

## BOOK REVIEWS.

CASES ON TRADE REGULATION. By Herman Oliphant, Professor of Law in Columbia University. American Case-Book Series. West Publishing Company, St. Paul, Minn., 1923, pp. xxi, 1078.

"I am very glad to say that the work of preparing case books, so far as this Faculty is concerned, is very nearly accomplished." Thus spoke Dean Ames, of the Harvard Law School, in 1904. Ever since then, for twenty years, the "work of preparing case books" has gone on and steadily grown, both in and out of the Harvard Law School. Dean Ames in himself embodied the ceaseless stream of law, or, to put it more accurately, the eternal struggle between constancy and change. In the quoted passage he spoke as the great leader of a generation of law thinking and law teaching that was about to pass over into a new generation of law and legal activity, of which also he was a pioneer. For each generation has its emphasis, born of the pressure of its own problems. There is thus a new "reception" of the common law by every generation, with all the necessary adaptations—additions, subtractions, divisions and multiplications. And so there come fresh case books in the familiar fields of law, and pioneer case books in new fields of law—not truly new, but new in scale or heightened in significance. Isolated instances soliciting judicial judgment repeat themselves; there is a recurrence of pattern rendered vivid by the variant details. "Practice" provokes "theory"; "theory" reacts upon "practice"—helps to guide practice, through system and critique. This is the process by which the instance becomes generalization, and the generalization is tested and refined by new instances. Only yesterday did the law of "torts" emerge as a fecund generalization from a mass of individual cases, heedlessly buried in unconnected pigeon-holes of contemporary legal classification. The generalization is still in the making. But from Holmes' seminal essay, "Privilege, Malice and Intent" (8 HARV. L. REV. 1), and Wigmore's "The Tripartite Division of Torts" (8 HARV. L. REV. 200) to Pound's chapter on "Liability" in his "Introduction to the Philosophy of Law," the synthesizing process has proved itself the indispensable instrument of self-conscious and, therefore, effective legal action.

This creative process of tentative hypothesis-making is at present extremely active. It is a healthy sign of the sense of responsibility, on the part of law teachers, to master the almost overwhelming outpour of decisions by a resolute attempt to order the material. The attempt is founded on the conviction that there are woods as well as trees. Professor Oliphant's case book is another such attempt. Just as the term "torts" subsumes cases running back to the Year Books but previously dealt with as "forms of action" or "property" or what-not, so Professor Oliphant uses "Trade Regulation" as a binder of instances running from the Black Death to the Webb Act. Throughout

the centuries, our law has been confronted with collision of interests due to men's pursuit of their economic needs and desires. The law's method of dealing with such collisions—the limits imposed upon economic activities and the methods by which these limits are enforced—is bound to be a more insistent problem in proportion to the industrialization of society and the steady shrinkage of available natural resources. The assumption underlying Professor Oliphant's *Cases* is that a prerequisite to the law's capacity to deal with these problems is the conscious formulation of the issues and the systematic analysis of the factors entering into any accommodation. To that end the various considerations by which the law's balance is struck—logical coherence, history, social environment, the source and knowledge of relevant data, society's presuppositions ("the inarticulate major premise")—must be brought together in a comprehensive whole and systematically tested.

To meet these aims Professor Oliphant has given us an indispensable collection of material. Criticising the details of a case book when the work has been done by a competent editor seems a sterile enterprise. Such criticism implicitly involves merely personal preferences in the selection and use of material. All readers of Professor Oliphant's comments on "trade regulation" decisions in the *Journal of the American Bar Association* know that he is thoroughly at home in his subject and moves freely amid the relevant economic, social and industrial facts which are the heart of this body of the law—and without which it has no head. Every case book is, of course, a latent treatise. Judged as such, Professor Oliphant's analysis strikes me as an admirable organization of the mass of cases with which he was confronted.

