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Book Reviews

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The common-law rule has been generally abrogated or modified by statutes, both in England and in this country. The general tenor of the statutes is that a devise will operate on such real estate as the testator was entitled to devise at the time of his decease, and which he intended to devise, whether it is property that he acquired after making the devise or is property of which he was owner when he made the devise and afterwards sold, repurchased, and died seized. *In re Estate of Hopper,* 66 Cal. 80, 4 Pac. 984 (1884). Under the *Wills Act* of 1837 in England and similar statutes in this country, a conveyance of lands after a devise of them operates to revoke the devise, if the title to the land remains out of the devisor at the time of his death. See *Woolery v. Woolery,* 48 Ind. 523, 526 (1874). Generally, however, under such statutes all that is necessary is that the devisor shall, at the time of his death, be seized of substantially the same estate as that of which he was seized at the time he executed a devise thereof, in order that the devise operate to pass the same to the devisee. *Woolery v. Woolery, supra.*

In the case of *Phillippe v. Clevenger,* 239 Ill. 117, 87 N. E. 858, 16 Ann. Cas. 207 (1909), it was held that no will could be revoked other than by cancellation, tearing, or obliterating, or by some other will, and that a *specific devise* of land was revoked by a subsequent conveyance of that land to the devisee, and the devise was not revived by the subsequent reconveyance to the devisor, where there was no subsequent republication of the will. The rule that a subsequent conveyance revokes a prior devise has been applied in Illinois only in cases where the devise was a specific devise. In *Strang v. Day* there was a general devise and it was held to have passed land which was conveyed to the devisee after making the will and which was subsequently reconveyed to the testator.

As early as 1842 the Supreme Court of Illinois, under a statute providing that a testator should have power to devise "all the estate, right, title, and interest . . . which he hath, or at the time of his death shall have, of, in, and to any lands," held that a devise would operate on after acquired lands, if the testator so intended. *Willis v. Watson,* 4 Scam. 64 (1842). A republication of the will, upon acquisition of after-acquired lands which the will purported to devise, was held to be unnecessary. Notwithstanding the provisions of this Statute, *Phillippe v. Clevenger* held that a conveyance of lands specifically devised operates to revoke the devise, and if the lands are subsequently reacquired they will not pass under the specific devise if the will is not republished. But in *Strang v. Day* the court distinguished this case, saying that it dealt with a *specific* devise, while in *Strang v. Day* there was a *general* devise, and the testator intended to pass the after acquired lands under it, even though he had conveyed the same lands after he had executed his will.

James R. Burke.

BOOK REVIEWS

AMERICAN CONSTITUTIONAL LAW. By Charles W. Gerstenberg. New York: Prentice-Hall, Inc. 1937.

A book on Constitutional Law is always timely, even though in the future the subject may become a branch of ancient history. This volume answers the question, "Where can one find a book on Constitutional Law that is not too technical nor too long?" Since the Supreme Court issue has come before the country many well-meaning citizens have become Constitution conscious, whether

for or against "packing." While this book was not written especially to be read by the above named group, it would be well for the misinformed to do so, as the work gives the insight to this immortal (?) document, its workings and its interpretations. Professor Gerstenberg has made a worthy contribution to the field of Constitutional Law. He has combined the best features of a text book with those of a case book and has joined them together showing the relation of one to the other by the aid of footnotes that really serve their purpose. Although the book is but 717 pages, and the first 277 pages is text, the author has not treated the subject cavalierly, but by his industry and diligence he has succeeded in editing a book that will be of much value to the person who does not have much time to put on the subject, yet who wishes to have a fair understanding of Constitutional Law.

In the preface the author reminds the reader, "This is a text and case book for students who have relatively little time to devote to a big subject." He also sets forth a plan of study and method of use for this innovating book. The entire field of Constitutional Law is covered, not exhaustively but adequately from the historical development to modern trends and theories. Each of the twenty chapters of text deals with some phase of the Constitution, among which are such titles as: Interstate Relations, Separation of the Departments of Government, the Judiciary, the Powers to Regulate Commerce, Equal Protection, Due Process and many others. Each chapter of the text has its corresponding chapter of cases most of which are modern decisions. In all there are 67 cases, all of which are leading cases.

Mention must be made of the footnotes which form an integral part of this volume. Mainly for the purpose of elaboration of the principles set out in the text, they also point out the applicability and the workability of them. The footnotes are excerpts from cases, and, well-written, sensible comments from the author. The notes are definitely not to confuse the reader; neither are they used merely to fill space or give an authoritative air to the book.

