

BOOK REVIEWS

THE CONTINENTAL LEGAL HISTORY SERIES: VOL. VIII: HISTORY OF ITALIAN LAW. By Carlo Calisse. Translated by Layton B. Register. With Introductions by Frederick Parker Walton, and Hessel E. Yntema. Little, Brown, and Co., Boston, 1928. Pp. lix, 827.

This volume, the eighth of a series of ten, though published last, brings to a successful consummation the great editorial plan conceived by Dean Wigmore, the Chairman of the Editorial Committee, two decades ago, and worked out under his brilliant supervision by able translators and assistant editors.

This last volume is quite up to the high standard set by the preceding numbers of the series, and the choice of Professor Calisse to present the history of Italian Law is a most happy one. He represents the best type of Italian scholar and has back of him a long career as professor in four Italian universities and membership in many academic societies and learned congresses. He has furthermore a most imposing list of books, articles and addresses on legal history and kindred themes to his credit.

The present volume contains a translation of Parts II and III of Calisse's "*Storia del Diritto Italiano*"—Part I, on the sources, was included in "A General Survey of Continental Legal History," the first of this series. A translation from Calisse's "*Storia del Diritto Penale Italiano*" is used to connect up the Public Law of the first book with the Private Law of the third book. This interpolation of Criminal Law between Public Law and Private Law fits very well into the scheme of presentation of the history of law. Most judicial matters, in the early history of law, were of a penal character. The injured person wanted satisfaction and compensation. But even more he desired vengeance. The offender was pursued with arms, and the families of both the offender and the victim were drawn into the feud, this giving rise to private warfare. But this was detrimental to the peace of the state and public authority constantly extended its control over smaller social groups. The whole history of law thus becomes an attempt to delimit and differentiate the fields of public force and private redress within the realm of what we now call Criminal Law.

The opening book on Public Law gives a most readable and interesting account of the development of governmental institutions of the Italian peninsula during the Byzantine and Germanic Periods, and the Period of the Renaissance.

The second book, with its presentation of the historical development of the theory of crimes and penalties, has especial significance for the present day reader in its account of the philosophic theories of punishment elaborated by "The New Penalists" from Beccaria to Romagnosi; closing with a chapter on the reform of Criminal Law during the Eighteenth Century. Chapters XIX and XX, contributed by the translator, bring the history down to the advent of the Fascist government.

The third book, on Private Law, shows the course of development of the concepts of person, family decedent estates, property and obligations, with two concluding chapters prepared by Professor Calisse for this translation:

one on National Codification, and the last one on Present Developments in Private Law. The latter is designed to indicate the present tendencies in Private Law since the beginning of the present century and more particularly during and since the World War.

Especially worthy of note here is the concise and lucid account of the validating mark of contract in mediaeval Italian law. The primitive Germanic peoples did not base contract upon simple evidence of intent but rather upon some definite external formalities. They apparently started with the "real" contract in the Roman sense, in which the validity of the obligation depended upon delivery of a thing. Very soon they adopted the *thingatio*, an agreement concluded before the popular assembly. Then, in place of delivery of a thing which was the object of the contract, a symbol was given, known as the *wadia* or *festuca*, probably the giving of a spear or rod to indicate the yielding of authority over the object of the obligation. This seems to have been the primitive form of the Germanic symbolic contract.

At a later period, through the influence of the Roman law, a written *charta* was delivered as a mark of validation. These *formularies* with the identical name of *causa* or *cautiones* were favored by the clergy so that the *charta* was given the same significance as the *wadia*.

To these two forms which existed side by side, and were of like validity, a third validating mark derived from canon law was added, a moral or religious element which made the obligation binding quite independent of form, because of the duty to keep faith; for to do otherwise was to violate truth and offend God, who was identified with truth. Afterwards, through the influence of the canon law, the oath was used to validate obligations and all formalities became superfluous.

These three types were analogous to three classes of Roman obligations. The *wadia* corresponded to the "real" obligation, the contract *per chartam* had its counterpart in the "literal" contract, the obligation contracted under oath was similar to the "verbal" contract of the Roman law. In the course of development of Italian law the external formalities of obligations, especially those of Germanic origin, were abandoned and the element of consent, till then hidden under the formal marks, was brought into greater relief. The influence of the doctrines of the school of natural law reinforced this concept, so that today the Italian law recognizes consensual contracts alone, with certain unimportant exceptions; thus making the Italian theory of contract more nearly analogous to that of the German Civil Code than it is to that of the English law, with its doctrine of consideration, or to that of the French Civil Code with its analogous doctrine of cause.