This collection, like other recent case books, raises two problems that are giving increasing concern to the law teachers of the country. The first is the challenge to which the greatly lamented Albert M. Kales gave constant expression, namely, the particularity of "law" within its territorial scope. All of us are apt to forget this from time to time, and at the cost of clear thinking. The words of Mr. Justice Holmes cannot be quoted too often to remind us that "the common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified." (*Southern Pacific Co. v. Jensen*, 244 U. S. 205-22.) The obstinate force of this truth about "law" is especially to be respected when one is dealing with an aspect of legal control like trade regulations which is so intimately bound up with the economic and social outlook and aims of a particular jurisdiction and its judges. One wonders if the habit of thought, the ways of looking at things, common to "common law" jurisdictions, might not be clarified by an intensive study, in the first instance, of the "law" of a particular jurisdiction in the immediate field of legal control, *e. g.*, the body of law dealing with trade regulation enforced through the Federal courts.

Secondly, we are all of us being made more keenly aware that the "law" must be translated into terms of its application and enforcement. The physiology of law demands scientific attention. Particularly is this so in a field of legal control where the "legal principles" are so few and so simple as

they are in the field of trade regulation, because the "legal principles" are largely a few standards calling for endless application to an endless variety of facts. No one realizes that better than does Professor Oliphant. The problem unsolved, almost untouched, is how students can be made to realize it through the vehicle of case books and classroom discussion. The forthcoming Commonwealth Fund study of the Federal Trade Commission by Mr. Gerard C. Henderson shows how jejune is any discussion of the law enforced by the Federal Trade Commission if the judgment is confined to the opinions of courts or commission. Taught law is "tough law." And so, the central problem of law in this country is the stimulation and maintenance of an aliveness by law teachers to the kind of qualities we want in the lawyers and judges of the next generation. Fashioning lawyers is fashioning law.

*Felix Frankfurter.*

*Harvard Law School.*

HANDBOOK OF COMMON LAW PLEADING. By Benjamin J. Shipman. Third edition by Henry Winthrop Ballantine. West Publishing Co., St. Paul, Minn., 1923, pp. 644.

Common Law Pleading is one of the subjects that lends itself to the hornbook method of treatment. It is primarily a students' subject, inasmuch as the practice acts of so many states have modified its rules to such an extent that only in a few jurisdictions are the ancient rules sufficiently observed to permit its inclusion in a course on practice. Yet the substance of many of these rules must be mastered by the student as a necessary introduction to practice and to assist him in the intelligent reading of the older cases. Professor Ballantine's new (third) edition of Shipman's hornbook is an immense improvement on the original work. It not only includes many additional cases in the notes but embodies extensive additions and alterations in the text, with many references to recent law review articles, as well as to the great historical writers, Ames, Pollock, Maitland, Holdsworth, etc. While stating accurately the rules of the common law, Professor Ballantine does not treat them with that excess of reverence and laudation which renders some of the classics on this subject ridiculous in spite of their acuteness, and frequently misleading to the uninformed. We know now that common law pleading never was a *science*, as some writers pretentiously described it; but, in spite of its artificiality and uncouth mediævalism, it did disclose in many of its rules, as Lord Mansfield said, sound logic and common sense, and these traditions are properly carried over to the new and more or less experimental systems of the various states. There is a useful bibliography preceding the text of the book, and two appendices, containing extracts from the rules of civil procedure proposed by the American Judicature Society, and a chart of Illinois defensive pleading.

*W. H. Lloyd.*

*University of Pennsylvania Law School.*

OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW. By William F. Walsh, Professor of Law in New York University. New York University Press, New York, 1923, pp. 533.

The author of this work modestly makes no pretense to original investigation. The work is a readable compilation, based on the researches of Pollock and Maitland as well as those of other distinguished students of English legal history whose books and articles are cited in the notes, the intention being to make available to the average student material that would cost him some effort to discover. Of the five hundred pages, nearly three hundred are devoted to the law of property, that being the subject in which Professor Walsh is particularly interested. This part of the book is much the best, but is too concise to be much more than a well digested commentary on a part of the law for which the older generation of students usually depended on Blackstone. The average student, however, for whom the book is written, and perhaps some members of the bar whose historical studies were neglected, will find here a practical starting point for further research. There are chapters on crimes, torts, contracts, equity, and procedure. The most obvious criticism of this book is that its title claims too much. It is in no sense a history of American law. In the text there are scattered references to American cases and statutes but with the exception of the chapter on procedure, where something is said about the New York code, there is no treatment of American legal history or its sources. In Warren's "History of the American Bar," in "Two Centuries' Growth of American Law" by the Yale Law School Faculty, in the various essays printed in "Select Essays in Anglo-American Legal Literature," in Kent's "Commentaries" and in numerous other works the material was at hand, but it has not been used. This is the more to be regretted because the American student should be stimulated to take an interest in the early history and growth of legal institutions on our own soil.