The volume appears to have cost the author many laborious weeks in preparation. It is clear and readable, but not critical and pedantical. This book should go far in dispersing the appalling ignorance on Constitutional Law that possesses so many of us. The orderly arrangement of the material and the excellent chapter headings with their numerous sub-titles make it a simple matter to readily find any particular point dealing with the Constitution. The value of the book has not been lessened because of the two recent decisions of the Supreme Court, namely, the *Wagner Labor Relations* and the *Washington Minimum Wage Cases*, as the dissenting opinions in the *Adkins* case and the *Carter Coal Case* have now become law in this country. The latter two cases are discussed fully in the book.

Anthony W. Brick, Jr.

CASES ON CREDIT TRANSACTIONS. By Wesley A. Sturges. Second Edition. St. Paul: West Publishing Company. 1936.

This casebook should be highly interesting, not only to the law student but to the student studying business administration and technique as well, for in it the author has compiled a study of the cases and materials involving the frequently recurring transactions whereby parties borrow and lend money and buy and sell property on credit. The text materials include those credit transactions whereby the parties become involved in the law of suretyship and

guaranty, contracts of accommodation parties on bills and notes, letters of credit, real property and chattel mortgages, pledges, conditional sales and trust receipts.

In the average law school one usually finds most of the above subjects taught as separate courses. The principal materials embraced in these courses have been combined in this work on credit transactions. The materials are designedly elementary for it is not intended to touch upon all, or the more complex, methods of financing. Curricular, as well as other, considerations necessarily impose these temporary limitations.

The treatment of each of the types of credit transactions is taken up in an orderly and intelligent fashion, which gives the student a clear understanding of the entire transaction. For example, the first chapter is devoted to accommodation contracts. A discussion of the technical contract is taken up first, and this is followed by the consummation of the credit extension together with the relations and dealings of the parties during that period. The payment and discharge of the obligation is treated next, followed by extensions and renewals of the obligation. The time and method of outlawing the obligation, which involves the Statute of Limitations, is an important phase of the particular credit transaction. Finally, the author gives us an insight into the problems of the creditor in proving and having his claim allowed under insolvency and bankruptcy.

The author follows this mode of discussion in subsequent chapters for each of the credit transactions, including mortgages, pledges, conditional sales, and trust receipts. He devotes some space to pointing out the security holder's use of the credit and security documents, and the protection and priorities of such holder. The last chapter of the book explains and illustrates enforcement proceedings and rights to redeem in connection with the different credit documents.

To aid the student in acquiring a better understanding of the different credit transactions, Professor Sturges has incorporated a limited number of forms which are in current use. These forms are taken not only from certain private financing institutions, but from federal agencies as well, including those used by the Farm Credit Administration, Home Owners' Loan Corporation, and Resettlement Administration. In the appendices are found the Negotiable Instruments Law, the National Bankruptcy Act, and the three uniform acts on real estate mortgages, chattel mortgages, and conditional sales.

Besides its appeal to the student, this book should be very interesting to the practitioner and business man. The thorough treatment of each of several different credit transactions should urge one to deal with commercial law in terms of commercial doings, and to study legal decisions and propositions in terms of, and with principal emphasis upon, their effects on the business dealings and practices to which they relate.

James H. Levi.

CASES AND MATERIALS ON TRIALS, JUDGMENTS, AND APPEALS. By Thurman Arnold and Fleming James, Jr. St. Paul: West Publishing Company. 1937.

The West Publishing Company, through Messrs. Arnold and James, presents here a new type casebook on Trial Practice. This book covers the most frequently occurring procedural problems from the commencement of a case to the final termination of it on appeal. It begins with a chapter on the mystical conception of a court and ends with a chapter on appeals. On the way it treats

of the time and place and subject matter of judicial decisions. There is a very important chapter devoted to the ritual of the commencement of a suit, and one on venue. Two chapters are given over to executions, garnishment and attachment, receiverships, creditors bills, liens, supplementary proceedings, and exemptions. A very interesting and important part of the book is a chapter on devices for preparation of a case and clarification of the issues involved, which treats of bills of particulars and motions for certainty, items of negligence and damages, limitations, arguments, and counter arguments, and discovery and depositions. Then, as the final word on the matter of the trial, there is a chapter dealing with methods of controlling the jury. This most interesting chapter presents not only the required and accepted methods of selecting the jury and presenting to it the case, but is also a fine lesson in jury psychology.

