

BOOK REVIEWS.

LIABILITY OF RAILROADS TO INTERSTATE EMPLOYEES. By Philip J. Doherty of the Boston Bar. Little, Brown & Company, Boston, 1911. Pp. 371.

The profession, in these days of specialties, no longer demands broad dissertations on the law in general, but concise and specific statements of the history, theory and status of the law on a particular subject. The latter is what Mr. Doherty endeavors to furnish. His is the only book on this subject which has yet come to our attention.

Unlike many modern text-writers, the author does not content himself with a mere statement of the latest decisions by the courts on the different points open for construction. The most interesting feature of his book is his discussion of the legal principles underlying the doctrine of Assumption of Risk and the Fellow Servant Rule. At the very outset he disputes the soundness, viewed from a logical standpoint, of the common law decisions establishing these well known principles. In the course of the first fifty pages he proceeds, with admirable clearness, to demonstrate their fallacy, thus preparing the reader's mind for an unconditional acceptance of the provisions of the Employers' Liability Acts, which abolish these doctrines from the law as applied to Interstate Employees. Particularly worthy of commendation is his discussion on pages 45-57 of the six reasons advanced by the supporters of the Risk of Employment Rule.

We wish we could say as much for the remainder of Mr. Doherty's book. Portions of the next five chapters in Part I are serviceable and instructive, (particularly Sections 17, 18, 19 and 31) but Chapter IV, entitled "When is a Railroad Engaged in Interstate Commerce," does not show at all the same care and thought evidenced by the first three chapters. The conclusions at the end of this chapter are sound, but the citations throughout are loosely put together and in a number of cases are rather misleading than helpful.

For instance on pp. 77-78, as sustaining the position that an intrastate road participating in interstate traffic is amenable to Federal regulation, the author cites two decisions by the Supreme Court, (37 & 154 U. S.) eleven Circuit Court decisions, and nine decisions of state courts. Neither of the Supreme Court decisions cited bears on the point except very indirectly, although this question has been expressly decided in a number of other cases, typical of which is *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 662.

Mr. Doherty then cites, as *contra* to the preceding cases, three Supreme Court decisions all later than those in his first list, one being from 209 U. S. An examination of these cases will show that no one of them is in fact *contra*. One, the case in 204 U. S., he proceeds clearly to distinguish himself. The *Armour* case, (209 U. S.) he leaves entirely without comment. It is difficult to imagine how this case could reasonably be construed to bear at all on the point under discussion, but if it does it should appear to sustain the opposite conclusion from that for which it is cited.

Part II, pages 132-275, is devoted solely to an exhaustive argument in favor of the constitutionality of the Employers' Liability Act of 1908. As three cases involving this specific question have already been argued before the Supreme Court, and will probably be decided before this review goes to print, thus settling the question beyond dispute, so lengthy a discussion would not seem to be of much practical use at the present time. If the Court holds the Act constitutional, there will be no need of further discussion of the question, while if it sustains the Connecticut Court in holding it unconstitutional, a large portion of the remainder of the book, in addition to Part II, would become of historic interest merely. The cases referred to are *Northern Pacific R. Co. v. Babcock*, New York, N. H.

& *H. R. Co. v. Walsh* and *Moudou v. New York N. H. & H. R. Co.* The last case was decided by the Supreme Court of Connecticut at the same time as the much discussed *Hoxie* case. It is difficult to understand why this decision and the appeal to the Supreme Court are not mentioned by Mr. Doherty, although the appeal was taken more than two years ago.

The remainder of the book, pages 276-316, deals with the Federal Safety Appliance Acts, the proper construction of which is directly within the scope of the book, since by the Employers' Liability Act the railroad is deprived of the defences of Assumption of Risk or Contributory Negligence if it appears that the violation of a safety appliance statute contributed to the injury or death of the employee. This is a most important branch of Mr. Doherty's subject and many cases have been decided by the Federal Courts which would warrant discussion, classification, and criticism by him. On page 276 he gives a list of sixty-seven decisions in actions for injuries or death, construing the Safety Appliance Acts. We find only twenty-seven of these cases discussed or commented on by him elsewhere. It is unfortunate that the author did not devote to the important and unsettled questions involved in these cases some of the time and space used by him in connection with the constitutionality of the Act.

The index, a most important feature of a legal text-book, while passable, is not at all thorough, and does not show the result of very painstaking work.

On the whole, the book is interesting and worth having. It is to be regretted that all parts of it are not so carefully prepared or reliable as the author's evident ability might, with the addition of a little more time, readily have made them.

