

## BOOK REVIEWS.

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THE STATE: THE GOVERNORS AND THEIR AGENTS. (L'ÉTAT: LES GOUVERNANTS ET LES AGENTS.) By LEON DUGUIT, Professor of Law at the University of Bordeaux. Paris: Ancienne librairie Thorin et fils. Albert Fontemoing, editeur. 1903. Pp. 774.

Those who have read with interest the first volume of Professor Duguit's work on the State,<sup>1</sup> will be pleased to learn that the second and concluding one has appeared. The sub-title, "Governors and Agents," gives us the key to the new book. It is of the relations between these and the so-called "State" that he treats. The fundamental idea of the work is that *status* and not contract determines the rights of all. Our author premises in his introduction the conceptions of the objective law (founded upon the solidarity by similitudes), which controls all human affairs, and of "the State," which he says means only that in any community certain men monopolize political power. Thence he proceeds to show the development of the idea of representation, arising first in Roman Law; how, once established, it necessitated a State-person in order to validate the acts of the governors by giving them a contractual basis.

Our author shows that the conception of the Nation-person was made the basis of the "social contract," and so the "vicious circle" was complete. He denies the truth of the theory of representation and the reality of the State-person. The former is false, he says, because the governors represent only themselves—never the community—(a view which is held in some portions of the United States); the latter because it is impossible of demonstration.

Considering the Nation, M. Duguit rejects all *à priori* conceptions. He says, following the opinion of Aristotle, that before we can define it we must determine the nature of its constituent parts. Thence our author goes on to discuss the nature of the electorate. He says that universal manhood suffrage proceeds from a false premise, that it makes equal unequal things. His own view is that there is no *right* to vote; "the electorate is a power to will effectively in the domain of the law; the electorate is an objective power of an individual will." This, of course, follows from his conception of the objective law.

Having thus demonstrated that the electorate is merely a function our author proceeds to define parliaments as follows: "In political parlance the name of parliaments is given to assemblies of individuals who are in fact invested with the power

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<sup>1</sup> Reviewed in the LAW REGISTER for September, 1902.

to make decisions which are obligatory, in themselves, or under certain conditions, upon all the members of a given collectivism and over all the parts of the territory occupied by the collectivism." In considering the relationship existing between political assemblies and the wills of their constituents and the question of the will of parliaments, he says: "Political art has sought the best means of assuring the enactment of laws as nearly as possible in conformity with the rule of law founded upon solidarity; and the means which rightly or wrongly have appeared best to modern men is to consider as law the formula adopted by a certain number of individual wills, clothed with a certain objective power."

After discussing and rejecting theories which, on the basis of representation, seek to give juristic value to the acts of parliaments, M. Duguit expounds his own view thus, "A special solidarity unites the electors and the deputies, a solidarity which possesses, moreover, the same characteristics as social solidarity in general."

Our author then considers the chiefs of state. These—whether kings or presidents—he says, have no subjective rights. They are bound absolutely by the objective law.

The fourth chapter of M. Duguit's book is the most important, especially in its *résumé* of his argument to that point. He says: "Neither the assembly of the people, nor the electoral body, nor the parliament, nor the chief of state are titularies of a subjective right of power; they have not the property of this particular right, which is still called sovereignty. No more are they the 'mandataires' of the nation-person, which should be titular of the sovereignty. Nor is it even possible to see in them the organs of an entire collective person—the state.

"The primary governors and the representative governors have a greater power in fact, which is not in itself either a right or even an objective power, but the duty imposed upon them to employ this greater power for a certain purpose, implies for them an objective power, which is in fact organized, ruled and sanctioned. Whatever they may be, they have, then, only an objective power, power of an individual will, and all the rules of the positive law relative to governors must repose upon these two ideas: there is no political will but the individual will of the governors, this individual will of the governors is invested with an objective power, which should be controlled and sanctioned by the law.

"To the governors belongs the domain of the objective law; they formulate the abstract and general rule. They cannot act in the domain of the subjective law, nor create a subjective situation, nor intervene in a subjective situation already created. To the agents [belongs] the domain of the subjective law, they have the competence to create by an act of will a subjective

juristic situation, to state and realize a similar situation already existing."