But the part of the book that students will find most useful and informative is the introductory notes to each chapter. Here the authors are at their best. They have lifted out a general proposition from each case, and have delved into their own experience and that of their colleagues, and have written a note under each section heading that is a masterpiece of presentation of the law in brief form. After a few seconds reading of that note, the student can understand easily the most difficult case in the section, and can relate any case to others in the chapter as being in support of or dissent from the general rule.

The purpose of the book, which it achieves with consummate ease, is to correlate substantive law and procedure by giving a general, panoramic picture of the most frequently occurring practical problems which are common to most kinds of litigation. Apparently because they felt that the subjects could be treated to better advantage elsewhere, and in order to keep this book at a convenient size, the authors have omitted discussion of problems which primarily concern pleading and evidence.

Messrs. James and Arnold are to be congratulated on their thorough insight into the needs of students of law, and without question professors of procedure will find this casebook a distinct aid in lightening the burden of teaching this very difficult subject.

A. R. Martin, Jr.

HANDBOOK OF THE LAW OF WILLS. By Thomas E. Atkinson. St. Paul: West Publishing Company. 1937.

Every law student in his course of the substantive law of wills should take cognizance of the fact that at some time early in his career as a young lawyer a will will be thrust into his hands with directions to proceed until all the beneficiaries have full right and title to the property devised. Stark reality will present many questions. What court has jurisdiction? In petitioning for the probate of a will what allegations should be made? On the date set for hearing what proof should be offered? If no executor is named in the will who may qualify as an administrator and what procedure is followed for his appointment? What should be included in inventory and who should appraise the items listed? These and many other practical procedural questions relating to the collection, management, distribution, and settlement of an estate are fully discussed and presented in a manner specially adapted to student understanding. Moreover, Professor Atkinson of the University of Missouri has wisely included a chapter on the rules of construction applicable to wills with many suggestions regarding

the drafting of wills. Here the importance of clarity and certainty of language, possible contingencies which may occur in the lifetime of the testator, and an exact knowledge of the rules of law concerning property interests are pointed out. After reading this chapter one is indelibly impressed with the idea that he cannot be too cautious in drafting a will.

Of the 781 pages of text matter, fully half is devoted to descent and distribution and the procedure of administration. The substantive law of wills is thoroughly covered in the other half of the book. The chapter on intestacy, both in England and the United States, merits special comment as presenting a phase of the law difficult to explain in a concise and lucid manner. Anyone consulting this chapter will find the chart for determining degrees of relationship under the civil law and the canon or common law especially helpful. Throughout the book, the author has not been content to confine himself to a strict exposition of the law of wills but has generally touched upon other subjects of the law. A proper delineation of the law of wills includes such subjects as trusts, taxation, conflict of laws, insurance, and all property law.

Every law student would do well to consult this most recent book written in the typical and popular hornbook style. The West Publishing Company is to be praised for their progressiveness in constantly improving and keeping the hornbook series abreast with the most modern developments of the law.

Arthur C. Gregory.

INDIANA ANNOTATIONS TO THE RESTATEMENT OF THE LAW OF AGENCY. By Homer Q. Earl and Elton E. Richter. St. Paul: American Law Institute. 1936.

The American Law Institute's plan of restating the general common law of a particular subject of the law without regard to any single jurisdiction followed by individual state annotations has been fully realized on the subject of agency for the State of Indiana. To Professors Homer Q. Earl and Elton E. Richter of the University of Notre Dame belongs the credit of compiling and annotating the Indiana decisions and pertinent statutes to the two volumes of the Restatement of Agency. A valuable service has been performed for the Bar of this State in that it makes the Indiana decisions more readily accessible and the Restatement more practical to the practicing attorney.

The annotations in this volume are not exhaustive of all the Indiana decisions on a given rule of law but the compilers have felt that a representative number of sound, clearly stated, and well-reasoned cases would be far better than to clutter pages with citations which barely come within the rule stated. Once given a "lead" any number of cases can easily be found. Comment on the cases have been interposed wherever it was thought necessary. Cases squarely in accord or contra with the restatement have been so designated. The sequence of citing the most recent case first and then on to the earliest has been adopted because those recent cases are usually the best cases in stating the principle of law. This order, however, in many instances has been abandoned and an earlier case cited first because of a better statement of the rule of law. Accuracy of the cases cited in relation to the rule stated in the Restatement has been placed above all else.

These annotations are available to the bar of Indiana in a single bound volume or in pocket supplement form.

Arthur C. Gregory.

INDIANA ANNOTATIONS TO THE RESTATEMENT OF THE LAW OF CONFLICT OF LAWS. Prepared by Kelso Elliott and George E. Palmer of the Indianapolis Bar. St. Paul: American Law Institute. 1936.

