

## BOOK REVIEWS

SOCIAL CONTROL OF SEX EXPRESSION. By Geoffrey May. New York: William Morrow & Co., 1931. Pp. xi, 307.

The function of most social control is to harmonize and reconcile the conflicting interests of individuals, but in the case of the control of *voluntary* sex expression, with which the present work is concerned, there is no conflict of individual interests, and society interferes and opposes itself to the desires of individuals primarily to preserve the welfare of the social group. American law on this subject but reflects English law, and since during a great part of English history the Church administered the laws relating to the family and to morality, one must, in order to understand English law, go to the origins of the doctrines of the Church. These origins are three: the customs of primitive peoples, early Hebrew law and the conditions surrounding the early history of the Christian Church.

Thus Mr. May's book is divided into three parts. The first deals with the doctrine of sex repression among primitive people, among the ancient Hebrews and among the early Christians. Primitive people do not, as many fondly think, live a life of unrestrained sexual license; the basis for social control may be largely economic rather than moral but it is not less real on that account. Among the Hebrews we have a mixture of the primitive economic ideas with a certain amount of moral idealism, while among the early Christians the doctrine of asceticism as a moral value attained its greatest influence, an influence which is still very powerful in theory if not in fact. It is not possible to outline briefly the development of English and American law from these influences. Mr. May provides a wealth of historical information which shows a painstaking and intelligent use of his sources. The documentation deserves special mention; the bibliography which includes the works cited in the text takes up nineteen pages. Thus the book will provide many points of departure for further research. It should prove particularly valuable to students of the law and of social institutions, to psychologists and to any who wish to be informed on a highly complex and important problem. A book on the general subject of sex may arouse suspicion; many books on the subject are written apparently to entertain, others to edify, but the present one is written to inform. Those who have a romantic interest in sex will find the book quite dull, those with a moral axe to grind, or an immoral one for that matter, will find no comfort here. The careful, serious and calm scholarship of this work can not be over-emphasized.

If we were to draw a conclusion from the evidence presented we would say that the social control of sex expression has been comparatively successful where it has enjoyed the real support of public opinion, otherwise it has failed. The general attitude of public opinion appears from the author's own statement: "For the greater part of the past six hundred years the history of the control of sex expression in England and America has been the history of administrative failure." In America the disparity between law and practice is enormous. We may give an example cited by the author. In New York the

sole ground for divorce is adultery, but adultery is a crime punishable by fine, imprisonment, or both. Nevertheless in 1916 there were in New York City ten prosecutions for adultery and more than fifteen hundred divorces.

To some it may be a matter of regret in reading this book that the author has seen fit to give so few constructive suggestions. His purpose throughout, however, has been to examine the problem in the light of history and perhaps his book is the better for what it lacks. A definite fault, however, is found in the failure to relate the ineffectiveness of social control to fundamental factors in human behavior and to analyze these factors more fully. Sex expression, for obvious biological reasons, is among the most important of human activities and the course of natural evolution has associated with this important function an individual satisfaction which makes the demand for sex expression imperious and insistent, but a demand which frequently so far as the individual is concerned is quite dissociated from the primary purpose of the sexual function. Through the progress of science the dissociation is being rendered complete, and unless lawmakers and other social regulators recognize this fact they will only invite the failure which has so far crowned most of their efforts.

*Miles Murphy.*

*University of Pennsylvania.*

CASES ON THE LAW OF TORTS (Third Edition). By Francis H. Bohlen. The Bobbs-Merrill Co., Indianapolis, 1930. Pp. xx, 1193.

Professor Bohlen's second edition of Cases on Torts, published in 1925, consisted of 1214 pages and 493 cases. Of these cases 401 have been included in the present compilation together with 83 additional cases. Thirty-three of these new cases have been decided since 1925. Nineteen of the 83 additional cases were decided in New York, 15 in Massachusetts and 7 in England or its dominions. One hundred twenty-six British cases constitute about 25 per cent. of the entire number in the third edition; 62 New York cases, 13 per cent.; 54 Massachusetts cases, 11 per cent., and 20 Pennsylvania cases, 5 per cent.

