

## BOOK REVIEWS

SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH PERIODICALS. Edited by a Committee of the Association of American Law Schools. The Macmillan Company New York, 1931. Pp. xcvi, 1320.

The Association of American Law Schools appointed as a committee to compile and edit this book George J. Thompson, Cornell University Law School, Chairman; George K. Gardner, Harvard University Law School; George W. Goble, University of Illinois College of Law; James M. Landis, Harvard University Law School; and they have performed the work entrusted to them in no perfunctory way. The most cursory examination of the book shows the thoroughness and care with which the compilation and editing has been done, and a reviewer can find little to criticize either in the project or in the way that it has been performed.

For a statement of the reasons making such a collection desirable there is a strong temptation to quote the entire introduction of Judge Cardozo, expressed, as it is, with the literary charm that illuminates everything that he writes. Since such wholesale quotation is not possible, it remains only to state in briefer form why the "law-review essay has felt beyond the common lot the repressive cruelty of prejudice," and the reasons for its gradual emergence, justifying this collection. The prejudice has been due not only to the fugitive form of periodical literature, but to a distrust of academic productions, since a very large proportion of the articles in legal periodicals are written by teachers.

A judge who seeks to decide justly, and must decide with reasonable rapidity the vast number of cases that come before him, can do so only if he is aided by collections and classifications of authorities and arguments. Sometimes those presented by counsel are inadequate, and, in endeavoring to make them adequate, busy lawyers themselves must in turn look for help. It is inevitable that this help should come chiefly from the law schools. Under modern conditions few except those engaged in teaching the law can find time for the labor and thought involved in the preparation of these collections and classifications. This is not altogether a new development, since from the time of Blackstone and Kent down through the days of Story, Greenleaf, and Parsons, the most important treatises have been written by teachers of the law, but most of these writers had also achieved distinction as practitioners or judges. Two things, however, are comparatively new. One is the recognition by the law schools that teaching law is an occupation generally carried on most successfully if the teacher engages in it while he is still young, and thereafter permanently devotes most of his time to study and teaching. It is hardly possible for such teachers to achieve much distinction in practice, and their literary product is necessarily academic. Its value for practical purposes had to be proved before the profession would accept it. Gradually, however, the profession has discovered that the results of academic thinking, qualified as they may need to be by practical considerations, are at least grist for the mill. The second development of recent years is the increase of the volume of case law to such proportions that teachers of law, as well as other writers, are often driven to narrow their subjects of intensive study. The results of such study can find publication only in periodicals.

It is obviously impossible to reprint even within a volume of over 1300 pages all meritorious articles on so large a subject as Contracts, and no two persons would in every respect make the same selections; but unquestionably the most important and influential articles are included. The system of selection involves not only the collection of the most original and important articles, but also their classification in a succession of chapters, the titles of which would be appropriate

to the successive chapters of a treatise on contracts. The book may indeed be regarded as such a treatise, though inevitably there are gaps in the treatment. Naturally the selections are confined to essays dealing with the more general principles of contracts. Insurance, suretyship, vendor and purchaser, and other specialized branches of the law of contracts are not within the scope of the book.

There is a carefully prepared index and a table of cases. The value of the book is also increased by a selective bibliography of periodical literature on contracts classified in accordance with the titles of the chapters. This bibliography gives the reader references to other articles of value on the subject that have not been reprinted in the book itself. Both law students and practitioners should find the work useful.

If a reviewer cannot find any fault of consequence in a book he should at least prove that he has examined it by calling attention to some trivial matter. This reviewer, therefore, gives expression to a slight pang that he felt on failing to find in the Selective Bibliography under "Conditions" somewhat elaborate articles by himself on the risk, under the common law and under the civil law, of loss after a contract to sell<sup>1</sup> while an article by Professor Keener taking the opposite view (obnoxious to the reviewer) of the same vexed problem is included. It may be added that the reference in the table of cases to *Paine v. Meller*, the leading English case on the question, is to page 1339, though the book contains but 1320 pages.

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POLICY AND ETHICS IN BUSINESS. By Carl F. Taeusch. McGraw-Hill Book Co., New York, 1931. Pp. xi, 624.