The increasing frequency of citations of the American Law Institute's restatements by courts gives added value and meaning to the state annotations.

Practitioners may save themselves much work and time by using the annotations for at least points of departure in their searches for law.

The Annotations here considered seem particularly valuable due to the enlightening character of the comments on the cases annotated.

Homer Q. Earl.

MCCLINTOCK ON EQUITY. By Henry L. McClintock. St. Paul: West Publishing Co. 1937.

This book of 364 pages of text, which came from the press a few months ago, certainly has no superior, if it has an equal, as a handbook of equity jurisprudence. It has a table of contents admirably arranged in 24 chapters, and, in addition, has 20 pages of index from which the searcher may readily find clear reference to the particular branch of the subject with which he is immediately concerned. The leading principles of equity are stated with clarity and brevity. About 2800 adjudicated cases are cited, and the footnotes are illuminating. To the law student, lawyer or judge, this book seems practically indispensable. By its use, he may at once ascertain the leading principles; and examination of other more elaborate texts and adjudicated cases referred to will aid him in the solution of more abstruse problems. Unlike some highbrow modernists, the author very properly declares the basis of equity jurisprudence to be the moral law as administered by the ecclesiastical canonists who held the office of Lord Chancellor up to the time of the reformation, after which the lay chancellors, habituated to thinking in terms of rationalized natural justice, carried on the same work on the same basis. Nor does this author scorn as some do, the well-known maxims of equity which are "terse general statements, in striking phraseology, which can be retained in the memory." He gives the list of 11 of these maxims as given by Pomeroy. By some unfortunate oversight, perhaps, one of the most important of these maxims is omitted, *viz., Equity acts in personam.* The discussion of these maxims is both intelligent and instructive, as is also the subject of rescission and cancellation of contracts induced by fraud, and, reformation of contracts entered into by mutual mistake or mistake on the one part and fraud on the other. But it is not necessary to mention the adequate treatment of any one branch of the general subject. This book is a clear, dependable and adequate outline of the whole subject of equity jurisprudence.

William M. Cain.

RESTATEMENT OF THE LAW OF PROPERTY. St. Paul: American Law Institute. 1936.

When the American Law Institute set out upon its ambitious task of restating the general common law of the United States in 1923, it was stated that its object "should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which

will tend better to adapt the laws to the needs of life." No higher or more praiseworthy object was ever expressed by any body which sought the improvement of the law. Also, perhaps, no legal work has received more praise by those high in the profession or more publicity than has the Restatement in the short period the final drafts of eleven volumes on six subjects have been before the legal profession. Today, generally, that object has become a reality. But despite the high caliber of the work of the Restatements and the very able men who prepared them there is one fault which has hindered the wider use and greater influence the Restatement would otherwise exert. This fault, if it may be termed such, appears in the earlier Restatements and has been perpetuated in the two recent volumes of Property here reviewed. It consists in the evasive manner adopted in stating a rule of law. Often, in the statement of a rule of law in bold letter type, reference is made to prior sections by number as stating the rule; or, again, a rule is stated subject to the exceptions contained in other sections. Section 64 of the *Restatement of Property* is typical:

> "Both possessory and future interests in land can be created pursuant to the rules stated in §§ 59-63 inclusive."

By referring to Section 63, as requested, a rule is stated thus:

> "Except to the extent that statutes have limited the purposes for which trusts may be created, or have restricted the duration for which trusts may continue, equitable interests in land can be created by the methods and in accordance with the rules stated in §§ 59-62 inclusive."

Section 62 reads:

> "(1) Except in a case described by Subsection (2), an estate of one of the kinds dealt with in this Chapter (fee simple conditional, or fee tail, or an estate or estates substituted by a modern statute for a fee tail) is created in favor of issue of the life tenant, by an otherwise effective conveyance which
>
> (a) contains a limitation of an estate for life; and
>
> (b) contains further language purporting to create an estate in the same land either in favor of the conveyor, or his heirs, or in favor of some third person limited upon the death of all or of a designated class of the issue of the life tenant.
>
> "(2) When the facts stated in Subsection (1) creates a situation to which the Rule in Shelley's Case applies (§ 60), the consequences of the transaction are not included in the rule stated in this Section."

