

## BOOK REVIEWS.

THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT. By Samuel Rosenbaum. Pp. xiv, 321. Boston: The Boston Book Co., 1917.

Liberal samples of Mr. Rosenbaum's studies of English civil procedure have already been presented to readers of the *LAW REVIEW*. Three chapters of this compilation were originally published in English legal journals. The title chosen for the compilation does not fully reveal the inclusive nature of the work which traces the result of judicial rule-making thoroughly and critically through what has been the most fruitful and triumphant period of British judicial administration.

The preface, written by T. Willes Chitty, master and editor of the *Yearly Practice*, shows the exceptional facilities which the author enjoyed. No English lawyer had ever attempted to sum up and estimate the period following the adoption of the Judicature Acts of 1873 and 1875. While this situation implied pioneer research, it was offset by the willing assistance afforded by eminent authorities, men whose experience spans all or nearly all of this remarkable period. The result is one of those rare accomplishments of an alien scholar in an exceedingly technical field.

From the standpoint of American needs no native could have handled the subject so well; he probably would not have conceived it as one primarily relating to judicial responsibility. More readily than English lawyers we can understand that the relationship between court-made rules and judicial efficiency is one of cause and effect, for we have little of either in our typical state system.

Of course it will not do to overlook the unification of English courts under the Judicature Acts as a prerequisite for the exercise of the rule-making power—and this is set forth in an early chapter of the book—but the outstanding difference between our system and that prevailing in Great Britain and the numerous associated commonwealths is that we still adhere for the most part to statutory procedure, while they look to the courts for rational evolution in the machinery of justice. The difference is the difference between inexpertness and expertness in rule drafting, between irresponsibility and responsibility in the administration of justice. While we still squander energy in litigating unessentials of procedure, in British courts around the world litigation is practically confined to substantial issues.

By the year 1887 reform in English courts had reached a state to justify the estimate of Lord Bowen, who said: "It may be said without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation . . . law has ceased to be a scientific game that may be won or lost by playing some particular move." (P. 270.)

In justice to Mr. Rosenbaum it must be said that he assumes no thesis. His study is in the scientific spirit and the missteps taken at times and the omissions still remaining are set down frankly. The author's literary skill is such as to make fairly entertaining a study which would seem necessarily

prosaic, while his account is so faithful and complete that no American lawyer, seeking to understand the English system, can do without this book. Only by tracing the subject historically and critically can one understand such a thing as the early willingness to dispense with pleadings in certain causes and the success of efforts in this direction.

The actual constitution of the rule-making authority is a matter of the greatest present interest to progressive lawyers in a number of states. Chapter XVI, entitled *Rule-Making in the Courts of the Empire*, is especially informative. Here is related briefly the operation of the principle in Scotland, Ireland, the Canadian provinces, Australia, New Zealand, South Africa, India, and the island possessions of the Pacific and the Caribbean. Various experiments have been made in respect to the make-up of the rules committee. There is still agitation on this point at home. Success has undoubtedly attended the coupling of the bar with the bench. In all these experiments there are lessons for American lawyers now approaching a new era which promises ultimate success, but undoubtedly has its own special risks. Emphasis falls upon organized responsibility. Our decentralized judicial systems cannot easily assume this new and necessary function of regulating procedure. While we cannot imitate the forms worked out in British jurisdictions we can accept the principles involved and work them out in practical fashion.

The thoroughness of the author's work is evidenced by the fullness of citations backed up by tables of cases, statutes, and books to which reference is made. The style of composition is admirable, but upon this readers of the *LAW REVIEW* have had opportunity already to bestow appreciation.

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A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS. By Henry Campbell Black. Vol. I, Pp. xxvi, 837. Vol. II, Pp. xiv, 837 to 1779. Kansas City, Mo.: Vernon Law Book Co., 1916.

