BOOK REVIEWS


Within the past twenty years, the subject of municipal corporations has been somewhat grudgingly accepted as necessary to a well rounded course of legal study, albeit for the most part as an elective course in an already over crowded curriculum. The tremendous practical importance of instruction in the legal principles relating to our local government both to the practitioner and to the legislator has been forced upon the law schools. The inadequacy of the incidental treatment of various phases of the subject in the traditional courses in public law is apparent. Our courses on constitutional law are generally limited to the construction and application of the federal constitution and in most of our schools no time has yet been found for courses on the state constitutions, statutory construction, administrative law or the law of taxation. All these subjects are intimately related to the ever increasing problems reflected in the litigation directly affecting local governmental units. The task of the instructor of law students in the extremely complicated field of municipal corporation law is therefore beset not only with the difficulty of adjusting his course so as to cover the general principles applicable to his field, but also often of supplementing the lack of coordinate courses in public law and administration. It follows that the true content of the course and its correlation to the rest of the curriculum must be determined by the instructor in the individual school. Upon this must also to a large degree rest the responsibility of supplementing his case book with such other materials, by way of ordinances, statutes, constitutional provisions and local decisions, as will bring home to his students the practical application of the principles developed to the current problems of local government. Because of this difference in the needs of the individual instructor and the limited time at his disposal no case book on municipal corporation law can quite fill his needs except as the topics selected fit in with the curriculum of his own school and is largely supplemented by other materials.

In the meantime, those of us who have had to deal with the problems of preparing cases and materials for use in the study of this subject in the various schools have felt required to cover a large field and to leave to the individual instructor the choice of those topics that best fit his peculiar situation and the time allotted to his course. In meeting this problem Professor Stason has produced a case book that should be found acceptable by any instructor in this subject who is fortunate enough to have these correlative courses also available to his students. Within the space of seven hundred and fifty pages he has covered the general principles, and with a perspective that reflects a long teaching experience. The first chapter of the book deals with legislative control over municipal corporations, constitutional limitations upon their creation and alteration and the effect of change of boundaries. Throughout the work special emphasis has been laid upon the subject of the delegation and construction of municipal powers. Following a chapter outlining the general principles, the author takes up their application in the fields of city planning and zoning, health and public safety, and the appropriation of public funds. In considering municipal indebtedness he has brought together the landmark cases dealing with constitutional limitations and estoppel, including the federal doctrine of recitals. His treatment of this part of the subject is so thorough that one may regret the omission of any of the numerous decisions within the past three years bearing upon the P.W.A. legislation designed to circumvent the state limitations upon municipal indebtedness. Subsequent chapters have to do with quasi-contractual liability, the rights of abutting owners in streets, municipal liability in tort, acquisition and alienation of property.
From this brief review, it is apparent that Professor Stason has thought best to omit any separate consideration of the subject of internal organization to which Professor Beale, in his well known case book, devoted nearly one hundred pages. This logically carries with it the omission of an extended consideration of home-rule, which today has to do mainly with questions of organization, or of the procedure of ordinance making and the nature of ordinances as laws. A goodly part of these subjects can be readily covered in a separate course in administrative law. The same is true of local taxation which is likewise left to the complimentary law school course. It is doubtful that many of the instructors in other law schools to which the subject of municipal corporations is assigned are as fortunate as Professor Stason in thus being able to cut down the necessary content of the course.

When all this is said, the fact remains that within the limits circumscribed the author has produced a case book that meets the best traditions of scholarship and of pedagogy. The cases are well selected, duplication is avoided, and the essential principles progressively developed. A nice balance has been maintained between the older and epoch making decisions and the recent case that illustrates the application of the established principles to unique and interesting situations. Wherein the treatment of the topics he undertakes is limited, he has freely supplemented the case material with textual notes carefully prepared and made readable to the student without requiring him to go to the authorities cited. Some fifty pages of such material including historical notes and an excellent bibliography of twelve pages, all carefully selected and edited add to the value of the work as a teaching tool.

C. W. Tooke.†


This slim volume written by Dr. Cleon Oliphant Swayzee, Assistant Professor of the University of Nebraska, being one of the series of studies in history, economics, and public law edited by the Faculty of Political Science of Columbia University and published by the Columbia University Press, presents a thorough and excellent treatment of a timely and important subject. It is generally conceded that some form of collective bargaining is necessary to solve the questions that arise between employer and employee. In these negotiations the labor unions have played and will play an essential part. It is in the course of these labor controversies that strikes frequently arise. And the labor injunction cases, in which the power of the courts to punish for contempt is invoked, usually grow out of such strikes. The matters discussed in this book, therefore, for the most part relate to the problems and questions that occur in the rise, progress, and termination of industrial strikes.

