal with it largely in textual form. Conceding the general value of the case method, do we not approach a *reductio ad absurdum* when the investment of time which it requires yields such a slight return as it does when used for simple informational matters? Secondly, this course seemed to me to set up artificial barriers that cramped understanding, because it excluded related questions of the substantive

---

1. Preface, Vol. I, p. viii.

2. The past tense is used because these courses disappeared from the Yale curriculum two years ago.

law of gifts and trusts and, in so far as administration of decedent estates really received attention,<sup>3</sup> of the management of estates by trustees.

The pros and cons of the controversy over the desirability of the use of the trust<sup>4</sup> as a basis of classification for curricular and other<sup>5</sup> purposes have probably by now been sufficiently aired. I will merely say briefly that the traditional Trusts course left<sup>2</sup> me, even more than the Wills course did, with a sense of incompleteness of understanding and perspective, due again to barriers set up by a synthesis based on a legal concept, however fully the course might outline the doctrinal structure of its subject matter. This course is presumably based on the assumption that it is desirable to group together for teaching purposes cases of which the common factor is the use of the trust by the parties, by the court, or by both. To accompany the trust on its peregrinations through varied and not necessarily related types of human activity may be interesting and important for some purposes, but does not seem to me to be the most efficient teaching arrangement. I believe that it renders incomplete the consideration of particular issues both in the Trusts course and elsewhere. I think that students will be better able to handle and to understand the trust, either as a consciously adopted form of transfer or as an argumentative device, if it is treated in combination with other materials in connection with the situations to which it and they are relevant. I suspect that students will be sufficiently impressed with its ubiquitous utility if they meet it constantly in the curriculum. I am willing to take a chance on sacrificing the ideal of an integrated comprehensive view of the varied uses of the trust, particularly since this ideal has become somewhat theoretical. The commercial uses of the trust have, in at least some curricula, been largely assimilated by other courses. Much of what remains concerns the gratuitous disposition of wealth, and may profitably be merged with wills and other materials affecting that general field. I believe that, after such a merger, the materials should be redistributed into two courses, one on the substantive law and the other on management of estates.

I am not convinced of the desirability of Mr. Powell's proposal that materials on future interests be included in this merger. I make this statement with some diffidence, because dissatisfaction with the Future Interests course seems to have been Mr. Powell's original stimulus,<sup>6</sup> and very likely he and his students see relationships that are not apparent to a reviewer with only the casebook before him. That trusts, wills, and future interests are factually related subjects is clear enough. It may be advisable to require students of future interests to have some previous acquaintance with the law of wills and trusts, which can be accomplished by a prerequisite requirement under an arrangement of separate courses. But I believe that contemporaneous treatment is unnecessary, and that the materials involving trusts and wills can be properly understood without a knowledge of future interests. I think that a course focused on the drafting, validity and effect of dispositive provisions in instruments of transfer is a satisfactory teach-

---

3. Such attention should surely be encouraged by the intelligent emphasis on and treatment of administration in *MECHEM AND ATKINSON, CASES ON WILLS AND ADMINISTRATION* (1928).

4. To simplify the form of statement, the term "trust" is used in the singular without attempting to enumerate the different ideas connoted by its varying content.

5. See Arnold, *The Restatement of the Law of Trusts* (1931) 31 *COL. L. REV.* 800; Scott, *The Restatement of the Law of Trusts* (1931) 31 *COL. L. REV.* 1266.

6. Preface, Vol. I, p. v.

ing vehicle by itself. Perhaps "Future Interests" is too restrictive a title, since the problems of restraints on alienation and of accumulations, included by Mr. Powell in his casebook, also belong there. The most important consideration is that such a course seems to have intellectual unity. But, in addition, it probably suits the emotional attitude of instructor and student toward that *rara avis*, future interests. I suspect that at least a slight addiction to the mania referred to by Mr. Mechem<sup>7</sup> is essential to successful teaching of this subject. A teacher so affected may well prefer to direct his drive and enthusiasm toward overcoming the obstacles of a single though complicated job, rather than to dissipate his energies over a broader field. If giving the course recommended by Mr. Powell, will he not tend to overemphasize future interests at the expense of the other materials?<sup>8</sup> And I am not sure that the teacher who likes future interests will like trusts or wills, or vice versa; or that this course would not raise difficulties of instructional assignments in some faculties.

The length of Mr. Powell's course will be considered by some a serious objection to it. According to Mr. Powell's statement<sup>9</sup> he and Mr. Cheatham covered these materials in 112 class hours, with the assistance of what is probably a good deal more than the average amount of outside work by the students. I doubt very much if other instructors could proceed as rapidly through over two thousand pages of very closely packed material. Assuming that they could, the curricular arrangements of most schools indicate a general opinion, in which I concur, that shorter courses than this are preferable for both student and instructor. No doubt in anticipation of this objection, Mr. Powell has outlined arrangements for shorter courses, saying that "such curtailment is not recommended but is possible."<sup>10</sup> With the constant growth in the possible subject matter of law school instruction, a school may wish to employ such a compression of existing subjects into a single course. On this basis, presumably the plan would appeal to schools which, unlike Columbia, have a limited teaching force, and wish to decrease or avoid an increase in teaching hours. I personally prefer a sequence of several courses, permitting specialization and flexibility of schedule, to a long single course which will compel the individual student to take everything or nothing. Under the present arrangement at Yale, there are three courses in this field. The first deals with the general substantive law of intestate succession, wills, gifts *inter vivos* and *causa mortis*, and non-commercial trusts; the second with management of estates by executors, administrators and trustees; and the third with future interests. In addition, there is honors work available. This makes it possible for a student to take anything from a minimum of three semester hours, sufficient to acquaint him with the more common terms and concepts, to an indefinite maximum.