There has been a discriminating selection of new cases and also a judicious elimination of cases from the preceding collection. The cases left out of the new compilation were on the whole less satisfactory for teaching purposes than those retained. Among the added cases are *Palsgraf v. Long Island R. Co.*,<sup>1</sup> *Baltimore and Ohio R. Co. v. Goodman*,<sup>2</sup> *O'Shea v. La Voy*,<sup>3</sup> and the old case of *Gilbert v. Stone*.<sup>4</sup>

A number of cases have been changed from one part of the classification to another. Several cases of which *Weaver v. Ward*<sup>5</sup> and *Newson v. Anderson*<sup>6</sup> are typical have been removed from the trespass group and placed under negligence with a section heading "Transition from Liability Without Fault to Liability Based on Moral or Social Misconduct." These cases make a good approach to the subject of negligence. They show the development of a fault basis

<sup>1</sup> 248 N. Y. 339, 162 N. E. 99 (1928).

<sup>2</sup> 275 U. S. 66, 48 Sup. Ct. 24 (1927).

<sup>3</sup> 175 Wis. 456, 185 N. W. 525 (1921).

<sup>4</sup> Style 72, 82 Reprint 539 (1648).

<sup>5</sup> Hobart 134 (1616).

<sup>6</sup> 2 Ired. L. 42 (1841).

of liability as growing out of changing conceptions of liability for trespass and especially battery. From them the inference arises that the duty to refrain from bringing harm to another by negligent conduct of a positive nature has its origin in trespass. Although the historical significance of these cases is important as an introduction to negligence, it is also important in working out the modern law of trespass. For example, the action of battery may be considered. While liability without fault to a large extent in battery has been abandoned, it is a difficult matter in some jurisdictions to determine what type of conduct will support the action. Probably intent of some kind is generally necessary even where actual bodily harm is done. The intent, however, may be constructive. At any rate the intent that will suffice is quite different from that defined in the Tentative Restatement of the Law of Torts. It has been held that where a body execution followed a judgment in battery and the prisoner sought to be released under the Insolvent Debtor's Act that the judgment was conclusive that malice existed.<sup>7</sup> Some recent cases hold that negligence will support battery or that intent is not required.<sup>8</sup> It is believed that the modern law of battery is sufficiently important to warrant a consideration of the transitional cases under that head. Later when the subject of negligence is approached the transitional features of these cases will be more significant, their place in the development of battery being understood, than if they are first encountered where they are placed in the third edition.

Part I of the casebook deals with trespass. Here the chapter headings have been changed from "direct invasions" to "intentional invasions." The title of Chapter V is "Intentional Invasions of the Interest in the Exclusive Possession of Real Property. 'Trespass Quare Clausum Fregit'." The change from "direct" to "intentional" is appropriate so far as assault, battery and imprisonment are concerned. It is doubtful, however, whether trespass *q. c. f.* should be classified under intentional invasions any more than under negligent invasions or invasions without fault. Generally it is desirable to classify cases according to the nature of the interest invaded or according to the social significance of the defendant's conduct and to ignore so far as practicable procedural distinctions. Intentional invasions is a better heading for assault than direct invasions. However, it is of questionable expediency to place as important a procedural class of cases as trespass *q. c. f.* under a heading that may give the student an erroneous impression of the kind of conduct that creates liability.

The changes in section headings under legal cause are desirable. Section 1 "actual cause" and section 2 "concurrent cause" remain the same. Section 3 in the second edition was entitled "Natural or Probable Consequence." This matter properly belongs under negligence. The title of section 4 was "Consequences Resulting Without Assistance of Outside Forces" and of section 5, "Consequences Brought About by the Assistance of Outside Forces." These headings

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<sup>7</sup> *Peters v. U. S.*, 177 F. 885 (C. C. A. 7th, 1910).

<sup>8</sup> *Lentine v. McAvoy*, 105 Conn. 528, 136 Atl. 76 (1927); *Sauers v. Sack*, 34 Ga. App. 748, 131 S. E. 98 (1925); *Jackson v. Mack*, 141 Mich. 99, 104 N. W. 395 (1905); *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N. E. 484 (1902).