H. S. D., Jr.

THE INDIVIDUALIZATION OF PUNISHMENT. By Raymond Saleilles, Professor of Comparative Law in the University of Paris. Translated from the Second French edition by Mrs. Rachael Lzold Jastrow. Little Brown & Co. Boston. 1911.

This is the fourth, and the most valuable, contribution yet made by the Committee on Translations of the American Institute of Criminal Law and Criminology in its work in making available to the American student the work of the great foreign authorities on criminology.

Our author's work divides itself into four topics: The history of punishment; a review of the different schools of criminology; the doctrine of responsibility; and a plea for individualization in punishment. In many respects the review of the schools of criminology is more enlightening than a study of the books in which the theories of the schools themselves are set forth, for these theories are treated with eminent fairness and at the same time the reader is given an acute critique of them.

The chapter on the history of punishment is most interesting; not because of any new facts presented, the author does not undertake to present any new facts, but because of the analysis of the facts to show the theory underlying them. From these facts he concludes that primitive punishment was primarily subjective; it was the crime that was punished, not the criminal. There is absent not only individualization, but the conception of moral culpability; there is no theory of punishment, the penalty is for compensation merely. It is the Ecclesiastical law that brings in the idea of responsibility and its resultant culpability.

Very acute and interesting also is his analysis of the reforms of the eighteenth century as represented by the work of Baccaria, in Italy, Bentham, in England and Feuerbach, in Germany, by which under the guise of a philosophic theory they harked back, in effect, to the primitive conception that underlay the *Weregild*.

The different schools of criminology are taken up in turn, and their

advantages and defects considered. The classic school, with its eighteenth century philosophy of crime; the Neo-classic school, with its assumption of free will, and individualization based on responsibility; the Italian school, and individualization based on formidability.

The two chapters, on the Doctrine of Responsibility, and Responsibility and Individualization, contain the meat of the book; on the ground work laid there, the conclusions reached and applied by our author in the remainder of the book are based. It is this part of the book in particular that justifies Tarde, the great philosopher, in saying of our author: "M. Saleilles presents two qualities rarely combined: the didactic subtlety of the jurist and the keen analysis of the psychologist and criminologist." Though probably the jurist would not apply the characterizations in the same way M. Tarde does.

It is in these chapters that M. Saleilles embodies his greatest contribution to the science of criminology. In them he essays the rôle of a mediator between the two schools of criminologists; those who base their conclusions on the postulate of freedom of will, and those who reject the idea of moral responsibility based on free will. M. Saleilles would reconcile these two schools by retaining the idea of freedom of will, as a basis of moral responsibility, but rejecting it as a basis of punishment. His conclusions may be summed up thus: The conception of responsibility should be retained and incorporated with that of punishment; without it the criminal is a creature despised, ostracised, abnormal and even monstrous; with it self-esteem remains, or at least may be regained. The possible criminal, *feeling* himself free (our author does not say he is free) in his actions, is conscious of his power to act rightly as well as wrongly. It is therefore a valuable moral lever which should not be dispensed with. But while penalty for crime is thus justified by responsibility, it should not be measured by it.

Penalty must be apportioned to the subjective criminality. This subjective criminality presents two aspects, first a latent and passive criminality in the static condition—which is one with the essence of character—second the active dynamic criminality considered as a psychic factor which on occasion sets free an impulse which in turn breaks out into action. The criminality thus made manifest—the sum of the will and the character made manifest in an action—constitutes the crime.

But when we come to determine the discipline of the punishment we should no longer consider the particular variety of criminality inherent in the act; character must determine the discipline. The nature of the punishment should be determined by the passive criminality in its latent or passive condition, that is by the character.

Taken as a whole the work is one that every one interested in the scientific improvement of criminal law and criminology should read.

W. E. M.

THE SHADOW MEN. By Donald Richberg. Chicago: Forbes & Co. 1911.

Under the happy title of "The Shadow Men," Mr. Richberg has contributed his mite to literature in the shape of a novel advertised as being "of interest to lawyers." This contention will not be disputed, but the publishers should add, "and to bankers, brokers, scientists, gentlemen of leisure and others who have sufficient feeling for this little world of ours to be interested in its social development." Of actual law there is not one page or line, and we must seek the reason for the advance notice in the fact that the conditions exposed by Mr. Richberg can only be remedied by public opinion through the medium of the law.