---

7. "It is a matter of common knowledge that Future Interests is not properly a course but an obsession, and that teachers of it in time develop a complex, akin perhaps to the Jehovah-complex, which leads them to think that the law school exists for the sole purpose of teaching Future Interests." Book Review (1933) 19 *IOWA L. REV.* 146, 149.

8. According to my calculations from Mr. Powell's schedule, printed in the Appendix (Vol. II, p. 1013) he devotes about one-half of the classroom time allotted to this course to future interests, and slightly more than one-half of the outside reading required of students concerns that subject. Perhaps this proportion might be reduced if Mr. Powell were not teaching so many prospective New York practitioners.

9. Vol. II, p. 1013.

10. *Ibid.*

Mr. Powell's course, again assuming that other instructors will not need more time than he allots to it, effects a substantial reduction in the classroom hours usually consumed by the merged courses. If it did not do so, it would be quite unmanageable in length. This is of course commendable in so far as it results from elimination of duplication. But the share of this important field in the curriculum should not be reduced to the point of requiring the omission of significant matters. I feel that, in selecting his materials, Mr. Powell has somewhat over-emphasized the approach, important though it is, to the problem of drafting instruments so as to care for comparatively large estates. Clients are unfortunately not always wealthy. And lawyers are not always able to guide in advance the actions of their clients or of opponents of their clients. Some of the matters entirely or virtually omitted in this casebook seem to me not merely independently important but also valuable in their contribution to understanding and perspective because of their close relationship to the subject matter of the course. I believe the subject of intestate succession to be quite basic in this field, particularly when joined with the restrictions imposed on alienation by the rights of the surviving spouse. It is involved, not only in actual distribution of estates that are wholly or partially intestate, but also in other issues, such as the construction of some testamentary gifts and the determination of the right to contest. And a transferor should know the extent to which the rights of his family furnish an alternative to, or a restraint upon, his disposition. In view of Mr. Powell's emphasis on "the constant core of the familial function,"<sup>11</sup> one would expect to find more attention given to this matter. But, although the historical antecedents,<sup>12</sup> relative frequency,<sup>13</sup> philosophy,<sup>14</sup> and comparative law<sup>15</sup> of intestate succession are included, the details of the modern American law on the subject are only incidentally referred to.<sup>16</sup> Mr. Powell states:<sup>17</sup> "Little as to the handling of intestate estates has been included herein. Such estates are typically small;<sup>18</sup> the law applicable is simple;<sup>19</sup> there are reasonably adequate text discussions of the field; and the editor has observed that in law schools announcing a course on 'Wills and Administration' few days of the term remain when the class begins the topic of 'Administration'."<sup>20</sup> Again, consideration of the law of gifts inter vivos and causa mortis seems to me to shed considerable light on the law of wills and trusts, as well as to involve interesting and difficult problems in the application of the doctrine of delivery to

---

11. Vol. I, p. 53.

12. Vol. I, p. 3.

13. Vol. I, p. 39.

14. Vol. I, p. 234.

15. Vol. I, p. 248.

16. See, in addition to the above, Vol. I, p. 257, note 24; p. 314, note 74; p. 867 *et seq.*

17. Vol. I, p. vi.

18. But they are numerous. See Vol. I, p. 39. And, even in testate estates, there is often the possibility of a claim by the surviving spouse.

19. This is probably true of the ordinary questions involved in determining intestate successors (e.g. computation of degrees, representation, effect of adoption, etc.) but not of the rights of the spouse, which Mr. Powell no doubt does not intend to include in his statement. And, if the law is simple, it can be worked into the course without much expenditure of time.

20. I wonder if this is generally true. It was not so in the course that I gave, using the casebook by Mechem and Atkinson. If it is true, it does not appeal to me as a particularly important reason.

the transfer of choses in action. Mr. Powell has only one case on gifts *causa mortis*<sup>21</sup> and a few indirect references.<sup>22</sup> He says:<sup>23</sup> "Logically, *inter vivos* gifts unaccompanied by a trust constitute a part of this same picture. Practically they play a small role." I do not understand the latter statement. Possibly it is due to his emphasis on drafting, since many gifts are made or attempted without benefit of legal advice. But the reports are full of cases of such *inter vivos* and *causa mortis* gifts; they often base claims against decedent estates; and they may and sometimes do involve large amounts.<sup>24</sup> Further, the virtual omission of materials on administration of decedent estates by executors and administrators<sup>25</sup> seems surprising, in view of its practical importance and close relationship to the management of estates by trustees. For these and other<sup>26</sup> reasons I believe that Mr. Powell's conception of the objectives of merger in this field is, in many respects, different from my own.