also are included in the concept negligence. Conduct is negligent according to circumstances and these include forces both outside and otherwise. Moreover, the consideration of cases under the head of forces is conducive to the formulation of rules of thumb that are as likely to lead to bad results as good ones. One of these mechanical rules is the "insulation" doctrine of Wharton.<sup>9</sup> The headings of sections 3, 4 and 5 have been omitted in the new edition and two new ones introduced. Section 3 is "Causal Connection Between Misconduct and Injury Necessary to Maintenance of Action." This title is important in showing how actual cause operates to create liability for negligent conduct. It might well be a sub-topic of section 1 under actual cause. Section 4 is entitled "Causal Connection Required to Make Wrongdoer Responsible for Harmful Consequences of an Actionable Injury." This title is significant in the recognition of a distinction between the harm that is required for existence of liability and harm that involves only extent of liability. This distinction has usually been ignored in the discussions of legal cause. To determine the existence of liability for a harm only the concepts of actual cause and negligence as limited in the *Palsgraf*<sup>10</sup> case are important. But a different problem is presented where the question is whether the plaintiff should recover for a loss other than that which establishes his action. Here the foresight doctrine is less important if important at all. In this connection "legal cause" may be of some value in deciding cases. However, the fictitious nature of the expression itself suggests that cause has nothing to do with the matter. There would be more meaning in the title "legal damage" or "extent of responsibility for tortious conduct." The justification for the expression "legal cause" is usage.

Most of the changes that appear in the new edition are in trespass and negligence. This is explained in the preface as a result of the research made in these topics by the American Law Institute. The cases are annotated to sections of the Tentative Restatement of Torts. Several footnotes have been enlarged by citations to new cases or new articles in law magazines. Parallel citations have been supplied for all cases. Some of the cases have been added to by portions of the reports that were before omitted and the text in a few has been shortened by omissions. Omissions are indicated by asterisks. In some cases of the second edition attention was not called to omissions.

The second edition was widely recognized as a valuable collection of cases. On the whole the changes that have been made to produce the new edition are beneficial. The cases are interesting and well suited for classroom discussion. References to the Restatement will save the time of both teacher and pupils. Teachers will welcome these improvements which amply justify a third edition of this widely used casebook.

*George B. Weisiger.*

*University of Illinois College of Law.*

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<sup>9</sup> "I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces." WHARTON, NEGLIGENCE (2d ed. 1878) § 134.

<sup>10</sup> 248 N. Y. 339, 162 N. E. 99 (1928).

THE MIXED COURTS OF EGYPT. By Jasper Yeates Brinton. Yale University Press, New Haven, 1930. Pp. xxvii, 416.

On the twenty-sixth of February, 1926, the Mixed Courts of Egypt celebrated their Fiftieth Anniversary. It was time that an account should be given of the work accomplished by one of the most successful international experiments. The need of a comprehensive study was much felt, the existing literature dealing mainly with the procedure before the Courts. Former Judge Herreros' book of 1914<sup>1</sup> is too concise. And Judge Heyligers' brilliant lectures at the Academy of The Hague in 1927 are also very short.<sup>2</sup> The present author was at a vantage point to write on the Mixed Courts. He has been a member of the Mixed Court of Appeals in Egypt since 1921 and this work is a product of personal observation of the working of the Courts.

The story is a fascinating one. The Mixed Courts of Egypt are an outgrowth of the early capitulatory regime. Their creation is due to the abuses of the former regime which, however, has not been entirely abolished. Justice Brinton unfolds the origin of the Courts, describes the diplomatic battle which preceded their organization, and shows the victory of the undaunted great Armenian Foreign Minister of Egypt, Nubar Pasha, the founder of the Mixed Courts. The Mixed Courts were organized on the idea of making justice in Egypt independent from the government and independent from the consulates. They may be distinguished from "international courts" since their source of authority is national, although they function under conditions fixed by international agreement. They are "mixed" since their composition is "mixed" (Egyptian and foreign judges) and try only "mixed" causes. Created originally for a trial period of five years, and extended successively to 1921, they were prolonged in that year "for an indefinite period."

Justice Brinton's tale of the history of the Mixed Courts since 1876 is replete with historical incidents and shows the Courts doing a work as great as it was quiet and unpretentious. Their independence and integrity, the lack of any national partisanship and admirable *esprit de corps* of an institution devoted to administering law and not to protecting national interests was splendidly proven during the world war when the Mixed Courts kept aloof from all considerations of national or political character. The author further describes with an admirable clarity the judiciary—the Mixed Court of Appeals sitting at Alexandria and the three Mixed District Courts at Cairo, Alexandria and Mansourah—the selection and appointment of foreign judges and their qualifications; the Procureur General and the Parquet; the jurisdiction of the Courts and their organization and judicial methods; the procedure before the Courts; the bar and legal education in Egypt; and lastly the relation of the Mixed Courts with the other judicial institutions in Egypt. The most interesting chapters are those on the "Law of the Mixed Courts" and on the "Legislative Functions of the Courts." Throughout the organization, procedure and method of the Courts run the French legal tradition and law. The language is French. The Mixed Courts administer their own law, which is

<sup>1</sup> ENRIQUE GARCIA DE HERREROS, LES TRIBUNAUX MIXTES D'EGYPTE (Paris, 1914).