Of the juristic nature of the appointment of agents the author has this to say:

"When a service enters into the obligatory mission of the state, three concomitant phenomena of varying degrees are produced: the nomination of the agent charged with the service becomes unilateral; the agent is placed in an objective situation; often he acquires competency to perform acts, unilateral, or, of public power." The author means to say that the agent is, as it were, subrogated to the "*detenteurs de la force.*"

In discussing the status of agents, M. Duguit declares that, once appointed they are amenable to the subjective law only. But where it does not prescribe their functions they are subject to supervision and restraint. The nature of this control our author declares to be primitive and like that exercised by general laws over private individuals. He then discusses what he calls the "hierarchy" of agents, *i. e.*, the manner of annulling the illegal or inexpedient acts of agents, by superiors. M. Duguit makes a *résumé* of this chapter as follows: "Agent functionaries are exclusively in a situation of objective law, from both an active and passive point of view; agents, not functionaries, are in a subjective situation which is determined by the juristic act, efficient cause of this situation, and which consequently variable for each agent, cannot be the subject of a general theory."

In his fifth chapter our author discusses the juristic situation of "agent-functionaries." "Competency," he says, "is an objective power." Practically in no form of government save our own, where we accomplish it by a Supreme Court, is there an effective sanction for the laws of competency.

Pursuing his thought in reference to various kinds of agents, M. Duguit comes finally to the case of a soldier. He, the author says, must implicitly obey the command of his superior, but where he is allowed discretion he may exercise it. This view, so self-evident to a Frenchman, to whom an army means national existence, may appear to some few in an unmilitary country to be open to debate. Confounding the principle that the civil law is superior to the martial law in time of peace, with the notion that it is always superior to it, they endeavor to hold a private soldier criminally liable for performing his duty in a region where martial law has been proclaimed.

Finally M. Duguit considers the relation existing between a community exercising, for the sake of convenience, rights normally pertaining to the state, and the state itself. Such groups he calls "decentralized agents." He shows that the existence of such communities renders impossible the existence of a state-sovereign, since it necessitates a parcelling out of sovereignty into bits for distribution in certain localities.

The criterion of decentralized agents, according to our author, is their election by a local plebiscite. They are, nevertheless, amenable to the superior authority.

We see, then, that all political power springs not from right but from the fact that one man, or a group of men impose their will, *per fas vel nefas*, on the rest. They are controlled only by the objective law, a violation of which results in destruction. State there is none, sovereign there is none; only vast groups of men struggling, each according to his lights, for happiness and often, perhaps always, tolerating the impositions of other men, whom they are too busy or too indolent to resist. Unflattering, but most like portrait of the human race!

We have discussed "*L'Etat*" at length because we deem the book of more than temporary interest, and because few readers will wade through fourteen hundred pages written in a foreign language.

Of the work as a whole, apart from the value of the ideas it contains, we think that much might be gained by condensation. Many of the arguments are spun out into tiresome and insipid detail. There is endless repetition of dominant thoughts. Much might be gained for the foreign reader by a detailed table of contents, which would enable him to follow the general arguments without being compelled to peruse long disquisitions upon French law. In other words, while M. Duguit's work will always be of interest to the learned and studious, we fear that, in its present form, it will repel rather than attract the occasional reader.

*E. B. S., Jr.*

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THE ENCYCLOPEDIA OF EVIDENCE. Vol. I. Edited by EDGAR W. CAMP. Pp. 1020. Los Angeles, Cal.: L. D. Powell Co. 1903.

The editor's preface states that "the limits of this work cannot be precisely determined by definitions of the word 'evidence,' but must be fixed by the use and wont of lawyers in investigating matters in litigation."

It is not surprising, therefore, to find that of thirty subjects dealt with in the volume, only three, Admissions, Ambiguity, and Alterations of Instruments, are usually considered as belonging peculiarly to the law of Evidence. The rest of the volume consists of substantive law stated in the form of rules of evidence and of particular applications of the general rules of evidence to the specific subject discussed. Whether such a treatment does not tend to confusion and obscurity is more than questionable. Certainly from the standpoint of a scientific treatment of the law of Evidence it cannot be defended.

But such a book will be of service to the busy practitioner who wishes to obtain at a glance in a condensed form an idea

of what are the substantial elements which he must prove in a particular action and how he may prove them. The arrangement is for this purpose good, and the book has evidently been carefully prepared. That the undertaking is intended to be exhaustive would appear from the fact that this the first volume only brings the subject down to Assault and Battery. *F. H. B.*

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CRIME IN ITS RELATIONS TO SOCIAL PROGRESS. By ARTHUR CLEVELAND HALL, Ph. D., Fellow in Sociology, Columbia, 1894-95. Pp. xvii + 427. New York: The Columbia University Press. The Macmillan Company, Agents. 1902.

