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Book Review

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THE MIND OF THE JUROR. By Albert S. Osborn. Albany. Boyd Printing Company 1937. Pp. xv, 239. $4.50.

Since the beginning of time, judges, lawyers and even laymen have been interested in what makes the law "tick". Many have essayed to take legal procedure to pieces, although few have attempted it on so complete a scale as Osborn in his latest book. In most instances, writers have selected smaller areas for dissection. Witness the narrow compass of Wellman's "Art of Cross Examination" and "Day in Court"; of Munsterberg's "On the Witness Stand"; and even of Judge Ulman's more recent book "The Judge Takes the Stand".

In the present volume, the author, using a lower powered microscope, depends upon his superior vision, trained by vast experience as an expert witness, to cover a very much larger field. A quotation on the fly leaf of the book warns his readers that the author is writing "his mind"—a sufficient indication that his subject is comprehensive. Indeed, it is rather too broad for a single volume as there is meat enough in some of its chapters for individual dissertation.

Some judges and many lawyers may feel irritated at the author's outspoken criticisms of their foibles and pet strategems. Even his courage and frankness, admirable as it is, may not evoke their enthusiasm. Others, however, will see in written form much that they have secretly thought but lacked the courage or skill to express.

As the author makes his approach from the position of an imaginary juror he, of course, has free rein for critical comment covering a wide field which embraces court room deportment, judicial and legal ethics and procedural matters. The scope is broad and the treatment sufficiently provocative to stimulate discussion. Judges, jurors, lawyers and witnesses are pilloried in turn. Oratory, logic and ethics are criticized or commended. Fairness, honesty and courtesy have their merited praise. All, however, pass in critical review before the hypothetical juror and censure is often tempered with constructive suggestion.

It is somewhat difficult to characterize a trial court as a "cock pit" and a judge as "spineless" without arousing some antagonism. It is equally hard to class lawyers as

business rather than professional men without opposition. To suggest that members of the bar should interest themselves in the cultural and scientific side of the law may seem a bit harsh, yet the author believes it needed. Indeed, he makes some apt comments on the educational handicaps and the rather nebulous ethical standards that sometimes result from the lack of a proper intellectual foundation both before and during the practice of law.

It is evident that his attack on procedure is really a criticism of judges, lawyers and possibly legislators who are responsible for existing methods which he thinks result in delays before and during trial. Some of these misadventures which occur in the course of trial he blames upon the lack of capacity of the ordinary juror and possibly upon the lack of proper training of both judges and lawyers. In any event, he suggests that the general condition of legal procedure and the uncertainties of trial lead in civil cases rather to compromise than adjudication. These uncertainties also tend, in his opinion, to keep out of court the highest type of lawyer who should be in the forefront of the trial bar.

In concluding his book Osborn makes certain comments upon the weight of the evidence and the methods through which the credibility of the witnesses may be tested, winding up with his suggestions for reform both in procedural and forensic technique.

The book, as a whole, will provoke controversy and possibly self-examination, though the reader may disagree with the author's conclusions.

—Walter L. Clark.*

Chief Justice Waite, Defender of the Public Interest. By Bruce R. Trimble. Princeton. Princeton University Press, 1938. Pp. ix, 320. $4.00.

The announcement on the jacket of this book states that it is the only extant biography of Chief Justice Waite; and in many ways it is a very interesting one. Starting with some introductory comments as to Waite's forebears, the story covers his life from his birth in 1816 until his death in 1888. By inheritance Waite naturally gravitated toward bar and bench, his father being chief justice of Connecticut's highest court when he reached the compulsory retire-

* Of the Baltimore City Bar. Lecturer on Evidence, University of Maryland School of Law.

ment age of seventy in 1857. Waite entered Yale in 1833 and among his classmates were William M. Evarts, who became Secretary of State under Hayes, and Samuel J. Tilden. After graduation, he studied law in his father's Connecticut office for a year but in 1838 decided to move westward and settled in Maumee City, Ohio, a town with a population of approximately 800 people. Despite the fact that the future Chief Justice lost his first case—the author states that "he was frightened, nervous, awkward: he stammered, stopped and finally almost broke down, but the court and opposing counsel encouraged him and he finally managed to get through"—within a very few years he was one of the leaders of the northwest Ohio bar, representing railroad and corporate interests. From 1840 on he commenced taking an active interest in politics. He participated actively in Harrison's log cabin campaign for President, and although his own success in running for office was always very indifferent, he maintained to the end of his life a lively interest in political affairs.

During the Civil War, Waite actively supported the Lincoln administration. During the dark days of 1862 when the Union cause seemed to be at low ebb and many in Ohio were wavering in their determination to carry on the war, he helped to infuse new vigor into the languishing Union cause by some very effective staging of a mass meeting at which he delivered a deeply stirring and fighting speech. He did not, however, come into any national prominence until after the close of the Civil War, when he was appointed one of the counsel representing United States claims against Great Britain at the Geneva Arbitration. One of the more interesting chapters in the book deals with the arbitration proceedings, and with Waite's share in presenting the American case.

President Grant, after unsuccessfully trying to get the Senate to confirm two appointments to the Chief Justiceship left vacant by the death of Salmon P. Chase, finally submitted Waite's name in 1874 and he was unanimously confirmed by the Senate.