In conclusion, to offset the perhaps disproportionate amount of space devoted to disagreement in this review, I wish to incorporate here by reference my first paragraph. Replete with important information intelligently treated, Mr. Powell's casebook is an extremely valuable contribution to the legal literature of this field.

Yale School of Law.

ASHBEL GREEN GULLIVER.

THE PORTUGUESE BANK NOTE CASE. By Sir Cecil Hermann Kisch. London: Macmillan and Co. 1932. pp. ix, 284.

THE Portuguese Bank Note Case<sup>1</sup> arose out of a gigantic financial swindle, notable alike for its ingenuity, daring, and success. During 1925 Messrs. Waterlow & Sons, Ltd., a well known London firm, which held a contract for the printing of notes for the Bank of Portugal, was tricked into supplying a group of crooks, among whom figured the Portuguese Minister to the Hague, with a considerable mass of so-called Vasco de Gama notes of 500 escudos each. The firm acted under the belief that the notes were intended to be put into circulation in the Portuguese Colony of Angola as a part of scheme for instilling health into its finances, then in a very sorry condition. From time to time the conspirators produced forged documents purporting to convey the authority of the Bank for the printing of the notes and for their delivery to an agent of the gang. Poor Angola was never given the chance of testing the magic restorative power of a heavy administration of fresh paper money, for the swindlers, having through an extraordinary combination of circumstances succeeded

21. Vol. I, p. 108.

22. Vol. I, p. 116; Vol. II, p. 27.

23. Vol. I, p. 1.

24. Cf. *Chase Nat. Bank of New York v. Sayles*, 11 F. (2d) 948 (C. C. A. 1st, 1926) (\$1,500,000).

25. Perhaps on the assumption that the student can assimilate the procedure after leaving law school. The ease of assimilation will depend on his location.

26. For example, I would prefer dealing with the interrelationship of the forms of transfer after, rather than before (Vol. I, p. 108), considering them separately. There are many other details of form and arrangement that I am interested in but refrain from discussing in order to keep this review within bounds.

1. *Banco de Portugal v. Waterlow and Sons, Ltd.* [1932] A. C. 452.

in obtaining the notes from Messrs. Waterlow without arousing the suspicion of the firm, set about putting them rapidly into circulation in Portugal, chiefly through the agency of a new bank, a charter for the establishment of which they managed to secure from the Portuguese Government. As the illicit notes were practically identical with licit ones which Messrs. Waterlow had previously manufactured for the Bank of Portugal, they circulated freely, despite spreading rumors of forgeries inspired by the sudden appearance of considerable quantities of new 500 escudo notes, until the momentous discovery was made, in December, 1925, of several pairs of notes bearing duplicate numbers. Thereupon the Bank's directors promptly decided to withdraw all the Vasco de Gama notes from circulation and to issue in exchange, up to a stipulated time, notes of another design. When the substitution was completed, it was found that illicit notes to the extent of approximately 105 million escudos, equivalent at the then prevailing rate of exchange to over £1 million, had been injected into the currency. For this amount, less the sum (approximately £488,000) which it recovered from the liquidation of the forgers' bank, the Bank of Portugal sued Messrs. Waterlow in the English courts.

The author gives a full and lucid account of the manner in which the remarkable crime was carried out, of the circumstances attending its discovery, and of the tests, worked out by the printers, by which the false notes, after they had been withdrawn, were eventually distinguished from the genuine. He also presents carefully summarized versions of the judgments delivered in the three courts which successively dealt with the Bank's action for damages. His main purpose, however, is to investigate the problem with which the courts were confronted, namely that of measuring the loss sustained by the Bank as a consequence of the fraudulent encroachment on its privilege of note issue, from the standpoint not of the jurist but of the economist. Such an examination, Sir Cecil, as joint-author of the standard work on "Central Banking," was highly qualified to undertake. In the course of his analysis he considers much material which was not brought to the attention of the courts and the conclusion he reaches differs strikingly from that arrived at by them.

The courts were, in effect, asked to choose between two views: one, argued by the Bank, that its loss was to be measured by the face value of the licit notes which it had paid out in exchange for the illicit ones; the other, maintained by Messrs. Waterlow, that the Bank had suffered no pecuniary damage other than that represented by the cost of printing the required number of licit notes. The Bank submitted no clear evidence in proof of its alleged loss but based its claim chiefly on the ground that it had been obliged to issue notes having a market value of over £1 million without receiving any value in return. To which Messrs. Waterlow replied that these notes were merely inconvertible paper, that the Bank was under no liability in respect to them, that they were furnished at the mere cost of a printer's bill, and that their emission left the Bank still with a large unused power of note issue. The case was fought from the King's Bench, through the Court of Appeal, up to the House of Lords. The Bank won all along the line, and judgment was finally pronounced in its favor for £610,392. Two out of five Law Lords held, however, that the Bank was only entitled to recover the cost of printing, the comparatively insignificant sum of £8922. The enormous gap between these two amounts indicates how unusual in character was the legal problem presented to the courts, and constitutes ample warrant for the author's attempt, even though the juridical issues have been irrevocably determined, to solve from the economic standpoint the perplexing question of the Bank's financial loss.