The publication of this volume has been delayed because of the untimely death of the translator who first began the task, Mr. John Lisle of the Philadelphia Bar. The translation as given to us by Mr. Layton B. Register of the University of Pennsylvania, who is also the translator of Volume X of the Series, is most satisfactory. The reviewer has observed but one instance, where "The Code of the Two Sicilies" is spoken of as the *perfectionment* of the French Code, which would indicate that it is translated from a foreign tongue.

The profession has learned by the use of previous volumes how extremely valuable the series is. We now have in English dress the most significant works

of the greatest Continental scholars in the field of European legal history and the several volumes may be used as source books for courses in comparative law.

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CASES ON THE LAW OF CARRIERS (Second Edition). By Frederick Green. American Case Book Series. West Publishing Co., St. Paul, 1927. Pp. xxxv, 851.

In making up a case book dealing with public service one is confronted with the duty of selection. He may make a case book dealing with carriage alone, or with public utilities alone, as public utilities are defined in most states, or he may attempt to combine the two in one case book. Our author chose to confine himself to a case book on carriage. His reason seems to be, as he points out in the preface, that public service has been developed chiefly in connection with carriage, and a case book confined to that topic will necessarily carry with it a large knowledge of the general principles of public service. He has, therefore, given the last part of the book to the relation of carriage to the law of public service as shown in the development of the law by legislatures, commissions, and courts. The treatment in this regard is adequate, except, perhaps, that it does not develop historically the real origin of the underlying principles of public service. It may be that a case book formed on the present plan ought not to be expected to give space for any considerable treatment of historical principles.

The author, however, has not confined himself by any means to treatment of carriage as related to the laws of public service. He says, "But it is intended to exhibit the law of carriage as including much more than the law of public service . . . to require a carrier to perform his services adequately and impartially does not of itself alter the services or displace the law that governs them." One is tempted to ask how a carrier in performing his service can separate himself from the peculiar law that governs carriage and how any real distinction, after all, can be made. In following out this line of thought we note that the author himself has founded the case book on the proposition, "that carriage, like insurance, is a *peculiar* undertaking whose obligations, *founded on custom*, have had their primary development within the field of contract, and that a study of the law of carriage should begin with a consideration of the carrier's undertaking in that light." The difficulty in making the separation is indicated in this statement that carriage is a peculiar undertaking, that it is founded on custom even though it has had its large development within the field of contract.

An interesting point in this connection is noted in the preface where the author quotes Sir Francis Bacon,¹ to the effect that man has no power over nature except that of motion, and John Stuart Mill's declaration to the same point. The author makes this the text for his development of the fact that, "The moving which is carriage needs to be distinguished from other moving." He has selected his cases in the chapter on "What is Carriage" with that in view,

¹ BACON, DE AUGMENTIS SCIENTIARUM, Bk. II, c. II.

although he points out what is very evidently true, that cases on carriage are by no means decisive on this point.

One important and significant feature of the book is the large use made of cases involving the rules that appear in maritime affairs. This is done on the proposition that many important rules in regard to carriage appear first in maritime laws. This cannot be denied because such laws are very old, beginning at least with the Rhodian Laws, coming down through the *Consolato del Mare*, the *Laws of Oleron*, *Wisby*, etc. Here the question of balance would cause us to wonder whether or not too much space is given to the laws bearing on maritime affairs. This again is a matter of judgment, and it cannot be denied that the author has made very effective use of these maritime cases, and that he has by them made clear the fundamental principles he wishes to develop.

The first four parts of the book are taken from the text of the first edition with the suggestion that the teacher may omit cases or topics that he finds less important now than formerly. The author, however, has included references to later decisions and citations by introducing changes in the notes to the cases of the first edition. The remainder of the book is new and has important elements dealing with the *Bills of Lading Acts*, both state and federal, and *Uniform Warehouse Receipts Act*. He suggests that Part Five, together with the first part of the book having to do with the liability of a bailee, may be used for a study of the law of warehousemen. The last part of the book deals with the *Interstate Commerce and Public Utility Acts*, and brings out the principles in regard to equality in service and rates, discrimination, adequacy of service, and what is a reasonable rate; and introduces at the end important cases having to do with remedies and enforcement, one of the best parts of the book.