*W. H. Lloyd.*

*University of Pennsylvania Law School.*

OUTLINES OF HISTORICAL JURISPRUDENCE, VOL. II. By Sir Paul Vinogradoff, F. B. A., Corpus Professor in Oxford University. Oxford University Press, New York, 1922, pp. x, 316.

This is the second volume of a comprehensive work on historical jurisprudence by the famous Russian-English scholar and Corpus Professor of Jurisprudence in Oxford University. The general scheme is laid down by the author on page 158 of the first volume: 1. Origins in Totemistic Society. 2. Tribal Law. 3. Civic Law. 4. Mediæval Law in its combination as Canon and Feudal Law. 5. Individualistic Jurisprudence. 6. Beginnings of Social-

istic Jurisprudence. Tribal Law is treated in the first volume, and a third volume is announced on the Mediæval Jurisprudence of Western Christendom. This second volume deals with the second topic, civic law. It is, however, confined to Greek Law and apparently there is to be no treatment of Roman Law. This will, of course, make the work of Vinogradoff incomplete. But unless we misunderstand his plan, his purpose is to present to the English reader what cannot be found elsewhere, at least in English, rather than to make the work complete by restating what has already been said by others. Roman jurisprudence has been treated over and over again in English as well as in the European languages. But the same cannot be said of Greek jurisprudence. In the bibliography at the end of the volume there is no work mentioned in English on the subject, and but an article or two on some small topic pertaining to the subject. And while the German and French legal literatures are more fortunate in this regard, it would seem that the precise subject envisaged by Vinogradoff was not treated in the same way by his German or French predecessors in this field. They either endeavored to give a history of Greek law or they expounded the legal, political and ethical theories of Plato, Aristotle and Theophrastus. Vinogradoff uses the word "jurisprudence" in its analytic sense, as equivalent to the science of law, and thus stands in his treatment midway between Dareste, to whom he dedicates this second volume, and Mitteis. He does not go into details, but neither does he content himself with restating Aristotle. As the present writer has found by experience, to one who is not familiar with Greek history and law, some of the legal discussions in Aristotle's "Ethics" and "Politics" seem to hang in the air, as if they were the product of Aristotle's imagination. This feeling is enhanced by the fact that they do not seem to suit our present conditions, and hence have an air of unreality about them. Thus his theory of distributive justice was never clear to me. The value of Vinogradoff's book lies in the fact that the early chapters are like a commentary on Aristotle. From his great erudition he throws light on the meaning of Aristotle by citing quotations from Greek inscriptions, from the Greek orators, historians and even the poets and the dramatists. This illustrates his method throughout the work. At the basis of his treatment is the modern division of the law. After treating of the concept of law, of the idea of justice, of the sources of the law and of the structure of the Greek city, he discusses the public law of the Greek city or the law of the Constitution, the international or intermunicipal law of the Greeks. Then, under private law, he treats of Crime and Tort (Crime was a semi-private wrong in Greek law), Property and Possession, Conventions and Transactions, or Contract in the general meaning of the term. In all these cases the author is in search of the principle, which he endeavors to deduce from the historical material extant. It is not always easy to do this, as the material is fragmentary and, for the most part, not legal in character. The orator, in defending his client or attacking his opponent, does discuss the law, but he twists it to suit his purpose, and is not a safe guide. The book under review is not intended for the kind of reader who desires to have the

results of a scholar's research stated in a plain, smooth, clear and easy style, but rather for a critical student who wants to have all the evidence for the author's conclusions. This method detracts from the continuity and clearness sometimes (Vinogradoff is not a master of clearness), but it makes up for this loss by taking the reader into the master's workshop. The work is certainly a masterpiece of erudition.

*Isaac Husik.*

*University of Pennsylvania.*