To the practicing lawyer Mr. Black's publication will prove valuable in several ways. It is a very complete index-digest of the law of Rescission and Cancellation, and it deals sufficiently with general principles to enable the mere plodder along the dusty highway to scent broad fields of legal speculation and theory which lie beyond the boundary lines of precedent and judicial decision. The subject has not heretofore been separately treated, and as it forms a very important part of the private law and is the basis of much litigation, Mr. Black's volume cannot fail to prove useful to the bar.

With this acknowledgment of its unquestionable value to the working lawyer is coupled an expression of regret that it is not the text-book that the student needs or is awaiting. Unfortunately, text-writers, like our author, assume the yoke of the law that is imposed by the courts and give us a restatement of judicial decision and reasoning instead of a treatment of the subject matter from the point of view of the investigator and scholar who, like Professor Wigmore in his monumental work on Evidence, seeks everywhere for light which may bring out the principle which is the ultimate

object of his search. One may read a book like Mr. Black's without being aware of the fact that scores of valuable articles that would illuminate his special sub-topics lie buried in the periodical legal literature. It is only by a use of this literature as well as of the literature of comparative jurisprudence and of the opinions and speculations of publicists, economists and theorists that any real advance in the science of the law can be made. Judge Story is quoted by Judge Keener as having said "tell me not of the last-cited case having overruled any great principle,—not at all. Give me the *principle*, even if you find it laid down in the institutes of Hindu law." There is no doubt that eventually legal writers will learn to use this great and growing periodical literature and will no longer confine themselves merely to reproducing the opinions of our courts.

*David Werner Amram.*

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BETTER CITY PLANNING FOR BRIDGEPORT. By John Nolen and Frank B. Williams. Pp. xx, 159. Bridgeport, Conn.: City Planning Commission, 1916.

Laborers sent to the city's almshouse because they could not at the prevailing rate of wages for unskilled labor (\$12 a week) afford to rent a home, a situation declared not to be unique, is the compelling reason Mr. Nolen gives to the citizens of Bridgeport, Connecticut, for real planning by and for the city of the future. The city at present with a population of 150,000 (an increase of fifty per cent. in twenty war months) expects soon to have a population of 250,000. The main survey, "Better City Planning for Bridgeport" (1916), should be read in connection with the preliminary report made in January of 1915.

The report is interesting in content and both aptly and amply illustrated. Mr. Nolen in planning his main thoroughfares, works them out along the lines of the following principles: (1) That all main lines must be planned by some central city authority; (2) that arterial streets and roads must be adequate not only for present, but also for future needs of inter-communication; (3) that efficiency now requires separate lines and tracks for the three vehicles of three distinct speeds; (4) that minor roads should be gathered up into secondary streets and brought into main thoroughfares only at fairly long intervals, in order to decrease danger and delay; (5) that at these junctions ample space for traffic should be provided; (6) that these main thoroughfares should include a view not only of industrial and residential districts, but also of areas for recreation; (7) that a system of varying street widths is more efficient and more economical and more stable; (8) that in new suburban areas adequate widths on the main roads should be provided. In other words, the city planning of the present day plans not so much for beauty, though not neglectful of beauty, as for utility. Zones are provided for business and industrial districts, for parks and open spaces, for first and for second residential districts and for tenement districts. All are properly located with a view to traffic, access to industrial plants, prevailing wants, transportation facilities and needs, *etc.* The legal means to be adopted for carrying out the plans are also included as are the plans for financing the

necessary changes. The happy departure is that the Planning Commission, which employed Mr. Nolen, puts in the footnotes their agreement or disagreement with his main recommendations, thus in effect making Mr. Nolen's personal report in a true sense the report of the Commission.

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ABRAHAM LINCOLN, THE LAWYER-STATESMAN. By John T. Richard. Pp. vii, 260. New York: Houghton Mifflin Co., 1916.

To those who are accustomed to look upon the Great Emancipator as a great lawyer and a great statesman, this book, while interesting and instructive, performs no great service; to the many who have been led to doubt his ability as a lawyer and his high standing in the legal profession, this book will prove little short of a revelation. It is written with one purpose in view, to disprove the statements so often made that Abraham Lincoln was but a mediocre lawyer and to demonstrate that on the contrary he was possessed of all the mental and moral attributes that go to make a distinguished lawyer and that he met with that success in practice which is only acquired by the foremost members of the bar. The author, himself a lawyer, held a brief when he wrote, and it is safe to say that he has proved his case beyond a doubt.