To go a little more into detail. The liability of a bailee for damage includes cases covering about fifteen pages. They are well selected although one notices that *Coggs v. Bernard*² is the only English case, and the only case reaching back to the beginning of the Eighteenth Century. The notes to *Tracy v. Wood*³ are fully as enlightening as the cases themselves on this topic, and *Flint & P. M. Ry. v. Weir*⁴ brings out very clearly the differences between a tort action and a contract action in such cases.

The section on the obligation of a common carrier is somewhat disappointing. It is very brief and does not disclose satisfactorily the principles underlying the obligations of a common carrier. The familiar cases of *Jackson v. Rogers*,⁵ and *Lane v. Cotton*,⁶ are the only ones used in the section on the duty to serve. The obligation to serve all as brought out in such cases as *Kansas Pacific Co. v. Nichols*,⁷ *Pittsburgh Taxicab Co. v. U. S.*,⁸ or *The Express Cases*,⁹

² 2 Ld. Raym. 909 (1703).

³ 3 Mas. 132 (U. S. C. C. 1822).

⁴ 37 Mich. 111 (1877).

⁵ 2 Show. K. B. 327 (1683).

⁶ 12 Mod. 472 (1701).

⁷ 9 Kan. 235 (1872).

⁸ 281 Fed. 669 (C. C. A. 6th, 1922).

⁹ 117 U. S. 1, 6 Sup. Ct. 542, 628 (1885).

is not clear. There is nowhere, apparently, a discussion of the relation of carrier to passenger as disclosed in such cases as *McNeill v. Durham, etc., R. R.*¹⁰ There is one case on liability for damage or loss by a common carrier.

The attempt to show a distinction between moving which is carriage, and moving which is not, is interestingly disclosed in the chapter on "What is Carriage." The cases are well selected. One notices here *Farley v. Lavary*¹¹ with extensive notes, the old case of *Roberts v. Turner*¹² with notes, and *Edwards v. Manufacturers' Building Co.*¹³ with valuable notes.

The conduct of transportation is given considerable attention and occupies about seventy pages, and the selection of cases warrants the attention given to the topic. One might have expected, however, a somewhat larger treatment of the topic of continuity. The topics of route and the effect of deviation are treated more thoroughly, as is the section on seaworthiness. These topics, dispatch, continuity, route, effect of deviation, seaworthiness, all illustrate what has been said about the use of maritime cases in this book. The same is true in regard to the care of goods and passengers, which is headed by excerpts from the "Table of Amalfi" and "The Consulate of the Sea." The section on excuses for failure to transport is largely taken up with maritime cases, seven out of a total of nine cases being given to maritime laws, in addition to two excerpts from the Laws of Oleron. Among these we notice the cases of *Exposito v. Bowden*¹⁴ and *Assicurazioni Generali v. Steamship Bessie Morris Co.*¹⁵ The development of a new type of carriage (taxicabs and busses) and the law in connection with it is not noticed, apparently, except in a note at the end of chapter three on "What is Carriage," which note has to do with Public Hackmen.

The completion of the carrier's undertaking is well covered, and the rights of a holder of a bill of lading are given adequate treatment. One notices here an important Kansas case, *Wichita Savings Bank v. Atchison, Topeka and Santa Fe Ry.*¹⁶ The chapter on tickets is excellent, especially the extensive notes at the end of the chapter. Chapter seven of Part Two, dealing with the liability where several persons are concerned in carriage, is important and well developed. Part Three is given wholly to the obligation of the shipper, a topic not always given adequate space and treatment. Part Four on the exceptional liability of a common carrier is also well developed and more than usual attention is given to the cases not within the rule of exceptional liability, a topic not always well treated. Part Five on *The Bills of Lading and Warehouse Receipts Acts* has already been spoken of. Part Six on *The Interstate Commerce and Public Utility Acts* is given quite a bit of space, over 200 pages being devoted to that general topic. The treatment, therefore, is adequate and thorough, with the possible exception of chapter five on the

¹⁰ 135 N. C. 682, 47 S. E. 765 (1904).

