

## BOOK REVIEWS.

THE GROWTH OF THE LAW. By Benjamin N. Cardozo, LL. D., New Haven. Yale University Press, 1924, pp. 145.

The distinguished judge of the New York Court of Appeals needs no introduction to the legal reader. His recent book on "The Nature of the Judicial Process" is a little masterpiece of clear and progressive and persuasive thinking and of beautiful and eloquent writing. Whoever read that little book had his appetite sharpened and was eagerly waiting for more from the same source. If respect for law and interest in its working and progress on the part of the thoughtful layman are desirable, and if the law needs the help of this class for its proper development, then there is no better way of appealing to them than through such presentation as Judge Cardozo gives us. He does not, indeed, write for the general public, who are easily persuaded of the correctness of his views. His battle is with the dyed-in-the-wool jurist, whether judge or lawyer, who can see nothing beyond precedent and the letter of the statute. But there is no doubt that the layman too will hear him and re-enforce his pleading for a "philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth."

Certainty and progress are the two catchwords which embody the suggestive and informing discussion in the book under review. The law must be certain for obvious reasons, and it must follow the progress and change of the times for reasons still more obvious. The law, like the Sabbath, is made for the people, and not the people for the law. In other words, law is a means and not an end. The end is social welfare or justice, which it is hard or impossible to define with precision, but in many cases it is clear that certain rules of law are not the proper means to bring it about.

The conserving element in the law serves the need of certainty. But even here the mere principle of *stare decisis* can not assure certainty with so many different jurisdictions and thousands of decisions, unless a deliberate attempt is made every once in a while to take stock of the accumulated material and systematize it in the interest of consistency. This the American Law Institute has undertaken to do, and not the least valuable part in Judge Cardozo's lectures is the appreciation of the plan and the work of the American Law Institute in the first lecture. Coming as it does from one who is in daily contact with the living law, and is engaged in making it in the greatest State in the Union, and not from a mere professor of the classroom, Judge Cardozo's approval of and faith in the work of the Institute will exert an influence on the ordinary lawyer such as no professorial treatise could do.

But certainty is not enough. If the law is to progress with our social needs, it must be capable of growth, and the question is how shall it grow? To answer this question we must know what the function and the ends of law are, and this is equivalent to a philosophy of law. Judge Cardozo pleads eloquently and persuasively, not in the interest of culture or speculative enjoyment, but for its practical value, for a philosophical study of the law. "A Philosophy of law will tell us how law comes into being, how it grows, and

whither it tends." And first of all we must know what law is. Cardozo's discussion of this preliminary question is typical of his method and views generally. He finds the truth in neither or none of the extremes maintained by the various schools of jurisprudence, but somewhere in the middle. He is a pragmatist so far as legal philosophy is concerned and stays close to earth and reality, always ready with a case to point his moral or to illustrate his argument. Thus in the definition of law, he sways from the old definition of the analytical jurist in the direction of what we thought was the obsolete Law of Nature School, but no one need fear that he is likely to be influenced by the vagaries of that school.

Of the several methods used by judges in the decision of cases, Cardozo enumerates four, the method of logic or analogy, the method of history, the method of tradition or custom, and the method of "justice, morals and social welfare, the *mores* of the day, with its outlet or expression in the method of sociology." He gives every one of these four methods its legitimate due, but feels that the last is not taken account of as much as it should, though it is on the whole the most important, all the others taking what value they possess from this one. Certainty, tradition, custom are inherently indifferent. They become of value in law in so far as justice and social welfare are more likely to be realized in the long run if the law is certain, than if it is not. But one must not lose sight of the end on account of the means and think that certainty is everything.

Of justice itself, Cardozo says. "It remains to some extent, when all is said and done, the synonym of an aspiration, a mood of exaltation, a yearning for what is fine or high." This seems very unsatisfactory and inadequate. All our law is to serve justice as its ultimate end, the judge overruling if need be all other considerations, precedent, certainty, custom, tradition, history, logic, in its favor. And if you ask what this all-important justice is, all he can tell you is "an aspiration, a mood of exaltation, a yearning for what is fine or high"! And yet Judge Cardozo has the reviewer's sympathy in his perplexity. When one has gone through the definitions of justice attempted by the famous philosophers from Plato to Stammler, one wonders if the best thing said about it is not precisely what Judge Cardozo does say.

The little book is full of suggestiveness, and is stimulating in the extreme. Its reading is a delight and one wishes we had more of them.