A title such as this suggests that the author intends to discuss first what business men do and then what they ought to do. And since he dedicates his book to two eminent teachers of ethics, we may assume that he is more concerned with pointing the way than in expounding situations. It is highly to his credit that he deals with real material, actual legal cases, actual business cases, collected, described and analyzed in Reports of various sorts, and one can well believe his statement that the cases he has examined are many times as numerous as those he finds occasion to cite.

Mr. Taeusch begins with an introduction on "The Land, The People and Their Ideas". He has three chapters on the Sherman Act, five on the "Structure and Dynamics of Business" intended (p. 144) "to discover therein the factual basis for a system of business ethics", three on the "Ethics of Price Policies", three on "Unfair Trade Methods" and four on "Self-Regulation in Business", which constitute the last section. The whole is a volume of somewhat formidable dimensions. It is well printed and neatly bound and, except for the back which has something of the grace and elegance of nice new linoleum, it makes a handsome book. That is a real merit for which we should be duly grateful.

It must be apparent from what has been said that the book has grown from chapter to chapter by accretion rather than by organic unfolding. A great many of the ethical problems of business are discussed, but no particular reason is shown—though one might have been—why problems of combination should precede those presented by the smaller vices of fraud and dishonesty, and certainly no reason is apparent for the extraordinary importance attached to the Sherman Act in this particular connection. One gathers—it is not too clearly stated—the title of the book means, "What is the ethical consequence of certain existing

<sup>1</sup> Williston, *Risk of Loss After Executory Contract of Sale in the Civil Law* (1895) 9 HARV. L. REV. 72; Williston, *Risk of Loss After Executory Contract of Sale in the Common Law* (1895) 9 HARV. L. REV. 106.

business policies?" and since combination is certainly an existing policy, an important statute against combination must obviously be considered. But so far from being the beginning of an ethical examination of the problem, the Sherman Act was a belated repetition of an ancient ethical judgment that such combinations were essentially wrong, and the date 1890 for the rise of Ethics in the American business world (p. 54) is not merely "arbitrary", but without much foundation, and is not remedied by references to methodology and to "political metaphysics".

It is open to anyone to speak of the "rule of reason" applied in the *Standard Oil Cases*<sup>1</sup> as a "functional" interpretation as contrasted with a previous "absolute" one. It is at least equally reasonable to take the change as a bold, although not altogether unprecedented, piece of judicial legislation in the interests of corporate groups adversely affected by what the Sherman Act apparently requires of them. But surely Mr. Taesch has misunderstood the matter when he confuses the "rule of reason" of these decisions with the "reasonable" limitation of the common law rules against restraint of competition. The common law did not prevent any persons from agreeing to restrict their own competition if they did so reasonably. But it is certainly startling either at common law or under the statute or in any other respect, that A and B might combine to restrict the competition of C; and under a criminal statute, might do so with impunity, if they observed the "rule of reason". It sounds a little like the case in which the declaration alleged that the defendant had hurled huge stones at the plaintiff and the plea was that it had been done "*molliter ac leviter*".

This is not the only one of Mr. Taesch's confusions. Apparently he thinks the rule of "*caveat emptor*" received an enlargement and sharpening in the United States during the nineteenth century, due to the influence of Jews (p. 39). A little examination would have shown him that the doctrine was in fact seriously modified just at that time and his assertion would surely have amazed my Lord Hobart who seems to have announced the rule sharply enough in a still Jew-less England, *tempore Jacobi Primi*. Similarly (on p. 425) Mr. Taesch seriously misunderstands a matter so concrete as contempt of court. No violation of "fairness" is a contempt unless that particular act of that particular man has been previously prohibited by an order of the court or commission. Without such an order there would be no contempt, even if the violation of fairness were gross and unmistakable.