These injunctions are commonly granted by the courts against striking employes for acts of an unlawful character charged to have been committed by them in the course of the strike. There is now no question as to the right of employees in private business to strike whenever they are so inclined. Furthermore, it is now generally settled by statutes and by court decisions that the strikers have the right to use peaceful picketing and orderly solicitation. It is only when they exceed these limits that their actions become illegal and subject to injunction by a court of proper jurisdiction. Such an injunction is, of course, ineffective of itself. There must be a power back of the injunction to enforce its mandates. Such power must lie either in the court granting the injunction or in the general jurisdiction of the law to punish those who are guilty of criminal acts. Accordingly, if the terms of an injunction

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issued in a labor dispute are violated, those who are guilty of such infractions may be punished as for contempt by the court issuing the injunction; or if appropriate statutes exist, they may be prosecuted under the criminal law. It is obvious, therefore, that the power of the enjoining court to punish those who violate its injunctions is an essential and fundamental element in these great human problems which are of such vital concern to the general welfare of the people. Perhaps at no period since the beginning of history have these questions been more acute or more important than at the present time. It is, therefore, most appropriate that this treatise should now be published.

The author has confined himself very largely to a discussion of the labor injunction cases that have arisen in the courts of the State of New York. This is quite proper, because in no other jurisdiction has there been more litigation in this field. Dr. Swayzee begins with a consideration of the question of the general powers of the court to punish for contempt. He then proceeds to examine the New York cases from the year 1904 to 1932, giving the facts in several of the more important controversies. He then mentions the legislative steps toward revision and concludes with his own suggestions on this subject.

In his preliminary consideration of the general powers of the court to punish for contempt, it is interesting to note that some recent writers dispute the contention that all courts of record enjoy inherent powers to punish summarily for contempt. It is claimed that until the Seventeenth Century the English courts had no such power of summary punishment, unless the accused confessed his guilt; and that in default of such confession it was necessary that he be prosecuted under the general process of the criminal law. This discussion, however, is conceded by Dr. Swayzee to be academic. It is now well settled that the courts have such inherent power. The question as to which there is most argument and dispute relates to the method in which that power shall be exercised. Apart from the punishment of contempt by the ordinary criminal process of indictment or information in the criminal courts, the only manner of enforcing injunctions, including labor injunctions, is by proceeding in the enjoining court to hold the accused for contempt and to subject him to the pains of penalties provided therefor.

The writer calls attention to the provisions of Section 750 of the Judiciary Law of our state, which defines the instances in which persons may render themselves liable to punishment for criminal contempt. He also mentions Section 753 of the same law, which provides for civil contempts. Generally speaking, these criminal or public contempts “include only those acts the aim of which is to defeat the purpose of the judicial system by wilful disregard of its authority.” Civil contempts, on the other hand, include “acts which amount to an invasion of some private right, acts which serve to ‘defeat, impair, impede or prejudice a right or remedy’ of one of the parties to the action, but which are not acts of intentional disregard for the authority of the court.” This classification is by no means clear, and there is much confusion in the court decisions as to whether a given act constitutes a civil or criminal contempt. In addition to this classification, there is another important division to be considered. There are, in the first place, those acts committed in the immediate view and presence of the court and directly tending to interrupt its proceedings or to impair the respect due to its authority. Then there is another group of acts which occur outside the immediate view and presence of the court but which constitute wilful disobedience or resistance to the provisions of its order. Those offenses which take place in the immediate presence of the court can be punished summarily, while the others must be prosecuted upon notice and after hearing. It is clear that the former class falls within the category of criminal or public contempts. It is difficult to conceive of an offense committed in the immediate view and presence of the court which would be merely a civil contempt. It follows, therefore, that all criminal
contempts, if not in the view of the court, and all civil contempts should be punished after due notice and hearing. All except the most extreme radicals concede that the court must have power to punish summarily any breach of its power or dignity committed in its immediate presence and disturbing its activities. Without such power the courts could not function with dignity or efficiency. As to the second class, consisting of acts claimed to be in violation of the order of the court, but not committed in its immediate presence, there is a very marked and positive difference of opinion concerning the proper procedure.

The vital distinction between the two schools of thought on this subject consists in the fact that one group believes that the enjoining court should possess the authority to punish without the intervention of a jury, while the other holds that this tremendous power should not be lodged solely in the hands of the tribunal which granted the order claimed to have been violated. Those who favor the jurisdiction of the court to punish those who have broken its decrees, claim that such a power is necessary to the proper conduct of the business of the court. They say the court decrees will not be respected and obeyed unless they are promptly and vigorously enforced; and that such result can be accomplished only by the action of the court itself, without the delay and difficulties which they say will arise if the accused have the benefit of a jury trial. On the other hand, those who support the opposite contention aver that if prosecution for contempt of court is essentially a criminal proceeding, the accused must have the same right to a trial by jury that is given to him under our system of jurisprudence, when they are being prosecuted by indictment. In this connection they further allege that every court order is signed by a judge who is a human being and is, therefore, peculiarly sensitive to any criticism or disregard of his own mandates. This consideration has been recognized by the highest judicial authority. The late Mr. Chief Justice Taft, in the case of Craig v. Hecht, said:

"The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest."

