

## BOOK REVIEWS

A HISTORY OF CONTINENTAL CIVIL PROCEDURE. By Arthur Engleman and others, translated and edited by Robert Wyness Millar. Little, Brown & Co., Boston, 1927. Pp. lxiii, 948.

This volume is published in continuation of the Continental Legal History Series translated and edited under the auspices of the Association of American Law Schools. The book opens with a preliminary study of the formative principles of civil procedure by the editor reprinted from the *Illinois Law Review*, here called a Prolegomena, a learned and philosophic study of comparative procedure without which much of the book would be unintelligible to those not accustomed to Continental modes of thought. Then follows an account of the mediaeval German and Swedish procedure; the Roman procedure of republic and empire; the Romano Canonical procedure, and lastly, the modern development of civil procedure in Germany, Austria, France, Italy and Sweden. The principal contributor to the volume is the late Arthur Engleman, presiding justice of the Court of Appeal of Breslau, but there are chapters by distinguished scholars—French, German and Italian—and in the notes are innumerable references to other works. A vast enterprise splendidly completed sums up one's first impressions of this work. Indispensable is a strong word; we get along, in a way, without many things until we have them. But having this book it is difficult to see how anyone can hereafter undertake to teach civil procedure or pleading as a scholar without informing himself of its contents. Of course, there are favored instructors who have studied abroad and visited European Courts as interested spectators, but it is a great boon to have in compact form and in the English language accessible to all this learned historical outline of the civil procedure of Continental Europe from its primitive beginnings to its present state. A state of imperfection still exists we are led to believe by some of the distinguished contributors, but who has ever had a good word for procedure, the maid of all work in the house of jurisprudence?

There are weaknesses inherent in a book of this type; twenty-five hundred years is a long time to cover; the congeries of petty states that long made up central Europe and Italy present many variations in their legal institutions to systematize which means condensation and generalization. In Engleman's contributions, this is particularly noticeable, the tendency being to over-emphasize analysis at the expense of the continuity of the story. One feels that the learned commentator is more interested in philosophizing, in giving a theory of why things were done, than in telling us what the courts did and how they did it, all of which is characteristically German. That part of the book dealing with the Roman law of procedure is not recommended to beginners. There are much clearer expositions in many manuals such as in Buckland's textbook

and Poste's Gaius. It is also a pity, for purely practical reasons, that the longer Latin extracts from Roman sources have not been translated in the notes. True, it may be lamentable that bar examiners, as a concession to our superficial education, have waived the requirement of Latin; but it is a fact that should have been considered. There are many intelligent, and, by American standards, cultivated members of the junior bar who know no Latin yet who might become interested in this subject if presented in a less refractory form. Particularly unfortunate is the failure to give a translation of the famous statute of Pope Clement V, (*Clementina Saepe*) the most important procedural document of the middle ages and the key to the practice in secular as well as ecclesiastical courts.

One feels that if Professor Millar had written this book from beginning to end himself, it would have been just as learned and twice as readable. No one is better qualified to speak on comparative procedure. But one must receive amiably the gifts that the gods bring us and this is a bountiful one. The series to which it belongs is avowedly a collection of translations from works written for Continental needs by scholars whose whole mental attitude toward legal problems differs from that of the English or American lawyer. Indeed, the study of exotic and unfamiliar commentaries is an excellent discipline. For just as there is no better way to understand one's own country than to travel abroad and see it from the outside, so the strength and weakness of our own law becomes more intelligible through the observation of rival systems. Although primarily for the specialist in procedure this work will appeal to all teachers of law with a flair for history. The teacher of equity, for example, will find in the account of the Romano Canonical procedure highly interesting sidelights on the origin of equity practice. Like the other volumes of this series it is a book that the practising lawyer should have in his home library for the long winter evenings as a bracing antidote to some of the depressing lubrications that pass for literature. Then again, no branch of the law is so constantly exposed to public criticism as procedure, criminal and civil, some of it intelligent, most of it unintelligent. Its history is marked by changes that in the long run usually make for the progress of the law but in detail lead to disappointment and disillusionment. Reforms loudly heralded and triumphantly achieved are turned by human perversity to purposes of chicane, and the painful effort to bring about improvement must be undertaken once more. In the history of procedure from the comparative viewpoint our common law system, with all its faults, does not come off so badly. Its publicity was altogether wholesome and that principle Continental Europe is learning. We too may learn much from Continental experiments in many fields. And if we are to continue our efforts to reduce the expense and delay of litigation it is senseless to ignore the experience of the great civilized nations of the world with whom our cultural and economic relations are constantly growing closer.