*Isaac Husik.*

*University of Pennsylvania.*

THE FEDERAL TRADE COMMISSION, A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE. By Gerard C. Henderson, 1924. The Yale University Press, New Haven, 1924, pp. 382.

How are administrative law and administrative authorities operating in the United States? The book before us is the first of a series of studies on this problem, prepared under the auspices of a special committee on administrative law and supported by the Commonwealth Fund. Professor Henderson has conscientiously examined a great mass of material in the Commission's files,

has analyzed its methods and offered suggestions to render its work more effective. He reviews the chief Federal trade laws and gives chapters on the Commission's procedure, findings of fact, trade practices, and his conclusions as to desirable changes.

He criticises many features of the Commission's work: its failure to distinguish sharply between its investigating and its semi-judicial functions; the former practice by which a prosecuting attorney, acting for the Commission, summarized the findings of fact which were reached by the examiner who held the preliminary hearings of testimony, thus giving these findings a partisan rather than an objectively fair form; the refusal of the Commission to have its original complaints placed in such specific form that the respondent may know exactly with what he is charged; the suppression of important facts favorable to the respondent, which might place his practices in an entirely different light, both in the findings and in the orders or decisions of the Commission; the custom of denying to respondent any information as to who filed the original application for a complaint against him; the unnecessary vagueness and narrow technical nature of the terms employed by the Commission in its decisions; and most important of all the slowness of Commission decisions.

The author believes that all of these defects can be corrected by the Commission itself. He further suggests that the Commission should refrain from action in those fields where special statutes such as the Pure Food and Drug law, the Trade-Mark Act, the Postal laws, etc., already offer effective and quick means of correction, and that the Commission should concentrate attention on unfair methods in fields where the honest competitor has not been adequately protected by other statutes. He suggests that the Commission's work has been especially effective in stopping the fraudulent use of certain trade names such as wool, linoleum, silk, etc. Prof. Henderson also points out a serious weakness in the law as now interpreted by the Supreme Court. Congress plainly intended that in handling unfair competition the flat prohibition against unfair methods, contained in Section 5 of the Act of 1914, should govern the Commission, but that the Commission should have a reasonable discretion as to the cases in which Commission action was required. This is clearly necessary in view of the immense number of cases that would be brought to the Commission's attention. But the Supreme Court in the celebrated Gratz Case, 253 U. S. 421, has so changed the law as to prevent the Commission from acting unless the Court can see a public interest in the procedure; that is, a clear case of unfair methods may be shown, but it must be on such a large scale and involve such broad interests as to be of general concern to the public in the view of the judges, otherwise the Commission is powerless, and this in spite of the plain terms of the law which authorizes the Commission to act, if in its own opinion a proceeding would be in the public interest. We have here, apparently, a parallel to the early action of the Supreme Court in reducing the powers of the Interstate Commerce Commission below the point of effectiveness intended by Congress. Professor Henderson very properly deprecates this undue restriction of the Commission's usefulness.

His book on the whole is an excellent statement of the strong and weak points of the Trade Commission's work in the past. It is written with a desire to be helpful rather than to criticise. Most of his suggestions, if adopted, would be useful to this end. The value of the book is not lessened by the fact that some of the defects which he points out had already been corrected by the Commission before the appearance of his work. If later volumes in the series on administrative law are equally valuable, the Committee will have done a real public service.

James T. Young.

University of Pennsylvania.

CASES ON EQUITABLE RELIEF AGAINST TORTS. By Zechariah Chafee, Jr., Professor of Law in Harvard University. Published by the Editor. Langdell Hall, Cambridge, 1924, pp. 552.

The proof of the pudding is in the eating and Professor Chafee's collection of cases has only just been served. Many of us, however, have tasted other puddings and are still hungry. Invaluable though the collection of cases which was compiled by the late Dean Ames undoubtedly is, and though perhaps it is even now sufficiently comprehensive on the subjects of specific performance and waste, all of us must have sensed the march of events and the growing importance of other branches of equity, and have felt that in that collection sufficient attention was not given to the subjects of penalties and forfeitures, equitable conversion, merger, satisfaction and performance, election, subrogation, marshalling security and equitable relief against torts. All of us also have realized that many cases have been decided since the compiling of the book mentioned, which no thoughtful student can ignore, and which have to be reckoned with.

