

## BOOK REVIEWS.

ESSAYS ON CONSTITUTIONAL LAW AND EQUITY AND OTHER SUBJECTS. By Henry Schofield. Boston, Chipman Law Publishing Company, 1921, Volumes I and II, pp. xxiv, 456; viii, 1006.

These two finely printed volumes preserve for the profession the literary contributions of the late Professor Schofield. They were gathered together for publication by his colleagues of the faculty of the Northwestern University School of Law during his lifetime, as a mark of appreciation of his merits, and without his knowledge; his untimely death in 1918 gave them an opportunity to make these volumes a tribute to his memory. Not the least attractive feature about the volumes are the appreciative forewords of Professors Wigmore and Kocourek. As a character delineation Mr. Kocourek's contribution is noteworthy.

Professor Schofield was evidently a learned, very modest and much loved man. Seventeen years of association with him apparently produced in his colleagues an ardent admiration of both character and intellect, which attest the superior man. The profession at large can know him only by his writings, and these appeared in periodical form only. His major interests lay in the field of constitutional law and equity, and if we may judge from his writings, even these interests were specialized. For example, nearly all the articles here reprinted deal with the procedural side of constitutional law and to a certain extent this is true of those on equity. The editors of these volumes have grouped his articles and his numerous comments and notes, mostly published in the pages of the *Illinois Law Review*, into appropriate topics, so that, while scattered indiscriminately through the field, there is a certain order of arrangement, disclosing definite doctrinal ideas. The articles are nearly all critical in character; it is not improbable that this type of contribution is of greater value than the standard text monographs which are usually limited by space and purpose to the dogmatic and expository at the expense of the critical. Many of the articles are necessarily controversial in character, called forth by some recent decision or doctrine. The moderation of the argument and expressions of opinion and the lucidity of the thought, though not always clothed in the most approved literary style, add to the merits of the essays. Not all of them are of equal general interest, for Illinois problems occupy a certain amount of space, as for example, the long essay on the "Street Railroad Problem of Chicago" and the Illinois "Civil Service Act." The most important of the essays deal with the relation between federal and state courts in the interpretation of state laws. Professor Schofield's predilection for unified federal judicial control leads him to advance the proposition that the due process clause so enlarges the scope of Rev. Stat. 709, regulating the appellate power of the Supreme Court to review the judgments of state courts, as to enable that court to review any state decision affecting private rights, in order to determine whether it gave due effect to the existing laws of the state, and

in so doing, to decide independently what the state law is. This startling proposition is qualified by the statement that in order to deny due process, the departure by the state court from established principles must be "so gross as to shock the reason and justice of mankind." Thus, our apprehension that Mr. Schofield's proposal would involve the review of all state decisions tinged with error is tempered by the explanation that only gross error amounting to arbitrariness or lawlessness comes within the scope of the federal judicial veto power. *Scott v. McNeal*, 154 U. S. 34 sustains Mr. Schofield's views.

An essay somewhat related to this deals with the doctrine of *Swift v. Tyson*, which held that when the federal courts obtain jurisdiction over a question involving so-called general law, they are not bound by the rule adopted in state courts, because those judicial rules of decision are not "laws" of the states binding on the federal courts by virtue of section 34 of the Judiciary Act of 1789, now Rev. Stat., Sec. 721. From this Prof. Schofield advances the thesis that the state courts are thus bound to follow the decision of the federal court, both by reason of the grant of judicial power to the federal courts in cases of diverse citizenship of the parties, and of the supremacy of the federal law under Article VI of the Constitution. He therefore criticizes vigorously the position of Justice Miller in *Delmas v. Merchants' Insurance Co.* (1871), 14 Wall 661, who denies the thesis of Mr. Schofield. Justice Miller is held responsible by Mr. Schofield for the existing conflict between state and federal courts in this matter rather than Judge Story in *Swift v. Tyson*, who is charged with the offense by Professors Hammond and Gray. It is believed that Mr. Schofield's view is not sustainable, for the same reason than Story's is, namely, that the word "laws" in Article VI of the Constitution can only by a forced construction be deemed to embrace judicial decisions. Of course, even Prof. Schofield admits that the state legislature can change the rule and make it then binding on state and federal court alike, but he does not attempt to deny that possibly conflicting interpretations would raise the same problem and thus, if his view were followed, effectively impair the powers of state courts in the interpretation of state law.

