

BOOK REVIEWS

COLLECTED LEGAL PAPERS. By Oliver Wendell Holmes. Harcourt, Brace & Howe, 1920, pp. 316.

The author of this book is so well known that the mere mention of his name is an all-sufficient reminder of his untiring and varied services as editor, author, teacher, historian, jurist and judge. The manner and generosity of his performances, in discharging the debt to the profession which both Coke and Bacon laid upon each of its members, have been such as to make him our general creditor for his assumption of our debts. The character and value of his edition of Kent's Commentaries will become all the more apparent when the Centenary of Kent's labors is celebrated a few years hence by the American Bar Association. His monumental book "The Common Law" stands and will stand for all time as one of the lighthouses of Jurisprudence. His contributions to the Harvard Law Review shine as particular stars in the constellated mass. His lectures to law students are among the most precious memories of his pupils. His historic expeditions into our *terra incognita*, like Stanley's Dark Continent, have been the despair as well as the incentive of many lesser explorers. The breadth of his juristic knowledge has sustained many of his most important judicial utterances. The sparkle of his style has revealed the beauties as well as the depth of many hidden caves of learning.

This collection consists of papers or parts of papers hitherto widely dispersed, in which views of law and life have not been elsewhere so fully expressed by the author. In the preface he modestly refers to them as "little fragments of my fleece that I have left upon the hedges of life." Examination proves that the fleece was golden, and the regions in which the fragments were found indicate the enterprise and daring of our Jason.

The papers are twenty-eight in number, arranged in the order of their date, which disturbs their continuity of subject or of treatment. Their full force and effect, however, can be gathered by a rearrangement and classification under three main heads—*Legal Essays*, under the topics of Early English Equity; Agency, in two parts; Privilege, Malice and Intent, and Executors; *Addresses to Law Students*, under the headings of The Law, The Profession of the Law, The Use of Law Schools, The Bar as a Profession, The Path of the Law, Legal Interpretation, Law in Science and Science in Law, Address at Northwestern University Law School, and Law and the Court; *Miscellaneous or Occasional Utterances*, in which estimates are given of the characters and works of Montesquieu, Professor Maitland, W. S. Holdsworth, the Historian of English Law, John Marshall, and Bracton, interspersed with Economic Elements, Ideals and Doubts, and an Introduction to Continental Legal Historical Series.

The paper on Early English Equity is devoted to a demonstration of the part which Equity has played in the development of English law. Agreeing with Mr. Adams that the most important contribution of the Chancery has been its procedure, which was confessedly that of the Canon law, the author controverts the error that its substantive law is merely the product of the procedure. With this object in view he proceeds to a discussion of *Uses*, which he considers the greatest contribution to the substantive law which has ever been credited to Chancery. He contends that the feoffee to uses of early English

law corresponds point by point to the *salman* or executor of the early German law as described by Beseler fifty years ago, and step by step, following the development of the office and obligations of an executor to observe the will of a testator, and the absence of appropriate remedies at common law by which a *cestui que use* could enforce his rights, he reaches the conclusion that the doctrine of uses rested on the *fides*, or trust reposed and the obligation of good faith, and that circumstance remains as a mark of Teutonic origin as well as of the ecclesiastical origin of the jurisdiction. This is of importance because it shows a source of jurisdiction antedating the influx of the civil law into England, and connecting the common notion of lawyers that the law of trusts sprang entirely from the law of Rome. The doctrine of uses was not the reaction of the remedy by subpoena, although the form of remedy reacted powerfully upon the conception of the right. Then, through the identification of substantive and remedial rights, a use came to be regarded as a right to a subpoena, losing the character of a *jus in rem*, and passing into the category of choses in action. Under the head of Contract, he disputes the common notion that the Common Law borrowed the doctrine of consideration from the Chancery. The Chancery, having become a separate Court, asserted a power of which it had been shorn as an ecclesiastical tribunal by giving a remedy for contracts for which the common law courts of the King afforded none, thus retaining some relics of ancient custom which had been dropped by the Common Law, but had been kept alive by the Church.