Sir Cecil analyses with scholarly thoroughness the constitution of the Bank, the conditions under which its privilege of note issue was exercised, the reactions of the

Bank and of the State to the illicit issue (especially with a view to discovering how far if at all the Bank was obliged to contract its assets or was prevented from increasing them) the subsequent course of foreign exchange rates and of the Bank's profits. He shows that the Bank in fact sustained no loss in profits, that its earning capacity was virtually unimpaired, and that the chief result of the "watering" of the note issue was a small inflation and a fall in the sterling value of the escudo. His final conclusions, therefore, are that the Bank suffered no serious financial prejudice as a result of the transactions of 1925, that the enormous sum which it recovered from the printers, equivalent to more than seven times its paid up share capital, constituted a pure windfall, and that the real losers were the escudo-holding public which has "suffered the reduction in the exchange value of the currency unit."

Although Sir Cecil's economic solution differs so fundamentally from the legal one, he does not go so far as to say that, on the basis of the evidence and arguments presented before the courts, the latter should have decided the question of damages otherwise than they did. Whatever the legal merits of the decision may be, however, "it can hardly be maintained from a financial point of view," as the author puts it, "that the distribution of the indemnities has any particular correspondence with the incidence of the pecuniary losses." Sir Cecil is to be congratulated upon an interesting, valuable, and, in the opinion of the reviewer, convincing study.

Yale School of Law

WILLIAM H. WYNNE.

THE PROTECTION OF NATIONALS. By Frederick Sherwood Dunn. Baltimore: Johns Hopkins Press. 1932. pp. x, 228.

DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO. By Frederick Sherwood Dunn. New York: Columbia University Press. 1933. pp. x, 439.

SINCE the publication of Professor Borchard's outstanding work, which gave name to and brought recognition of the diplomatic protection of citizens abroad as a separate branch of international jurisprudence, that subject has been of increasing importance and has produced a tremendous literature. Most, if not all, of this material has dealt with the subject or with particular phases of it from the viewpoint of analytical jurisprudence; and many of the more pretentious monographs and articles dealing with the subject have been produced by writers who were not lawyers and who consequently produced material reflecting this handicap. But Dr. Dunn is a lawyer and has apparently kept pace with the developments in his science. In these two volumes he attempts to turn upon the problems raised in the field of diplomatic protection the light of present day legal thinking. He brings to this task not only his legal training but also the practical knowledge of the workings of diplomatic protection through his work in the Department of State and before the Mixed Claims Commission of the United States and Mexico.

In the first volume Dr. Dunn concerns himself with the nature of law and particularly international law and the purposes to be served by it. He then examines the question of how well in practice it satisfies the desired ends and in what manner it may be made to serve those ends more effectively. The wealth of materials and precedents available in the portion of international law dealing with the protection of citizens abroad makes that branch, of course, the most logical one for the author to choose for his study. Much has been said and written on the nature of international law, and indeed whether it is law at all. Those who have denied legal character to international law have often sought support in a finding that nations

disregard its supposed rules at will and are motivated solely by selfish interests. In the field of diplomatic protection, legal character is often denied to international law on the ground that such protection is simply a manifestation of imperialism, and cases are cited where stronger nations are said to have imposed their selfish interests upon weaker nations contrary to established rules of law. Dr. Dunn exposes these fallacies in a most satisfactory manner, and the book would have been worth publishing for this alone. He points out that this notion is founded upon a misconception of the nature of law itself which presumes that for every fact situation there is a fixed and immutable rule of law ready and waiting in some mysterious pigeon-hole that can be applied to the facts by the judging agency in order to get a uniformly predictable result. In almost every controversial question in municipal as well as international law we find competing "rules" of law between which the judging agency must decide for application to the particular fact situation. This is further complicated by the difficulty in determining which facts of the group are controlling. If one group of facts be deemed controlling, one rule might be applicable while if another group were deemed controlling an opposite rule would be applied and an opposite result reached. When government officials are faced with controversial facts, such as might be presented to a court, and when, as a court would, such officials select one of two "rules," both logically supportable with regard to the particular facts, and the rule selected by them happens to lead to a favorable result for their country, it is hardly reasonable to say that thereby the nation of which the officials are citizens is committing an act of imperialism. No matter how sincerely the officials of both governments may act, on most occasions both may bring forward in support of opposite positions rules of law logically applicable to the particular facts. The many occasions in which a government has admitted liability and where an official of the State Department has rendered a decision contrary to the material interests of his country receive no publicity, and it can not be too often reiterated that the remarkable thing about international law, both in times of peace and in times of war, is the generality of the sincere efforts of governments to observe it, and not the comparatively few deliberate governmental breaches of it.