By the term "Shadow Men" is meant the men higher up—the vague uncertain figures behind the great corporations to whom may be attributed the

juggling of accounts that so often results in scandal and exposure and so seldom brings the jugglers themselves to justice.

Mr. Richberg has done for his subject—the evil of the financial manipulation of corporate affairs—what Mr. Sinclair did for the packing trusts in his book, "The Jungle." There is, however, one great distinction between them. Whereas "The Jungle" was distinctly of that type of literature known as "muckraking," "The Shadow Men" contains nothing of this sort. If the author has any one corporation in mind, it has been carefully concealed. He deals with a general situation, and in so doing has, we think, fallen into an error common to this type of book. He is over-pessimistic. The reader is imbued with the idea that no large corporation is honest; that "rebating" and "watering" is universal; that all successful business men are malefactors of great wealth; and worst of all, that the law, or rather its administration, is too corrupt and rotten to afford relief. Even the law books share in his bitterness: "They pretend to be heirs to the wisdom of the ages and yet are untouched by the supreme wisdom of humor. Thousands of dull, dull pages are devoted to the things men do with hardly a line discussing why they do them." Of humanity in general he says that few indeed "are fitted to leave even a noticeable grease spot on the page of time. The main function of humanity appears rather to be to provide the pulp from which the pages are rolled." A long continuance in this gloomy strain is tiresome and depressing.

From a literary standpoint, "The Shadow Men," while not a masterpiece, is distinctly a success. On the whole the book is thoroughly enjoyable, and lawyers (and, as has been said, other less fortunate members of society), may well spend a few pleasant hours in its reading.

C. H. S., Jr.

LAW FOR THE AMERICAN FARMER. By John B. Green of the New York Bar. New York: The MacMillan Company. 1911.

This is one of the Rural Science Series, edited by Prof. L. H. Bailey. The author was confronted with the task of preparing a treatise that would be comprehensive enough to cover the legal questions that ordinarily arise in the life of the farmer, and yet not be so exhaustive as to include subjects, which, while they occasionally concern the farmer along with others, are not so peculiarly connected with farm life as to warrant their being included under the title of the book. For the most part, a wise selection of subjects has been made. The law on many of the topics discussed, such as contracts, sales, insurance and carriers, is in most instances, the same for one not engaged in agricultural pursuits as it is for the farmer, but the author is probably warranted in including them, as they deal with situations constantly arising in farm life where some kind of legal knowledge upon them will allow the farmer to recognize his rights and duties should a controversy arise.

As the title indicates, only American cases are cited, the status of the farmer and the land laws of England being materially different from both in the United States. The volume will be useful to the lawyer in providing a handy finger-post to many cases deciding legal principles which he knows exist but the authority for which is not always readily at hand. The indexing is especially well done, this part of the work covering some sixty-nine pages.

W. J. C.

A HISTORY OF THE AMERICAN BAR. By Charles Warren. Little, Brown & Company, Boston. 1911.

"If I were asked," said De Toqueville, writing in 1835, "where I place the American aristocracy, I should reply without hesitation, that it is not

composed of the rich, who are united by no common tie, but that it occupies the judicial bench and the bar." Their studies, he declares, insure them a separate station in society; they form the highest political class and have nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. This enviable position, shared today with the captain of industry, has not been maintained without exciting jealousy in the lay mind at all periods, from Dick the Butcher's sanguinary proposal to "kill all lawyers," to the somewhat milder strictures of *Ignotus* upon the "Legal Trust" in recent numbers of the *Westminster Gazette*. To such animadversions the bar has never failed to respond with countervailing blasts from its own trumpets. In fact no other class, outside of royalty, has been the subject of so much self-laudatory biography, echoes of bar meeting pompousness. It is refreshing, therefore, to turn to a work which in tracing the history of the American bar from its obscure beginning, presents the subject in proper perspective.

From innumerable scattered sources the author has, with fine discrimination, selected and assembled the salient facts in the history of the profession, and, without neglecting the picturesque features which serve to lighten the pages of history, has traced in a most informative manner the influences social, educational and economic that have assisted in producing the American lawyer. Only the most patient research could have collected the material; only stern repression could have condensed the material into a single volume of less than six hundred pages. In Part One are described the legal conditions prevailing in England and the American Colonies prior to the Revolutionary War; the organization of the courts and their attitude toward the common law; the education of the lawyers and the available law books. Part Two describes the growth of the American bar from the foundation of the United States Supreme Court to the opening of the Civil War. One chapter describes the widespread prejudice against lawyers and the common law that prevailed in the opening year of the nineteenth century. Much attention is given to the Federal bar and the historical aspects of the leading cases argued before the Supreme Court. There are chapters devoted to American law books, law schools and early professorships in law, the movement for codification, the rise of railroad and corporation law and the progress of American jurisprudence.