Of course, Sections 59, 60, and 61 must be read for a complete statement of the rule as enunciated in Section 64. But the above sections are quoted as illustrating a bad feature which should be and could be eliminated from all future Restatements. Such sections are unnecessarily confusing, difficult, and irksome to read. While the import of those sections may be clear to those writing the Restatement, it is not so readily clear to others. Law students particularly object to using the Restatements for this reason and as a result a certain respect is lost for them. Such a manner of stating a rule presumes that one will read a Restatement from cover to cover and ponder over each rule, but in most instances references are hurriedly made only for a particular rule of law which might be quoted as authoritative. We prefer a repetition of the rule and thus have something definite and tangible that can be readily understood and quoted verbatim rather than to have such an indefinite and evasive manner of stating a rule of law. We think the involved style of the Restatements has been a distinct hinderance to their wider use among law students.

Volume I, entitled "Introduction and Freehold Estates," covers definitions of general terms and terms relating to estates, and a discussion of estates in fee

simple absolute, estates in fee simple defeasible, estates tail, estates in fee simple conditional, and finally estates for life.

Volume II is entitled "Future Interests Parts I and II." Part I differentiates future interests from other property interests. Part II takes up the characteristics of future interests and treats of their transferability by conveyance inter vivos, succession on death, subjection to the satisfaction of claims of creditors, and partition and judicially ordered sales. Consideration is also given to the protection of future interests as against act and omissions of the owner of the present interest, protection of future interests as against acts and omissions of persons other than the owner of the present interest, protection of future interests as affected by statutes of limitations and the doctrine of prescription, and finally the termination of an interest as affecting succeeding interests.

Although other volumes on property covering easements and profits and the remainder of future interests are in preparation, these two volumes on property are in themselves complete with the usual detailed and thorough Restatement index. In this Restatement one's attention is drawn to an appendix in each volume which contain certain monographs which are stated "to apply to sections in which the rule of law stated is contrary to an impression believed to be widely entertained by the profession." These monographs are most interesting and instructive. Moreover, as much of the law of property has been modified by modern statutes, the American Law Institute has wisely adopted the policy in this Restatement of citing state statutes to a number of sections. This is a highly commendable addition.

While many eminent authorities in the field of property law have assisted in the preparation of these two volumes, special mention should be made of the Reporters who shouldered much of the work. Mr. Harry A. Bigelow, of Chicago University, during his term of approximately two years submitted the first three chapters. Upon his resignation Mr. Richard R. Powell, of Columbia University, was elected Reporter and has held that position throughout the preparation of these two volumes. Mr. W. Barton Leach, of Harvard University, has acted in the capacity of Special Reporter.

Arthur C. Gregory.

THE ANNUAL INDEX OF LEGAL PERIODICALS (August 1, 1935, to July 31, 1936). Published by Current Legal Thought.

To aid adequate research and yet appease many students of the law, who, along with the rest of the people of this country, have been swayed by the attitude to hurriedly accomplish any purpose, The *Annual Index to Legal Periodicals* has answered the request for facilities for those who want to keep abreast with current legal periodicals. This topical index, brief and concise, thoroughly surveys law reviews of many foreign jurisdictions as well as all reviews of this country. Only in this way could the articles of all these publications be retained for future use. Bold-faced type topic titles classify the articles that have appeared not only in Current Legal Thought, but also, more important, any subject of any character which has been presented in thest reviews. The specific title of the article along with a citation of the exact edition of the review in which it was printed concludes the particular comprehensive index. Therefore as a key and guide to the latest legal thought its value is exceptional.

John DeMots.

THE ULTIMATE POWER. By Morris L. Ernst. New York: Doubleday, Doran & Company, Inc.

This book of 326 pages seems to have left the author's hands in November, 1936, and to have come from the press in 1937. The only importance of this fact is that, since the first named date, the Supreme Court has sustained the validity of the Washington Child Labor Act and the Wagner Act. Since these impressive decisions would hardly have influenced the author's major thesis which is that the legislative and executive power should be made absolute and supreme, and the judicial power subordinate and subservient thereto. He makes this clear in his considered suggestion of a suitable amendment to the Constitution to effect this change, the amendment to provide that Congress, by a two-thirds vote, could override a decision of the Supreme Court upon any constitutional question. He claims this would be a modification of Madison's proposal that "in case both the President and the Supreme Court veto an act, a three-fourths vote of Congress would be required to override these dual vetoes." Transference of the power to protect and enforce the guaranties in the Bill of Rights from the Supreme Court to Congress, the author seems to think is the only thing necessary to admit us all into an economic paradise.