It almost seems that Mr. Taesch is a little innocent in handling legal matters, although he quotes so many cases, uses so much legal material and attacks all of it so doughtily. We should not make this as a serious reproach against him, if he dealt adequately with his more immediate subject: the application of ethical standards to business policies. But unfortunately I cannot find his discussion adequate, for all his fulness of detail. There are great gaps which, in an enterprise so solemnly inaugurated, should have been filled. It is proper enough to discuss the egregious forms of advertising that we take for granted, the hectoring tactics of large scale producers, but there are other topics. There are ethical implications in the problems of valuation, in the marketing of securities, in salesmanship and in speculation that are more serious than the rather special cases upon which Mr. Taesch dwells and in regard to which he seems to repeat trite judgments, when we should have liked a fresh and personal reassessment. He is a professor in a school of business administration and these schools have an unrivalled opportunity to draw the largest and most wide-reaching questions within the orbit of their influence. Administrators cannot, to be sure, escape responsibility for the unsavoriness of the smallest selling devices, but words like "business policy" in a title lead us to expect that even the pinnacles of our industrial civilization, magnificently secure monopolies like the American Woolen Co.,

<sup>1</sup> 221 U. S. 1, 58, 66, 31 Sup. Ct. 502, 514, 518 (1910).

would be scrutinized, and the springs of our tariff policy more earnestly probed than Mr. Tausch ventures to attempt.

The most serious difficulty, however, I find with a book sponsored as this book is, is its ethical incoherence. Ethics implies a valuation and accordingly a standard. What are Mr. Tausch's standards? Is the prevailing moral dualism of our business men merely a reflection of the generally reported dualism of Anglo-Saxons? Is this dualism an inevitable consequence of seeking to graft a competitive system on a religion and an ethic fundamentally hostile to it? We should bear more tolerantly with Mr. Tausch's irritating smugness if he came to grips with the hard problems of his subject, and if he justified his tone of slightly condescending moral superiority by criticising vigorously and unsparingly the accepted methods of correcting age-old abuses.

The real value of the book lies in its abundant illustrations which a gratifyingly ample index makes easy to use.

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A TREATISE ON THE PRINCIPLES OF LAW COVERING CORPORATE DIRECTORS. By Howard Hilton Spellman. Prentice-Hall, Inc., New York, 1931. Pp. xix, 780.

The increase in the number of recorded cases has forced a division of law books into two categories. One type chooses a given and usually limited body of material, and aims to present the author's synthesis of this material informed by his own ideas and imagination. The other tends to become a manual, purporting to contain all or substantially all of the cases dealing with the subject chosen, and to provide a summary of the result of these cases as they stand. Both types have their places in legal writing today; the former are apt to be more significant from the point of view of law development; the latter find wide use by attorneys seeking to find doctrine and citations with which to support a brief or to justify an opinion. Some day text writers will combine both functions, as Wigmore did in his famous treatise on "Evidence"; but ability of this kind is Napoleonic, and rare. This reviewer, inclining heavily to enjoy the former type (which is, after all, the historical function of a law text) tends invariably to regard the appearance of the digest-handbook type as a lost opportunity—a reflection probably unjust in most instances.

This exordium is designed mainly to classify Mr. Spellman's really excellent manual on the Law of Corporate Directors. In the latter category, the book is first-rate. In his brief preface, Mr. Spellman promises rather more, pointing out the need of a book on the subject in view of changes in business and organization through the past two decades, and observing very accurately that "stockholders, particularly in the case of large corporations, have ceased to be collaborators in business activity; they are investors and their functional powers extend only to the protection of their investing." Accordingly, Mr. Spellman submits, old concepts need to be revised, and a critical discussion of the source of material needs to be placed in the hands of lawyers and laymen. In all this he is painfully right, as every lawyer and many directors will testify.

In part the book lives up to this conception. Mr. Spellman's first chapter does so admirably; he feels through the corporation to the Board of Directors; points out that the old theory that residual power lay in the stockholders can hardly be indulged today; and accurately discerns "the unwritten law" distinction between Board of Directors of a "great" enterprise and a closed corporation.

From here on, the book tends to become more the manual and less the imaginative, sensitive analysis. But it is a beautifully arranged manual, collecting the great bulk of the cases, and noting a fair number of the statutory kinks in

various jurisdictions—there being obviously no point in attempting to do the latter with great thoroughness in view of the perpetual change in these kinks. After discussing methods of election, actions to determine title to office, tenure of office and proper procedure at directors' meetings (chapter VI covering this last subject may want some revision if the appeal in the *Bethlehem-Youngstown* litigation finally is decided), the book tackles a variety of problems in which many really substantial issues have to be faced. Chapter VII covering the powers of the Board of Directors, is disappointing in one or two respects, not because Mr. Spellman omits or misstates, but because he obviously has material on hand to carry his discussion further. For example, he observes that actions of Directors will not be inquired into by the courts in the absence of proof of fraud (p. 366), though obviously "fraud" is a conclusion; when broken down, the concept yields all kinds of results. Courts have rarely indulged this analysis; and Mr. Spellman carries the discussion no farther. As manual technique one cannot quarrel with this; but it is an opportunity missed.

