

BOOK REVIEWS

THE HISTORIANS OF ANGLO-AMERICAN LAW. By W. S. Holdsworth. Columbia University Press, New York, 1928. Pp. 175.

This book comprises a series of lectures delivered by W. S. Holdsworth at Columbia University on the James I. Carpentier Foundation.

Professor Holdsworth is of the opinion that legal history should be written either by lawyers who are historians, or by historians who are lawyers. The professional tradition of the historical development of English law, he thinks, became established in the last of the sixteenth and the early seventeenth centuries. Prior to this time he finds that practitioners used legal history only in the form of traditional legends, and then more to prove political theses and to embellish arguments than to establish legal propositions. Even Coke was not a true historian, for, though he made use of the Year Books, he accepted Anglo-Saxon legends and was a fanatical politician. Yet the system of case law was laying the foundation in the fourteenth century for this tradition; and it soon became established, because of the necessity of adapting mediaeval law to modern conditions, because the settlement of the power and jurisdiction of the courts and of the prerogatives of the King involved history, and because history was beginning to be studied for its own sake.

The pioneers in this field were Lombard and Somner, who showed up the absurdities of the Anglo-Saxon fables and made the texts available; Dugdale, Prynne and Madox, who wrote the history of various legal institutions; and Henry Spelman, who (with Madox and Somner) wrote the history of many legal doctrines. These were succeeded in the seventeenth and eighteenth centuries by Selden, who was the first scientific historian of English law; Hale, the greatest English historian before Maitland; Blackstone, the only historian of English law as a whole up to his time; Reeves, who wrote the first complete though dull history of English law to the reign of Elizabeth; and in the last half of the nineteenth century by Maine, a great student of comparative law; Vinogradoff, with a profound knowledge of Roman law; Dicey, who in the nineteenth century held a place comparable with Blackstone in the eighteenth century; Pollock, the most learned English lawyer; and finally Maitland, whom Professor Holdsworth regards as the greatest of all English historians.

Professor Holdsworth believes that all true history is a history of ideas, that there can be no effective legal history without comparisons, and that it must be imbued with the spirit of historical criticism; and he believes that all of the lawyer historians of the seventeenth, eighteenth and nineteenth centuries, with the exception of Reeves, ranked high in all these respects. There probably will be general agreement with Professor Holdsworth's estimates.

Lord Mansfield thought his age so much more enlightened than prior ages, which he called "Gothic," that he paid very little attention to the professional tradition, and Bentham thought the study of history of minor importance; but Professor Holdsworth thinks that the professional tradition was rightly successful in resisting Lord Mansfield's reform innovations and in compelling Bentham's reforms to be carried out by men bred up in this

tradition. One cannot but wonder if Professor Holdsworth has not here overemphasized either the success or the advantages of the professional tradition.

Professor Holdsworth is particularly generous in his recognition of the value of the contributions to Anglo-American history by United States lawyers. He names a great many as entitled to credit, but those given the most credit are Holmes, Bigelow, Ames, Thayer, Gray, Langdell, Wigmore and Street, at the head of which list he puts Holmes. The reviewer would not quarrel with this judgment. Professor Holdsworth thinks the work of Americans has been scholarly, practical and liberal. It is flattering to get this opinion from a man of Professor Holdsworth's standing. He also acknowledges for Anglo-American history a debt to foreign contributors like Brunner and Liebermann.

Professor Holdsworth himself exhibits in this book everything he has said about the charm of style of Maitland, Pollock and Blackstone, and the ability of Selden, Hale and Maitland to stand the test of modern scholarship.

Hugh E. Willis.

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RATIONALE OF PROXIMATE CAUSE. By Léon Green. Vernon Law Book Company, Kansas City, 1927. Pp. viii, 213.

Always there has been genuine need of a book that would accurately analyze, interpret and evaluate decisions of various types, resting upon, or purporting to rest upon, one or another of the supposed rules growing out of the several doctrines of causation. Leading thinkers and others have occasionally attacked various phrases of the subject in articles in law journals. Heretofore most of such literature has been written with too much reverence for the great mass of judicial rubbish that has accumulated around the law of cause. Even the best articles on causation have lacked completeness in the working out of a system really covering the field. With the most complete understanding of the judicial process and with approval only for the truth, Professor Green has proceeded, in this great work, to interpret the decisions said to bear upon this important subject. Not the least service done by the author is the banishing of a host of cases from the realm of proximate cause. It is clearly shown that many of the cases assumed by judges to be cases of causation are really cases in which the question is, "Is the plaintiff's interest protected by law, *i. e.*, does the plaintiff have a right?" or, "Is the plaintiff's interest protected against the particular hazard encountered?" or, "Did the defendant's conduct violate the rule that protects the plaintiff's interest?"