The approach to discussion of this question is distinctly hostile. The Convention of 1787 is assailed as not being representative of the people, of consisting of "rich men" selected to protect the "propertied classes." At the time when delegates were being elected to the several state conventions, to vote upon the newly drafted Constitution, a property qualification was necessary to suffrage in all states except New York which had manhood suffrage. Yet the vote in New York was little different from that in the other states, the author saying it was thought that the patroons could control the votes of their servants.

In the introduction to this book, we find these somewhat startling words: "But the jurists, sitting like ancient witch doctors, remote from the mines and the farms, with words no layman and few barristers can fathom, held back the tides of potential prosperity and well-being for all our people." By these words, the author introduces the villian of his piece,—the treacherous coterie who have "held back the tides of prosperity for all our people." None other than our Supreme Court! It is a little curious that no one has discovered this sinister fact before. Others, including Theodore Roosevelt,—whom he quotes,—and Alfred M. Landon have advocated the "recall of judicial decisions" by the people who would know nothing of the evidence, the arguments or the law and would have had to vote for reversal or affirmance by "blind reckoning." But, as far as I am informed, no one up to this time has made this serious charge against our Supreme Court. And yet this author says of our present Supreme Court: "In ability, erudition and tenacity, these nine jurists surpass the highest bench in any state court, and are collectively superior to any group of men ever sitting on the Supreme Court bench during the century and a half of its existence." What a pity that men so magnificently endowed should prostitute their talents to blocking the road to prosperity for 130 million people! It is a comforting reflection that no one, outside certain institutions, will believe it.

This author claims that he is a lawyer, but seems to have a robust grudge against his own profession, for, when speaking of the 76 lawyers who have been judges of the Supreme Court (p. 296) he says: "We must remember these men are lawyers. They belong to a profession which has always been basically dishonest. . . . Judges, as lawyers, were of necessity double dealers." Twenty-eight delegates to the Convention were lawyers, who took a leading part in forming our Constitution. Still the author does not hesitate to quote from these "basically

dishonest, double-dealing" men to sustain his contentions on questions of fact. The truth is that without lawyers no constitution would have been drafted or adopted, and there would have been no Nation.

Some idea of the moderation and fairness of this book may be had from the language used to state a decision of the Court,—apparently the New York Minimum Wage decision,—where we find the author saying: "The Supreme Court of the United States, however, ruled that girls must go back to work at five dollars a week. So the Court, as a court, wrote a prescription for the women of the land,—a prescription of hunger, want and disease." With equal moderation of expression, we may suppose that the Court's decision in the Washington Child Labor case would be reported thus: "So the Court wrote a guaranty for the women of the land that, henceforth, they would live in luxurious idleness with every want munificently supplied and in complete immunity from disease!"

Chapter IX, "The Founding Fathers," contains brief biographical sketches of tht active 55 delegates to the Convention. Most of them are derogatory, the possession of wealth being suggested as a distinct qualification, besides the 28 members of the "basically dishonest profession" of the law. Of George Washington, whose memory most of us still revere, the author's sketch begins thus: "Educated by a local sexton, married to 15,000 acres, 30,000 francs, and several hundred slaves."

In many ways, the author seeks to discredit the Convention, the differences of opinion expressed by the delegates as to the powers of the Supreme Court, carefully omitting to state what the Convention agreed upon and the people approved in these words: "The judicial power shall extend to all cases in law and equity, *arising under the Constitution,*" etc. (Italics are mine.) The fact that the Convention transcended the purpose of the call for it, which was merely to "revise the Articles of Confederation," is also mentioned. Why this trivial circumstance should be referred to does not appear, unless further to discredit the work of the Convention and to show that the delegates seized the opportunity to make their own holdings of government securities worth par. It is hardly to be imagined that a member of even a "profession basically dishonest" would claim that all interests acquired in reliance upon the validity of the Constitution should forfeit all their holdings with a Communistic grab-bag merely because the work of the delegates exceeded the limits of the Annapolis call therefor. No objection on that score was made in the Convention, and, it would seem, in words that even a layman can understand that the adoption by the people of the work of the delegates would cure any defect in the call; and that, after the lapse of 158 years, it is a trifle late to raise the question. The tendency of the whole book is to afford "parlor communists" material for arguing that, from the very beginning to the present moment, everything that has been done in our America has been wrong.