Mr. Spellman's chapter on Interested Directors and Interlocking Directorates is perhaps the most interesting in his book; it does carry the synthesis beyond any known to this reviewer. See, for instance, his discussion of good faith as a test of the action of such Directors, and his conclusion that the Courts reach the result of insisting, not only that the Director shall act in good faith, but that he shall be in a position in which his good faith is not open to temptation. Here the law is rapidly shaping itself along the lines laid down for trustees: the conduct of interested Directors may be ethically correct, but the social dangers of letting him act when his interests conflict are too great to permit his action to go unquestioned. On ratification of such action, however, Mr. Spellman once more becomes the manual writer. It would have been interesting had he followed his hand, and discussed whether stockholders' votes in connection with Directors' actions amounted to a real ratification, in view of the fact that the vote is actually cast by a set of proxies almost invariably named by or with the concurrence of the Directors themselves.

Space does not permit the discussion of any considerable number of the interesting problems covered in this book. Every corporation law office will want it. The lawyer who is anxious to find out whether a Director's term ends when he puts in his resignation or not until the Board accepts it will find his question answered. Students of the corporate problem in the large will find a great deal of the basic material collected. That Mr. Spellman did not go further is due principally to his own conception of the task before him. Perhaps he will, having given an excellent summary of the Law of Directors (as far as it goes), indulge his fancy and the desire of many students a little further, distinguishing between those conceptions which are outworn and must be scrapped, and those still alive; and indicating the lines of trend. Meantime, the book is one well worth owning and reading; and in any corporate situation is worth while having handy.

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THE CRIMINAL, THE JUDGE, AND THE PUBLIC. By Franz Alexander and Hugo Staub. Translated by Gregory Zilboorg. The Macmillan Co., New York, 1931. Pp. xx, 238.

The authors, a psychoanalyst and a lawyer, collaborated four years on this book, engaging in the study of criminal cases, and in actual analytic work among criminals in Berlin. Its publication attracted wide attention, and Alexander and Staub organized a seminar for lawyers and judges at the Psychoanalytical Institute of Berlin. Last winter Dr. Alexander lectured at the University of Chicago,

and this year will lecture at the Judge Baker Foundation in Boston, so that his work is somewhat known among doctors and social workers in this country. But it is little known to members of the legal profession, and the book is, I venture to think, definitely important for lawyers to read. It is not easy reading, arranged in no orderly sequence; with unnecessary repetition, a sort of sloppiness of structure resulting probably from the inevitable looseness of collaboration, and expressed in the dreadful terminology—in the English translation at least—of psychoanalysis. So that the reader, unfamiliar with this particular jargon, may easily be discouraged by what will seem to him saying simple things in a complicated and heavy manner. But the authors' problem was not easy. Psychoanalysis, after all, is a comparatively young science, with an undeveloped and unaccustomed vocabulary; an approach not yet accepted by the medical fraternity, grossly misunderstood by the lay public, through its false over-simplification and popularization; and doubtless irritating to lawyers whose categorically-trained minds reject such a blurring of "moral" values. If, however, the book is read with an open and attentive mind, the authors' thesis will be found developed with power, lucidity and economy.

What is that thesis?

Analytical experience shows that conscious self-restraint of our primitive instincts is unimportant compared with fear of pain and expectation of pleasure. Social order is the equilibrium between the renunciation of our instinctual demands and their gratification—and the sense of justice regulates this equilibrium, social recognition affording the expected pleasure. When justice miscarries the equilibrium gives way and the unconscious instincts are unchained. Witness the violent emotional storm surrounding the Sacco-Vanzetti case, in which the sense of justice of a large part of the community was shocked, resulting in a sudden resurgence of primitive instincts. The present system of justice is no longer supported by the affective forces of religion and loyalty but is a "mere matter-of-fact structure, poor in content with outlived institutions". The introduction of the jury, the rough psychological admission of "motive" in crime, the more modern use of the "expert" psychologist, is a recognition of the inelasticity of the law, unscientific and futile, in face of the rigid classification of crimes, and the lawmaker's tendency to shoulder responsibility for injustice on the written law.