The author of this volume has produced a work which cannot fail to be of the greatest interest to all careful students of sociology. Those who have never had occasion to refer to the subject will doubtless be surprised to find that crime is apparently increasing fast. But the author brings out very clearly that this is due to the fact that with the advancement of civilization many acts which formerly were regarded as mere negligences are prohibited by the law-making power of the state and denominated crimes. So that while criminal acts as a whole are becoming more numerous, the number of commissions of any one offense may be decreasing. How the extension of the legislative inhibition in converting immoralities into positive crimes is improving the character of the social body is well demonstrated by the author. In spite of many references to statistics, the book is written in an interesting style. For an exhaustive and interesting discussion of the relation of crime to society the work is recommended. *F. W. S.*

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THE TRIAL LAWYERS' ASSISTANT IN CRIMINAL CASES. By HENRY HARDWICKE. Pp. x + 308. Albany, N. Y.: Banks & Co. 1902.

"The chief object the author has had in view in writing the . . . work is that of giving, in a concise form, information which would prove serviceable to the trial lawyer." The book contains about three hundred and fifty subjects, gathered together from many sources, and considers them in proportion to their worth to the trial lawyer. Some are merely defined; others are dismissed with a mere reference to the New York Penal Code; and still others with fuller discussion and citation of authorities. There is an appendix of seventy-two pages, which contains a "Table of Contents of Sections of the New York Code of Criminal Procedure . . ." and sections of that code.

An examination of the first fifty subjects discussed shows that sixteen are almost wholly, if not entirely, based on references to

New York statutes and cases; so, all through the book, thus—"Animals" (page 3); "Cruelty to, N. Y. Pen. Code, § 655-659"; "Public Peace," page 145; "Religious Liberty and Conscience," page 158, etc. The book is, therefore, of little or no importance to lawyers other than those practicing in New York. Whether in its present shape it will be of value even in New York is doubtful. The arrangement of the book is bad. While the subjects are collected together under general alphabetical heads, farther than this the author has not gone. "Assault" on page 1 is followed in succession by the subjects, "Abduction," "Arson," "Animals," "Absence," etc. This fault pervades the whole book, thus: "Limitations" is considered before "Larceny"; "Public Peace" before "Pardon," and so on. The mistake is not remedied by an index. True, there is a "Table of Subjects" (page 299 *et seq.*), but the same arrangement exists even there. This is of course a criticism of mere mechanical details, the proper arrangement of which seems to have been overlooked.

Looking at the real substance of the book, there is some real worth therein contained, together with much that has no place in a volume of this nature. On page 72 we read: "Felon. One convicted and sentenced for felony"; on page 93, "*Idem Sonans*. Sounding the same"; on page 136, "Penitentiary. A prison for the punishment of convicts"; this and nothing more is said of the subjects thus treated. These, and several more like them, have no place in a book which purports to be of any practical assistance to a trial lawyer. On page 187, under the heading "Qualities of a Trial Lawyer," the author writes, "A good advocate should be, above all things, a good man." A busy lawyer has no time to use a book full of such statements. While every word of the sentence is true, a book of the practical character claimed for this, should be practical. Ethics and morals should be learned elsewhere. One goes to a dictionary for matters of orthography, pronunciation, definitions, etc., but not for essays on law or literature. *Pari ratiōne*, he goes to a trial lawyer's assistant for practical assistance, and not for the interpretation of words whose meaning is obvious, still less for lessons of morality. Lawyers gain nothing by the addition of this volume to the ever increasing number of legal publications.

B. H. L.

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THE TRIAL LAWYER'S ASSISTANT IN CIVIL CASES. By HENRY HARDWICKE. Pp. xii + 789. Albany, N. Y.: Banks & Co. 1902.

Practically the same criticism applies to this book as to the author's "The Trial Lawyer's Assistant in Criminal Cases." The same reliance on New York statutes and cases, the same

fault in alphabetical arrangement, the same habit of inserting impractical matter (*vide* "Judge" p. 164, "We cannot refrain . . ." etc.) is here in evidence. The subject "Maxims" extends from page 233 to 368 inclusive; such lengthy consideration is disproportionate to the general scope of the work.

B. H. L.

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THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND. By HERBERT THORNDIKE TIFFANY. Two Vols. Pp. xxxiii + 1589. St. Paul: Keefe-Davidson Co. 1903.