The distinction between the question whether negligence exists and the question whether a negligent act is the proximate cause is clearly shown. Much light is cast upon the troublesome question of the functions of court and jury in cases involving these questions.

Having disposed of preliminaries in a masterly fashion in the first four chapters, the author proceeds, in chapter five, to discuss "the problem of causal relation." This he does in the most careful and analytical manner. The text bearing directly upon the causal relation constitutes an accurate statement of

the usual situation, in which the causal relation is a question of fact, and of the less usual situation, in which facts as to the causal relation are so clear as to raise no issue of fact. He elucidates the common type of case in which the court mistakenly requires the jury to pass upon a legal question under guise of determining proximate cause. The old notion that one rule of causation governs negligence cases and another rule governs intentional wrongs, is well analyzed and corrected. The author demonstrates the error and emptiness of the probable consequence theory, and states the merits of the substantial factor theory, while recognizing the inexactness of this latter theory, and its uncertainty in getting proper results from a jury.

The work is of value to law schools, law offices, and courts. The academic value of so scholarly a work in this important field is self-evident. And it seems certain that it will be an invaluable aid, at least occasionally, in the trial of negligence cases, especially during the period of stabilization of the law of negligence and causation, which must follow the uncertainty and instability of the supposed legal rules resulting from the orgy of loose and untrained reasoning of courts in these fields during the past century. Although the work is not large in volume, it seems to be one of the great law books of this generation.

Ralph Stanley Bauer.

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EQUITY JURISPRUDENCE. By Sherman Steele. Prentice-Hall, Inc., New York, 1927. Pp. xi, 897.

This work, consisting of about three hundred cases, is "an attempt . . . to present a fairly comprehensive survey of the doctrines of Equity Jurisprudence as they are applied today in the American courts." It purports to present all the heads of equity jurisdiction usually comprised within the subjects designated as Equity in a typical law school curriculum, each chapter and sub-division being introduced by a very compact statement of "principles" in text or commentary form. Of the latter feature, the author says modestly, that it "scarcely merits the designation of a summary, and, of course, does not pretend to be an exposition of the subject. At best, it may serve to correlate the cases and perhaps to put the student in a questioning frame of mind . . ." Considered from this point of view, the value of these summaries may be questioned. Some of them are very well written, indeed, and cover the topics to which they relate so comprehensively, though briefly, as to leave little to the curiosity of the student. This is the case, for example, with the historical introduction in Chapter I, with the article on trespass in subdivision 2 of Chapter IV and with that on prevention of multiplicity of suits, in Chapter VIII. Some of the other summaries, however, entirely merit the description given by the author. In short, the reviewer's impression is that a slight lack of uniformity of treatment is manifest in the textual matter.

The collection of cases is remarkable. Many excellent modern American decisions, which do not appear in any other compilation, have been found, and the best of those which have been favorites of other editors have been retained. Considering the scope and plan of the work, it is not too much to

say that it would be difficult, indeed, to collate more strikingly teachable groups of cases than are found repeatedly in many of the chapters.

Of course, one can always find ground, if not cause, for criticism; and the ambitious project of reducing the case-material for the study of a subject, to which three standard law school courses are usually allotted, to the dimensions of this one volume, could scarcely have been undertaken without peril of pitfalls here and there. There is always the problem of arrangement, which, perhaps, no two minds would solve alike. Yet it is difficult to see the reason for postponing *Massie v. Watts*,¹ *Silver Camp Mining Co. v. Dickert*,² and other like cases for special treatment under specific performance, instead of selecting a smaller number of them to follow *Gardner v. Ogden*,³ (the first case in the book) and to illustrate more fully the important point respecting action *in personam*. One would also think that, in such a collection, the *Salton Sea Cases*,⁴ or some representative of their class, would be put into the first group, instead of *Payne v. Hook*,⁵ which principally illustrates a point in federal jurisdiction. Somehow, it seems as if Chapter VI, on restraint of actions at law, etc., should find place earlier in the book. The complete segregation of the cases on prevention of multiplicity of suits, and the introduction of this chapter immediately before specific performance is encountered, does not seem wholly satisfactory. The chapter on fulfillment of conditions is made to include the cases on certainty and fairness, which appears to be illogical, and those on mutuality, which, though unusual, is stimulating and suggestive. It excludes the cases on relief against forfeitures, which are put in a separate chapter; and this is to be commended, although it would seem more appropriate to place the two chapters in immediate succession. Similarly, the chapter on negative decrees might well have been introduced earlier, instead of at the end of the subject of specific performance. No doubt, however, there is much to be said for the order of arrangement employed.