To all of which we might comment that the law is not a science, but, as Judge Holmes has, I think, somewhere said, an anthropomorphic document; and our authors would answer that this need no longer be the case, for psychoanalysis has made possible a scientific understanding of the criminal.

Our law moves in the abstract principles of the older psychology, obtaining no "pictorial knowledge" of the living personality which Freud's studies of the subconscious have made possible. A criminal acts from motives which are necessarily contradictory and largely unconscious. Our mechanism of confusion by cross-examination therefore is unsound.

Most criminals are the result of environment, not heredity. The criminal like the child is a socially unadjusted being. The child builds up its "Super-Ego" (conscience) to control the demands of its subconscious nature. The criminal has not learned this psychological control; and the authority of the father to the child is reflected in the authority of the state to the criminal, the state being identified with the father. The neurotic's gratification and the punishment which accompanies it are self-inflicted; the neurotic criminal finds a similar gratification and punishment in reality sought and inflicted in the outside world. Punishment therefore is not a deterrent but psychologically an attraction to such a criminal.

In addition to the neurotic criminal (undeveloped child) there is the normal criminal (gangster) created by environment, whose ideals correspond with his acts, and the "pathological" criminal, organically conditioned (the epileptic, feeble-minded, etc.). The law deals adequately with the latter class; and punish-

ment, involving the postulate of freedom of will, fits the "normal" criminal, since his acts are consciously chosen. It is to the neurotic type, claimed to be by far the largest group, whose actions are conditioned by impulses hidden from consciousness that the attention of the book is chiefly addressed.

And with respect to this type the theory of free will and responsibility is therefore psychologically unsound. The judge of the future must differentiate between conscious and unconscious causes, and for this purpose must be trained in analysis. The criminal rationalizes as well as the judge. We dislike and fear the unconscious, and our Western illusion of freedom of will is a substitute for our lost knowledge of ourselves. "Those who accept psychoanalysis accept and recognize the power of the unconscious; such recognition, however, signifies not a denial of, or a bowing to, the unconscious forces; it is instead the first step towards the real mastery of them."

But even if we conclude that neurotic criminals should be treated as if they were sick, and "normal" criminals punished, yet no such scientific treatment can be made by a society which itself demands atonement, retaliation and revenge. Failure to punish where the public demands punishment would tend to weaken repressive controls.

The criminal cases cited are not very convincing to a lay reader; and if he is a lawyer he will probably distrust the new knowledge, encroaching on his field of static and ordered arrangement. But even he may be sceptical of the criminal law's achievement in the world as it is; and will remember that the new knowledge has encroached on every other well-ordered preserve.

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WARENZEICHEN UND WETTBEWERB IN DEN VEREINIGTEN STAATEN VON AMERIKA. By Dr. Walter Derenberg. Carl Heymanns Verlag, Berlin, 1931. Pp. xi, 400.

Almost half a century ago Joseph Kohler symbolized the interest of German scholars in the American law of trade-marks, by taking as the motto upon the title-page of his epoch-making work, *Das Recht Des Markenschutzes*, the dictum of a New York judge: "honest competition relies only on the intrinsic merit of the article brought into the market, and does not require a resort to false or fraudulent device or token." Kohler regarded the combat against "*der Hydra der illoyalen Concurrenz*" as of paramount importance to German commerce and, ruefully pointing out the defects in German law,<sup>1</sup> laid much stress upon American, among other, precedents, although the American doctrine of unfair competition itself was still but in its infancy. Dr. Derenberg's treatise on trade-marks and competition in the United States, just published in Berlin, bears witness that the hydra has not been slain; but that, on the contrary, it thrives lustily upon the tremendous increase in the manufacture and distribution of trade-marked goods in both lands, and that legal ingenuity everywhere must be ever on the alert with a new weapon to grapple with some new head of its iniquity.