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CASES ON FUTURE INTERESTS. By Richard R. Powell. American Casebook Series, West Publishing Co., St. Paul, 1928. Pp. xxviii, 968.

This, the most recent volume in the American Casebook Series, naturally invites comparison with Professor Kales's "Future Interests and Illegal Conditions and Restraints" also published in that same series ten years before. Professor Powell, in his preface, notes his indebtedness both to Professor Kales and also to his predecessor, Professor Gray. He points out, however, that both their volumes deal more particularly with such family settlements as were common in England and that he is endeavoring to illustrate by problems of the type that are now being actively litigated in this country. Hence he uses fewer English and more American authorities, and also, to some extent, cases dealing with American statutes. There can be no doubt that this method of approach to a difficult subject tends to make it of more practical value to the future practitioner. The experience of the trained teacher is seen in the numerous questions appended to the various cases, which ought to be of value both to teacher and student in relating the decision in a particular case to the cases before and after. I fancy also the entire omission of the problem of "Illegal Conditions and Restraints" which as contained in Mr. Kales's volume seems to have little relation to the general problem of Future Interests (which occupies the bulk of that book).

A hasty survey of this volume suggests, however, a certain loss in arrangement as compared with Kales's volume. The writer has found the general classification of Kales's volume, namely, Part I—Classification of Future Interests, and Part II—Construction of Limitations, of great value in impressing upon the minds of students the various kinds of future interests and certain problems of construction relating to them. All of the various kinds of future interests are discussed by Professor Powell, though not under one connected title, so that the student is not certain to gain a complete picture of the entire subject from the more scattered discussion of its parts. A more important criticism is that there is nothing corresponding to Kales's Part II "Construction of Limitations" at all; true, various problems of construction are discussed, but the discussion is scattered among titles dealing with the various kinds of future interests, so that, again, there is no related classification of the problems of construction as a whole. The writer believes that the consideration of various problems of construction is the most important portion of the subject of future interests that is likely to be dealt with by the practicing lawyer, and would, therefore, welcome an extension of the problems of construction as treated by Kales, so as to include other familiar problems which are wholly omitted by him. Certainly the treatment of one problem of construction, namely, "Limitations made in favor of heirs of living persons" in Chapter IV; and of another problem of construction, to wit, "Implied Limitations" in Chapter V; and of another problem of construction, to wit, "Vested or Contingent" in Chapter VI, and of another problem of construction, to wit, "The effect of a prior interest by the failure of a succeeding interest" in Chapter VII (dealing with the characteristics of expectant estates) does not

tend to produce in the mind of the student a concrete picture of the general topic of problems of construction, much less do they suggest to his mind (what seems so vital to the writer) namely, that the only safe guide in approaching any problem of construction is to start with the presumption that technical words are intended to have their technical meaning, and to so decide unless the language of the will justifies some other construction. It is believed that it is the failure to hold to this guide, and the substitution for it of a more or less futile attempt to ascertain the testator's intent from the four corners of the will, which has resulted in certain jurisdictions in almost eliminating rules of construction, and in substituting for them the peculiar inferences that may be drawn by the mind of a particular judge, or the similar inferences reached by a number of judges sitting as a single court. The reviewer believes that the natural outcome of this latter view is great uncertainty of decision, and that reasonable certainty of decision is of vital importance in this branch of the law in order to avoid interminable litigation, and he therefore feels that in order to secure greater uniformity in this branch of the law in the future, it is important to impress this point of view upon the students of the law in this generation.

However, taken as a whole, Professor Powell's volume embodies a great deal of valuable material for the teaching of this subject which will doubtless be cheerfully availed of by those who are dealing with it.

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CASES ON PARTNERSHIP. By Scott Rowley. Prentice-Hall, Inc., New York, 1927. Pp. xv, 784.

When the casebook supplanted the textbook as the method of teaching law, it was on the theory that study of cases would afford a first-hand study of sources. This theory so far as it went was sound. But as a matter of fact, it soon became apparent that the casebook often was written around some standard treatise, the case material being merely illustrative of the generalizations set out in the text. Thus the scientific induction, for which the study of cases seemed to afford an opportunity, was transformed into the disguised deduction of the orthodox casebook. And throughout these casebook offsprings of textbooks too often runs the assumption that legal postulates true in themselves can be developed and the whole co-ordinated into a beautifully arranged system.