In the two papers upon *Agency*, the thesis is that the present law of agency has been caused by the survival of ancient doctrines of the rights and liabilities of heads of families based on substantive grounds which have long since disappeared, but that in modern days these doctrines have been generalized into a fiction, which, while largely formal, has reacted on the law, the fiction being that within the scope of the agency, principal and agent are one. In a narrower sense, the law of agency presents but a special application of the law of master and servant, but in the early law of England, in every branch of the subject—tort, contract, possession, ratification—the fiction survived. As time went on the liability of the principal or master was not confined to family relations, but was worked out in terms of master and servant on analogies suggested by the earlier relationship.

In the second part of the paper, the history of agency as applied to contract is elaborately traced. The value of the paper consists not so largely in the conclusions reached, which the author candidly admits may be disputable, but in the demonstration that the study of legal history is the surest means of reaching an understanding of the present doctrines of the law, disclosing their origin, and in part explaining their anomalies.

In the paper on *Privilege, Malice and Intent*, the broad field of Torts is entered, illustrated by questions of policy, economic interferences, combinations as to rates, boycotts, and the like, considered from the broad viewpoint of temporal damage, whether foreseen or actually intended, or negligently disregarded as to consequences.

In the paper on *Executors*, the present fiduciary character of the office is traced through various stages of development into the modern doctrine, and the gradual displacement of heirs from their primary responsibility for the debts of the deceased is shown. The paper should be read in connection with the one on *Early English Equity*.

In the Addresses to Law Students there is a splendid uplift in the book. The effect of a continuous reading of them, is not so much a settlement of disputed questions, or the provocation of discussion, as to breathe into the reader the catching enthusiasm of the author in urging upon students the pursuit of "the anatomy of legal ideas as marked out by the English school of jurisprudence," and "the embryology of the same conceptions" to be found in the works of German students of the subject. "Happiness * * * cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable purpose, a hint of the universal law."

The remaining papers, biographical, analytical, historical, philosophic are permeated by the same spirit. The law, its universality, its sublimity, its infinity—these are themes dwelt on with enthusiasm and faith. The law—"it is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and to the men of his generation—and for this above all we celebrate him and them—its red is our life blood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives."

The great names in the law—*Montesquieu*, "one of the high priests of thought," "a precursor of political economy," "the precursor of Beccaria in the criminal law;" "the precursor of Burke when Burke seems a hundred years ahead of his time," the man whose book had "a dazzling success at the moment, and since then probably has done as much to remodel the world as any product of the eighteenth century;" *Bracton*, the mightiest name in English law prior to Coke, whose monumental work is now in the editorial hands of Professor Woodbine of Yale, generously backed and splendidly equipped for the task; *Mailland*, the incomparable scholar and writer, whom "one is almost ashamed to praise (as) a dead master for what he did in a field where he was acknowledged to be supreme;" *Holdsworth*, whose history of English Law is to be recommended equally "To philosophers who can understand it and to practical students of the law;" and *John Marshall*, "a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*," whose success "marks the fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code;" these names serve to supply the opportunities to the author of sketching in striking outlines certain crises in legal development, and of presenting expressive portraits of the main actors in legal work, whose relationship to practical affairs is too little known, and so often neglected.

Let not the busy lawyer, immersed in the affairs of the court room and the office, cast this book aside with the remark that it differs so much from a volume of reports that he cannot cite it as authority upon the point of a case. It will open his eyes, if he have insight, to the true relationship of many ideas with which he has had but a speaking acquaintance, but which he never suspected to be of

the same lineage. Let not the student imagine it to be so recondite as to discourage the perseverance requisite for its mastery.

To both practical lawyer and student it will be found to possess value, for, above all else, its unquenchable spirit will inspire and refresh all real lovers of the law.

Hampton L. Carson.

THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS. Report and Commentary by James Brown Scott. Published by the Carnegie Endowment for International Peace, Washington, 1920, pp. 235.