In a measure, Mr. Chafee has sought to meet this need and has furnished the law teaching profession, and the bar generally, with a characteristically scholarly, well arranged and discriminating book of *Cases on Equitable Relief Against Torts*. He has not undertaken to cover the whole field of equity jurisdiction nor to undo that which already has been done. He has conceded, for the time being at any rate, the adequacy of the chapters of Dean Ames' collection which deal with the main principles of equity jurisdiction and the specific performance of contracts, as well as of Dean Pound's *Collection of Cases on Equitable Relief Against Defamation and Injuries to Personality*. Perhaps he has not ignored William H. Loyd's seemingly adequate collection of cases on *Certain Equitable Doctrines and Remedies* and has realized that there is at least one outstanding case book on labor law by Professor Francis Sayre which deals quite exhaustively with the matter of the use of the injunction in labor disputes. His aim has been to fill an important gap, and this he has done with success. By a wise co-operation and arrangement with the family of the late Dean Ames he has both perpetuated his scholarship and at the same time has amplified, expanded and brought down to date the subject of equitable relief against torts which that author had not the opportunity or perhaps the inclination adequately to cover, and which is assuming a growing importance as the years go by.

Perhaps a distinguishing feature of the collection is its wise estimate of the growth and workings of the judicial mind. Except in the first and fifth chapters, the cases have been grouped according to general equitable principles and not specific torts. The author realizes, and in the chapters mentioned makes it clear to the student, that equity did not assume jurisdiction over all torts simultaneously and that there are certain specific peculiarities of treatment, but as a general rule he has recognized and given emphasis to the fact that the analogy which the chancellor applies is a wide analogy. He deals with the equity that there was, and still is, in the common law, and, in addition to his leading cases, by brief notes, summarizes and abstracts, traces the growth through the years of the dominant principles, and the crystallization and formulation of the law. He furnishes the necessary historical perspective and evolution and, at the same time, the present result, yet the ancient does not obscure the modern. Differences of opinion, of course, may arise as to whether all of the cases have been wisely selected and whether some of the condensations are adequate. Some may question the wisdom of the arrangement in some particular or other; all of us have our own foibles and our own pet ideas. But the excellence of the work is certain, and its worth cannot be questioned.

*Andrew A. Bruce.*

*Northwestern University.*

**CASES ON OIL AND GAS.** By Victor A. Kulp, Professor of Law in the University of Oklahoma. American Case Book Series. West Publishing Company, St. Paul, 1924, pp. xi, 512.

This book is a departure from the announced purpose of the series of which it is a part. The original announcement promised a series of scholarly case books "on the fundamental subjects of legal education," which would "develop the law historically and scientifically." There is nothing fundamental in the subject of this book. The body of case law which is segregated under the title of Oil and Gas, like the larger body, of which it is a part, and which is spoken of and written of as the Law of Mines, constitutes merely a group of applications of the rules of property law, whose separate consideration is justified by the commercial importance of the matters in litigation. A separate collection of cases on this subject, and analysis and discussion of them, will be valuable to those lawyers whose practice brings them in touch with the commercial interests involved, but certainly Oil and Gas is not a fundamental subject of legal education.

Professor Kulp, however, finds a warrant for this case book in a belief that a distinct set of principles has been created by the courts, particularly in connection with the rights and obligations growing out of the so-called "oil and gas lease." To the reviewer, it is clear that in this connection there is only one principle that courts have been called upon to decide. That is the answer to the question, What rights does a landowner have in the fugitive minerals contained in the natural reservoir beneath his surface, before they are reduced to possession by the drilling of wells? When the court gets beyond this question, all other questions growing out of the so-

called "lease" find their solution in the established rules of construction and interpretation of written instruments. Unfortunately, the courts of the oil-producing states have differed in answering the prime question. According to the Supreme Court of the United States, "each surface owner in an oil and gas area has the exclusive right on his own land to seek the oil and gas in the reservoir beneath, but has no fixed or certain ownership of them until he reduces them to actual possession."<sup>1</sup> This doctrine has been logically and consistently followed in Indiana and Oklahoma, and with some disposition to waver in Texas and Kansas. On the other hand, the Supreme Court of Pennsylvania has announced that oil and gas, "like all other minerals, necessarily belong to the owner in fee or his grantee, so long as they remain part of the property, and though he cannot use them until he has severed them from the freehold, exactly as in the case of all other minerals beneath the surface, he nevertheless has an ownership which he can sell and which otherwise he will lose only by their leaving the property."<sup>2</sup> In this view West Virginia concurs.

