

BOOK REVIEWS

THE CIVIL LAW SYSTEM. CASES AND MATERIALS. By Arthur T. von Mehren. Englewood Cliffs: Prentice-Hall, Inc., 1957. Pp. xvii, 922. \$11.50.

Since the end of the second world war, interest in foreign legal systems has strikingly increased in the United States. This growth has presented a perplexing question to American law schools, namely, how to present foreign systems to American students. One possible solution is that offered by Professor von Mehren in *The Civil Law System. Cases and Materials*.

As stated in the author's preface the "book's fundamental purpose is to give a student, having some common law training, insight, at various levels, into the workings of the civil law system as typified by the French and German legal systems." The compilation is divided into five books or parts. Book I deals with the general background of codification; Book II with the structure of the French government, separation of powers and French administrative law; Book III with torts, or to use continental terminology, delictual responsibility; Book IV with contracts; and Book V with the judicial process. With the exception of introductory notes, the materials consist of excerpts from publications already written in English or translated into English and of translations into English of French and German texts, code provisions and judicial decisions. The general scheme is to set before American students the basic legislation, doctrine (commentary) and jurisprudence (court decisions). The aim, it should be emphasized, is not so much to teach tort, contract or administrative law as it is to offer means or tools for a study of how the French and German legal systems work. For example, in the field of torts the student can observe how French law with only five declarations of general principles¹ developed through the case law and under the influence of legal writers from a doctrine of responsibility based on fault, or in some instances a rebuttable presumption of fault, to one of strict responsibility when an injury is inflicted "by a thing," such as an automobile.² In this connection, the student is afforded an opportunity to compare the German system with that of France and the two with the common law system. The same opportunity for comparisons exists, of course, with respect to contracts.

It might be objected that the inclusion in the book of materials on administrative law and practice makes it too voluminous. The development

1. CODE CIVIL arts. 1382-86 (54th ed., Dalloz 1955).

2. *Id.* art. 1384.

of government responsibility for injuries caused by employees of the State and its subdivisions in France might well be described as a legal phenomenon in that the broad base of responsibility was almost entirely developed by the Council of State acting as a judicial body with little legislative intervention. Then too, state responsibility is akin to individual responsibility in the field of torts. In any event, the position of administrative law in the French legal system is such that it could hardly be ignored in any study of that system. A further and contrary criticism might be that the coverage in the field of private law is too narrow since only contracts and torts are treated. It should be kept in mind, however, that these two subjects consume approximately two-fifths to one-half of the hourage allotted to the law school first year. Materials cutting through the entire field of the law could not be covered in the time which could be allotted a course in comparative law in the normal law school.

Also, as has been said, the objective in the use of the book should be acquisition of an understanding of the two civil law systems in action and not the acquisition of a given amount of knowledge of civil law data. With an introductory understanding, a student who is interested in legal data and who has the necessary linguistic ability can through his own effort or in a seminar group acquire understanding and knowledge in other areas of the civil law.

Reference should be made to the vast amount of labor which must have been devoted to the examination of French and German materials before even a beginning could be made on the selection of those that were used. The matter of acceptable translation must have been time consuming and taxing. Accurate translation of foreign legal material is likely to be difficult since often the English equivalent which one may be tempted to use is in reality not an equivalent. Further, there may be no exact equivalent. Professor von Mehren's translations, particularly of the code provisions, are far better than any others this reviewer has ever seen.

The book is an exceptional contribution for those interested in the teaching of comparative law.

George W. Stumberg †

THE DECISION TO INTERVENE, Volume II of SOVIET-AMERICAN RELATIONS, 1917-1920. By George F. Kennan. Princeton: Princeton University Press, 1958. Pp. 513. \$7.50.

RUSSIA, THE ATOM, AND THE WEST. By George F. Kennan. New York: Harper & Brothers, 1958. Pp. 116. \$2.50.

In the forty years of uneasy Soviet co-existence with the rest of the world, there has been no episode more unfortunate than Allied intervention in Russia in the last months of the first world war. Originally urged by

† Professor of Law, University of Texas Law School.

the British and the French in an effort to reconstitute an Eastern Front, and so to remove desperate German pressure in the West, intervention led to Allied entanglement in the tragic morass of the Russian Civil War, and eventually to military defeat. More important, intervention removed any possibility that the West could come to terms with the Revolution in its early years, and gave to the Bolsheviks concrete evidence of the presence of the encircling capitalist enemy, an image which has always obsessed the Soviet mind.