A brief review cannot reflect the thoughts suggested by this work, which both veteran and student may read with profit. Some who live a thousand miles from "The Hub" may feel that sufficient space is not given to local heroes, and that too much stress is laid on the achievements of the lawyers of the northeastern states, but local pride is a pardonable fault and bar horizons are essentially narrow. One conclusion is obvious. With very few exceptions, the great reputations at the American bar have been made in the field of constitutional and public law. This has detracted from interest in private law and its scientific statement. In this field we have preserved much of the atmosphere of the eighteenth century, the impetus to most legal reforms and progressive legislation coming from without. The author gives much interesting information as to the preliminary collegiate education of the great bar leaders, but has covered with a mantle of charity the defective education of the average lawyer of the nineteenth century. Until the rise of the modern law school, law was studied both in England and America as a trade rather than a science, and if the student had not received a liberal education before entering upon his legal education he was greatly handicapped. Nor has this condition altogether passed away. The "submerged tenth" of the legal profession is a pitiful group, invited if not lured to the bar by lax standards of mental and moral fitness. But of these minnows of the law the author does not tell us, and perhaps it is just as well; let us live, at least in imagination, with the leviathans.

W. H. L.

A SELECTION OF CASES ON MUNICIPAL CORPORATIONS. By John E. Macey, LL. M. Boston: Little, Brown & Company. 1911. pp. XIV, 503.

One can well understand the dry humor, almost, of Mr. Macey's prefatory remark that it required the reading and examination of three hundred and eighty cases to form one section of four cases. The amount of labor involved in carefully selecting cases dealing with municipal corporations, and arranging them for ready use, is not a little, and deserves full appreciation of its merit. And if we may judge, from the selection made of those four cases, of the quality of the editor's work, the result rightly deserves praise not only for the quantity of the labor, but for its excellency. The section deals with the methods of acquiring public easements; yet the small number of cases seems adequately to present this rather difficult subject, leaving perhaps, the only thing to be desired, a more specific reference to the method by eminent domain proceedings than a bare allusion to it by a court.

The complete chapter upon Public Easements may be taken as an example of the sub-division of topics. There are six sections, dealing respectively with the establishment of the easement, the interest of a municipality in a public way, its obstruction, the extent of public rights against the privately-owned fee, the abutter's easement, and the police power over the use of the way. So far as the avowed purpose of the collection is to supply a basis of class discussion, this covers the field in a very satisfactory manner. Nothing is included anent the municipality's right to grant a sub-easement or servitude in the highway to non-public service companies, or as one recent writer insists is the true statement of the problem, the duty of such grantees to serve the public; but this may well be considered, though an allied subject, foreign to the scope of this collection. Mr. Macey has apparently ranged himself with those editors who believe the use of more or less specific sub-divisions is proper. Another school, perhaps the ultra case system school, takes the position that only the most general chapter headings should be used, leaving the student to value the case for himself and place it in its proper bearing. This is a difference of opinion that bids fair to continue. In its aspect as a whole, Mr. Macey's analysis of his subject has not departed fundamentally from that of Judge Dillon's text, of which the fifth edition has just been issued by the same publishers. Of course, many sections of that large work have been omitted. It is noteworthy also that no English cases appear in the present book, due, not improbably, to the difference between the English and our constitutional system. The compiler has prepared what, it is believed, will prove a most satisfactory collection of cases, and thereby has filled a real need. His promised text, paralleled to it, will be awaited.

R. J. B.

CAPTURE IN WAR ON LAND AND SEA. By Hans Wehburg, D. Jur. Translated from "Das Beuterecht in Land und See Kriege," with an introduction by John M. Robertson, M. P. London: P. S. King & Son. 1911.

This little volume contains an exceptionally lucid survey in small compass of the law and practice in regard to the seizure of private property in time of war. The law of prize on land is treated in the first three chapters and neatly disposed of, but the more vexed subject of the law of prize at sea, and the questions of the abolition of the right of seizure requires nine chapters, of which fully half are devoted to the argument for the abrogation of the present law and practice. This portion of the book is therefore, from its very nature, polemical, and what is more, polemical on an issue that is of tremendously vital importance at the present moment. For only recently Great Britain made her first concession