Logically, the book begins with Lincoln's legal training. Next follows a complete account of his actual practice in the courts of Illinois, both *nisi prius* and appellate, and in the Supreme Court of the United States, as far as such a record can be completed from the sources that are now available. Mr. Richards proves from the cases themselves and from the contemporary and subsequent tributes of others, that Mr. Lincoln possessed all the technical skill, the searching analysis, the frankness and the candor which, coupled with his unusual ability to state principles with the utmost clearness and simplicity, stamped him a real leader of the profession. This is supported by a demonstration of the logical and lawyer-like attitude which Lincoln, the president, took toward all constitutional questions that confronted him in that high office. There is also a chapter in which Mr. Richards defends and explains Lincoln's attitude toward the Dred Scott decision, which position has been called by some a criticism of the judiciary. The book ends with a tribute to the man as an orator.

Probably that which is of most practical value in the work is a complete list and digest of every case in which Lincoln appeared in the appellate court of Illinois and in the Supreme Court. Another important contribution is the information the author gives in regard to the precise time of Lincoln's admission to the bar. The entire work represents a great amount of research and investigation, and helps to throw new light upon the greatest figure in our American history.

L. B. S.

THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland. Twelfth Edition. Pp. xxv, 454. New York: Oxford University Press, 1917.

Professor Holland's text-book on Jurisprudence is so well known; its reputation so thoroughly established that an extended review of the twelfth edition just issued from the Oxford University Press seems hardly necessary. The learned author states, however, that this text may be regarded as final, and as a consequence there is evidence of careful thought in producing a text which, in so far as it presents the author's views, may be regarded as word perfect. In the notes and occasionally in the text will be found changes suggested by the recent literature on jurisprudence and some material suggested by the great war now in progress. Legal methodology has a very slight appeal to the English and American Bar, hence it is somewhat to be regretted that the foremost systematic writer in our language should occasionally reduce his discussion to a degree of abstractness that has been complained of as dry. However, in no other form is there presented a comparative view of civil and common law, so compact and clear. Hence, to the student who is completing his studies and wishes to round them out, with a view of the law as a whole, this work will be most valuable, as it has, in fact, proved itself in the past.

*W. H. L.*

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CASES ON LEGAL ETHICS. By George P. Costigan, Jr., Professor of Law in the Northwestern University. American Case-Book Series. West Publishing Co., 1917.

This case-book marks an epoch in the study of Legal Ethics. For the past ten or fifteen years, Bar Associations generally have been urging more methodical study of this important subject. In the last two or three years, tentative courses on the subject have been given, among other institutions, in the University of Pennsylvania Law School. Now for the first time, a case-book has been published in which some of the authorities have been conveniently collected for the use of both students and instructors in this subject. The author has made excellent use of the material including, in addition to numerous cases, on the one hand, the canons of the American Bar Association and the questions addressed to the New York Committee with their answers, and on the other hand including a number of references to authorities not in the form of judicial decisions. The general arrangement of the subject is that which is familiar to students of the subject; it has always seemed to the Reviewer that it would have assisted in clearness, had the canons of the American Bar Association been arranged in some more logical and helpful order.

An interesting item is the list of fifty resolutions written by David Hoffman, of the Baltimore Bar, in which many problems of Legal Ethics are stated in very concrete and useful form, though some, perhaps, would not be universally accepted at the present day. The canons of the American Bar Association are grouped together in an Appendix with a few annotations, which may render them more helpful. The Reviewer believes that the study of this subject is one which is going to claim more and more attention in the various Law Schools in the future.

*R. D. B.*

CASES ON CIVIL PROCEDURE. Selected and annotated by William H. Loyd, Professor of Law in the University of Pennsylvania. The Bobbs-Merrill Company, Indianapolis, 1917. Pp. 949.