The author's comments on the Bill of Rights contained in the first ten amendments are interesting, and, also, misleading. The provision in the First Amendment that "Congress shall make no law . . . abridging the 'freedom of speech or of the press," it is claimed has been repeatedly violated. Despite this amendment, it is stated that all through the Coolidge-Hoover administration "newspapers of left wing economics were denied the mails." In 1936, in Arkansas and California, "as two outstanding examples," the right of peaceful assemblage was denied, and, in many states, citizens have been convicted while peacefully petitioning the government for redress of grievance. It would be interesting to know just when and where these outrages occurred. Was it in New Jersey or Illinois where the assemblage "peaceful petitioners" did it by occupying legislative halls, day and night and excluding the elected legislators?

For a moment, let us return to the claim that the constitutional guaranty of "freedom of the press" was outrageously disregarded by denying the mails to newspapers containing articles on what is euphemistically called "left wing economics." First of all, it is to be remembered that there never has been any such thing as absolute unconditional "liberty or freedom" of the press or of any person. Every "liberty" has been *limited* by the principle that one person's liberty ends when its exercise would deprive another of his liberty. All philosophers, all jurists, and all men of plain common sense have been in accord on this principle for centuries. And yet this author complains of the Supreme Court because "The judges carved a piece out of Liberty and called it License." There is "liberty of speech and the press," but if you take the words literally and falsely charge your neighbor with some heinous offense, you may have a libel or slander suit on your hands and the constitutional guaranty will not be a defense. If, depending upon "the precise and certain" words of this First Amendment, which the author suggests could not now be written with "greater clarity," you publish "sexually exciting literature," you will find yourself, convicted for violating an act of Congress putting a ban on the circulation of such literature for interstate shipment. And another hideous outrage on your constitutional "freedom of the press" will have been violated, evoking howls of anguish from the prisoner and his friends. In sustaining the Act of Congress the Supreme Court said, as a reason for its decision, "Anything libidinous or lewd or indecent would corrupt the people of the land." But this author, mark well, says, "To a nonlawyer a free press, as referred to in the amendment, *implies the dissemination of such literature,* but Congress *limited* the First Amendment, and the Supreme Court acceded to the limitation." So, in this instance, neither the Supreme Court nor Congress nor even both combined meets the favor of this author. This is the first time this writer has ever heard of this "freedom of the press" guaranty justifying the interstate dissemination of obscene, sexually exciting, foul and vile literature. By a parity of reasoning, detailed pointed instructions for the scientific commission of murder, robbery, kidnaping or rape could not be forbidden circulation. And, if the Government may lawfully prohibit the circulation of literature which "would corrupt the people of the land," can it not, also, enact a similar prohibition against literature which tends to the destruction of the Nation itself? In countries under the control of Communism, the howlers for "liberty" here would be dumb,—"and like it."

The Fifth Amendment engages the apparently serious attention of the author. The parts of that Amendment which he claims have been denied, or which he criticises, follow: "No person shall be *held to answer* for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same *offense* to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." (Italics are mine.) Admonishing us to "read it carefully" and avoid being "bewildered by the fact that it is called law," he proceeds to blunder on the first of the above quoted provisions relating to indictment and Grand Jury. He says, "You are *entitled* to a *grand jury hearing* before being tried for certain crimes,—those punishable by capital punishment and other infamous crimes." Flatly, this is untrue. No defendant or prospective defendant is entitled to any "hearing" before a grand jury. Proceedings before a grand jury are *ex parte* and secret. It is merely an *accusing* not a *trial jury,* and never pronounces upon the guilt or innocence of anybody. Neither defendant nor his counsel is entitled to be present, let alone having a "hearing" before any grand jury. All this body may lawfully do adverse to defendant is to make two findings: (a) that a felony

has been committed, and (b) that there is probable cause to believe that the defendant committed the crime. If these are found in the affirmative, a "True Bill" is returned into court which requires that the defendant be tried. Observing the admonition of the author to "read it carefully," where are the words giving defendant any right to a "hearing" before a grand jury? On page 200 he says, "Comparatively few people sent to jail today are *indicted* by a (grand) jury—even though the sentences they are serving run for long years." Literally, standing alone and unexplained, this statement is partly true; but when the whole story is told, the statement is wholly untrue. Many states have adopted the procedure of prosecution by "information" as a substitute for "indictment" and a preliminary hearing before a magistrate to determine the fact of the commission of a felony and the probable guilt of the defendant as a substitute for inquiry and return of an indictment by a grand jury. The Supreme Court of the United States in the case of *Hurtado v. California,* 110 U. S. 516, 4 Sup. Ct. 111 (1884), held that this form of procedure when adopted by a state was lawful, and that all rights of the defendant were fully accorded to him. In all states where this form of procedure has been adopted, it may truthfully be said that convicts are serving long terms who have never been "indicted," though they have been "informed" against. It is generally believed, by those in position to know, that prosecutions by grand jury indictment are archaic, ineffective, expensive and, in general, a nuisance. Committees appointed to investigate this subject during the past 40 years have all reported against it. On the other hand, criminals and those who always sympathize with them favor the retention of the grand jury system,—it affords such a splendid opportunity for the political underworld to "work on" the grand jurors during its frequent intermissions.