In contempt proceedings to enforce labor case injunctions there is also the highly important consideration that the strikers, who for the most part the prospective subjects of the discipline, will be much more resentful if they are punished by the order of the court than they will be if they are prosecuted before a jury. Unfortunately there is a strong tendency among the working men and women to believe that the courts are inclined against them. They are all very generally convinced that the courts are on the side of the employer rather than the employe. In my own judgment this is a mistaken view. In the vast majority of cases the courts hold the scales of justice evenly balanced in these as in other cases. There have been instances in which the courts have unduly favored the employer; and there have been quite as many, and indeed in my judgment more, instances where these tribunals have leaned the other way. But there can be no doubt that there is a widespread opinion among employes that they do not receive the same consideration from the courts as do the employers. It would be a great national misfortune to have such a belief, mistaken though it is, crystallize into a fixed opinion on the part of the workers of this country. This is, to my mind, a strong argument in favor of the contention that cases of indirect contempt, not committed in the presence of the court, should be dealt with by indictment and trial by jury rather than by the sole edict of the court. From the viewpoint of strict logic, I think it can be successfully maintained that the enjoining courts should have the self-contained power to enforce

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1. 263 U. S. 255, 279 (1923).
their decrees. Undoubtedly such authority is necessary in order to maintain, with complete efficiency, the authority of the orders of the court as well as the dignity of the tribunal itself. But as a practical proposition it is perhaps best for the interest of the general welfare that these offenses which are not committed in the presence of the court should be tried before a jury.

In March, 1932, the Federal Congress enacted a law providing for a speedy public trial by jury for labor contempts not committed in the presence of the court. The constitutionality of this statute has not as yet been specifically determined by the courts. However, according to Dr. Swayzee, two cases involving the injunction provisions have been heard and their constitutionality upheld. On this very important subject it is interesting to note that the State courts have generally vacated these laws. As Dr. Swayzee says:

"There have been, at one time or another, laws providing for jury trials in contempt cases in Massachusetts, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, and Virginia, but all these have been nullified. The grounds for the nullification of all these are well stated in a Massachusetts case: 'It is an essential element of a court that it possess power to enforce its orders, and to protect itself from having its authority flouted.' As unsatisfactory as this record may be, however, it is not difficult to see why the various states have kept clear of the subject, for on examination of the cases it is clearly evident that the weight of authority is sufficient to discourage the most ardent labor partisan. In almost every case where the question has arisen it has been held that it is beyond the power of the legislature to curtail the jurisdiction or power of the courts over contempts.

"Despite the weight of this precedent, however, twelve states now have statutes providing for jury trials in contempt cases, eight having been enacted during the last two years. Pennsylvania has had such a law since 1931, Wisconsin since 1927, New Jersey since 1925 and Utah since 1917."

Dr. Swayzee also calls attention to the fact that during the 1935 session of the New York Legislature, a law was passed amending the Civil Practice Act by providing that no person should be punished for a contempt for disobedience to an injunction growing out of a labor dispute except after trial by jury.

The author is of the opinion that ultimately it will be held that the Congress and

6. Citing State v. Morril, 16 Ark. 384 (1855); In re Shortridge, 99 Cal. 526, 34 Pac. 227 (1893); In re Hays, 72 Fla. 558, 73 So. 362 (1916); McDougal v. Sheridan, 23 Idaho 191, 128 Pac. 954 (1913); Cheadle v. State, 110 Ind. 301, 11 N. E. 426 (1887); Joyce v. Everson, 161 Ind. 440, 69 N. E. 135 (1903); In re Chadwick, 109 Mich. 588, 67 N. W. 1071 (1896); Chicago B. & Q. Ry. Co. v. Gildersleeve, 219 Mo. 170, 118 S. W. 86 (1909); State v. Clancy, 30 Mont. 193, 76 Pac. 10 (1904); In re Bowers, 89 N. J. Eq. 307, 104 Atl. 196 (Ch. 1918).
9. Wis. STAT. (1927) § 133.07.
the state legislatures have the authority to regulate the powers of the federal and state courts respectively to punish for contempt by providing that indirect contempts must be prosecuted by indictment and tried before a jury. He recommends such legislation and ends by saying:

"The only important difference between present contempt law and that proposed would be found in extending the use of a very satisfactory and traditional fact-finding institution, the jury."

In conclusion, it is my judgment that this study by Dr. Swayne is careful, thorough, and adequate. There will be many who differ from his conclusions but all must agree that it is a vital subject, toward the consideration of which he has furnished in his book a very substantial and worthy contribution.

GEORGE GORDON BATTLE.


"If I had more time, I would write a shorter letter" wrote the master of Roman prose two thousand years ago.

As the passage of time has given form and content to the new juristic term "Administrative Law," it now has become possible to produce a wieldy teaching tool of 651 pages to replace the awesome and cumbersome experimental tome of 1177 pages published three scant years before.