America's part in this unhappy venture has long been the object of systematic misrepresentation by the Russians themselves. Stalinist historians (and Stalinist historiography, after all, dates from the early 1930's until at least 1956) have maintained that American finance capital was the guiding influence behind the intervention, and that the British, French, and Japanese were simply its tools. Further, Russian chronicles have told us that from the very moment of the October Revolution, Allied policy in Russia was motivated by the desire to destroy the infant socialist state.

Curiously, Western historians have not much applied themselves to these myths, and Mr. Kennan's present history is the first work of merit to be done on the relations of any of the Allied countries with Russia in the years of intervention. In part, this lack of concern is due to the medieval secrecy which governs access to British and French official archives (American archives for this period have been fully open for a decade), but part of this reluctance has been due to the enormous complexity of the events in Russia and in the Western capitals, and the great difficulty of placing them in a coherent account.

No one is better equipped for this task than Mr. Kennan, and one cannot imagine a more satisfactorily executed history than the work of which he has just published the second volume. To his writing he has brought the intense preoccupation of thirty years, most of them spent as a diplomat actively dealing with the Soviet Union. Equally important, he is a man consumed with an interest in other individual men. Mr. Kennan's diplomatic history is not a record of decisions taken and notes despatched, but of the ways in which individuals, many of them cut off from all contact with their government, reacted to a situation which few of them could fully understand. It is this conception of history as a patchwork of human actions and reactions which makes *The Decision To Intervene*, like its predecessor, *Russia Leaves the War*, so absorbing to read.

Russia Leaves the War dealt with the brief four months between the Bolshevik Revolution and the Soviet treaty of peace with Germany, signed at Brest-Litovsk in March. Principally, it charted the frantic and misguided Allied efforts to keep Russia in a war which, physically and spiritually, she had left a year before. Far from making a systematic and concerted effort to destroy the Revolution, the Allies would have been willing to nurture a Soviet state committed to fight on. Blinded by their losses in the West (and unable to see that Russia, with greater losses,

had been bled dry), the British and French bound themselves to a policy of backing any Russian faction willing to remake an Eastern front.

When no sizable loyal group could be found, the two Allies set about formulating plans for the introduction of Allied troops into Russia, from Siberia and the Arctic North, to serve as seed crystals around which Russian forces could precipitate. With no forces of their own to spare, Paris and London seized upon the idea of using American, and, particularly, Japanese troops. Their efforts to involve the United States, and American reaction and policy, both in Russia and at Washington, are the subject of *The Decision To Intervene*. Initially, Washington would have none of these plans. To United States strategists, less inclined to indulge in the wishful thinking which gripped their hard-pressed Allies, the idea that hundreds of thousands of Japanese troops could be transported the 5,000 miles across Siberia to a new Eastern front was lunacy. President Wilson and the State Department feared both the prospect that Japanese presence on Russian soil would drive the nation into the arms of the Germans, and the possibility of Japanese designs on Manchuria and Eastern Siberia. In Tokyo, a General Staff with just these designs had no desire to dissipate Imperial forces deep in the heart of Russia, and the Japanese government indicated that prior United States approval was the only basis on which it would even consider action. Consequently, as spring 1918, turned to summer, and the gigantic German offensive in the West gained momentum, British and French pressure on the White House grew to the point of siege, with every sort of advocate, from diplomats and generals to philosopher Henri Bergson, coming to plead the cause.

Suddenly, in mid-July, the President gave way, and assented to a very limited sort of action, only to protect the stores of Allied war material at Vladivostok and Archangel from reported bands of German and Austro-Hungarian prisoners, and to safeguard the evacuation of a Czech army corps that had been making its way across Siberia toward the Pacific. But at the very time Wilson made his decision (he made it against the reasoned advice of every ranking United States military leader), the Bolsheviks had already removed the stores from Archangel and the Czechs had become embroiled in fighting Soviet forces deep in the interior, and United States agents on the scene reported that there was no danger from prisoners of war. The decision to intervene bore little relation to Russian realities, and as British statesmen confidentially predicted, American commitment on a small scale led inevitably to a far greater involvement than Wilson had ever imagined.