This little book takes the form of a letter to the Carnegie Endowment for International Peace by James Brown Scott, Secretary and Director of the Division of International Law, describing the personnel, proceedings and conclusions of the advisory committee of jurists invited by the Council of the League of Nations to prepare a plan for a permanent Court of International Justice.

After an account of the members and the proceedings, we have the text of the project finally adopted, with comments; the resolutions of the committee; the French and English texts of the project and resolutions; the Covenant of the League of Nations, and, in the appendix, the text of various recent projects for a court of international justice. The student has thus, in easily accessible form, the materials necessary for a study of the subject.

The work which Mr. Scott here has undertaken requires no originality or display of literary workmanship, and calls for no criticism except perhaps the remark that some of the comments on the text seem somewhat unnecessary. The chief interest lies in the work of the committee. These learned men met at the Hague during the months of June and July of 1920, and too much cannot be said in praise of their self-denying efforts in the cause of international peace, and, if the work they have done fails, it will fail not because of any omission on their part but because of circumstances over which they had no control, and which circumstances are, in brief, the present undeveloped state of the society composed of the independent states of the world, a society which has as yet developed no political power nor any means of exercising such power even if it were in existence. An effective court of justice is necessarily based on the presence of sufficient political power to enforce its decrees. It appears that one of the principal points of difficulty was whether the jurisdiction of the court should be compulsory and that the compulsory features of the plan adopted were discarded by the Assembly of the League of Nations in subsequent session at Geneva. It is clear, however, that a compulsory provision for compulsory jurisdiction will be fruitless in the absence of any power to enforce it, and that discussion over whether such a provision shall be inserted is, after all, purely academic except in so far as such a provision may be in the nature of a seed from which a compulsory jurisdiction may come into being in the future.

The other principal difficulty lies in the manner of appointing the judges. In this respect the committee did the best they could under the present circumstances. The ideal court will undoubtedly consist of judges appointed for life and giving their entire time to the business of the court. The appointing power

must be independent and reside in the political power which is back of the court, and thus we are brought again to what may be said to be the *pons asinorum* of the entire project.

The Carnegie Endowment has rendered a distinctive service in printing in so accessible a form these original materials for the student of international law.

Roland R. Foulke.

FREEDOM OF SPEECH. By Zechariah Chafee Jr., Professor of Law, Harvard University. Harcourt, Brace and Howe, 1920, pp. 431.

When the hosts of Cambyses invaded Egypt, it is recorded that the Egyptian soldiers refused to fight and were slain unresisting, because each invader bore before him a cat bound to his arm as a shield. This superstitious fear, in the light of modern reason, appears grotesque; but neither the Declaration of Independence nor the Constitution of the United States changed human nature. Strong men are swept down, and the most cherished hopes of a christian world yield under stress and strain of hysteria.

When the mobs of Paris, wild with their new liberty and drunk with power, challenged the established institutions of the world, 300,000 Jacobins dominated the 26,000,000 people of France. Driven by fear of losing their liberty they destroyed the monarchy, established the worship of the Goddess of Reason, attempted to reduce the population to 5,000,000, and did massacre 3,000,000 persons before their madness was checked.

A small minority of the people of Russia organized as demagogic despots, are repeating on a larger scale the horrors of the French Revolution. Little wonder that mankind is apprehensive. During four and a half years the fiery concentrated energy of the human race has been applied to the principle of self-preservation; whatever a strong and preponderant public opinion regarded as inimical to the public welfare was treated as within the scope of the police power to restrain, and constitutional limitations were impotent to furnish protection.

Matthew Arnold proposed in the interest of honest thinking that we cease to employ those expressions which have been spoiled by long and continued misconception and misuse. Among such battered terms he designated the word Liberty.

