

BOOK REVIEWS

CASES ON THE LAW OF PROPERTY. Volume II. Introduction to the Law of Real Property. Rights in Land. By Harry A. Bigelow. American Case book Series. St. Paul, West Publishing Co., 1919. Pp. 88-741.

With the publication of Professor Bigelow's Cases on Rights in Land the five-volume set of Property Case Books in the American Case book Series is complete. Gray's Cases on Property, the classical work on this subject first published about thirty years ago, will be superseded by these newer works embodying the teaching experience of the intervening years and making the newer cases available for classroom instruction. In a prefatory note to the cases, Professor Bigelow sets forth his reasons for his division of the subject matter and the arrangement. Even though the teacher of the subject may differ with the author whose suggestions are offered without dogmatism, he will concede the value of this collection of cases without hesitation.

The author has made a concession to the judgment of those who maintain that the case system in its pristine purity fails of its purpose in that it gives what one critic has called an atomistic view of the law. Professor Bigelow has deemed it desirable to preface his collection of cases with a brief treatise, which he entitles An Introduction to the Law of Real Property, covering a history of the feudal system, a review of the various estates and non-possessory interests in land and chapters on joint ownership, disseisin and its remedies, and uses and trusts. The law of real property lends itself particularly to this method of treatment and it is well that the beginning should have been made by a teacher of the case system in presenting in connection with the cases a concise and summary view of the law covered by them. This general survey of the field will enable the student to appreciate more readily the relation of the case problems to each other and to the whole field. A similar prefatory statement or introduction to the field of the law covered in every case book would be highly desirable. Professor Redlich, in his report to the Carnegie Institution, made it clear that although the case system of instruction is most excellent and desirable, it should be accompanied by readings which shall give the student a survey and a systematic view of the whole field. The trend of legal instruction seems to proclaim the correctness of that opinion and the curricula of ten years hence will most probably show that we are now in a period of transition to the newer method of legal instruction.

David Werner Amram.

THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN, by Floyd Barzilia Clark, Ph.D., Assistant Professor of Political Science in Pennsylvania State College. The Johns Hopkins Press, Baltimore, 1915. Pp. 208.

The title of this volume suggests that it contains a study of the opinions of Mr. Justice Harlan, bearing upon questions of Constitutional Law, but the text is almost entirely confined to a consideration of his dissents, of which—everyone knows—there are many. Apparently, this is the purpose of Professor

Clark, since the preface discloses an intention to study "the constitutional doctrines of a single great judge as found in his dissenting opinions." Just why he has so limited his study is not explained, and is not easy to discover. The dissenting opinions of a judge seldom present a fruitful source of legal doctrine, and the reviewer, after a very careful and interested reading of this volume, finds it difficult to believe that the dissenting opinions of Mr. Justice Harlan present an exception in this regard.

He is somewhat at a loss, therefore, to discover the real purpose supposed to be subserved by the volume. This may proceed from a lack of sympathy with the "doctrines" of this jurist, and from a lack of admiration for his judicial style. It is not easy to find in mere dissent the elements of greatness. Opinions presenting constructive ideas which, having become imbedded in the body of the law, prove the fertile source of later development, mark the strong judge.

The suggestion that Mr. Justice Harlan's dissent in *Leisy v. Hardin* anticipates the later development of the law overlooks the fact that the principle of *Leisy v. Hardin*, as a general principle, remains a vital doctrine of constitutional law, and is only overruled with respect to the liquor traffic because of the legislation and constitutional amendment applicable to this specific branch of commerce. When it is noted that his dissenting opinions in the Civil Rights Cases and in *Hurtado v. California* are held up for admiration, the point of view of Professor Clark is fully disclosed. To those who are persuaded that the doctrines of the Supreme Court in these cases are the only doctrines which are consistent with the provisions of the Constitution, as well as with the best interests of the country, these dissents alone would deny any claim on behalf of Mr. Justice Harlan to a high place among the justices of the Supreme Court.

The volume opens with an introduction, and then classifies the various dissenting opinions in eight chapters, incorporating in these chapters the comments of the author, which, it need hardly be said, concur with almost unvarying uniformity in the opinions discussed.

Henry Wolf Bikle.

For an article presenting a different point of view on the dissenting opinions of Justice Harlan see 51 *Am. Law Rev.* 481.—Ed.

ON JURISPRUDENCE AND THE CONFLICT OF LAWS. By Frederic Harrison. With Annotations by A. F. H. Lefroy. Oxford, at the Clarendon Press, 1919. Pp. 6-179.

In his eighty-eighth year, Mr. Frederic Harrison republishes the five lectures contained in this volume, originally delivered and published in 1878 and 1879. The first lecture, entitled *Austin and Maine on Sovereignty*, sets forth with extraordinary clearness the real meaning and purport of the concept of sovereignty as set forth by these two masters. The second lecture is devoted to a brilliant presentation of Austin's analysis of law. Contrasted with Austin's definition of law as "a command directly or indirectly imposed by the supreme authority on political inferiors commanding an act or a forbearance," we have Mr. Harrison's definition "law is a general rule respecting the property, person, reputation or capacity of the citizens of a State which the sovereign power therein

will cause to be observed by the authority it delegates to its tribunals." In his third lecture he emphasizes the value of the historical method which was first clearly presented in England in the epoch-making works of Sir Henry Sumner Maine. This leads the author to the conclusion that scientific jurisprudence is no longer an intellectual luxury but a practical necessity for the English lawyer and that the insularity of English law is a thing of the past. This logically leads to a consideration of the subject matter of the fourth and fifth lectures, namely the conflict of laws. This is one of the early and most brilliant presentations of a topic which has now become one of the recognized subjects of study in our best law school curricula, has engaged the thought of several of the Hague Conferences, and has led to the consideration of the international assimilation of law, at least within the fields of commercial law and the law of patents, trademarks, copyrights and international transportation. The student, both of history and philosophy of law, rises from a reading of the brilliant lectures of this venerable master with the feeling that he has come into contact with an intellect which has been able to correlate the often petty and apparently insignificant legal rules and practices of everyday life with a great and as yet partially unknown system that society in the process of its evolution has created for its own government.