In his examination of the nature of international law and the legal process, Dr. Dunn sets out the admitted factors which operate upon the judging body to produce a given result from a given state of facts and then, with particular reference to international tribunals, sets out and discusses the various secret or unconscious elements which operate to produce the result reached. The positivists demand that the choice between rules be intuitively made and that the result reached be regarded as the one which always would have been ineluctably reached. This, it is maintained, is necessary if the law is to furnish that relative predictability of result which is necessary if it is to fulfill its functions. Dr. Dunn argues, and not without force, that this relative predictability would be greater if the judging body would make a conscious effort to determine the social end sought to be reached by its decision and to determine its effect upon future events, and that the judges should consciously consider the various so-called unadmitted factors which of necessity influence the decision reached. It would seem, however, that so long as litigated claims between nations are usually considered by ad hoc tribunals, there would be no greater predictability if Dr. Dunn's theory were applied. In dealing with a single tribunal the lawyer comes to know fairly well the social and economic views of the judges and the nature of the so-called unadmitted processes which work upon them. It is quite a different matter, however, when a tribunal is set up for the purpose of hearing and deciding a single case. That there will be no improvement in the predictability of decision, however, does not interfere with the author's argument "that,

since individual choices must inevitably be made, they should be conscious choices, directed toward approved social ends, and guided by the best available knowledge."

Coming now to the more specific application of Dr. Dunn's theories to the legal process as applied to international reclamations, we find him studying it not from the standpoint of analytical jurisprudence but as a going social institution devised to serve a particular set of human needs. He explains in detail the extraordinary divergence of views with regard to personal and property rights and as to the content of the word "justice" in various nations. The legal process, if it serves its purpose, must find some means for adjusting the conflicting interests of members of the international community. The difficulties which are met in attempting to resolve these conflicting interests are not to be solved, says the author, by the mere codification of rules or the attempt to add new rules to those now receiving fairly general recognition. He does not question the desirability of having rules, nor does he belittle the value of analytical jurisprudence; he simply argues that we must have something more, and that our attitude toward the method of application of these rules must be modified. The end to be sought, he says, in connection with injuries to foreigners is to preserve the minimum conditions which are regarded as necessary for the continuance of international trade and intercourse on its present basis. This purpose, when not consciously kept in mind, is apt to be obscured in the confusion of what Judge Hutcheson has called "bewardling" in attempting to justify a given result in terms of fixed rules of law. The fine distinctions between acts committed by minor officials and by superior officials, the extremely variable meaning of "due diligence," "denial of justice" and the like are all to be avoided, he feels, by the rejection of the doctrine of *culpa* and by substitution therefore of a theory of risk allocation. The question to be answered in each case is "Is the delinquency of a type which, if permitted to occur generally, would make the conduct of customary, social and business relations impossible?" If it is, then there is international responsibility and the risk is allocated to the state; if it is not, international responsibility is not involved, and the risk is allocated to the alien. It is not entirely clear to the reviewer whether the author regards it as necessary that the particular act involved should be repeated often enough to indicate some break-down of the police administration for the risk to be allocated to the state, or whether the risk may be allocated to the state if the particular act in question is of such a nature that, if repeated, it would react unfavorably upon customary social and business relations. In some places the author seems to approve one view and in other places the other, but this is perhaps due to the particular doctrine under discussion to which he attempts to apply his rule. The application of the risk allocation theory would do away with the present distinctions between higher and subordinate authorities and, indeed, between state authorities and acts of private individuals. Whether he would apply the theory to legislative acts interfering with the personal or property rights of aliens is not entirely clear, but no reason is perceived why, under his argument, it would not be equally applicable to such a situation as well as to every other one where there existed a conflict between the interests of aliens and the state involved. It is admitted that the proposed test is by no means exact or certain, but the author urges that it is more so than the present distinctions between higher and subordinate authorities, and more so than the attempts to define the limits of "denial of justice." Dr. Dunn's ideas here are quite interesting, but whether their application would result in any improvement over the present system is at least questionable. It is not improbable that the result would be merely to substitute a new set of words for rationalizing judicial decisions. The author, in discussing his theory, uses such terms as "approved standards," "minimum conditions," "necessary for the continuance of international

trade and intercourse on its present basis," the meaning of which are susceptible to quite as much divergence of opinion as the words "denial of justice," "exhaustion of local remedies" and the like. What is the "present basis" of international trade and intercourse? Is the decision to be made upon social and commercial international relations as they exist at the present date or as they may happen to exist in 1975 when a particular decision has to be made? If the decision is to be made in accordance with changing conditions of international intercourse, how is it to be determined when a practice which might once have been thought injurious to international trade receives sufficient general acceptance to justify the allocation of the risk of injury from such acts to the alien rather than the state? Does it help any to say that the determination is to be made in accordance with "approved standards" rather than to say that it must be made in accordance with an international "minimum standard of justice?" Certainly the substitution suggested would not do away with the existence of the conflicting interests involved, nor would it, in the judging process, do away with the wide divergence in views between nations as to what constitutes "justice," the relative merits of personal and property rights, the comparative desirability of spiritual and material values, and so forth. It is hardly to be supposed that any different result would have been reached in the controversy between the United States and Mexico growing out of the Constitution of 1917 if Secretary Kellogg and Sr. Saenz had argued in terms of risk allocation instead of in the terminology they actually used. On the other hand, if the substitution of concepts be not as general as Dr. Dunn would have it, it is not improbable that it might serve a useful purpose in some situations. For example, the author's presentation of his theory as applied to the acts of individuals (whether their acts be in their capacity as private citizens or as public officers) is more convincing than his application of it elsewhere. Whether we continue with the present theories or whether we accept Dr. Dunn's substitute, we must still find ourselves considerably befogged by wind and words. Though it is questionable whether the application of these theories would lead us any more certainly to desired ends, such an application would apparently let us know what kind of vehicle we are riding in and thus, perhaps, enable us to guide it more intelligently. In any event the author makes clear for international law what has been made clear by others for municipal law: considerable work needs to be done in the structure of the law, and our attitude toward it, lawyer and layman alike, needs to be changed.