Another matter involving discrimination is the relative quantities of material to be used for the development of the several principles within the scope of a work like this. In general, this book seems to be properly weighted in this respect. As in more than one of the recent casebooks, the number of cases on protection of business seems to the reviewer to be excessive, in proportion to the size of the work as a whole, especially as most of the opinions discuss the substantive law of torts, rather than equitable problems as such. There are no cases on mistake and misrepresentation as defenses to specific performance, none on equitable restrictions on the use of property, and the two on interpleader are of questionable value. More than fifty pages are given over to a chapter on restraining official actions. To be sure, the quantity of such litigation is great; but in view of the attention usually given to this topic in other courses, this amount of space seems too great in a volume of this total size.

¹ 6 Cranch 148 (U. S. 1810).

² 31 Mont. 488, 78 Pac. 967 (1904).

³ 22 N. Y. 327 (1860).

⁴ 172 Fed. 792 (C. C. A. 9th, 1909).

⁵ 7 Wall. 425 (U. S. 1868).

On the other hand, the chapter on priorities and notice, and that on equitable conversion, in both of which material is introduced which is not customarily found in case books on Equity, represent valuable contributions and contain much excellent material; though here, too, there is some overlapping of the field of mortgages.

On the whole the author has achieved a real feat in the comprehensiveness of the view of contemporary Equity which he offers through the limited number of cases in this really excellent book.

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LES GOUVERNEMENTS DE FAIT DEVANT LE JUGE. By Noël-Henry. Librairie R. Guillon, Paris, 1927. Pp. xxxii, 260.

Professor Basdevant in his preface to this book claims for it a permanent place in legal literature. He is an interested judge, having watched paternally over its preparation. But his estimate is scarcely exaggerated; the work is an event well worth the attention of all those concerned in the difficult questions arising out of the recognition or non-recognition of new governments.

M. Noël-Henry's division of the subject into three parts, according as the act of the *de facto* government is being considered (a) by the judge of the State where it has held power, (b) by a foreign judge, or (c) by an international tribunal, forms the basis for illuminating and weighty distinctions. Part I will probably meet with little objections. Parts II and III, on the other hand, are calculated to arouse keen criticism. But whether or not we agree with the findings, we cannot but admire the scope and industry of the author's research and the extraordinary clearness with which he conducts an elaborately documented argument.

When the foreign judge is asked to decide whether the act of a body claiming to be the government of a State is or is not a valid act of that State, his answer must depend absolutely, so we are told, upon whether or not such body has been recognised by his own government. Recognitions expressed to be *de facto* are here of precisely the same value and significance as those *de jure*. The author is particularly interested at this point, as throughout his book, in British and American precedents, and does not hesitate to attack what he calls the recent shift in the course of American judicial decision. In a very penetrating analysis of the cases involving the competence of the Soviet Government, he attributes the shift to three things—(a) the erroneous application of Civil War precedents, (b) the influence of Professor E. D. Dickinson, and (c) the fear of contrary decision in countries which have recognised the present Russian régime.

The principle upon which M. Noël-Henry bases his strict limitation of the judge's competence in these matters is the separation of powers. External relations are the business of the executive government, not of the judiciary, and for the latter to admit that a non-recognised government exercises for any purpose the sovereignty of a foreign State would be an encroachment upon the former's province. But this subordination of the judicial to the political au-

thorities is surely carried too far when the judge is denied competence even to decide whether any given relations amount to recognition. Here the usual clarity of the argument breaks down, and some inconsistencies appear. Thus we are told that the judge may act upon common knowledge of the status of a government, which may well involve an appreciation of facts other than express recognition. Again, the author cites with approval British decisions based on an interpretation of certain Orders as equivalent to recognition *de facto*. The insistence upon express recognition is clearly untenable.