¹¹ 107 Ky. 523, 54 S. W. 840 (1900).

¹² 12 Johns. 232 (N. Y. 1815).

¹³ 27 R. I. 248, 61 Atl. 646 (1905).

¹⁴ 7 El. & Bl. 763 (1857).

¹⁵ [1892] 2 Q. B. 652.

¹⁶ 20 Kan. 519 (1878).

reasonableness of rates. Here only one short page is given to *Smyth v. Ames*,¹⁷ and *The Minnesota Rate Cases*,¹⁸ and other important cases. On the other hand, the case of *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*,¹⁹ *The Sugar Cases of 1922*,²⁰ and *The Trans-continental Cases of 1922*,²¹ are given adequate attention. The treatment of abandonment under the chapter on adequacy of service seems too brief for the importance of the subject. But it is clear, and the notes on pages 732 and 735 are copious and valuable.

This case book has many excellent qualities and its use certainly would lead to an adequate understanding of the law of carriage. The selection of cases and topics, while a matter of judgment upon which no two persons would always agree, is, considering the theory of the case book, probably as good as could be made. It is a thoroughly interesting case book and ought to develop keen interest in the subject on the part of the student. It shows discrimination and scholarship, and a thorough understanding of the topics treated.

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CASES ON TRIAL PRACTICE. By James Patterson McBaine. American Casebook Series. West Publishing Co., St. Paul, 1927. Pp. xvi, 1045.

The publication of this volume as one of the American Casebook Series is further evidence of the acceptance by the law school world of the fact that Practice is a subject susceptible of instruction by the casebook method. No effort has been made by Mr. McBaine to emphasize the rules of practice of any particular jurisdiction. Cases will be found from the courts of England, from the United States Supreme and Circuit Courts and from the courts of forty-two of the states. More than two-fifths of the one hundred sixty-two cases contained in the book come from England, the United States Supreme and Circuits Courts, New York and Massachusetts.

The cases are predominantly of comparatively recent decision. One hundred fifty-eight were decided in the present Century, two hundred ninety-one were decided since the middle of the last Century, and only thirty-two antedate the Nineteenth Century, and all but one of this latter class are English cases chosen for historical purposes.

The material of the book is contained in sixteen chapters, arranged with the idea of presenting the subject "from a chronological standpoint." This, of course, it is impossible to do with complete accuracy, because the chronologies of cases vary to a considerable extent. It is easy to suggest changes in arrangement. Chapter six, on "Continuance," could be placed almost anywhere in the outline. Chapter five, on "Change of Venue," could as well precede chapter four, on "Judgments Without Trial of Facts." The material of

¹⁷ 169 U. S. 466, 18 Sup. Ct. 418 (1898).

¹⁸ 230 U. S. 352, 33 Sup. Ct. 729 (1913).

¹⁹ 262 U. S. 276, 43 Sup. Ct. 544 (1923).

²⁰ 81 I. C. C. 448 (1923).

²¹ 74 I. C. C. 48 (1923).

chapter nine, on "Opening Statements," logically precedes the material of chapter eight, on "Sufficiency of the Evidence." Chapter thirteen, on "Trials by the Court," could be taught in advance of the material on trial by the Jury. However, the arrangement chosen by the compiler is as teachable a one as any which could be devised.

So far as the cases themselves are concerned, some of them are so outstanding as to require inclusion as a matter of course. A number of others have appeared in earlier casebooks. The large number of cases from the United States Supreme Court, and from the older, stronger state courts, give substance to the book. Generally speaking, the emphasis placed by the compiler upon particular topics is very even. The longest section in the book, containing thirty-six cases and over one hundred pages, is the one entitled "Grounds for Awarding New Trials." The number of points included in this subject, and the valuable review of possible errors in trial methods seem fully to justify the length of the section. Another long section is that on "The Directed Verdict." One wonders a little at this, especially as the compiler recommends this section as one which may well be omitted.

Chapter eight, on "Sufficiency of the Evidence," and section one of chapter ten, on "Province of the Judge and Jury," cover topics sometimes taught in the course in Evidence. Perhaps they belong more properly in the course in Trial Practice. In any event curriculum makers would do well to make teaching adjustments between the two courses if Mr. McBaine's book is used.