This recent book, in two volumes, on Real Property is a very useful effort to furnish what its title indicates, to wit, "A Treatise on the Modern Law of Real Property." There are many standard treatises of high reputation upon the law of Real Property, but most of them emphasize what might be called the historical as opposed to the modern side of law; such are Leake's "Digest of the Law of Property in Land," Digby's "Law of Real Estate" and Challis's "Real Property," not to mention the earlier books of Williams and Washburn, and the still earlier authorities of Kent and Blackstone. The author of these volumes has not hesitated to refer freely to these and other standard works, but has apparently based his book to a very unusual degree on the "Cases on the Law of Real Property," by Professor Gray, of Harvard University. The book indeed may properly be described as so distinctly based upon this collection of cases, as to be of special value to students of those cases. The writer believes that no study of cases is sufficient unless supplemented by lectures or text-books, and it is probable that the students of Gray's Cases will find in this volume just the necessary supplementary matter that they need. This statement, however, suggests also the limitations of this book; it will be of very little practical value in the library of the ordinary practicing lawyer, as the form of the work is not suited for that purpose. In making this statement, however, it is only fair to add that perhaps it is questionable whether any such general work could be of use in the library of the lawyer, inasmuch as the law of real estate is so largely governed by the statutes and decisions of each state that it would be very difficult, if not impossible, to write a general text-book which would be of practical use everywhere.

From the point of view of the student, however, this book is extremely well prepared. The student has a natural desire to know how far the ancient principles which he has studied are still in force, and while the discussion is properly restricted to a very limited space, Mr. Tiffany has almost invariably followed his statement of the law with a reference to the modern statutes or decisions in this country. Again, the arrangement of the book, while primarily based upon Gray's Cases, seems to contain

some ideas which are perhaps improvements upon Mr. Gray's arrangement. For example, in Gray's Cases, the entire subject of "future estates and interests" is not reached until the fifth volume of his work, long after the discussion in the first volume of the various kinds of estates. Logically it would seem that "future estates" should be treated as a part of the discussion of "estates" as a whole, and it is so treated by Mr. Tiffany. It has sometimes occurred to the writer that the probable reason for Mr. Gray's arrangement in this particular matter is the difficulty of the subject of future estates, and the desire therefore not to treat them until the student has spent two years on his study of the less difficult parts of property. However that may be, as a matter of logical arrangement, Mr. Tiffany's plan seems to be preferable. Similarly the subjects of "dower" and "curtesy" (also found in the last volume of Mr. Gray's Cases) are, apparently for the same reason, treated by Mr. Tiffany under the same general title of "estates."

Passing by Part Two, "The Ownership of Land," which includes the topics just mentioned as well as many others belonging under that title, we come to Part Three, "Rights to Dispose of Land not Based on Ownership." Under this title the cases on "Powers" are grouped. It would seem to the writer that this also is a logical arrangement, and helps to suggest to the mind of the student the correct logical relation between the rights exercised by the owner himself and the rights exercised by the owner acting through an agent.

Part Four discusses "Rights as to the Use of Profits of Another's Land." It will be remembered that Mr. Gray is probably responsible for this very convenient title, which is discussed in his second volume. Mr. Tiffany has adopted it pretty generally, but has made the slight improvement which has often suggested itself to the writer of starting with "Natural Rights" and following them with "Artificial Rights" of the various kinds, concluding with a chapter on "Public Rights." This part concludes the first volume.

The second volume begins with Part Five on "The Transfer of Rights in Land." It includes conveyancing and decedent's estates, with some of the minor titles included in the third and fourth volumes of Gray's Cases, such as forfeiture, dedication, etc. It also includes several topics not covered at all by Gray's Cases, such as "Transfer under Judicial Process." Under this same part are included the topics of "Notice" and the "Recording Laws," and also the topics of "Fraudulent Conveyances" and "Conditions"; it seems to the writer that these topics, which are included in the last volume of Gray's Cases, are very properly included by Mr. Tiffany in his general discussion of "Transfer of Rights in Land."

Finally in Part Sixth, "Liens," there is a discussion of Mort-

gages and Equitable and statutory Liens, which seems to the writer to be very appropriate, although not covered at all in Gray's Cases. While the subject in the University of Pennsylvania Law School is considered under a separate head, it would certainly seem desirable that every student of property should study, at least to a limited extent, the law of Mortgages and other Liens.

For the reason thus indicated, the writer believes that the students of the various Law Schools will find Mr. Tiffany's volumes of real practical use, and he is to be congratulated on furnishing the best work for this purpose. If time permitted, it would be possible to call attention in detail to many chapters in which the proportion of Ancient and Modern Law seems to have been admirably preserved. As an especially good illustration, Chapter Five on "Equitable Ownership" is an unusually successful effort to state the ancient law of "Uses" and its modern development in the law of "Trusts."

*B. D. B.*