Commenting on that provision against self-incrimination contained in this Fifth Amendment, our author says: "You need not testify against yourself." Many court decisions, however, *have approved confessions induced by the third "degree."* To this, I reply that no court has approved confessions induced by the third degree. Many courts, it is true, have "approved confessions" which the defendant *claimed* were "induced by the third degree." When an arrested suspect who has made a confession of guilt, gets a criminal, who has been admitted to the bar, to defend him, and tells this criminal lawyer that he has made a confession, he learns for the first time that it was extorted from him "by the third degree." When on trial, he testifies to the various brutalities that were inflicted on him by the police so as to annul his confession. Evidence is then produced by the state tending to show that his whole story is false and that his confession was entirely voluntary. This, of course, raises an issue of fact, the question being which side is lying. Sometimes this question is presented to the jury, and sometimes the court alone decides it. If the jury finds the defendant guilty, or necessarily must find that the confession was voluntary, this finding is usually binding on the court and so he "approves it," as he must, unless the verdict of guilty is clearly wrong.

One of the trickiest statements in the book, relates to the provision that "private property shall not be taken for public use without just compensation." Then, in discussing what is "just compensation," this author says: "When a city buys land for playgrounds or parks, due process demands, so the Courts say, that a much larger sum be paid than the amount the landowner *claimed* it was worth *when the city assessed the same land* for *tax purposes.*" Everyone knows that when a landowner states the value of his land "for tax purposes," he, almost invariably, fixes that value at *very much less* than *its true value* so as to escape payment of as much tax as possible. And yet the author says in regard to the attempt of the courts to ascertain the *true value,* as opposed to the fictitious value, "On such legal legerdemain, the city slums remain intact and

new housing, so sorely needed, is unobtainable." It might be retributive justice in a condemnation case to compel the landowner to accept in payment for his land taken, the exact sum which he himself declared it was worth when the assessor inquired, but the Constitution says "just compensation."

Going to the matter of trial by jury, the author says: "More people are in jails of the land today, having been tried by judges without jurors, than by judges and jurors." Nobody knows with the slightest degree of certainty whether this statement is true or not. Perhaps it is, but, if so, it can be accounted for in several ways. In metropolitan areas, usually a great deal of "bargaining" takes place between the defendant and the prosecutor, the defendant offering to plead guilty to an offense of lesser degree if the prosecutor will charge a crime of less gravity. In case an agreement is reached, the defendant pleads guilty, and, of course, there is no jury trial. Then in certain states, the defendant may elect to be tried by the judge alone, and waives his right to trial by jury. But, possibly, by far the greater number who are "in the jails of the land today" without jury trial are those who were charged only with misdemeanors which are triable to a magistrate without a jury. No constitutional provision is violated by this procedure, since the word "crime" now has a different signification than it had in 1787.

The author claims that bail of $350,000 in case of a racketeer in New York was recently required, and that it was "excessive." In other words, he complains that a racketeer, handling, perhaps, millions, was unable to *buy* his way out of the clutches of the law. He does not name this racketeer. It may have been Luciano, Head of the Vice Ring in New York, engaged in the sale of women. If it was Luciano, then no amount of bail necessary to hold the defendant for trial would have been "excessive."

The book, as a whole, is an attack on both the Supreme Court and the Constitution. Various suggestions are made for taking from the Court its power to hold legislative acts void. One device suggested is that Congress may repeal its former acts giving the Court power to review cases involving validity of legislative acts.

By the new constitution adopted in Russia last November, supreme power legislative, executive and judicial is lodged in their bi-cameral congress, formed something like our own only more numerous. Members of either house are selected by universal suffrage of all persons over 18 years old. It is intended to be strictly a proletarian congress. But it has supreme power. There is no court to block the streams of prosperity for all. Congress not only enacts laws but dictates how these laws shall be interpreted and enforced.

The author wants our Congress to participate in considering whether its own acts are valid, thereby falling into the common error that a multiplication of stupidities will finally result in wisdom.

Very appropriately, this book is dedicated to Heywood Broun, the columnist, "who asked for it," and it may aid Broun in his socialistic endeavors.

William M. Cain.