In view of Mr. Schofield's bias toward the federal power of judicial review on a denial of due process by state courts, one is a little surprised to find him protesting against both the majority and the minority view of the Supreme Court in the *Frank* case (1915) 237 U. S. 309, to the effect that if mob domination were sufficiently great to deny the essentials of a fair trial the Supreme Court would not hesitate to assume jurisdiction (I, 63). Mr. Schofield seeks to show by historical research that the external conditions surrounding a trial, even bribery of judges, would not involve a denial of due process within the meaning of the Fourteenth Amendment. But in the empirical assertion of federal power it is not likely that the Supreme Court will consider itself hampered by formal conceptions in pricking out the vague line between judicial discretion and arbitrary power in the state judicial administration of state law.

Perhaps the next most important contribution of Prof. Schofield's involves his consideration of the full faith and credit clause (I, 153). He

believes that the Supreme Court's support of the view that "comity" justifies a state in refusing to enforce causes of action arising under statutes of a sister state deemed contrary to its public policy or to enforce a judgment of a sister state when the Supreme Court determines that it lacked jurisdiction, as in *Haddock v. Haddock*, is a denial of the efficacy of the full faith and credit clause and therefore erroneous. While as to the former the argument is not without merit, though contrary to the decisions, it is not convincing as to the latter, either to sustain the Supreme Court's independent power to pass on the requirements of jurisdiction or certainly to sustain the much wider claim of federal power to pass a uniform divorce law, which Mr. Schofield advocated (I, 211). The due process clause would seem to support sufficiently the Supreme Court's power to pass on the essential requirements of jurisdiction or the enforceability of a decree. Mr. Schofield's criticism of the Supreme Court's asserted distinction between a local rule of state jurisdiction and of decision is original and suggestive. Few of the court's leading decisions under the full faith and credit clause escape his criticism. Students of the conflict of laws will find these articles of great value.

A notable essay on the case of *Slocum v. New York Life Insurance Co.*, (1912) 228 U. S. 364, is entitled "New Trials and the Seventh Amendment," in which the author discusses critically the limitations on the power of courts to find facts differently from the trial jury (I, 251). He criticizes the district judges who held the first federal Employers' Liability Act unconstitutional, though they were later sustained by the United States Supreme Court. Under the head of "cruel and unusual punishment" (I, 421) he deals with the *Weems* case, 217 U. S. 349, and analyzes the doctrine of the majority that "cruel and unusual" signifies "disproportionate." Mr. Schofield's argument on religious liberty and Bible reading in Illinois public schools—in criticism of the case of *People v. Board of Education*, (1911) 245 Ill. 334, where the legislature was denied the power to authorize such reading—has just been adopted with long quotations from Mr. Schofield's article by the Supreme Court of Georgia (1922), 110 S. E. 895, which concluded that such reading was not violative of religious freedom. His article on the "Freedom of the Press" (II, 510) is an excellent historical and analytical contribution. His discussion of the element of motive as immaterial is suggestive. But in times of political and social stress—the only times when the guaranties of free speech and press need to be invoked—it may be doubtful how effectively and dispassionately the assumed standards or tests of truth in statement of fact and fairness of comment can be applied.

About 250 pages are devoted to articles and comments dealing with various subjects of equity. Among the most important are the article on specific performance (II, 739), arising out of certain Illinois cases and dealing with the word "not" as a test of equity jurisdiction in the enforcement of negative covenants; the several comments on the rule of mutuality (II, 774); the article on the equitable jurisdiction to construe and reform wills and his comments on the same power as applied to other written instruments; and the articles on the power to enjoin illegal saloons as public nuisances and the

privilege of workmen to have a threatened strike enjoined, together with various contributions on special topics.

The volumes exhibit a profound grasp of constitutional history and of the decided cases. If all the essays are not of equal merit or importance, this is largely due to the irregular and casual way in which they appeared. The purpose of the editors—to bring all of Prof. Schofield's writings together—accounts for the inclusion of several comments and briefer notes that might otherwise have been omitted. In making Mr. Schofield's many contributions readily accessible to the profession, the editors have performed a useful service.

*Edwin M. Borchard.*

CASES ON INTERNATIONAL LAW, PRINCIPALLY SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS. Edited by James Brown Scott; American Case Book Series. West Publishing Company, St. Paul, 1922, pp. xxxvi, 1196; Appendices, Index, Table of Cases.

Scott's Cases on International Law needs no introduction to American students of this subject. This new edition has the virtues of the earlier one and the additional one of being up-to-date. The incorporation of the work in the excellent American Case Book Series should enhance the reputation of both parties to the amalgamation.