The second volume is complementary to the first and may best be described as a case history in support of the theories and conclusions stated in the preceding work. In it the author examines historically and realistically the functioning of the institution of diplomatic protection between the United States and Mexico. In doing this he has gathered together a large number of the unpublished decisions of the earlier Claims Commissions, and has thus made available much valuable material which has hitherto been practically inaccessible. The author concludes that, while diplomatic protection of citizens of the two countries has not been entirely satisfactory, it has probably functioned better than any other existing institution and will probably continue to be used until some fundamental changes are made in international law.

It has been impossible in the compass of this review to discuss all, or even a majority, of Dr. Dunn's ideas and arguments. The reviewer hopes, however, that his discussion, however inadequate, may turn those interested in international law to the reading of these two stimulating and interesting books.

JOHN P. BULLINGTON.

Houston, Texas.

THE ADMINISTRATIVE CONTROL OF ALIENS. By William Cabell Van Vleck. New York: The Commonwealth Fund. 1932. pp. ix, 260.

DEAN Van Vleck's book is a very useful addition to the Commonwealth Fund series of studies of the administrative processes in various departments of law. These studies have been carried on under the general direction of committees of distinguished practicing lawyers and law teachers. Dean Van Vleck's committee, for example, included Mr. Justice Cardozo (then of the New York Court of Appeals) and Judge Learned Hand, who has been responsible for numerous important judicial decisions involving the administrative rulings of various immigration officials.

The present volume is of interest to a wide public. Students of public administration are always interested in the numerous and complicated administrative functions which are controlled by the Bureau of Immigration. Social workers continue their concern over the rights of aliens which are so frequently placed in jeopardy in administrative hands; and lawyers are always concerned about the body of legal theory and practice developing in this field. Social workers have always wished that a competent lawyer might critically review in an unprejudiced manner the conduct of immigration officials in the whole gamut of exclusion and expulsion cases. Here at last is what we have long hoped for. Dean Van Vleck has studied both the exclusion and expulsion processes in his book. He began with a first hand study of Ellis Island machinery. Later he attended hearings before the Board of Review in Washington, and finally he made "a close detailed study and analysis" of one thousand cases in the mine of administrative records in the Bureau of Immigration in the Department of Labor. The records are so completely buried, so difficult of access to the average person, that Dean Van Vleck has rendered a most valuable service in his review of a random sample of this important body of material. He has also examined the immigration cases before the various federal courts, although this part of his study does not uncover any original or hitherto inaccessible material.

Similarly the review of immigration legislation is not an outstanding contribution to the subject, as is the review of the administrative process which is based on the hidden case records of the Department. In a country whose tradition is the protection of the rights of the common man, it is very useful to have a lawyer's review of these records of the most friendless of the common men and women who have been unfairly denied the right to enter our country or who, having entered, have been ruthlessly expelled.

The author points out that the World War has had a marked effect on the course of immigration legislation in the United States. The increase in expulsions has been very marked, rising from 4,517 in 1920-21 to approximately 19,000 in the last fiscal year. Dean Van Vleck correctly describes the extensive use of the process of expulsion as "a comparatively recent thing" and points out that this has meant placing a large number of aliens under the control of minor administrative officials. "The power to expel is no longer disregarded as a mere incident of the more important matter of excluding. It is being invoked as an aid to the criminal law and as a protection against proscribed opinions. It is becoming a popular subject of public discussion in the press and in political speeches. Indications point to a much more drastic enforcement of this extensive power to expel."

Dean Van Vleck presents a lawyer's evaluation of the records of testimony in exclusion cases. "No legal rules of evidence," he says, "are applied in these cases. Hearsay and opinion evidence are received and relied on. A witness testifies that his friend knows the alien well and tells what his friend said about him. A letter states that the writer has been advised that the alien is a lawyer."

The casuistry of the immigration staff in its zeal to debar and deport is illustrated by numerous interesting cases which the author cites from his study of the Department of Labor records. For example, a man became a public charge fourteen months after entry because of tuberculosis. The authorities held his wife for deportation on the ground that she was likely to become a public charge at the time of her entry into the country because "she was apparently dependent on her husband." Although the evidence in the record showed that she was employed, and although the examining inspector had said that she "appeared entirely capable of self-support," the department refused to allow the wife to remain even when bonds were offered in her behalf.