This categorical arrangement has been followed by Professor Rowley, who explains in the preface to his "Cases on Partnership" that he has constructed his book along lines similar to those used in Rowley, "Modern Law of Partnership." Accordingly, he develops the "Definition of Partnership" in Chapter II, passes to the "Nature of Partnership" in Chapter III, reviews the "Tests and Essential Elements" in Chapter IV, and so on. The last three chapters in the book contain cases involving limited partnerships, joint stock companies and

Massachusetts trusts. The cases are fitted into their respective chapter pigeon-holes and sometimes are cut down to the few lines of the opinion which happen to set out the principle the author has in mind. This practice, in effect, relieves the student from the valuable examination of the facts of the case which were responsible for the formulation of that principle. The collection contains a majority of the "old standbys" in the law of partnership. However, it is to be regretted that Professor Rowley did not see fit to include in his first 666 pages, more than a half-dozen cases decided since 1915. This omission, of course, eliminates all litigation under the Uniform Partnership Act, particularly such decisions as the leading Illinois case of *Wharf v. Wharf*.<sup>1</sup> There are no footnote cases, but a number of references to excellent periodical literature.

As a casebook, Professor Rowley's collection is thoroughly orthodox, and is well adapted to the needs of those teachers who would emphasize above everything else the "logic of the law."<sup>2</sup> In the opinion of the present writer, a much stronger case is made out by those scholars<sup>3</sup> who give logic its proper place as a useful tool in legal thinking, but who realize that law, like the life it interprets, is constantly "in a state of flux."<sup>4</sup> These latter thinkers take into account the fact that judges are bound to read into their opinions all the subconscious elements in their natures,<sup>5</sup> and that these same judges—like all other human creatures—tend, often unconsciously, to dress up their decisions in logical array, using a syllogism, with its middle term the mathematician's "real variable," as their technical tool. And these pragmatists maintain that until we are able to analyze more exactly the economic, political, sociological and psychological elements which actually are cast into the melting pot of nearly any border line decision, we still are far from having either a "science of law" or a "logic of law."

Two cases as set out in Chapter III, "The Nature of Partnership"—that battle ground of legal scholars—illustrate well the danger of over-emphasis on general principles as a true basis for a given decision. The court, in the only portion of *Good v. Jarrard*<sup>6</sup> which the vast majority of any partnership class ever will read, at least during student days, states that a partnership "is a distinct entity from the members of the firm in their capacity as individuals." It would seem, then, from this excerpt, that the South Carolina court has reasoned from this major postulate to its conclusion, namely, the decision on the issue before it. The process, presumably, is somewhat as follows: (1) determine *a priori* whether that business relationship termed partnership has within it enough of the inherent entity elements to classify it under the entity

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<sup>1</sup> 306 Ill. 79, 137 N. E. 446 (1922).

<sup>2</sup> "Logic" here is used in the sense of *deductive* logic.

<sup>3</sup> Notably Prof. Walter Wheeler Cook of the Yale University Law School, whose lectures in Jurisprudence stimulated some of the ideas contained in this review.

<sup>4</sup> BARRY, *THE SCIENTIFIC HABIT OF THOUGHT* (1927) 139.

<sup>5</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 167.

<sup>6</sup> 93 S. C. 229, 76 S. E. 698 (1912).

fiction; (2) decide, if you are in doubt, whether the business arrangement in the fact situation before you is or is not a partnership (the postulates for answering this second question are found in sections 1 to 10 in Chapter IV, namely, the "Tests and Essential Elements"); (3) having determined that a partnership is or is not an entity, and having decided whether or not the specific relationship is a partnership, you now are prepared to fix the legal relations (rights, privileges, powers, etc.) of the plaintiff and defendant accordingly. Or take the excerpt from the opinion of *Abbot v. Anderson*<sup>7</sup> (p. 9) which, as set out, appears to illustrate some such logical process as this: (1) major premise—a partnership is not a legal entity under the law of Illinois; (2) minor premise—this business relationship is a partnership; (3) conclusion—therefore, this firm is not a legal entity, and hence, cannot be adjudged insolvent while one of its members remains solvent, because only a legal entity is "distinct from and independent of the persons composing it."

The real reasoning of the courts in these two cases is another story. *Good v. Jarrard* was a bill for specific performance growing out of an agreement to purchase a piece of land, made between plaintiff vendor and defendant vendee, the latter being a member of a partnership which was occupying a storehouse on this land under a lease. The defendant, however, made the agreement in his individual capacity. Before the transfer was completed the storehouse was destroyed by fire and the defendant refused to carry out his agreement. Under the Massachusetts rule which the court decided to follow—in lieu of no prior adjudication upon this precise point in South Carolina—the risk of such a loss falls upon the vendor who is declared still to be the "owner" of the property. But the court realized that—largely because of the English decision of *Paine v. Mellor*<sup>8</sup>—another rule prevailed in other jurisdictions casting the burden of loss upon the vendee on the theory that he had the "equitable title" and hence is the "owner" of the property. However, the South Carolina court, in a truly scientific spirit, was not prepared to accept the equitable title principle without investigating the policy underlying it. This policy, it declares, is that damages only will not afford to the vendee a complete remedy against a vendor who refuses to convey. But it was never the intention of the chancellor to permit a vendor to invoke the rule in order to shift the risk of destruction of the property to the vendee, the more especially when the vendor did not surrender possession.