A divided purpose will be apt to govern a compiler of judicial utterances in the field of International Law. There being no international tribunal with final power of decision over members of the Family of Nations, the only decisions available are those of municipal tribunals in cases of local provenience and dealing with the interests of private persons. The question thus arises whether the object to be sought in the study of such cases is knowledge of a branch of municipal law through study of the doctrines of International Law, or *vice versa*. The opening words of Dr. Scott's Preface would make us believe that it is the former objective to which he looks in the compilation, but inasmuch as he endeavors to cover the entire field of International Law and to that end includes many British decisions, one suspects that the alternative objective is the one really in the forefront of his mind.

Thus the further question occurs, as to the precise value of judicial decisions as evidences of International Law. It is certainly true that there is no single agreed source for most International Law, and for such as there is, that source is not municipal adjudication but international agreement. In ordinary times doubtless the judge is usually a more reliable reporter of International Law than the diplomatist. Yet when there is sharp divergence between their views it is the diplomatist's view which is apt to prevail; and in extraordinary times the best of judges sometimes capitulate to the local basis. In this connection Dr. Scott quotes an utterance of his famous namesake, who later became Lord Stowell, repelling "the imputation which is sometimes strangely cast upon this court, that it is guilty of interpolations in the Law of Nations." Yet the imputation remained, even in British minds, as one

can discover for himself by turning to the *Edinburgh Review* for 1812. On the other hand, the opinion here quoted (page 1052 following) from Lord Parker, of Waddington, in the case of the *Zamora*, which urged in the midst of the late war the right of the British Prize Court to be considered an independent organ of International Law, seems to have been confirmed by events. At any rate, judging from the paucity of reference in these pages to the questions of International Law raised by the Allied embargo upon trade with Germany, the British Government must have been both dexterous and alert to prevent such questions from getting before its Prize Court. At the same time, this fact hardly justifies Dr. Scott in excluding cases like the *Imina*, the *Steri*, and the second half of the *Peterhoff* case—the first half is included—all of which bear directly on the validity of the embargo.

"On the vexed question" whether International Law is "law in the abstract" Dr. Scott declines an opinion; and such an opinion is less necessary today than it would have been a few years ago, when all legal theory was still grounded on the dogma of political sovereignty. But today we are getting back to those more universal concepts of law and its relation to political authority out of which International Law originally sprang, and it is the claim of International Law to be *international* which now most demands vindication. In this connection, however, it must be seriously questioned whether the distinction which Dr. Scott makes in his Preface between "the judgment" of a court and what he calls "*obiter dictum*" is very serviceable. "It is," he writes, "the judgment that is authoritative, although the *obiter dictum* of a distinguished judge is entitled to respect." In the first place, if Dr. Scott means by *obiter dictum* everything that is said in a judicial opinion, no matter how directly and logically it conducts to the final result, he is, of course, using the term much too broadly. But more exceptionable still is the implication that only the judgment is "authoritative." "All law," said Lord Stowell, in a passage quoted by Dr. Scott himself, "is resolvable into general principles"; or as Lord Mansfield put it: "The law does not consist of particular cases, but of general principles which are illustrated and explained by those cases." The point is particularly worth insisting upon in relation to the teaching of International Law by the case system. In their scorn of general principles—which, after all, do determine nine-tenths of the cases before they ever get into court—exponents of this system are prone to reduce the law to a sort of mystical mumble of the judicial oracle—a point of view the blighting effect of which on the pretensions of International Law must be obvious.

Dr. Scott's annotations are pertinent and sensible, and not so copious as to smother the diligence and initiative of the instructor. At one point, however, on account of the current interest of the subject, his researches may be briefly supplemented. In *Church v. Hubbart* (2 Cr. 187), which is given at page 361, the Supreme Court, speaking through Chief Justice Marshall, sustained a maritime seizure beyond the three mile limit; later, in *Rose v. Himely* (4 Cr. 24), Marshall seems to have repented of his earlier decision, wherefore Dana, in his edition of Wheaton, treats *Church v. Hubbart* as having been overruled on the main point. But this view, it turns out on investigation, is without justification. Notwithstanding his direct assurance to the contrary,

the Chief Justice spoke on the main issue in *Rose v. Himely* for only himself and two other justices, the majority of the court still adhering apparently to the earlier doctrine. Dr. Scott is therefore quite right in treating *Chuch v. Hubbard* as still law and in relegating *Rose v. Himely* to a footnote. But on another point he must be corrected. It was not Marshall but Ellsworth who rendered the decision in the *Peggy* (page 466).

Edward S. Corwin.