The rights of citizens are sometimes involved in the exercise of administrative power over aliens, for the question whether the person concerned is a citizen or an alien is not infrequently involved. By a precise analysis of the "war of competing decisions," the author accounts for "the apparent inconsistencies of the decisions of the United States Supreme Court" on this interesting point.

Although of less magnitude and less exigent than in pre-war days, immigration problems still remain on the horizon of practical politics. In the preparation and publication of this excellent study of these problems, the Commonwealth Fund, Dean Van Vleck and his committee have rendered a notable public service

School of Social Service Administration  
University of Chicago

EDITH ABBOTT.

ESSAYS IN EQUITY. By Harold Greville Hanbury. New York: Oxford University Press. 1934. pp. xvi, 160.

OF the eight essays collected in this little volume, all but one, that on "Equity in Public Law," have previously been published in either the *Law Quarterly Review* or the *Journal of The Society of Public Teachers of Law*. All but one of them, that on "The Place of Roman Law in the Teaching of Law Today," deal with topics in equity, and Professor Hanbury's justification for the inclusion of this essay is found in "the close connection between Roman Law and the 'conscience' idea underlying medieval equity." Having been originally published separately as discussions of a variety of interesting topics, there is, naturally, no consistent progress or development of a thesis in the essays when now collected as chapters of a book. The variety of topics is indicated by the chapter headings: "The Recovery of Money"; "A Periodical Menace to Equitable Principles"; "The Field of Modern Equity"; "The Place of Equity in a Curriculum of Jurisprudence"; "A French Monograph on the Law of Trusts"; "Equity in Public Law"; "The Place of Roman Law in the Teaching of Law Today."

In a number of these essays, there crops up for discussion "the root principle that equitable rights and interests are not *iura in rem*. They much resemble these, but the dividing line appears at once in the recollection of the bona fide purchaser for value of the legal estate."<sup>1</sup> To Professor Hanbury, this "root principle" is the measuring stick for determining the accuracy of many recent English decisions of significance, the dissection of which is one of the features which makes this volume interesting and valuable.

Frequently in these essays, Professor Hanbury shows his predilection for the methods of the historical jurist. In his discussion of the available remedies for the

---

1. HANBURY, ESSAYS IN EQUITY (1934) 16.

recovery of money paid under mistake, for example, he asserts that when money has been paid to a corporation *ultra vires*, "to allow an action for money had and received here would be unhistorical and nonsensical."<sup>2</sup> This charges the courts of many of our American jurisdictions, including the Supreme Court, with rendering decisions that are unhistorical and nonsensical, when they have permitted quasi-contractual recovery of value received under an *ultra vires* contract. One wonders how Professor Hanbury would characterize the decisions of the courts in the majority of American jurisdictions which do not stoop to the fiction, but permit an action upon the *ultra vires* contract to the extent that it has been performed.

In discussing the judicial treatment of the status of labor unions, Professor Hanbury exhibits a less formal approach. He says that: "When mighty interests of a vast section of the community are at stake, practical necessity outweighs theoretical exactitude."<sup>3</sup> Many prefer this manner of approach to equitable principles, including the principle that equitable rights are in *personam* and not in *rem*. Should not this principle be regarded for its functional rather than its theoretical importance? It is suggestive of an historical distinction, a distinction not yet entirely obliterated. We have come to recognize the propriety of treating equitable remedies in *personam ad rem* as the equivalent of an equitable interest in the property. Equitable interests in real property devolve in the same manner as do legal interests in real property devolve in the same manner as do legal interests in real property; under statutes or judicial decisions widows are permitted to have their dower interest in the deceased husband's equitable estates as in his legal estates in real property. The English Property Acts "have fused together common law and equity, taking ideas from the rules of both."<sup>4</sup> Professor Hanbury himself qualifies Maitland's view when he says: "The whole doctrine of the following of trust funds by a beneficiary shows that equitable rights are a great deal higher than mere *iura in personam*, for the beneficiary emphatically claims a proprietary right, and will recover the trust property *in specie*; he will not be relegated to a mere right to a dividend like an ordinary creditor of the trustee. Equitable rights and interests must, then, be regarded as hybrids, standing midway between *iura in personam* and *iura in rem*."<sup>5</sup> Professor Hanbury submits "that the real criticism of Maitland's view must be that the two postulates, namely, that equitable rights are only *iura in personam*, and that the position of a bona fide purchaser for value is immune against equities, are not inseparable, . . ."<sup>6</sup> The thought is repeated in another chapter as follows: "Of course a beneficiary, in the process of following a trust fund into the hands of his trustee's banker, must sue *in rem* and not *in personam*, or he will sink to the level of a mere creditor, and this sort of action is fostered by the equitable tracing order, but the beneficiary's right is not a proprietary right in the same sense as is that of a legal owner, for it cannot prevail against a bona fide transferee for value from the trustee."<sup>7</sup>

It seems unsatisfactory to make the nature of "proprietary rights" and the distinction between rights in *personam* and rights in *rem* depend upon the effect of the intervention of a bona fide purchaser for value. There are, of course, instances in which sales to bona fide purchasers cut off legal titles, for example, in market overt,

2. *Id.* 12.