David Werner Amram.

CASES ON NEGOTIABLE INSTRUMENTS SUPPLEMENTARY TO AMES'S CASES ON BILLS AND NOTES. By Zechariah Chafee, Jr. Langdell Hall, Cambridge. Published by the editor, 1919. Pp. 1-106.

This is a collection of twenty-nine modern cases intended to supplement the well-known collection of Professor Ames and made desirable by the course of judicial decision under the Negotiable Instruments Law. Teachers of the subject who use Ames' cases will welcome this little additional collection, the value of which is increased by frequent references to articles in legal periodicals. Professor Chafee in his prefatory note indicates that a new case book will be published by himself and Professor Brannan. This will, of course, become the Harvard case book to take the place of the classical collection of Ames.

THE RELATION OF CUSTOM TO LAW, by Gilbert T. Sadler, London, 1919. Pp. 86.

"Customs by repetition, or by declarations of popular authorities, often acquire certain marks (such as ancient, reasonable, certain, continuous, undisputed). When the Society in which such customs exist becomes a *State*, with a central coercive authority, such customs as have certain marks *become at once law*, because they *will be* recognized as law, should occasion require. They will *need* to be so recognized (or ratified) because the people hold them as sacred or necessary to their lives, and for a judge to refuse recognition would endanger the peace. The marks which change customs to law in a State vary in regard to general customs, particular local customs, customs of merchants over the world, and international customs: but in each case the marks are such as make it *practically binding* on the judge to recognize any custom when a case arises

involving the said custom. Customs in a primitive society without any central coercive authority are not laws, but customs in a State which, because of certain marks, will be recognized by a judge, are not only customs, but are also laws already." Pp. 85-86.

"Custom is, in the *broad* sense, all the social rules which are observed by the bulk of the members of a society—be it a clan or a nation—as well as the rules which pertain to a locality or a trade." P. 2.

"Instincts, interpreted by reason, may be . . . said to have created custom," p. 11.

At the same time the popular arbitrator, in interpreting the custom, slightly alters it, and so makes a new custom, p. 27.

In these few propositions we have the entire doctrine of the book. The rest of the book is mainly taken up with illustrations of customs taken from various times and countries, and an account of the recognition of some of them as laws by the State by reason of their having certain marks.

The only thing new in this book in the opinion of the present writer is the collection of examples. Otherwise the attentive reader might father the same information as to the essence of custom and its relation to law from a book like Holland's *Jurisprudence*. The latter discusses the formation of custom and its transformation into law on pp. 56-63 of the twelfth edition of this book, and one sees no advance in Holland in the book before us. We are told then (57) that without doubt custom originated generally in the conscious choice of the more convenient of two acts, though sometimes in the accidental adoption of one of two indifferent alternatives. In some cases there was no doubt "some ground of expediency of religious scruple, or of accidental suggestion" which suggested the custom taking one direction rather than another. This is quite as illuminating an account of the origin of custom as our author's "instincts interpreted by reason." And one does not see how any one can say much more about the origin of a thing so vague and yet so obvious as custom.

That custom is law even before it is recognized by the State expressly as such is also clearly stated by Holland, p. 61: "The rule that a court shall give binding force to certain kinds of custom is as well established as hundreds of other rules of law. . . ." Holland disagrees with Austin, who dates the State recognition of a custom (and hence its transformation into a law) from the time when the usage has been recognized in a court of justice. Holland's own view is that the court appeals to the custom "as to any other pre-existent law." The custom is therefore a law as soon as it can exhibit certain marks, and then it becomes a law by virtue of the rule of law that such customs shall be recognized by the State. Hence the State recognizes them potentially or by implication even before it takes actual notice of their existence. It will be seen from this brief description of the little book before us that it confines itself strictly to custom as above defined, and has no bearing on the topics, both intensely interesting and intensely complicated, that is treated in Dicey's "Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century."

Isaac Husik.

A SOCIETY OF STATES, by W. T. S. Stallybrass, M. A. E. P. Dutton & Co., 1919. Pp. XVI, 243. Price \$2.00.

The problem of the effect of a world-federation of states upon the sovereignty, independence and equality of the member nations is one which has demanded consideration of all writers on a League of Nations. This book is a thoughtful and clear development of the question, in which the author demonstrates that those ideas have no longer the absolute sense which was once given them, and that the encroachments upon the individualistic rights of member states under a League of Nations would be no more than another step along the line of development of the past century.

The book was written before the end of the war and before the present plan of the League of Nations was drafted, so that the consideration is of the general question of a World Federation rather than an argument on the League of Nations of the Peace Conference.

The author is a Fellow and Vice Principal of Brasenose College, Oxford, Several University of Pennsylvania Law students who were members of the Soldier-Student Detachment at Oxford University last spring had the privilege of attending a course of legal lectures given by him, and incidentally of meeting him on the athletic field as well, as he is a former "Varsity cricketer, and now a graduate official of the Oxford University Cricket Association.

R. D.