REAL ESTATE AND CONVEYANCING IN PENNSYLVANIA. By Louis W. Robey, Instructor in Real Estate, Law and Conveyancing, Temple University. George T. Bisel Company, Philadelphia, 1922, pp. xv., 708.

While the writer cannot speak with the voice of authority for the young Pennsylvania lawyers who begin practice in the larger cities where title insurance companies have usurped a field formerly held by conveyancers and attorneys, yet he can say from experience that in the country districts and smaller cities a great part of the young attorney's practice and income producing efforts is in connection with matters relative to real estate transactions and title searching. The young lawyer also soon learns that the broad subject of real property law is one that has a multitude of ramifications and matters of detail of great practical importance connected with it that have not been covered by his law school or student course. He derives a certain sense of satisfaction, however, in observing, on the other hand, that some of the older and more experienced members of the bar who have knowledge of these useful practical matters of detail at their finger tips, in many cases have either forgotten or have not had the time to work out many of the basic fundamental principles of real property law and the conflicting theories, rules and reasons, and decisions that were taught him (but perhaps not mastered) in his law school course, knowledge of which cannot be as easily acquired in any other manner.

Those deficient in either respect, and particularly the often-puzzled young attorney, will find in Mr. Robey's "Real Estate and Conveyancing in Pennsylvania" an up-to-date text to relieve him from part of his worries. The basic legal principles are clearly stated in easily understood language. There is no prolific citation of authorities. Yet the applications of principles are well illustrated by reference to the reports. And the reader gains confidence when he finds that each case referred to supports the proposition for which it is cited. No attempt is made to digest the cases or do the reader's work for him by a recital of the facts or by extended foot notes. Historical settings are seldom more than referred to, at most briefly stated. There are no extended theoretical discussions or explanations; *Ingersoll v. Sargent* and *Wallace v. Harmstad* are each cited two times. No apparent attempt is made to decide mooted questions or to raise hypothetical situations although opportunities may have occurred; *e. g.*, at Section 121, whether the Act of May 28, 1915, P. L. 631, allows a person other than the vendor the advantages afforded purchase money mortgagees. The work is an excellent statement of

the leading principles and applications of the law "as is." The typography is good. Consequently it should not tire the student and should be a good review and general reading for the practitioner. A table of cases cited and statutes construed, together with a well-arranged outline and index increase its value as a reference book.

As stated in the preface, Ladner's "Conveyancing in Pennsylvania" has been used as a basis. The arrangement of chapters and division of subjects will be considered by many as an improvement on the earlier work. The chapter on Ground Rents is a good exposition of this subject which is not clear to many lawyers outside of Philadelphia. Likewise, the fourteen pages on Building and Loan Associations give a clear outline of a subject not generally understood throughout the State. Sections 341 and 342 on "Suggestions in Drawing Leases," and similar ones, add value to the work as a handbook. Eighty-nine forms are printed in the appendix. Some may not consider copious reprinting of the Acts of 1917 as in the chapter on "Title by Descent" quite necessary. And others may not consider some sections, as Section 204 on Tax Sales, quite satisfactory. Such objections, however, may be more fancied than real.

The great value of the work, however, to the practitioner's working library, lies in the fact that it brings the subject to date. All relevant 1921 statutes are cited, together with the latest decisions. The preface is dated September 15, 1922. Cases are cited that had not been reported in the advance sheets when the text went to print. Perhaps this successful effort to include the last word from the courts may explain what appears to be a lack of thorough proof-reading; *e. g.*, "lie" for "he" at page 187; "miners" for "minors" at page 218; "landlord" for "husband," at page 219. The work is a worthy successor to Ladner's. It supplies a need among Pennsylvania legal texts.

*Harold F. Mook.*

THE A B C'S OF BUSINESS. By Henry S. McKee. The Macmillan Company, New York, 1922, pp. vi, 135.

This excellent little book presents to the general reader some fundamental, economic truths about the nature of our industrial organization, in style and with a simplicity that makes them easy to grasp. It is particularly meritorious in that it clears up in a convincing and lucid manner many of the fallacies with which the average citizen's ideas about money, wealth, speculation, business depressions, foreign trade, etc., are clouded. To business men and wage-earners alike the author preaches the doctrine that a nation's prosperity depends on its wealth production and that in economics, as in physics, one cannot lift one's self by his bootstraps. The author is evidently a conservative, for he defends the capitalists and business classes, the bankers, and the speculators, generally, from the attacks which have been made against them. One may take exceptions to his rather too sweeping approval of all these

gentlemen, for in some of their activities there is surely room for criticism; but on the whole his position is soundly taken. Readable, enlightening, interesting and refreshing, Mr. McKee's book is well worth the couple of hours' time its perusal requires.