The misconception and consequent bewilderment of the unthinking is due to the apprehension of liberty as an abstract, and not a relative quantity. Having absorbed Jefferson's declaration "that each human being with the endowment of life from the hand of God starts with the inalienable rights of life, liberty and the pursuit of happiness," some minds are unable to discriminate between the absolute civil and political liberty of a man on an uninhabited island, and his relative rights and duties as an individual dwelling in a society restricted by law, where the citizen must consider not himself alone, but the entire body politic of which he is but one, and submit to such restraints as the sovereign of which he is a part, imposes.

Herodotus, describing the freemen of Greece, said—"though free they are not absolutely free for they have a master over them, the law."

The war has brought into prominence the fact that the aberrations of undisciplined minds regard the constitutional power which lawfully conscripted millions of men to fight upon the battlefields of Europe, as impotent to stop the treasonable mouthings of a soap-box orator.

Professor Chafee's book "Freedom of Speech" in a wise, sane, dignified, impartial, lucid and admirable way, has set down the rights and limitations of the individual in relation to freedom of speech. He removes in the very beginning of his volume a prevalent belief that the constitution assures an unrestricted right to pronounce upon all occasions, restrained only by the penalties attached to slander. The reader is informed that there is no provision in the constitution relating to the subject other than the security afforded members of Congress, and that in the First Amendment the prohibition is found which forbids Congress to make any law "abridging the freedom of speech;" but neither the constitution nor the amendments enlarge, restrict or in any manner other than as there expressed, impair or amplify the right of the citizen to freedom of speech.

The book defines this right in clear terms, and traces its historical development.

The right of self-defense is at all times inherent in every nation. There are times when half baked social and economic philosophies which ignore alike fundamental traits of human nature and vital principles of human liberty are as harmless as a child's prattle; at other times the state of intelligence may be such that the populace will be thrown into a flame. The author indicates in clear terms the distinction between license and liberty, mania and reason, and shows with what facility debauchery may be cloaked in the name of freedom. He makes it plain that when from necessity a crime must be designated in generic terms, the exercise of intuition, common sense, and calm judgment, free from hysteria, is demanded not alone from the people, but in the tribunals before whom the accused are brought for trial.

The distinction between the right to discuss and urge the repeal or modification of laws and changes in government, and advocating resistance to the law, and advising the overthrow by violence of the government, is made apparent.

How much depends upon a proper sense of proportion is shown by a wealth of citation of cases tried in the courts, recording the treatment of those who would make chaos and call it progress, of the "conscientious objector" who prefers that his liberty be secured by the efforts of better men than himself, of those casual persons too proud to fight who detached themselves from the great tragedy, of the alien enemy, and sympathizers with the remorseless Hun. Time, place and circumstance, it is shown, are elements which enter largely into the right to speak freely.

A man with educational advantages to indicate the impropriety of his conduct, attempted to deliver, unbidden, a diatribe against capital, and interrupted a Sunday service in a fashionable New York church. His removal to a prison cell for disturbing religious worship called forth an attack upon what he regarded as an unlawful restraint of free speech; an address that could have been delivered with impunity at a proper time in an appropriate place was here improper.

One prompted by a commendable desire to lighten the gloom of a funeral gathering, taking advantage of the silence of those seated around the casket

of the departed, who should contribute to the occasion a comic song, or "funny story," would find no constitutional guarantee to prevent his ejection.

During the war there was an upheaval of the whole national life, a tribute demanded of thousands of precious lives, and a ceaseless and pitiless drain upon our potential vitality. The nation suffered from "nerves;" and there was neither sympathy nor forbearance for those who by word or deed rendered aid or comfort to the foe.

"Freedom of Speech" contains a magazine of information. Professor Chafee has made a book of great value and absorbing interest not alone for the layman, but to the lawyer and judge. He has fortified his text by an excellent bibliographic appendix, an index of reported cases under the Espionage Acts, and a digest of state statutes appertaining to freedom of speech, together with a complete index to the entire volume.

The book is a fine piece of work, well executed, and sheds a brilliant light where illumination is greatly needed.

J. Willis Martin, LL.D.

President Judge, Court of Common Pleas No. 5, First Judicial District of Pennsylvania.