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THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1927. Oxford University Press, American Branch, New York, 1927. Pp. 256.

"The British Year Book of International Law" has acquired an established place in the literature of international law. These annual volumes, of which that under review is the eighth, bring together a series of useful articles; a report of some of the principal decisions of international tribunals and of municipal courts (English and American) dealing with questions of international law; book reviews of some of the notable books of the year; a useful classified bibliography; a catalogue of official publications, principally of the British Parliament; and a summary of events of international legal importance, classified by country.

The articles in the volume for 1927 are of exceptional interest: The first by H. W. Malkin, entitled, "The Inner History of the Declaration of Paris," is a learned exposition of the diplomatic history connected with that important Declaration, which has had so much influence on maritime law and particularly on the rights of neutrals. Its standing today, by reason of its violation by European powers in the late war, has been questioned; but no nation has ventured to suggest that it is not legally binding. If it should be so regarded, the chances of any limitation of naval armament would practically evaporate. The author of the article presents Marcy's note declining to approve the abolition of privateering unless the right of capture of private property were also

abandoned, followed by Seward's reversal of this view in 1861, in order to prevent the Confederates from using privateers and to have such vessels treated as pirates on entering neutral ports. France and Great Britain declined the proposal. The United States has not, however, indulged in privateering since the date of the Declaration—1856—and has supported the Declaration in all wars in which it has been engaged since then. Lord Wemyss' statement in the House of Lords November 11, 1927, suggesting that Britain withdraw because the United States was not an adherent, involved certain misconceptions.

An article by John Fischer Williams on "Denationalization" deals, in the light of the Soviet decrees denationalizing some two million Russians, with the question of the power of a state thus to excommunicate its own nationals, and raises the question whether this is not a violation of its international obligation to receive its own nationals if expelled from other countries. It is doubtful whether the Soviet Republic is not a new State, rather than a new government in an old State.¹ The Egyptian nationality "law" of 1926 is only a bill; it has not yet been enacted, and may not be.

The history of "The Doctrine of Continuous Voyage, 1756-1815" is discussed by Mr. O. H. Mootham in the light of certain manuscript notes of prize cases discovered only recently. What happened under the so-called "extension" of the Doctrine during the recent war is not reconcilable with its construction by the prize courts down to 1815.

Professor Brierly, in an able article, answers the question: "Do we need an International Criminal Court?" in the negative. In spite of the considerable number of persons who seem to believe that such a court is necessary, the reviewer is inclined to agree with Professor Brierly that it is not. The demand for it was stimulated by certain emotions as to "war crimes" charged during the late war.

Spinoza's rather discouraging doctrine that international law is a mere rule of morality which may be discarded when it becomes inconvenient, is the subject of a study by Dr. Lauterpacht. The article is useful for its analysis of Spinoza's views and for its discussion of political theory and international law.

In an article on "Criminal Jurisdiction over Foreigners," Mr. W. E. Backett analyzes the *Franconia* case in the light of the then pending case of the *Lotus* before the Permanent Court of International Justice. The *Franconia* decision was repudiated by Parliament in 1878. The author approves a dissenting opinion in that case to the effect that a collision with a British ship by another ship is alone enough to give British courts jurisdiction on a "territorial" theory, and believes that the Permanent Court should follow this view. He was sustained in his belief by the decision of that court, and was also supported in that court's evident repudiation of the view that mere injury to a national wherever committed suffices to confer jurisdiction on national courts.

Professor A. Pearce Higgins, in an article on "Retaliation in Naval Warfare," undertakes to defend such decisions as the *Stigstad* and the *Leonora*, which announce the doctrine that neutrals could be retaliated upon if they did not adequately defend their neutrality against invasion by the other

¹ THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1927, 46.

belligerent, leaving it to the prize court to determine whether the inconvenience thereby caused was disproportionately harsh. Apart from the question as to which belligerent's measures were the more unlawful and unsustainable, the doctrine itself can hardly be regarded as more than a rationalization of a desire to effect a certain object, and finds little, if any, support in international law.

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EIGHTEENTH CENTURY DOCUMENTS RELATING TO THE ROYAL FORESTS, THE SHERIFFS, AND SMUGGLING. By Arthur Lyon Cross. The Macmillan Co., New York, 1928. Pp. xvii, 328.