3. *Id.* 104.

4. *Id.* 23.

5. *Id.* 26, 27.

6. *Id.* 26.

7. *Id.* 91.

under recording acts, and in transferring negotiable instruments. If the effect of a tracing order, which saves the beneficiary from sinking to the level of a mere creditor, is a sufficient basis for designating his equitable interest as something more than *iura in personam*, then the same effect is sufficient for a similar designation of every equitable interest in property which is enforceable in *personam ad rem*. Ames insisted that the fundamental difference between law and equity was that the law acts in *rem* while equity acts in *personam*.<sup>8</sup> This puts the distinction upon the difference between the method of enforcing judgments and the method of enforcing decrees. Langdell, taking the same position, contended that "through his [the Chancellor's] physical power, he could imprison men's bodies and control the possession of their property; but neither his orders and decrees, nor any acts *as such*, done in pursuance of them, had any legal effect or operation; and hence he could not affect the title to property, except through the acts of its owners."<sup>9</sup>

An epigram connoting a train of legal reasoning cannot be used with the same connotation when some of the premises from which the reasoning proceeds have been altered. We find it no longer true that equity operates solely in *personam*. This weakness of equity has been fortified by conferring upon it power to enforce its own decrees in *rem* as well as in *personam*. Furthermore, under the policy existing in some of the states against imprisonment for debt, we find it impossible now to enforce certain money decrees by attachment for contempt, and the one having the equitable remedy must content himself with the process of execution against property.

The American Law Institute, in restating the Law of Property, has abandoned the distinction between rights in *rem* and rights in *personam*.<sup>10</sup> Legal and equitable interests in land are defined as follows: "A legal interest is that kind of interest which has its origin in the principles, standards and rules developed by courts of law as distinguished from courts of chancery. An equitable interest is that kind of an interest which has its origin in the principles, standards and rules developed by courts of chancery."<sup>11</sup> One may not be entirely satisfied with these definitions to the extent that the classification is dependent upon origin, but, with modification, it seems preferable to the older distinction between rights in *personam* and rights in *rem*.

Certain facts stir equity into action. Sometimes it is a contract plus a unique chattel or real property as the subject matter; sometimes it is the declaration of a trust; sometimes it is the unconscionable conduct of another. The existence of the principal and ancillary remedies with which equity protects interests recognized exclusively or concurrently in equity, afford "the equitable owner" or "beneficiary" an effective control, which we call "equitable title." We do not speak of it as an "equitable title" because the interest is not recognized at law, but because the interest is recognized in equity. We do not speak of "equitable title" because the remedy for the enforcement of the interest is in *personam*. We do not cease to speak of it as an "equitable title" when it becomes enforceable in *rem*. An equitable title is the consequence of the fact that equity recognizes and will enforce the plaintiff's interest in a given subject matter; and a legal title exists because a court of law recognizes and will enforce the plaintiff's interest in the subject matter. That one is legal and the other is equitable is sufficient to cause them to be distinguished

8. AMES, LECTURES ON LEGAL HISTORY (1913) 435, 444.

9. Langdell, *Brief Survey of Equity Jurisdiction* (1887) 1 HARV. L. REV. 111, 115-118.

10. RESTATEMENT LAW OF PROPERTY (Tentative Draft No. 1, 1929) § 6, pp. 18, 19.

11. *Id.* § 10.

for many purposes, but should it shock us to find that the legislature has, for a specific purpose, say taxation, chosen to treat them alike?<sup>12</sup>

One of the most interesting chapters is that on "Equity in Public Law." Professor Hanbury challenges Maitland's suggestion that there was in public law little or no equity, and supports his attack with illustrations drawn from various fields. He points out that Lord Eldon's opinion that equity never can be invoked to restrain the commission of a crime is now discredited, and he cites sufficient cases of relief granted, both for and against the Crown, to satisfy us that the growth of criminal equity has been as pronounced in England as in the United States. He points out that protection of the Crown's interest is also available, but seldom sought, by bringing "an English information on the revenue side of the King's Bench Division, which has for this purpose succeeded to the old equity jurisdiction of the Court of Exchequer."<sup>13</sup>

Professor Hanbury is to be congratulated on the strength of his argument in the last chapter in favor of the present day teaching of Roman law. "As well might we attempt to study literature without Homer, philosophy without Plato, medicine without Hippocrates. Our whole vision would be intolerably narrow . . . Juristic science may be on the eve of a great reconstruction, and for this end we must marshal all our forces; and the most potent of these is Roman Law."<sup>14</sup>

ROBERT S. STEVENS.

Cornell Law School.

---

12. On the other hand, compare *Thompson v. Thompson*, 1 Jones 430 (N. C. 1854), 1 AMES, CASES IN EQUITY JURISDICTION (1901) 201, containing a dictum that, in construing a statute giving a widow dower in an "equity of redemption or other equitable or trust estate in fee," an equitable "estate" should be distinguished from an equitable "right," for, "as the widow is not entitled to dower where a husband has a mere right at law, so she is not entitled where the husband has a mere right in equity."

13. HANBURY, *supra* note 1, at 112, 113.

14. *Id.* 154-155.