In his first chapter, Professor Kulp gives a collection of recent cases which adequately illustrates these divergent propositions. Although in his "Prefatory Note" he warns us that he has not attempted historical treatment, it is to be regretted that he has not enlarged this chapter by including the older cases which illustrate the development of the two lines of thought, especially as the inclusion of those cases might have been compensated by the omission from other chapters of sections which seem redundant.

The greater part of this book is devoted to "The Oil and Gas Lease." The author has brought together a valuable selection of cases which sufficiently cover the problems that arise in connection with the conveyance of rights in oil and gas, the construction of the various usual provisions found in "leases," the rights and duties of the parties, and the termination and forfeiture of the lessee's interest. The author's classification may be open to criticism, but every teacher who uses this book will probably have his own pet analysis; and, as the subject deals not with a system of principles, but with the application of different rules to a single group of physical objects, the table of contents necessarily can only be a catalogue. The difficulty of classification is increased by the unfortunate habit which judges and lawyers have, of using the word "lease" to include every written instrument by which an interest or right of any kind in minerals beneath the surface is conveyed. This indiscriminate use of the word "lease" is often misleading. It is usually important to differentiate between a grant of an incorporeal hereditament, and a lease of land for a term of years, not to mention licenses and options. The author undoubtedly recognizes, while he does not emphasize, the confusing effect of the loose nomenclature of the courts. Accuracy of expression by the courts would much simplify this subject, but a maker of case books must take cases as he finds them. They should not be taken, however, simply because they smell of oil. In his attempt to systematize that which is

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<sup>1</sup> *Lindsley v. National Carbonic Gas Company*, 220 U. S. 61 (1911).

<sup>2</sup> *Hamilton v. Foster*, 272 Pa. 97 (1922).

not a system, Professor Kulp has reached out into categories which do not seem to have any necessary relation to his subject, such as, "Infant as Lessor," "Married Woman as Lessor," "Joint Ventures in Oil and Gas," "Storage," "Liens," "Pipe Line and Transportation Companies." The most extended view of the scope of the so-called "Law of Oil and Gas" can hardly embrace the question whether a filling station is a nuisance in a certain city in the State of Kansas.

On the whole, therefore, while "the best legal talent" which we are told has been engaged by "the magnitude of the interests involved in the acquisition, development and disposition of oil and gas rights" will find in this book a convenient collection of important cases dealing with those minerals, the teacher of law will not find it so useful. To the extent that it can be so used, its appeal must be largely local. Of the 165 cases in this book fifty-two are taken from Oklahoma and forty-two from the adjacent states of Kansas and Texas.

*John Stokes Adams.*

*Philadelphia.*

INSANITY AND LAW, A TREATISE ON FORENSIC PSYCHIATRY. By H. Douglas Singer, M. D., and William L. Krohn, M. D. Blakiston's Sons & Co., Philadelphia, 1924, pp. xii, 437.

At a time when there is so much controversy as to the question of the sanity of defendants, particularly those accused of homicide, and when there seems to be a lack of faith in the testimony of experts on the subject, this book is most timely. It offers many suggestions of a practical nature with reference to expert testimony, and the methods of arriving at the sanity of a defendant, in which the court shall take a part, making it more a matter of judicial notice than a raised issue of fact. The chapter entitled "Suggestions for Reforms" is especially commendable and the suggestions made therein should form the basis for profound thought and future action.

The book is an excellent and pithy treatise on forensic psychiatry, divided into two parts, the first dealing with the medical, the second with the legal, aspect of the subject. Though perhaps intended for the medical profession, it contains much valuable matter and data for the lawyer and jurist. The work has been fairly divided between the collaborators, Dr. Singer evidently having written the first part and Dr. Krohn the second, and, with the exception of a slight error relative to the question of divorce in Pennsylvania on the ground of insanity, it seems to be well founded both in fact and in theory. Though not a profound and comprehensive study of the subject from either aspect, as a hand book, it becomes much more valuable to one who is desirous of a special work on the subject, than a more comprehensive and technical treatise would be.

We are usually inclined to limit our thoughts, with reference to the legal aspect of insanity to the criminal responsibility of the insane, but in this work the authors have been comprehensive enough to show all the relationships of the insane, both civilly and criminally, to society in general. It is written in a simple and lucid style and shows a thorough preparation and