In keeping with American law school tradition, as well as that established in their first edition, the editors have made their book primarily a study of federal administrative law, making no direct advertence to the host of problems in this field presented under the systems of public law obtaining in the individual states. Indeed, the emphasis on federal law, in another sense, is one of the striking departures of the new edition from the model of its predecessor. One of the underlying theses of the first edition seemed to be that the basic principles of the unwritten British constitution are so like those of our written document that pragmatically there can be very little different between American institutions and those of the mother country. The first edition liberally interspersed decisions of the courts of England, Canada, Australia and the Colonies among cases taken from the American reports. But the second edition reports in the section dealing with Judicial Review of Administrative Action not a single authority from outside the United States. In the section on Delegation of Powers, the English decisions are physically segregated into a subsection apart from the American cases, the thesis apparently being that the two sets of cases involve a comparative study of two sets of institutions rather than a study of the universality of the institutions of all English-speaking countries. The only exception to this rule of segregation of authorities occurs in the subdivision of the chapter on Executive Power, "Recognition of Foreign Governments," where decisions of the United States Supreme Court and of the English Court of Appeal stand side by side, and are related to a series of footnote cases taken from the New York Court of Appeals. This exception is explicable from the editors' apparent view that the problems in this section require application of principles of International Law rather than of purely Municipal Law.

The general plan of the casebook remains the same in both editions. The purpose of the editors is to present a course on what may be termed the substantive admin-

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istraive law of the United States, rather than on the adjective phases of administra-
tive practice and procedure. It is planned as an extension of or supplement to the
course labeled "Constitutional Law," which was formerly (and is still, in only too
many institutions) the student's sole occasion for an excursion into the field of public
law. To this end, the first half of the book presents materials for examination of
what is at once perhaps the most heartily damned and the most heartily praised, and
is certainly the most thoroughly misunderstood phenomenon of constitutional law, the
doctrine of Separation of Powers. The second half of the book is devoted to materials
on Judicial Review (or, as the editors phrase it, "Control") of Administrative Action.

It is in detail and inner classification that the new edition differs from, and one
ventures to say, improves upon the first. The doctrine of Delegation of Powers,
instead of occupying a middle ground between Separation of Powers and Judicial
Review, as it did in the first edition, has now been assimilated to Separation of Powers,
and is arbitrarily considered under the heading, Legislative Power. This, while not
a logical, is certainly not an illogical classification of the subject, and it is submitted
that the mere fact of classification, in preference to leaving the subject at large, is a
move in the direction of simplification, and therefore of readier understanding of
what is, under the best of circumstances, none too clear.

The improvement is most marked in the section on Judicial Power. One had the
feeling, on reading the first edition, that the editors selected the cases in this section
because, to be sure, they were all striking illustrations of one problem or another in-
volving the nature of judicial power, but not, certainly, because they fitted into a
coherent scheme for the order of their presentation. This situation was attributable,
not to the fault of the editors, but to the undoubted fact that the state of the law was
(in 1932) such that formulation of a plan for presenting interrelated materials on
the nature of judicial power would be no better than arrant speculation. Fortunately,
between the dates of the two editions, the Supreme Court has made a number
of decisions which tend to clarify, to some extent, the position which the federal
judiciary holds in the constitutional scheme. This advance in the law has emboldened
the editors to undertake a fourfold classification of the cases dealing with this topic.
The categories are labeled: 1. Finality of Decision; 2. "Case" or "Controversy";
teacher, this classification will do until a better one is devised, and that, it is feared,
will not be until the Supreme Court makes a re-examination of basic principles and
either overrules or explains some of the apparently inconsistent dicta in reported
decisions. The cases dealing with Executive Power have also been formally classi-
fied in the new edition, but here no regrouping or substantial change in the order of
presentation was involved.

A happier, though not yet altogether satisfactory nomenclature has been devised
for the editors' fourth category under the topic Separation of Powers. The cases in
this section, involving problems for which either branch of the government (or con-
ceivably any combination of such branches) has jurisdiction to devise a remedy, were
listed in the first edition under "Admixture of Powers," but are now reported under

L. REV. 233, 236.
4. For example, in view of O'Donoghue v. United States, cited note 3 supra, what is now
the basis, in constitutional theory, of the decision in Tutun v. United States, 270 U. S. 568
(1926)? Cf. Keller v. Potomac Electric Power Co., 261 U. S. 428 (1923); Comment (1933)
47 HARV. L. REV. 133.
the classification "Blending of Powers." One regrets that limitations of space forced omission of the classic Wayman v. Southard, and of the cases which classify such apparent anomalies as the probation system in the framework of our public law.

In the process of eliminating over five hundred pages of text, it was inevitable that many familiar landmarks as well as valuable teaching media should go by the board. Thus, no space was available for Kilbourn v. Thompson, whose downfall has been completed by the recent decision in Jurney v. MacCracken, which is given footnote notice. From the teacher's viewpoint, a most regrettable omission was that of Bingham v. Miller from the section on Legislative Power. This case, instancing so strikingly the phenomenon of judicial legislation, or the more recent Great Northern Ry. Co. v. Sunburst Oil Co., which unprecedentedly gives formal constitutional sanction to it, might well have been included in the new edition. These occasional judicial revelations of the substance hidden behind the form of constitutional decision are too rare and too significant to risk their not coming to the attention of the student, who is generally so naively impressed with the ponderosity of Supreme Court opinions that it is many years before he realizes that the evolution of Constitutional Law is more than the matter of rules of thumb under which the doctrines of common law pleading were developed.