In Part III, the most controversial thing is the assertion of a duty to recognize effective governments. There is no attempt to prove a rule of international law to this effect, beyond a reference to the obligatory respect for the sovereignty of the State in the choice of its rulers. The assertion does not correspond to actual practice, and though the establishment of such a duty may be desirable, it is scarcely more so than a duty to recognise States, which duty M. Noël-Henry denies. If we reject this postulate, a good deal of what is said about the grounds for decision in an international court goes by the board, for, in the author's opinion, much depends upon whether a recognition has been illegally granted or refused. Some curious consequences are deduced from failure in the alleged duty to recognise. Thus Government A, which has succeeded in displacing Government B, may disown liability for the latter's delicts against the subjects of a foreign State on the ground that the foreign State had unjustly refused to recognise Government B. The refusal was an affront to the State which Government B had in fact effectively represented, and which Government A, perhaps assisted in its struggle for power by the very refusal, now represents. The author here shows an inclination for "strong decisions," an inclination which manifests itself again when he allows a successful revolutionary government to repudiate obligations assumed by it before recognition of its belligerency. In the latter case there has also been an affront to the State, the affront being commerce with a body which, though now recognised as the government of the country, was at the time in revolt against the constituted authorities. We can scarcely follow M. Noël-Henry in this extension of the practice of allowing a defendant to take refuge in his own iniquity.

Incidentally to the main thesis, a number of connected problems are discussed. Much real service is done in the dissipation of common illusions about the extent to which international law is applied by national courts, the significance, conditions and consequences of recognition of belligerency, the utility of a status of insurgency and the retroactivity of recognition. But the author has ignored or dismissed too summarily several unsettled questions more or less closely related to his theme. Thus, in connection with the processual immunity of States, he has nothing to say of the widely admitted exception as to real property, he is dogmatic regarding the effect of war on treaties, and he casually observes that a State may be liable for a judicial decision contrary to international law—matters, all of them, in which the writer must still proceed with caution.

In spite of some differences of opinion, I would close this review with repeated tribute to the scholarly author of an excellent monograph.

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INTERNATIONAL LAW AS APPLIED TO FOREIGN STATES. By Julius I. Puente. Burdette J. Smith & Company, Chicago, 1928. Pp. xxiii, 299, Index.

In this analysis of the present state of International Law in American jurisprudence, Mr. Puente, who, largely because of his former book on *The Foreign Consul*, has already taken his place as an authority, adds a very useful handbook to the bibliography of International Law, a subject which is fast growing in importance.

Professor Hudson, of Harvard University, in addressing the Bar Association of New York City, calls attention to the astonishing advance in the development of International Law. In view of this development, Mr. Puente's book is very timely and furnishes valuable source material of great assistance in diplomatic, consular, and legal circles, upon the subjects of which it treats.

In his introduction to the book, Mr. Puente states that he has attempted to deal with the questions above-noted, with the "minute distinctions" which legal precision requires, and describes his text as a case-text, or, an analysis of the juridical status of foreign states in American jurisprudence. "Minute distinctions" are not everywhere apparent in the book, as, for instance, when Mr. Puente treats of search and seizure on the high seas of vessels of foreign registry, and refers only to two cases and not to treaties made concerning that question, and attempts to cover the whole subject in nine lines in his book. On the other hand, to devote any space to the law governing the "Master of the Horse" of a foreign minister, and to indicate this subject in large type, when the only case¹ in which any question regarding the "Master of the Horse" arose, dates back to the William Blackstone reports, would indicate a lack of balance between those subjects requiring minute treatment and those to which no treatment at all would, perhaps, not derogate from the value of the book.

But the book contains valuable annotations, and, while essentially a summary of the law, is an excellent digest of many clarifying cases in American and British Courts. It is a commentary on these cases rather than an essay on the law, but it is also a logical presentation of numerous decisions, particularly American decisions, and, because of this, will take its place as a valuable source in which to find authoritative rulings on the subjects of which it treats.

No recent book of its size and character presents in such a favorable form citations of American cases which otherwise would be difficult to secure, and the legal practitioner in America will find the book of inestimable service to him in securing authority on the subjects treated, and such a practitioner will rejoice that instead of indulging in speculation, the writer, as he states, conscientiously avoided it, and instead has studied the cases and cited them in every instance for the principles which he asserts.

There will be no person engaged in any diplomatic service or having to do with any Embassy, or Consulate, who can afford to be without this book.

¹ *Poitier v. Croza*, 1 Black. W. 48 (1749).

Workmen's Compensation Acts and Federal Employer's Liability Acts, as affected by treaties, and the recent decisions covering these points, by their inclusion and treatment in the book, sufficiently indicate the careful work of the author; and his citation of the most recent cases on phases of International Law commends the book to anyone who is sufficiently familiar with the general subject, to realize what care and research have gone to its preparation.

On the whole, the book is not a reprint of other material, but a valuable and new summary of the law and of the cases cited. The index of subjects is excellent, but no index of cases cited is furnished. The index of "Words and Phrases" is particularly to be commended.

William J. Conlen.

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