There are few points about *The Decision To Intervene* which one can dispute. In its conclusions there is, perhaps, too unwarranted a belief in the efficacy of the simple fact of diplomatic contact as a means of alleviating the friction between nations. And Mr. Kennan has perhaps gone too far, in his effort to recapture the atmosphere of Russia in 1918, in attributing hypothetical feelings and emotions to the characters on his

stage. While such treatment adds to the readability of a superbly readable book, it sometimes exceeds the limits of historical credibility.

But these are quibbles. Mr. Kennan's account of these five months following Brest-Litovsk is of the greatest importance, not only as a chronicle of a crucial decision in American foreign policy, but as a study of just how decisions come to be made by any government. In concluding this second volume, he allows himself the thought of how pleasing it would be if he were describing the last example of "the congenital shallowness, philosophical and intellectual, of the approach to the world's problems that bubbled up from the fermentations of official Washington", and "the pervasive dilettantism of American policy." It was to the present-day manifestations of these traits that he turned in his B.B.C. Reith Lectures, *Russia, the Atom, and the West*.

In these lectures, Mr. Kennan calls to task Western statesmen, particularly Americans, for viewing Russia, through the eyes of 1948, primarily as a military threat (though not, as a matter of fact, through his own eyes of 1948—a close re-reading of his famous "X Article" in *Foreign Affairs*¹ shows that then, too, he regarded the Soviet "threat" as more political than military). The Reith Lectures are too familiar to call for any detailed summary here. But it should be pointed out that none of their many critics has given anything like a satisfactory answer to their real challenge to Western policy. When Mr. Acheson can dismiss them as vague and mystical and then plead (as he does in the April issue of *Foreign Affairs*) for a continuation of the *status quo* in Europe until that day when the pull of a thriving West on the peoples of Russia and the satellites will drive the Eastern bloc to "negotiations looking toward a united Germany, under honorable and healing conditions, and toward the return of real national identity to the countries of Eastern Europe, while preserving the interest of the Russian people in their own security and welfare,"² we must ask Mr. Acheson what he means by "vague" and "mystical."

It is unfortunate that Mr. Kennan did not phrase his lectures with the same exactness he brings to the writing of history. Their sometimes obscure syntax allows critics easily to sift out weaknesses (for example, the suggestion that Western Europe could rely for its defense on Swiss-type militias, or the implication that governments can root out subversive groups, such as communist parties, without damaging the fundamental structure of liberties) while ignoring their strengths. Nowhere, have we had a more accurate survey of the workings of the Soviet mind, and the very real Soviet fear of war. The same compassion with which Mr. Kennan treats the figures of 1918 allows him to view the Russians of 1958 as people, with very human concerns, and not simply as an abstract military machine "poised" to attack the West.

1. "X" (George F. Kennan), *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (1947).

2. Acheson, *The Myth of Disengagement*, 36 FOREIGN AFF. 371, 380 (1958).

Throughout the Reith Lectures, as throughout *The Decision To Intervene*, we find one recurring theme—the danger of overseas commitments too extended for satisfactory control by the normal procedures of democratic foreign policy. Mr. Kennan calls for a reform of these procedures, and the attitudes behind them, but he also calls for a reduction of the commitments. Some have called this isolationism; realism is, perhaps, a better word.

Richard H. Ullman †

SELECTED WRITINGS ON EVIDENCE AND TRIAL. Association of American Law Schools. Edited by William T. Fryer. St. Paul: West Publishing Co., 1957. Pp. xlv, 1232. \$10.00.

This collection of materials on evidence shows the impossibility of a one-rule world; any theory of absolutes has absolute negation here. As a study it is most revealing; as a collection for sure reference for the lawyer (trial or office, consultant or practitioner) it is quite necessary. I am quick to give my approval and recommend it, and I should like not to see a lawyer's or judge's shelf be empty of it—especially if it be true that, "Generally speaking, lawyers are less sure of themselves on the law of evidence than on any other legal subject." (p. 1,169).