In the second part of the casebook, the editors adhere to the postulate laid down in the preface to the first edition:

"... For the scientific development of Administrative Law a subject like 'judicial review' must be studied not only horizontally but vertically; we must explore not 'judicial review' generally or miscellaneously, but 'judicial review' of utility regulation, 'judicial review' of postal fraud orders, 'judicial review' of deportation orders. 'Judicial review' in Federal Trade Commission cases, for instance, is affected by totally different assumptions, conscious and unconscious, from those which govern courts when reviewing orders of the Interstate Commerce Commission. . . ."

The cases, therefore, in this part of the book are presented accordingly as they involve judicial review of utility regulation, tax regulation, alien regulation, and a number of other phases of governmental activity.

Omissions and replacements have contributed to brevity in this portion of the book as in the first part, and to much better purpose. In the section on Utility Regulation, three of the ten cases reported were decided after publication of the first edition; and the total number of cases in the section has been reduced from 17 to 10, a total saving of 95 pages. In the section on Taxation, six cases are reported, as against 16 in the first edition, filling 53 pages as against 103. The length of section on Control of Aliens has been similarly cut down. In these sections, adequate reference has been given in the footnotes to the omitted cases, with the result that these sections are at once up to date and teachable, and the danger is minimized of converting the course into one on Public Utilities or Taxation, or Immigration Problems. The sections on Control of the Public Domain, Prohibition Administration, and Administration of Patent and Trade Mark Laws have been wholly omitted from the new edition.

One could wish that the footnotes in Part I were as well done as those in Part II.

5. 23 U. S. 1 (1825).
6. 103 U. S. 168 (1890).
8. P. 57.
9. 17 Ohio 445 (1848).
In the earlier part of the book, the footnotes are for the most part unchanged, and in some cases even misprints have been carried over uncorrected from the first edition. Apparently, no effort has been made to bring these notes up to date, much less to enlarge their scope so as to include in condensed form some of the case material not reprinted. The unsatisfactory expedient has been adopted of occasionally inserting new notes on the body of the page after the report of a new case, so that there are, in effect, two sets of footnotes to bewilder the student, who generally has all he can do to cope with one.

One of the most commendable features of the new edition is an appendix listing the reported cases according to the type of procedural device used to raise the questions decided therein. This, while not a departure from the objective of the book as an exposition of substantive law, is a helpful and necessary reminder of the truism that, in the Anglo-American legal system, the recognition and enforcement of substantive rights still often depends on the manner of alleging them. Conspicuous by its absence from the new edition is the ten-page bibliography of the subject which graced the appendix of the first edition. That this collection and classification of the best treatises, essays and editorial notes was not enlarged and brought down to date is perhaps the most serious defect in what could readily be accepted as the best sourcebook in its field.

To conclude (without entering into the controversy over what is the proper scope of a course and a casebook on Administrative Law, and accepting the appearance of a second edition as evidence that there is a considerable body of pedagogical authority in accord with the Frankfurter notion of proper scope) one's impression of the worth of the book as a teaching device is good. It has the chief requisite of a work on Constitutional Law in that it is up to date. The editors' persistent refusal, in the face of student grumbling, to boil down opinions to bare skeletons is, in the long run, a virtue, for it is only by wading through the long pages of Supreme Court opinions that a student can come to know the philosophy of a supreme court, and a public law course which imparts a knowledge of the decisions but not of the philosophy of the Court serves but the aroma and loses the substance and essence of what it purports to give. The number of reported cases has been cut down, but there is left more material than the average class can digest in the time allotted, with sufficient range of selection and discard to give full rein to the individuality of the normal teacher. One can always wish for more materials to select from, but then, publishers are practical people, and students' pocketbooks are not always of unlimited depth.

John D. O'Reilly, Jr.


Occasionally there comes forth from the law publisher a book which represents the life work of a legal scholar in his special field. So Wigmore on Evidence and Williston on Contracts. The arrival of Professor Joseph H. Beale's three volume
treatise on the Conflict of Laws is an event of great importance to the legal profession. It may be safely stated that this work is one of the most important contributions to legal literature in recent years. Herein Beale presents the tangible results of forty years of class-room discussion, study and writing in a highly complex and developing area of the law. The actual preparation of this work, he tells us, extends back twenty years with interruptions caused by the World War and his burdensome, but fruitful, duties as Reporter on Conflict of Laws for the American Law Institute.