CASES ON SURETYSHIP. By Clinton DeWitt. Bobbs-Merrill Co., Indianapolis, 1920, pp. 726.

The editing of a case-book is much more difficult than would appear to those who have not tried to select from the great mass of more or less inconsistent decisions of the courts a representative group sufficient in scope to give the student a fair view of the subject. Should the historical side be emphasized? Or should the main object be to develop those controversial subjects which lead to classroom discussion and, as the saying is, teach the student to think? In suretyship, the case-books of Professors Ames and Henning have covered the historical side very fully and Professor DeWitt in presenting a new collection of cases has frankly made it his object to present the modern side of the problems connected with this most important subject, particularly those connected with the corporate surety, and those large enterprises with which the modern practice of requiring bonds is specially associated. Much law has been made in the last few years in this field and more is in the making. Hence this selection will be found both interesting and practical. If any fault is to be found with the book at all, it may be suggested that in places too many cumulative cases on the same point are given, and more cases might have been given on the equities of the surety, particularly on equitable exoneration. But on the whole, it is a very admirable piece of work, particularly in that part given to the surety's defenses, where will be found most of the problems that arise in connection with the practical working of bonding contracts.

William Henry Lloyd.

OUTLINES OF HISTORICAL JURISPRUDENCE. (Volume I—Introduction; Tribal Law). By Sir Paul Vinogradoff. Oxford University Press, New York City, 1920, pp. ix, 428, and The Clarendon Press, Oxford, 1920.

As the title indicates, the work before us is a treatise, (the first volume of one, to be precise), not on analytical or philosophical jurisprudence, but on the

historical development of legal institutions. It is perforce comparative at the same time, though primarily restricted, it would seem, to Aryan institutions. Accordingly the treatment of the subject proper begins on page 163 under the heading of "Tribal Law." Here are discussed the origins of the modern monogamic family and of the institution of marriage. Professor Vinogradoff brings to bear upon the subject the results of a very wide reading and shows a healthy reluctance to undue simplification at the expense of the evidence. He will not adopt either the theory of original promiscuity or that of the single pair, properly observing that it is not likely that one key will open the safe containing the secret of the pre-historical development of the race. Making diligent use, however, of the evidence coming from a great variety of sources, Prof. Vinogradoff does discover traces of loose unions among primitive peoples, group marriages, matrilinear arrangements, patrilinear and patriarchal schemes, and he endeavors to explain each and the transformation of one into the other by reference to physical and economic conditions.

Having devoted three chapters to the discussion of this subject in general, Professor Vinogradoff, in Chapter IV of this part of the work, passes to a consideration of the Aryan peoples in particular and comes to the conclusion on a somewhat insufficient basis, it seems to the present writer, that the Aryans at about the time of their dispersion, had a patriarchal form of society, and hence all traces of matrilinear arrangements to be found later in the various countries of their migrations must be charged or credited to the pre-Aryan population which the Aryan conquerors absorbed.

Marital unions are the basis and starting point of the community and ultimately of society and the State. Prof. Vinogradoff lays stress on this fact and describes the ancient forms of communalism as made necessary by the helplessness of the isolated individual economically as well as physically. He shows how families combined to form the kindred, how they expanded along agnatic lines to form the clan or gens, and how the combination of clans gave rise to the phratries, which in turn federated for purposes of defense to form the tribe. In connection with the discussion of this development, Prof. Vinogradoff investigates the legal arrangements and institutions which existed during the various stages of social development, such as succession and inheritance, primogeniture and ultimogeniture, rights of women, testation, the blood-feud and the manner of redress by composition, land tenure, the legal process or procedure and so forth. It would be out of place in a brief notice such as this to give a more detailed outline of the results obtained by Prof. Vinogradoff, but the reader will be interested in knowing that Prof. Vinogradoff bases his treatment throughout on written sources gathered from every part of Indo-European society. His method is to outline briefly the essence of the institution in question and to illustrate its various forms as found, for instance, in Iceland, among the Slavs of a certain locality, in the Indian village, in Wales, and so forth, at the same time endeavoring as far as possible to show that the form assumed by the arrangement in question was a necessary outcome of the conditions of life among the people, to which it was adapted.