*Raymond T. Bye.*

INTERVENTION IN INTERNATIONAL LAW. By Ellery C. Stowell. John Byrne and Company, Washington, D. C., 1921, pp. viii, 558.

Grotius centered his celebrated treatise written during the thirty years' war about the question, "When is war just?" thus giving his authority to an opinion doubtless held by many contemporaries of the world war, that this is the most vital question for international law to answer. Mr. Stowell has attempted to throw light on the same question for in effect the justifications of intervention are the justifications of war. The subject is one worthy of consideration, but we fear the present treatment will not be considered definitive. International law cannot expect to control the use of force in international relations until it can furnish more concrete guides than this:

"No state shall unreasonably insist upon its rights or pursue its interests to the detriment of the opposing rights and interests of other states. The refusal to evince a spirit of considerate compromise or adjustment upon the basis of the relative importance of the conflicting rights and interests is a violation of international law, which justifies an appeal to intervention" (p. vi).

Good practical advice, certainly, but hardly a legal rule of "transcending practical importance for the preservation of a just peace among nations" (p. vi).

The bibliography of eighty pages will probably prove the most valuable part of the book. The critical notes accompanying many of the entries as well as the voluminous footnotes throughout the book indicate Mr. Stowell's thorough examination of most of the literature of his subject, but the reader may question whether he had thoroughly digested all of this material when he began to write. The disproportionate emphasis of minor incidents, as for instance the devotion of sixteen pages to a discussion of the Putumayo atrocities of Peru, which led to no intervention at all (p. 195), and the excessive quotation of documents often containing much material irrelevant to the subject in hand, leads to this suspicion. These faults, it is true, give the book a certain value as a repository of source material, much of which is difficult to get at otherwise, but they seriously detract from the clarity of its argument.

The book is divided into five chapters of very uneven length, the second and third together comprising four-fifths of the book. The first chapter, entitled "interposition" attempts to distinguish "sovereignty," "interposition" and "self help" as the "three methods of procedure for the enforcement of international law" (p. 6), but then adds "national control," "cooperation" and

"combination" apparently as afterthoughts. The chapter also contains a psychological analysis of revenge and prestige and an account of several incidents in which formal amends have been given.

The second and longest chapter, entitled "International Police," is devoted largely to "humanitarian intervention." The author divides this into seven types each with a name. Readers may be surprised to find cases of asylum given to slaves and refugees on warships, and cases involving the application of the eighteenth amendment and the LaFollette seamen's act to foreign ships in port discussed as examples of humanitarian intervention. It is also rather disconcerting to find the writer frequently discussing under this head intervention attributed by the diplomats involved to motives other than humanity. Thus Mr. Stowell notes that England made the treaty of Vienna "the principal ground of protest against Russian tyranny" in Poland in 1863 (p. 106), but since in his opinion "a treaty cannot create a right to intervene in the internal affairs of a sovereign independent state even though the government thereof signs and ratifies the act or sponson which attempts in express words to confer such a right" (p. 107), he justifies the intervention on grounds of humanity. Other grounds of intervention, which contrary to usage is defined as comprising only "rightful uses of force" (p. vi) are "counter intervention," "international police regulation" and "supervision." Under the latter regional understandings including the Monroe Doctrine, and mandates which in Mr. Stowell's opinion were not innovations of the Treaty of Versailles, are considered.

The third chapter entitled "Non-interference," contains examples of unjustifiable action which includes the use of force to preserve the balance of power, to carry out treaties, and in self-preservation. The discussion, however, distinguishes some of these interventions as justifiable. Thus self-preservation justified British seizure of the Danish fleet in 1807, but not German invasion of Belgium in 1914. It should be noted that Mr. Stowell applies the term "interference" only to wrongful uses of force, thus distinguishing it from "intervention."

The fourth chapter, "Political Action" and the fifth, "Conclusion," are brief, unadorned by citations or footnotes and full of counsels of moderation and equity which seem to bear little relation to the preceding discussion.

The use of a novel nomenclature makes reading difficult and the multiplicity of distinctions without apparent significance suggests that Mr. Stowell was not acquainted with William of Occam's razor. The reviewer is not convinced of the soundness of the novel positions taken on the nature of treaties (p. 438), on the obligation to recognize de facto governments (p. 348), on the legal justifiability of humanitarian intervention (p. 51), and on the illegality of slavery under international law (pp. 206, 225, 229). Some discussions such as those on prestige (pp. 13-21) and necessity (pp. 396-414) are suggestive, though the