The subject of conflict of laws has become increasingly important since the turn of the century. The space destroying inventions of automobile, radio and airplane have tended to blot out state and national boundaries in the transaction of business, acquisition of property and societal relations. Latent in many a case is a conflict-of-laws problem of jurisdiction, domicile, right, remedy, comity or reciprocity which vitally affects the governing law. In demonstration of the rapid increase in the subject matter, Beale says that probably half of the cases digested in his treatise have been decided since 1906.¹ Not without reason is the author able to say that the material of Conflict of Laws "is now formulated as a whole subject for the first time."²

Certain it is that this work will be frequently consulted. One might say that this treatise must be consulted to catch the currents and trends of conflict of laws in our day and place. Beale was the guiding spirit in shaping the Restatement of the Conflict of Laws. His theories, written into the Restatement, will be canvassed by courts and lawyers and followed in many instances because of their persuasive force. By an ingenious method of section numbering³ Beale's Treatise on the Conflict of Laws is keyed to the Restatement of Conflict of Laws; it is "a commentary on the Restatement."⁴ Just as "no lawyer can safely give an opinion or argue a question of law without considering the Restatement,"⁵ so also it will be unwise for any lawyer to fail to read the thorough analysis of the sections of the Restatement set forth in Beale's Conflict of Laws.

Beale thus outlines his method of treatment:

"In the introduction, the general nature of law, of legal rights, and of jurisdiction will be considered; this will be followed by a detailed theoretical study of legal rights, in which an attempt will be made to establish the time and place in which legal rights come into existence, the legal effect of acts, and the limits of merely remedial action. The remainder of the work will be devoted to a careful study of the positive common law of England and America."⁶

Beale's first task is to set forth his theories of law, to invite the reader to look into his juristic workshop and to see the tools which he uses in welding together the framework of his subject. This scholarly introduction will be hastily scanned or passed by the busy practitioner intent upon reaching the particular topics later developed. But it is not without its value. To understand his subsequent treatment one must know something about Beale's approach, his philosophy of law and his "hobbies," to use his own phrase.⁷ Beale is an ardent believer in principle. To him law is

1. Pref. x.
2. Ibid.
3. "Each section of this book is doubly numbered. Before the decimal point the number is that of the Restatement [of Conflict of Laws]. After the decimal point comes the serial number of the sections commenting upon the Restatement sections. Certain parts of the work cover subjects not taken up in the Restatement." Id. at xv.
4. Ibid.
5. Ibid.
7. Pref. xi.
“in great part . . . a homogeneous, scientific and an all-embracing body of principles. . . .”¹⁸ This does not mean that Beale considers that the law is made up of arbitrary and adamant rules. On the contrary he freely concedes that motion is a part of the legal order:

“Change in our law has been accomplished in the past almost entirely by a slow and unconscious change in the understanding of the law by courts and lawyers. Each generation of men has its own mental as well as physical ways, its own solution of the problems of life, its own criteria of justice and social need; and these mental characteristics necessarily color its understanding of its legal system. . . . In this way for seven centuries the law has been growing, so as better to fulfill the needs of a changing society; and this principle of growth is as vigorous as ever in our law. The same method of growth is equally vigorous in other civilized systems of law.”¹⁰

Faintly concealed in his opening pages is Beale’s strong dislike “for a current but ephemeral school of legal philosophy” which has criticised Beale’s legal principles as “conceptual and legalistic.”¹¹ Doubtless he is referring to the so-called realistic school which views law as a science to be fashioned by the judge without too great devotion to principles and with an increasing emphasis upon facts. Beale squarely rejects the theory that the judges make the law rather than discover it. “Courts are sworn to enforce the law, not to make it.” This battle between conceptualists and realists is still being fought;¹² it is not necessary to await the outcome of the struggle.

Suffice it to say that Professor Beale deals largely with cases, authorities and conclusions derived out of their life-long study. Not for him are sociological investigations, laboratory experiments, fact-finding excursions, questionnaires and the other trappings so dear to the advocate of the new scientific approach in the law. In vigorous fashion, Beale states his own creed: “One studies decisions, which are facts of our law and the inferences from these which after forty years study and teaching seem to be necessary.”¹²

Recalling Beale’s theory that the law is in large part composed of principles it may be permissible to compress into a few lines the legal motif which, in Beale’s judgment, permeates conflict of laws in the common law countries. Out of his treatise come forth the key words: (1) territoriality, and (2) domicile.

(1) Territoriality. Two clashing theories of the Nature of Law, obtain in the modern world: (a) The theory that law is personal, i.e., law attaches to the individual by reason of his nationality or domicile and this national law determines his rights wherever he goes even in the face of contradictory local laws; (b) the theory that law is territorial, i.e., the law of a state applies to all persons within the state, both nationals and foreigners.

Beale holds fast to the view that “The conception of the common law has always been the conception of a territorial law.”¹³ In contrast with the personal conception

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8. Id. at xxv.
10. Pref. xiii.
11. For an extensive bibliography of articles by writers of the realistic school, see Llewellyn, Some Realism About Realism (1931) 44 Harv. L. Rev. 1222; see also Goodrich, Our Black Ink Balance (1932) 7 Am. L. School Rev. 385, 393.
A collection of articles critical of realism will be found in the reviewer’s article, Principles or Facts? (1935) 4 Fordham L. Rev. 53, 55, n. 9.
13. P. 52. There is a vigorous minority strongly contesting the soundness of the territorial theory of conflict of laws. Cook, The Logical and Legal Bases of the Conflict of Laws
of law found in European countries, the common law subjects foreigner and citizen alike to the lex situs when he acts within the confines of a common-law state or sends his property therein. Throughout his treatise Beale presses down upon the all pervasive doctrine of territoriality. Whether the problem to be solved is one of jurisdiction in general,\(^4\) or jurisdiction over persons within the territory,\(^5\) or jurisdiction over land,\(^6\) or power of taxation,\(^7\) or creation of property rights,\(^8\) or contract rights,\(^9\) or tortious wrongs,\(^10\) there is a constant repetition of the basic rule that "territoriality" is the test determining the proper law to be applied in the given situation. While Beale carefully notes several exceptions to this doctrine of territoriality\(^21\) he views it as the most important single principle of Conflict of Laws.