All this is extremely instructive and interesting and the reader whose inclinations lie in this direction will be grateful to Prof. Vinogradoff for the present volume, and will await with pleasurable anticipation the succeeding volumes,

of which the next, we are told, will deal with the Jurisprudence of the Greek City and will not be unduly delayed in its appearance. Prof. Vinogradoff is peculiarly suited to the treatment of so difficult and complicated a subject not only by reason of his great learning and wide reading but also by reason of his varied intellectual allegiance, if we may so put it. Englishmen as well as Americans are apt to be insular or provincial and to take too much for granted. Prof. Vinogradoff is a Russian by birth and education, and an Englishman by residence and adoption, and hence is not too much committed to any one point of view, and is less likely to ignore any attitude, however unusual or extreme. This is evident even in his treatment of so technical a subject as jurisprudence. Reading Holland, we would gather that the analytical treatment represented by him and others of the same school, is nothing short of jurisprudence *sub specie aeternitatis*. Vinogradoff reminds us that it is individualistic jurisprudence. "Recent discussions," he says, (p. 157) "make it abundantly clear that if individualistic civilization were to give way before one based on a socialistic conception of the social tie, all the positions of jurisprudence would have to be reconsidered." Accordingly in the lengthy and suggestive introduction to the book, Prof. Vinogradoff classifies the stages and types of social arrangement and law to be treated in a work on historical jurisprudence as follows: 1. Origins in Totemistic Society; 2. Tribal Law; 3. Civil Law; 4. Mediaeval Law in its combination as Canon and Feudal Law; 5. Individualistic Jurisprudence; 6. Beginnings of Socialistic Jurisprudence. And this must not mislead us into thinking that Vinogradoff is a socialist of the Marxian type, or a sympathizer with the Soviet system in Russia. Quite the contrary. "The error of materialistic fatalism," he says (page 82), "does not merely falsify the historical and scientific theory of the Marxists. It threatens the policy of practical socialism with a reduction to absurdity. If the life of organic evolution tends to war and to the levelling of society on the standard of the lower classes, it is obvious that it will lead to degradation in all respects and that all complex tasks requiring skilful handling will suffer in the process. Problems of engineering, of medicine, of law, of economics, can not be solved by mere appeals to communism. You do not build a railway bridge by the light of Marxist doctrine. We have lived to witness the blessings of the rule of workmen who do not work and of soldiers who do not fight in a great country confronted with every kind of difficulty and danger. Let us hope, at any rate, that the catastrophe of the Soviets may serve as an object lesson to illustrate the truth that it is not by discouraging education, industry and credit in favor of moral license, violence and corruption that the Socialists can hope to regenerate the world. If they want a serious trial for their views, they ought like every other great movement of opinion, to strive for a commanding position in the domain of thought and to justify the preponderance of the working class by its educational achievements."

The 160-page introduction also illustrates the author's breadth of view and variety of learning. It deals with the extremely important subject of the relation of law to the various sciences which affect it closely, such as logic, psychology, political and social science, and economics. The treatment here is bound to be brief, for each subject is so important and complex as to require a volume in itself, but, as it is the first time that we read in English a discussion of this sort in connection with a treatise of jurisprudence, we welcome it as a

beginning, erudite and suggestive, which, let us hope, will lead the way to more ample treatment at other hands.

The latter part of the introduction is devoted to a historical sketch of theories of jurisprudence. This, too, is a rarity in English writing. And a satisfactory account of the general development of Jurisprudence is still a desideratum in any language, as Vinogradoff admits. While this outline also is too brief to take the place of a history, it is a pioneer in English and exhibits, like the rest of the work, Vinogradoff's wide reading and extensive erudition.

Not the least useful part of the book is the Bibliography at the end, pages 373-398.

Isaac Husik.

Philosophy Department, University of Pennsylvania..