One must agree that if the courtroom is the setting for the search for truth, or at least the scene of the outcome of the greater probabilities, we must make the rules helpful to that search. At any rate, a reading of these selected writings leads one to say, in paraphrase of Maitland, that somehow or another, after a fashion all our own, we struggle or stumble into a general scheme of evidence for the reconciliation of permanence with progress.

Coming to the writings—there are leading articles covering many subjects; there are references to the federal rules, discussions on controversial subjects that are of intelligent impress and finally consideration of the *Model Code of Evidence* and the *Uniform Rules of Evidence*. Among the contributors are a great judge—Learned Hand; knowing intellects and teachers in the subject—Falknor, Ladd, Morgan, Maguire, McCormick, our own Levin, and of course the two masters—Thayer and Wigmore. And this does not finish the list (there are fifty-four authors of leading articles); it is merely descriptive of the vastness of the subject and the materials. Of Morgan's work, for example, the editor has included writings on evidence generally, with proposals for its reform, on hearsay, and on the much confused and debated subject of presumptions.

All these materials have appeared before, mainly in the law reviews. The immensity of the collection (some 1,200 pages) is justified by the

† Research Fellow in Modern European History and Politics, St. Antony's College, Oxford.

intelligence of the endeavor to achieve comprehensiveness which it represents. It is the immensity too that makes review so difficult. What writing, or what subject, can one choose to delineate? And which, one might ask, is more important—to point to or point up? That too is difficult. For the practicing lawyer, for the judge, the case in hand is the immediacy and the evidence problems need immediate attention—and solution if possible. In this collection he will find many thoughts if not all the answers. And the answers may depend on your jurisdiction. California, you will find, permits comment on the failure of a defendant to take the stand (p. 1,182); Pennsylvania does not permit such comment—at least adverse comment. Which is the preferable rule is well set forth by McCormick in his article “Some High Lights of the Uniform Evidence Rules” (p. 1,174). Returning to particular jurisdictions, there are Professor Levin’s article on “Pennsylvania and the Uniform Rules of Evidence: Presumptions” (p. 1,052); Winter’s article on “Independent Medical Experts To Testify in New York Injury Cases” (p. 605); and Roemer’s article “The Minnesota Experiment To Remedy Abuses of Medical Testimony” (p. 598).

In the main, the collected writings deal with the law of evidence in the United States, but there is an article by Morris Ploscowe on “The Expert Witness in Criminal Cases in France, German, and Italy” (p. 559).

The articles range from the scholarly to the practical. For example, there are extracts for the practical lawyer from Stryker’s “The Art of Advocacy” (p. 1) and, on the other hand, extracts from Guttmacher and Weihofen’s “Psychiatry and the Law” (p. 582).

The materials show diverse opinions of diverse scholarship and thought. But this is not to say they are haphazard. On the contrary, they are well arranged—a chapter for writings, their authentication and the much-debated Parol Evidence Rule; a chapter on the privileges—family, professional, and other privileged classes; the much-discussed privilege against self-incrimination and against evidence illegally obtained; a chapter on witnesses, their qualification and examination; a chapter on the Hearsay Rule and exceptions. These are but some of the many facets of the law of evidence to be found in this collection—all put together with the varying thoughts of the many writers on their respective segments in this vast field.

It is hard to choose, but, if I were put to it to select the best, it would be those where the effort is to show the need for reform, particularly chapter 12—“Reforms Being Advocated in Comprehensive Rules”—the discussions on the *Model Code* and the *Uniform Rules*. I suppose my choice comes from my experience as a *nisi prius* judge, and often I have asked myself the questions propounded by Professor McCormick: why hold on to a rule irrational or expedient in origin and irrational and unjust now? For example:

“How else explain such irrationalities as the rule that you can admit a dying declaration to hang a man, but in a civil action for the

same death, the dying declaration is not receivable at all. Or the rule that, if I acknowledge that I owe a bill at the corner grocery, the statement comes in as a declaration against interest, but if I confess the blackest crime in the calendar, this will not qualify as such a declaration." (p. 1,151).¹

To recur to Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."²

Joseph Sloane †

1. See *Lockard v. Vare*, 230 Pa. 591 (1911); *Commonwealth v. Antonini*, 165 Pa. Super. 501 (1949).

2. Holmes, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 187 (1920).

† Judge, Court of Common Pleas Number 7, Philadelphia, Pennsylvania.

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