(2) **Domicile.** Throughout his work Beale draws the pertinent distinction between domicile and nationality. He points out that the European emphasis upon nationality as the governing concept in the relation between a state and the individual is rejected by the common law. In common law countries, domicile, not nationality, is the decisive factor in spelling out jurisdiction in matters of marriage, divorce, legitimacy, adoption and many phases of taxation and the transfer of personal property after death.\(^22\) Beale's Treatise therefore omits any consideration of nationality and substitutes a thorough study of the law of domicile.


\(14.\) C. 3.
\(15.\) P. 339.
\(16.\) P. 437.
\(17.\) C. 4a.
\(18.\) C. 7.
\(19.\) C. 8.
\(20.\) C. 9.

21. Some of these exceptions wherein the common law departs from the theory of territoriality and follows the European concept of personality are noted by Beale: (a) The "law of the flag" partakes somewhat of the characteristics of personal rather than of territorial sovereignty (p. 287). (b) Jurisdiction over nationals is operative while they are abroad as well as at home (p. 291). (c) The law of taxation does not permit a state to levy a personal tax upon a person not domiciled within its territory or a citizen of it (p. 525). (d) Chattels removed without the consent of the owner are not generally subjected to the law of the state to which they are taken (p. 294).

23. C. 2.
24. C. 3.
26. C. 4a. The subject of taxation is not included in the Restatement of the Conflict of Laws.
27. C. 5.
The concluding volume covers Administration of Estates and Procedure.\textsuperscript{84} In an Appendix Beale has reprinted two chapters on the History and Doctrines of the Conflict of Laws which he wrote several years ago.\textsuperscript{86} A Table of Cases and Index complete the work.

Beale points out that his objective has been "to include every decision based upon Conflict of Laws." Acknowledging frankly that he has not reached this objective he modestly states that "he would be happy to be assured that he had included half the decisions."\textsuperscript{88} While there may be cases which might have been included,\textsuperscript{87} the marvel is that he has unearthed the wealth of material which characterizes this work.

The reviewer concludes, as he began, with the statement that Beale's Treatise on the Conflict of Laws is one of the most important contributions to legal literature in recent years. In his judgment it is destined to rank with Williston on Contracts and Wigmore on Evidence, a landmark in the law of classical tradition.

WALTER B. KENNEDY.\textsuperscript{†}


This book covers a field that the average lawyer does not enter, and the existence of which he knows of only in a vague and indefinite way. Its purpose is to serve as a guide in the procedure that governs the presentation of evidence in marriage cases pending before the tribunals of the Catholic Church, known as the "Rota." As the author states, it presupposes on the part of the reader a knowledge of the Canon Law of the Catholic Church with reference to marriage. That it covers its field thoroughly and extensively, is evident even to a reader who does not profess any knowledge of the Canon Law.

One lays it down with a feeling of amazement with respect to the detailed rules, the mass of precedents, and the many writings on the subject that have been accumulated over the centuries. And yet, one should not be surprised when he reflects upon the continuity of the existence of the Catholic Church, and the unchangeability of its doctrines, since the days of its founding.

The value of the book, however, to the average lawyer is not one of practical benefit, but rather educational. It is interesting to note the similarity of many of the rules of procedure and of evidence in force in these canonical proceedings to those which

\begin{itemize}
  \item \textsuperscript{29} C. 7.
  \item \textsuperscript{30} C. 8.
  \item \textsuperscript{31} C. 9.
  \item \textsuperscript{32} C. 10.
  \item \textsuperscript{33} C. 11.
  \item \textsuperscript{34} C. 12.
  \item \textsuperscript{35} App. 1880-1975.
  \item \textsuperscript{36} Pref. x.
  \item \textsuperscript{37} For example, the following cases seem to have been omitted: Mack v. Mendels, 249 N. Y. 356, 164 N. E. 248 (1928) (distinction between non-residence and absence); Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916) (effect of licensing a foreign corporation); Cramer v. Borden's Farm Prod. 58 F. (2d) 1028 (1932); Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624 (1925) (jurisdiction over infants); Burrell v. Root, 40 N. Y. 496 (1869) (Statute of Frauds).
\end{itemize}
prevail in the civil courts. The proceeding is started by a petition or plaint, consisting of a brief presentation of the facts to the tribunal and a request that it take jurisdiction. If the court decides to take jurisdiction, a summons is issued. The party has no right to initiate the action or to issue a summons. The summons may be served in various ways:—by courier, by mail and by edict—analogous to the civil courts’ methods of personal service, substituted service and service by publication. An answer may or may not be filed, but in any event, the court does not proceed to take further evidence until the defendant has had an opportunity to state his or her side of the case. Then the trial proceeds, the procedure being marked by a great deal of discretion on the part of the court with reference to such matters as the time and place for the hearings, the taking of depositions, the permitting or denying both parties to be present at the hearing, the selection of experts and the admission of evidence generally.