This is not a case book on pleading or on practice. It covers the general field in which they are both included, presenting cases on what may be called the substantive part of adjective law. Mr. Loyd has selected for especial treatment the topics of Courts, Parties, Actions, Trial, Judgment, Execution, and Appeal and Error; he excludes Pleading as being amply treated in other collections on the common law and code varieties, between which an instructor must choose, and, after commencement of actions, except for a few cases on statement of claim, he leaps directly to the subject of trial and the subsequent steps in an action. This leaves him free to devote more space and detail to the later stages of a contentious proceeding, to which the minds of students have hitherto been insufficiently directed, and enables him to present a compilation whose range, in one volume, is probably unique.

For the cases on post-trial procedure the book ought to be of service to practitioners as well as students; the volume of decisions the courts are rendering on those points is the best proof that it is a subject of which the essentials are not clearly perceived by the average lawyer.

But after all a case book is for students, and their needs should be the guiding principle in selection. Mr. Loyd has consistently kept that thought before him. There is a merciful minimum of black letter law, for however valuable and romantic are those landmarks of jurisprudence in the year-books, they occasion students at the school age little more than mystification and conjectural distress; the compiler is to be thanked for not yielding to the attractive temptation before every solid historian of civil procedure to make much of his knowledge of early beginnings. In place of these cases Mr. Loyd furnishes an ample substitute in printing many in which "the essay that goes with the decision" (to quote the familiar phrase of Dean Lewis) lucidly reviews the history and authorities of the subject. But he has also inserted a sufficient number of cases themselves raising points of difficulty to accomplish both objects of a case book—instruction for the lawyer's equipment, and exercise for his proficiency.

Another concession to law school students for which Mr. Loyd will be devoutly thanked is the frequent and consistent reference in the footnotes at the commencement of each topic to all the standard text books of real value, with enumeration of chapter and section in point. This will be a great assistance, especially to first-year men, who are usually plunged into a morass of cases on civil procedure without knowledge of either legal principles or legal lingo to which to cling. The case system at best leaves on a student's mind a picture of any field of law exceedingly patchy and impressionistic; it must be recognized even by its most passionate admirers that case-law needs some corrective. Perhaps Mr. Loyd's method will furnish it without unduly offending the irreconcilables, some of whom profess to look upon all text-books with suspicion, if not with contempt, and, at least in class, affect complete ignorance of their existence. Besides referring to text-books Mr. Loyd makes frequent reference to the wealth of monographs contained in law review publications.

The footnotes also offer frequent quotations from American codes such as those of New York and California, and citations to still others, to illustrate the manner in which statutes have met the obstacles presented by the common law. These are valuable, too, for stirring up in the minds of future practitioners the thought that other jurisdictions than their own may well be regarded with profit for the improvement of deficiencies that arise in the local practice machinery. Especially helpful in this regard are Mr. Loyd's careful and accurate references all through the book to details of English practice—a system which is more and more being recognized as the model that all American states must follow as inevitably as they did the New York code of 1848. He cites many rules by number, quotes fully from others, and always supplies decisions of the English court in exegesis. A careful reading of these references by one familiar with the English rules reveals the fact that they are always reliable and apt, and show a thorough comprehension of the method of the English practice. A few English citations might usefully be added, such as to the practice of making declaratory orders (page 33), a partnership suing and being sued under the firm name (page 40), the functions of the official referee (page 338), third party procedure (page 613), etc.

How refreshing an influence the study of the English rules can be is well illustrated by two cases in the book, on the subject of prejudicial error. In the first, *Bindbeutel v. St. Ry. Co.* (page 890), a Missouri appellate court tortures both language and logic into the conclusion that error in a record must be presumed to be prejudicial, and the footnotes give an appalling array of state courts in accord; in the second, a federal judge in *Press Pub. Co. v. Monteith* (page 893), refers to the English rule that: "A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial," and he declares it to be "the more rational and enlightened view" that prejudice must be shown to be substantial, not merely presumed.

There is a useful short appendix of forms ancient and modern.

*Samuel Rosenbaum.*