<sup>2</sup> *L'organisation des Tribunaux Mixtes d'Egypte* in RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL, 1927, II, p. 5.

founded upon a number of Codes modeled on the French Codes. Egyptian Statutes applicable to foreigners with the consent of the Powers are also part of the Law of the Mixed Courts. For the interpretation of the Codes the Courts resort generously to French *jurisprudence* and legal scholarship. Usage both local and general is an important part of the law of the Courts. This part of Justice Brinton's exposition is somewhat sketchy. Where all these legal materials are insufficient, the Courts were given power to "follow the principles of natural law and equity." Thus the Mixed Courts are placed in the same position as Italian and Swiss Courts. Of this power the Courts availed themselves abundantly in supplying the gaps of law in such matters as partnership, insurance, accidents, government responsibility and literary and industrial property. As an illustration the whole law of patents and trademarks in Egypt is a law worked out by the Mixed Courts on principles of equity. In addition, since 1911 the Mixed Courts were endowed with what appears to be direct legislative functions. Indeed, the Court of Appeals with certain additions to its membership acts as a Legislative Assembly in modifying and supplementing the "mixed law."

With regard to the future of the Mixed Courts, Justice Brinton seems right in holding that they have before them a still long period of usefulness, in view of the fact that in recent negotiations, it is proposed to transfer to them the jurisdiction of the Consular Courts on the abolition of the capitulations. It is difficult however, not to foresee that after a certain period the Mixed Courts are bound to be absorbed by the Native Courts with the progressive development of Egypt into a free and well governed State.

The volume is enriched by an appendix containing a good bibliography, a list of Justices and Judges of the Mixed Courts and documents relating to the Mixed Courts. A good index is given which is supplemented by a very detailed table of contents.

*Stephen P. Ladas.*

*New York City.*

CASES ON PARTNERSHIP. By James J. Cherry. Callaghan & Company, Chicago, 1931. Pp. xvi, 704.

This recent casebook is conventional in treatment and does not purport to suggest any novel method of teaching or of classifying the law.

It contains 190 principal cases, of which the geographical grouping is as follows:

English .....	7 cases
Federal and U. S. Supreme Court .....	30 "
32 States .....	153 "
The chronological classification is as follows:	
To year 1850 .....	5 cases
1850 to 1880 .....	6 "
1880 to 1900 .....	35 "
1900 to 1920 .....	25 "
1920 to 1931 .....	119 "

The diversification and modernity of the cases are thus self-evident. Some old friends are unavoidably absent. We look in vain for *Doner v. Stauffer*, *Thayer v. Humphrey*, *Gilruth v. Decell*, etc. But many newer cases, of the type of *Martin v. Peyton* (page 85), *Wharf v. Wharf* (page 362) and *Giles v. Vette* (page 563), more than atone for the omission. One is impressed by the editor's apparent pains to employ unhackneyed cases.

As to the identity of the cases themselves, it may be instructive to compare this book with another recent casebook of established reputation. In Crane and Magruder's Cases on Partnership, first edition, are to be found 42 out of the 190 cases selected by Professor Cherry. In the shorter version of the same casebook, published in 1930, are to be found only 27 of Cherry's cases.

In a modern casebook the footnotes have become almost equal to the text in importance. Professor Cherry has been happy in this respect, both with regard to his 566 illustrative cases and his 87 law review articles and casenotes. A table of law review articles, arranged according to their subject-matter, is of material value in this instance. The footnotes themselves are neither too brief nor too copious. As the preface states, they are meant to be neither "exhaustive nor exhausting." Their purpose is to stimulate the curiosity of the student without too easily satisfying it.

In presenting his material, Professor Cherry follows, as far as he can, the numerical sequence of the Uniform Partnership Act, sections of which are printed at appropriate intervals among the cases. While some of us may feel that this custom is unwise, in that it tends to facilitate unduly the reading of the cases by the student, one must be slow to condemn a practice that has been widely used in many fine casebooks on subjects covered by uniform legislation. The Uniform Partnership Act and the Uniform Limited Partnership Act are, of course, reprinted in the appendix, together with extracts from the Uniform Fraudulent Conveyances Act and from the Bankruptcy Act of 1898. The volume closes with an excellent and comprehensive index.