It was the custom of those who held high office in England in the Eighteenth Century to retain in their personal custody papers which we now consider public records. Lord Shelburne enlarged his hoard of manuscripts by copies which he caused to be made of other documents to which he had access. Most of the Shelburne Papers which refer to the Eighteenth Century are in the William L. Clements Library in the University of Michigan; and with the Clinton Papers and the Germaine Papers, also owned by that institution, form the most important collection in this country of documents relating to the American Revolution from the British side.

From the Shelburne Papers Dr. Cross has selected a group of documents having no bearing on American History. These are printed in the book under review with introductions by the editor, illustrating them and connecting them with the history of the subjects to which they relate. Shelburne was evidently impressed by the governmental inefficiency and corruption in the midst of which he spent his life, and he aggressively pushed the investigation of the systems of revenue and administration in vogue, for the reformation of which his own brief tenure of office gave little opportunity. The three subjects of the documents selected by Dr. Cross are connected only by the fact that Shelburne was seeking information on which to base measures for the increase of revenue and the prevention of waste in the fiscal administration.

We are told by Holdsworth that "in 1598 the forest organization was already in a state of decay" and "after the Restoration little more is heard of the forest laws." In his very adequate historical introduction to the section on "The Royal Forests" Dr. Cross points out that "toward the end of the eighteenth century increased attention was given to the importance of the forests with the increased need of timber for the maintenance of the navy." It was not, however, until 1817 that the first of the statutes was enacted by which the administration of the forests was entirely remodeled to carry out the purpose at which Shelburne was aiming. The twenty-eight documents in this section consist of reports, memoranda and letters on the extent, condition, use and administration of the forests and show a multitude of curious customs and a deplorable state of inefficiency, neglect and graft. A single illustration will suffice. The owners of thirty-five free hold estates in the Parrish of Widdecombe claimed certain privileges in the Forest of Dartmore, among which was the following: "When a Man comes to his Estate by the Death of

his Ancestor he Claims the Liberty of Inclosing Eight Acres of Land on any part of the Forest on paying one Shilling Yearly for the same, or when a Man Purchases either of these Thirty Five Tenements he Claims the same Liberty." The investigation shows that about thirty of these "newtakes," which were marked out by the Reeve chosen by the free holders, had been claimed, each containing from 100 to 300 acres. One is reminded of the forest acre of the eleventh century;² but the encroachment of the sovereign in the latter case is negligible when compared with that of the subject in the former.

The single document on The Sheriff is of little interest. It is a report, with extensive exhibits, on the casual revenue collected by that officer and the enormous expense of an antiquated and complicated system of accounting, with a plan for its reformation.

The thirty-seven documents on the subject of smuggling have a special interest because they present a picture bearing a close resemblance to that which the evasion of prohibition is producing in America with its accompaniment not only of open defiance of law but also of highway robbery and murder. Tea-running and spirit-running were the major sports of the smuggler. It was estimated that of the 13,000,000 pounds of tea annually consumed in Britain more than one-half was smuggled. "Whole fleets and no fewer than 40,000 people were said to be engaged in the gainful and exciting pursuit of defrauding the government." The credit of dealing with this situation has been generally given to Pitt because of the legislation under his ministry in 1784, but the diligent study and investigation made by Shelburne during his short ministry as revealed in these documents must have, as Dr. Cross points out, "helped to prepare the way for the later work of Pitt." The resemblance of tea-running in 1782 to rum-running in 1928 is illustrated by the following extract from the report of Mr. Lisle:

"Those who carry on the business from the Berry Head to the Ram Head, generally buy their Cargoes at Guernsey sometimes at Ruscoe, at the Mouth of Murliax River in France and bring over large Cargoes of Tea & brandy in fine Sailing Lugsail Vessells, that the Waterguard makes few Seizures. When they have landed their Cargoes: The Shore Officers are too much their Friends; to give them trouble."

The present day politician might profitably note that the only effective remedy which William Pitt could find for this condition was a reduction of the duty on tea.

This book is published as Volume VII of the University of Michigan Publications in History and Political Science.

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² MAITLAND, DOMESDAY BOOK AND BEYOND (1897) 376.