Soon afterwards he became the object of several incipient Presidential booms. His predecessor in office had been quite receptive to White House suggestions and many felt that the Supreme Court was getting steeped in politics. Waite in no uncertain terms voiced his disapproval of Chief Justices who permitted political moths to nibble at the judicial robe. In reply to an inquiry he wrote to his nephew:

> ". . . But do you think it quite right for one, who occupies the first judicial position in the land, to permit the use of his name for a mere political office? The Presidency, although high, is only political. In my judgment my predecessor detracted from his name by permitting himself to think he wanted the Presidency. Whether true or not, it was said that he permitted his ambitions in that direction to influence his judicial opinions. I am not one of those who believe he did so consciously, but one who occupies this position should keep himself above suspicion. There can't be a doubt that in these days of politico-judicial questions it is dangerous to have a judge who thinks beyond the judicial in his personal ambitions."

The author has sub-titled his book "Defender of the Public Interest". That this should be considered such an outstanding characteristic of a Supreme Court Justice as to warrant special emphasis in the title might provoke a smile from the Man from Mars. One might react to this title in the same way that one would to "John Smith, Man with Two Legs". However, the author is seeking to underscore what he regards as Waite's essential constitutional philosophy and chief influence upon the development of our constitutional law—the thought that government must be allowed, in the public interest, to act in derogation of private rights in conflict therewith.

Dr. Trimble sets forth in considerable detail the influence which Waite had in developing the "due process" clause from simply a procedural protection to a test for determining the validity of the substance of legislation. The author also discusses at some length the limitations placed on the doctrine of the Dartmouth College Case by various of Waite's decisions. Under the heading "Individualism Dealt Another Blow; Commerce and Other Powers", the author further enlarges his thesis that Waite consistently thought along the lines of subordinating individual rights to governmental rights, saying, "It might well be suggested that Waite was one of the first judges to apply what is now called the 'sociological interpretation' upon the law, and was therefore the forerunner of the Holmes-Brandeis school of constitutional philosophy".

That the life of a chief justice is not all roses is evidenced by some of Waite's correspondence with his associates when the latter were displeased with the assignment of opinion work. The letter to Mr. Justice Field explaining why the latter's intimate personal relations with the man-

agers of the Central Pacific Railroad disqualified him from writing an opinion, which Field desired to write, is most revealing. The Chief Justice's letter to Henry Newbegin in which he apparently confirms Judge Davis's statement that when justice required a decision in a particular way a good reason could always be found for it will give comfort to those who maintain that Courts first decide the result they desire and then find the reasons to support it.

This story of the life of Mr. Chief Justice Waite and his influence upon the Supreme Court and the construction of the Constitution is patently written *con amore*. This to a considerable extent explains both the charm of the book and also its limitations. Due to the lack of a critical approach, the reader, upon closing the book, does not have any feeling of a real knowledge of the man himself. Seldom does one have any particular emotional reaction to the man, either of affection, dislike, or sympathy. Only once in a while, particularly in the last chapter, are we permitted to feel that we are reading about flesh and blood and not just a rather wooden legal automaton. The picture of the Chief Justice trying to carry on a social life commensurate with his high position on an altogether inadequate salary, going deeper and deeper into debt in the process and having to borrow time and again from friends (always with the promise to do better in the future) is as human as it is amusing.

The book, while probably of limited appeal to the general public, should be read with interest by the profession and students of constitutional history.

—BRIDGEWATER M. ARNOLD.*

CONFLICT OF CRIMINAL LAWS. By Edward S. Stimson. Chicago. The Foundation Press, Inc. 1936. Pp. xi, 219.

Under a somewhat misleading title this little book treats of the problems connected with the matter of territorial jurisdiction to try for crimes. It is obvious from the title that the author's thesis is that the question of criminal jurisdiction should be analogized to the "choice of law" theme of the Conflict of Laws. Whether this is so and whether the contained problems are important enough to justify a separate book cannot, perhaps, be dogmatically asserted.

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* Assistant Professor of Law, University of Maryland School of Law.

The very important problems of extradition and interstate rendition are too scantily treated and submerged under headings which do not disclose their presence. There is no treatment of Federal jurisdiction over crimes, either that following from their localization on Federal territory or because of their connection with interstate commerce. All of these matters, it would seem, are of great timeliness, in the light of the mobility of the modern criminal.

A large portion of the book (79 pages) is devoted to a treatment of what law governs the various specific crimes, taken up crime by crime. Crimes committed on water are dealt with in two sections (42 pages) covering, respectively, "conduct on water" and "territorial waters." Another portion (22 pages) deals with criminal forfeitures and proceedings in rem against property. The book has more than its share of errors, typographical and otherwise.

The Maryland case of *Worthington v. State,* concerning the power of Maryland to try for larceny where goods were stolen in West Virginia and transported into Maryland, is cited. There is no citation, however, of the equally important Maryland case of *Stout v. State* which upheld the power of Maryland to try for murder where the fatal blow was administered in Maryland but the victim died in Pennsylvania.

The book is thoroughly indexed and contains a helpful table of cases. The specific problems which have been discussed seem to have received thorough treatment at the hands of the author.