In his consideration of sources, Dr. Derenberg makes the complaint, so often justifiably levelled at American legal treatises—traditionally bulky—in other fields, that our text-writers on unfair competition engage in the uncritical accumulation of decisions rather than in the constructive statement and analysis of principles. In a compact volume of four hundred pages that contain creditably

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<sup>1</sup> J. KOHLER, *DAS RECHT DES MARKENSCHUTZES* (Würzburg, 1884) v-vi. Cf. the preface to his *DER UNLAUTERE WETTBEWERB* (Berlin, 1914).

few inaccuracies,<sup>2</sup> he himself has given German lawyers a concise and at the same time suggestive presentation of the present state and problems of our law of unfair competition. Leading cases are selected with discrimination and quoted with discretion: there is no pyramiding of citations. To prepare himself for this task, he has not only read widely but has informed himself in America at first hand from such masters of the subject as E. S. Rogers and others. Unlike our own text-writers, he also makes full use of the considerable body of American periodic literature that has appeared in recent years, and draws comparisons with English, French, Canadian and, of course, his own German law that make his work additionally useful. He is careful to keep before his German readers at all times the intricacies of our trade-mark law, due to the dual system of Federal and State Courts and registrations, of common law and equity. All expressions that might baffle the German lawyer are meticulously explained—even “Special Term” and Billingsgate are defined and “comic strips” are interpreted in terms of the immortal “*Max und Moritz*”.

Dr. Derenberg has performed a service to all those interested in trade-mark protection here as well as in Germany. If his book is not ultimately translated into English, it should at least stimulate some American lawyer to the production of an equally thorough, thoughtful and at the same time actually portable book on the same subject.

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THE REVIVAL OF NATURAL LAW CONCEPTS. By Charles Grove Haines. Harvard University Press, Cambridge, Mass., 1930. Pp. xiii, 388 (Harvard Studies in Jurisprudence. Vol. IV).

This is a scholarly discussion of the development and influence of theories of natural law. The author traces natural law doctrines from Græco-Roman times to the present, and discusses the modern revival of such doctrines on the European Continent. But the larger part of the volume is devoted to the influence of natural law in the construction of written constitutions in the United States. The volume might properly be termed one on extra-constitutional influences in the construction of the state and federal constitutions. The historical discussion and that as to other countries is important and aids in presenting a complete picture, but the volume has a more direct interest for the American reader than its title may indicate. The discussion of natural law influences upon “due process of law” is of distinct interest and value to the lawyer. The author’s discussion of extra-constitutional influences in the United States is not complete, for he limits himself to natural law influences and does not discuss the doctrines of majority rule and of an inherent right of local self-government, which have recently been

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<sup>2</sup>In his citation (pp. 72-73) of *Borden Ice Cream Co. v. Borden Condensed Milk Co.*, 201 F. 511 (C. C. A. 7th, 1912), it should have been noted that on the main question, the reasoning of the case has since been rejected, almost unanimously—expressly in *Wilcox and White v. Leiser*, 276 F. 445 (S. D. N. Y. 1918); *British-American Tobacco Co. v. British-American Cigar Stores Co.*, 211 F. 933 (C. C. A. 2d, 1914); *Ward Baking Co. v. Potter-Wrightington*, 298 F. 398 (C. C. A. 1st, 1924); *Horlick’s Malted Milk Corp. v. Horlick’s Inc.*, 43 F. (2d) 767 (W. D. Wash. 1930). There is likewise no indication that *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F. (2d) 603 (C. C. A. 2d, 1925), considered at length on pp. 76-77, was reversed by the Supreme Court on a construction of the pleading in 273 U. S. 132, 47 Sup. Ct. 314 (1927). In his discussion of the relation of the Federal Trade Commission to the question of trade-mark infringement, the decision of the Supreme Court in *Federal Trade Commission v. Klesner*, 280 U. S. 19, 50 Sup. Ct. 1 (1929), should have been at least cited.

employed by the Supreme Court of Oklahoma in *Thomas v. Reid*.<sup>1</sup> In scholarship and in importance Professor Haines' work fully merits companionship with the other volumes in the Harvard Studies in Jurisprudence. The volume should be read by students of jurisprudence and of constitutional law.

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<sup>1</sup>285 Pac. 92 (Okla. 1930).

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