A great deal of space is devoted to the chapter on Presumptions, and this particularly is of interest to lawyers. As might be expected, by reason of the fact that until a comparatively recent date the jurisdiction over matrimonial actions in England was exclusively that of the ecclesiastical courts, we find recognized by the canonical courts many of the presumptions known to the civil courts, such as the presumption of the validity of a marriage entered into in due form, the presumption of marriage flowing from matrimonial cohabitation and reputation, the presumption of legitimacy of the children born in wedlock, the presumption of potency and consummation.

Two distinguishing features found in the procedure before the courts of the Church and not found in our civil law are the presence of the defender of the marriage bond and the duties of the court itself. In cases involving an annulment of the marital relationship, the presence of one styled the defender of the bond is absolutely necessary. He is, as it were, a co-defendant, and upon him devolves the duty of actively defending the status which is challenged by the plaintiff. It is true that some states of the union have seen fit to establish a similar office, but New York is not numbered among them.

In the civil courts it is customary to look upon the judge as one who merely presides over a contest waged by the respective parties. His duty is to decide the issues by applying the law to the facts as presented to him. Seldom, if ever, does a judge actively participate in the presentation of the facts in a case. His attitude is that such is the duty of the attorney, a necessary attitude for obvious practical reasons. In these ecclesiastical cases, however, one of the main duties of the tribunal is to develop all pertinent facts. The procedure is seemingly outlined with that thought in mind. The court is given great discretion with reference to the calling of such witnesses as he thinks may aid in the ascertainment of the facts. It may at any time before decision call the parties together again for a re-hearing. It may call one party without notifying the other. It may, without notice to the parties, call to its assistance, with respect to technical matters, such experts as it selects. The situation is, of course, an ideal one for the giving of such discretion. There is no jury and the judges could not possibly harbor any ulterior motives. The necessity, therefore, of guarding against the introduction of matters that might appeal to bias or prejudice or sway the arbiter unduly is not present to the same extent that our rules of evidence evidently presume it is in actions in our civil courts. Of late some of our judges and official referees, moved unquestionably by a feeling that the evidence presented to them was not based upon truth, have been moved to speech, and have in a certain sense constituted themselves the defenders of the bond. Who can doubt that a great percentage of the divorce actions brought and tried in our courts are based upon perjured testimony or are the result of collusion? Certainly they would not stand the test of the procedural requirements outlined in such detail in
this book. Certainly they would not pass the vigilance of the defender of the bond. Might it not be well for New York to establish such an office? It would certainly to a large extent put an end to the hypocrisy and sham, if not perjury, now prevalent in these actions in our courts.

RAYMOND D. O'CONNELL


THE LEES OF VIRGINIA.—The Lees who are most likely to interest present-day readers are Richard Henry, who formulated and proposed the American Declaration of Independence, which was adopted by Congress July 2, 1776; William and Arthur, living at the time in England, and afterwards engaged in secret diplomacy in the interests of the united colonies; Light Horse Harry, hero of the Revolutionary War, and father of Robert E., the leader of the Confederate forces in the Civil War. The author, to do justice to Arthur Lee, finds it necessary to discuss Benjamin Franklin, with whom Arthur was associated as a commissioner to France. Franklin’s support of the traitor Bancroft, whom he retained in his service, and who transmitted to the English secret service copies of all the documents sent or received by Franklin, is evidence of the credulousness of the philosopher. Arthur had protested against the retention of Bancroft and had furnished proofs of his treachery. The only effect of the protest was to create in the mind of Franklin an implacable hostility to Arthur. Light Horse Harry was largely responsible for the ratification of the federal constitution by the Virginia Convention; and Richard Henry, who had opposed ratification, was, in turn, largely responsible, while a member of the first United States Senate, for the adoption of the first ten amendments to the Constitution. The author devotes more space to a description of the characteristics of Robert E. than to his achievements, which are a matter of history. The Lees were a great clan, and their story is here well told.

ULYSSES S. GRANT—POLITICIAN.—This book belongs to the series of “American Political Leaders,” edited by Allan Nevins. The author follows his hero from the cradle to the grave—through the first futile period of his life up to the Civil War, through his triumphs in that war, through the presidency, to the end. As the title indicates, it is the political career of Grant which most interests the author. Grant, as President, found himself at the head of an organization determined to force negro suffrage upon the conquered South, and hungry for the spoils of victory. Grant appears as personally honest, but as the supporter of many a dishonest appointee. That success on the battlefield does not necessarily guarantee the wisdom necessary for a chief executive is the lesson of the book, which is interesting and well written.

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BOOBS RECEIVED