Here, however, the firm of which the defendant was a member actually *was* in possession of the premises, and the court to square its result with the rule it decided to follow had to get the defendant as an individual out of possession. For this reason only it relied on the entity theory of partnership, citing *Bischoff v. Blease*,<sup>9</sup> which did not mention the term "entity" at all, but held that for certain purposes of pleading under the South Carolina code it is not

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<sup>7</sup> 265 Ill. 285, 106 S. E. 782 (1914).

<sup>8</sup> 6 Ves. 349 (1801).

<sup>9</sup> 20 S. C. 460 (1883).

sufficient to set out the partnership name in the complaint, without listing the names of the individual partners.

Space does not permit a detailed analysis of *Abbot v. Anderson*, the only scientific method for determining *why* the Illinois Court talks in non-entity terms concerning the partnership relation. Suffice it to say that those seeking the aid of the court were depositors of a bank which had apparently failed to weather the financial storm of 1907, and the said depositors were attempting to get at the individual fortunes of the partners who were the bank. This was a test case. If the plaintiffs won, numerous other like suits would be brought. So the court decided that what these depositors should have done was to have had these individual assets administered in the prior bankruptcy proceeding which involved the partnership, instead of accepting (as they had) a composition settlement under a "mistaken view of the law" that they could still hold the individual partners for the balance of their claims. The reason given for this result is that as a partnership is not a "legal entity distinct from and independent of the persons composing it," the discharge of the partnership in bankruptcy discharged the partners individually. Another court, desirous of further aiding the depositors, might have reached the opposite conclusion as to the nature of a partnership, especially if *Francis v. McNeal*<sup>20</sup> had not been decided meanwhile.

This rather lengthy discussion of several decisions was undertaken in an effort to bring out the hopelessly inadequate picture of the judicial process which the student obtains by reading excerpts of an opinion when divorced from the facts of the case. Moreover, it is extremely unfortunate, if, as a result of this setting out of generalizations at the outset of the course—especially those involving the "nature of partnership" and the "tests and essential elements"—the student is led into seeking the solution of partnership problems through the exclusive use of the tool of deductive logic.

Obviously, it is much easier to criticize an existing casebook than to make constructive suggestions for the compilation of a non-existing one. However, the following are submitted: would it not simplify the task of both instructor and student, and eliminate needless duplication, if the various types of business enterprise were treated together under some such general title as Business Organization, with a source-book built along the lines of developing a concurrent discussion of these units which we label individual enterprise—partnership, corporation, joint stock company or business trust? (The writer has been told that a plan of this kind is now in operation at Columbia University.) Should not a study of the business organization cases be interwoven with a like study of current economic literature prepared to show which type of enterprise functions best in a given situation? Lastly, is not the case system defeating the justification for its existence when editors, for the sake of including as many decisions as possible within the covers of a single volume, cut both the facts and the opinion to the place where legal "principle" totters in the

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<sup>20</sup> 228 U. S. 695 (1913).

air without any factual legs on which to rest? Does not the future scientific study of the law of business enterprise rest on a thorough consideration of perhaps fewer cases in a given number of hours but with each studied in the light of the economic, the political, the sociological and the psychological elements that entered into its makeup?

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CASES ON CIVIL PROCEDURE. By Roswell Magill. American Casebook Series. West Publishing Co., St. Paul, 1927. Pp. xiv, 578.

One of the most serious problems of law school curriculum building during the last few years has been that of securing a proper integration of procedure courses with the standard courses in substantive law. For some years it was assumed that procedure could be taught properly only to advanced students, preferably to those in the third year. The exception to the rule was the course in common law actions, and to a very minor extent the course in criminal procedure. At the same time various experiments were carried on in introductory courses or outline courses designed to give the student some idea of court organization, the progress of the case through the courts, and other matters which were thought desirable for purposes of orientation. When in 1915, Austin W. Scott prepared a casebook on civil procedure designed for beginning students, he precipitated an intense discussion as to the possibility of teaching such material to such students.