The chapter headings give us a fair idea of the editor's treatment of his subject. He first discusses the nature, the determination of the existence and the property of a partnership, throughout 176 pages. The second and third chapters deal with the relations of the partner towards third persons (119 pages) and towards his co-partners (49 pages) respectively. The fourth chapter (45 pages) treats of the property rights of the partner, while the fifth chapter (153 pages) goes into the various questions of dissolution and winding up. Limited partnerships, joint-stock companies and defectively organized corporations are discussed in chapters six (32 pages), seven (11 pages) and eight (17 pages) respectively. The ninth chapter (47 pages) deals with common law, Massachusetts or business trusts, while the tenth and final chapter (21 pages) discusses joint adventures. One feels that more space could have been profitably devoted to the later chapters in order both to clarify the problems therein presented and to increase the number of cases reported in the volume.

In conclusion, one may say that Professor Cherry has produced a most satisfactory volume. Those who wish to experiment with new styles and theories of legal pedagogy may not wholly approve. But the seeker of a modern and workable casebook of the orthodox type will find that Professor Cherry's product meets such requirement to a high degree.

Daniel J. McKenna.

De Paul University College of Law.

THE LAWFUL PURSUIT OF GAIN. By Max Radin. Houghton-Mifflin Co., Cambridge, 1931. Pp. 144.

This book consists of a series of lectures delivered at the University of California on the Weinstock Foundation. It contains five short chapters, and in addition a brief introduction in which is sketched the attitude of society towards business from the time of the ancient Greeks to the period of the Renaissance.

In the beginning of the book the author states that business morality having the sanction of the law, and current morality were once identical; near the end of the book, he states that there is now a definite trend towards bringing business morality, by means of legal restrictions, up to the level of current morality. The author explains the separation of business and current morality, which these statements necessarily imply has taken place, by the stiffness of the law which has made it partially independent of ethical developments. But this assumes that society has progressed ethically, an assumption which is open to a great deal of doubt. The true explanation lies, no doubt, in the feeling on the part of the early English judges that business was a vulgar pursuit, carried on by persons who were not "gentlemen", who dealt at arm's length with each other, and between whom the court would not interfere. From this feeling arose the famous doctrine of *caveat emptor*, which may be as the author states, "bad Latin and from the Roman point of view, worse law", but which has long been a part of the common law.

The matter between these two statements deals with illustrations of the low morality of business practices. Thus the hard creditor, the dishonest vendor, the advertiser, the unfair competitor, are discussed in turn, not as persons outside of the pale of the law, but as persons with whose actions the courts could not find sufficient illegality to warrant interference. Such a discussion would have a melancholy effect upon an individual of sensibility, were it not for the rising moral scale applied by the courts to business practices. But in many cases, the courts have been content to tolerate abuses which manifestly needed correction, and it has taken extra-judicial bodies to do what the courts have neglected to do. The author is properly appreciative of the splendid work which has been done, and which is still being done, by the Federal Trade Commission in discouraging unfair and untrue advertising. Indeed, he states that the Federal Trade Commission in condemning the *suppressio veri* and *suggestio falsi* in advertisements, as well as outright misstatement, is above the level of cur-

rent morality. It is a sad commentary on current morality that his statement is correct.

As to the future of business, the author is guardedly optimistic. He believes that business morality will continue to rise, influenced upward by the law; that competition will remain in business, although it will be restricted by law, which restriction will in turn be limited by the political and legal powers exercised by "big business". But as long as the classic statement of Adam Smith that selfish desire for gain produces general human progress, remains the foundation of our economic system, there is little hope for the millenium in business.

Mr. Radin's book is written in a charmingly informal style, that makes delightful reading. It is studded with phrases that display a witty and nimble mind. Thus, in speaking of an advertisement, Mr. Radin says, "It had many merits, but truth was not one of them". And apropos of unfair competition, he has this to say, "Competition may be the soul of trade . . . this soul has much that is fleshly and earthly clinging to it". The book may be read with profit by everyone, but especially by those who seem to regard business as enthroned on a lofty and immaculate pedestal.

B. F.

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