Now comes Mr. Magill's book. It, too, is designed for beginning students, but it is organized on quite a different plan. In the first chapter we find a collection of material under the title "The Court System." The purpose of the chapter is to give, in brief compass, that outline of the history of court organization and trial procedure which has been found in the introductory courses previously referred to.

The next three chapters are entitled "Demurrers," "Objections and Exceptions," and "Motions." The chapters are grouped under the title "The Appellate Record." Chronologically the arrangement is wrong. But from the point of view of a beginning student, studying the decisions of appellate courts, each of which has a procedural history based upon a demurrer or an objection or a motion, nothing would seem to be quite so helpful as a study of the procedural concepts involved in those terms. This is Mr. Magill's contention and, while he concedes that a course designed to teach procedure and for no other purpose might well be arranged with more regard for chronological consistency, still, he insists, this course serves quite a different purpose not least of which is the orientation of the student. As the student must come into early and frequent contact with demurrers and motions, it is well that he learn something about them as soon as possible.

Part II of the book is entitled "Pleadings in the Actions—The Declaration or Complaint." The method of treatment used consists in developing, in

turn, each of the familiar common law actions. In some instances the material used consists of excerpts from texts, in others old English cases, in others, modern American cases. Cases which students of former generations studied in the courses on common law actions, common law pleading and code pleading, are here found grouped together, illustrating principles of pleading and demonstrating theories of action which have persisted under changing systems and changing names. The idea seems sound. However, two questions may fairly be asked: first, whether it is necessary or desirable to take first year law students so far into these subjects; second, whether the result is not to produce duplication of instruction in this course and the course in pleading?

Part III is entitled "Parties" and again might have been lifted from case-books on common law and code pleading. The same can be said for Part IV which is entitled "Pleas and Replications." Part V consists of a single chapter entitled "Enforcement of Judgments." An appendix which is an actual "Case on Appeal" in the appellate division of the New York Supreme Court, completes the volume.

Of the five hundred and sixty-three pages of source material, four hundred and seventeen are devoted to an admirable consolidation of the material usually covered in the three courses referred to above. Ten pages are devoted to a description of court systems. Seven pages on court procedure, fourteen pages on objections and exceptions, thirty pages on motions and eleven pages on enforcement of judgments—sixty-two pages in all—constitute the material out of which that part of the course on "Civil Procedure," exclusive of pleading is to be built. A seventy-eight page appellate record is available to illumine the course.

There can be no doubt that the book is well adapted to serve three purposes in one; namely, to give a sufficient history of court organization, to outline sufficiently the usual steps in civil trial procedure, and to indicate the common law sources and present developments of our familiar forms of action.

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CASES ON BANKRUPTCY. Second Edition. By Evans Holbrook and Ralph W. Aigler. Callaghan & Co., Chicago. 1927. Pp. xi, 650.

To those familiar with the first edition of this casebook (1915) and with the supplement of 1920, the excellence of the present work is no surprise. Thousands of bankruptcy cases have been decided in the twelve-year interim, and, fortunately, the Supreme Court has spoken in a rather unusually large number of decisions, many of which settled questions upon which the lower courts had been hopelessly in conflict. The editors have taken full advantage of this opportunity to substitute in many instances the Supreme Court's last word for less authoritative holdings selected for the earlier edition. Of course, most of the familiar "landmarks" are still to be found, though several have been replaced by later cases involving refinements of the old principles.

The present edition is timely, of course, in that it presents in the text of the *Bankruptcy Act* the amendments of 1926, which have helped to clarify and improve some situations which had come to be objects of widespread criticism.

In the preface the editors express the devout hope "that those who may use this book may not find it without material provocative of discussion." The reviewer, for one, will hazard the prediction that the editor's hope is destined for fulfillment, both as to this and any subsequent edition. The present volume, like the first edition, offers, as is eminently proper, some cases whose soundness is open to serious question, but it seems apparent that the editors, with their accustomed diligence, have lost no opportunity to include in the new edition any available decisions upholding the contrary views.

It is a far cry from the early type, which one may call, perhaps, the "pure casebook," to the prevailing form of the present day, so well illustrated by the volume under discussion, in which the scholarship and diligence of the editors present the student with a wealth of annotation, both to cases and to legal periodicals, and with a flock of pertinent questions, sometimes suggesting, at least, the editors' opinion of the law or what it should be. Twenty years ago this would have been "heresy." At all events, the contrast affords a bit of quiet amusement to those few law teachers who not only admit when pressed but even perversely insist that a scholarly textbook, under any name, is of inestimable value to the undergraduate, be he in pursuit of "the law," whatever that may be, or only of "legal reasoning," whatever that may be.

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