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## Book Reviews

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## Book Reviews

### Cover Page Footnote

Regent, Fordham University, School of Law. Author, *The Mind* (1925).

## BOOK REVIEWS

THE RISE AND FALL OF THE GOLD STANDARD. By Sir Charles Morgan-Webb. New York: The Macmillan Company. 1934. pp. vii, 187. \$1.50.

THE author's experience, according to the blurb, was acquired in India. According to the foreword the book is a development of talks which he gave to Rotary Clubs. To this latter fact it is due, undoubtedly, that the presentation of a very intricate problem is so exquisitely clear, and apparently simple.

He gives the history of the various money standards employed by England before 1816: "No one living in 1816 had had any experience of an efficient silver currency in England. Since 1730 it had progressively deteriorated, and it had become a byword for inefficiency." (pp. 44-45). "The new standard was an excellent blend of all that was necessary to meet the requirements of a new century." (p. 46). It was a gold standard, expressed in terms of silver, the pound sterling, at a fixed ratio,—£3 17s. 10½d. per ounce. It was designed to be a monetary unit for international exchange. It justified its purpose from 1816 to 1914, when the dollar became the unit of value in international trade. For some years after the World War, England was on an inconvertible paper money basis. England returned to what was called the "Gold Standard" in 1925, against the protests of manufacturers and laborers. In the meantime the hoarding spirit had developed. The United States, France, Belgium, Holland and Switzerland hoarded what gold they could in their central banks. Nations, debtors to the hoarders, sold goods in England, bought nothing, and transferred credits to the creditors. England had to find the gold to pay these debts. England had operated the Gold Standard on a free trade basis, giving the debtor countries an opportunity to pay their debts in goods. The hoarding countries, with high tariffs, wanted to sell, but were unwilling to buy. Free-trade England was the debt collector for them all, and England had to pay in gold. It was too much. The gold standard could not be operated on this basis. In the six years—1925-1931—when England was acting as gold collector for the creditor nations, prices fell, unemployment increased, and foreign trade was lost—in England.

Finally the hour struck when England could no longer pay in gold the balances of the debtor countries. She borrowed gold, and was confronted with more borrowing. Then it was—1931—that she went off the "Gold Standard."

The author does not quite do justice to the United States in its effort to finance foreign trade. During the Coolidge administration, while we annually sold something near \$5,000,000,000 worth of goods abroad, we imported goods exceeding the value of \$4,000,000,000. Besides remittances abroad to meet the expense of tourists, and to provide for the money sent home by foreign laborers in the United States, a credit was set up for the debtor countries by bond issues, which were taken by American citizens. Still Britain's work as a gold collector, especially after the Hawley-Smoot tariff went into effect, was important; and when it ceased—(when Britain went off the Gold Standard)—President Hoover declared his moratorium. The old Gold Standard, in terms of silver—the pound sterling—had been abolished.

What have we today? Inconvertible paper money. For the present the pound sterling does not mean what it meant between 1816 and 1914. A new unit of international exchange is developing, based on the Index Number of the value of commodities exchanged, and on the balance of trade.

A *dictum* that might serve as a text on the iniquity of the Hawley-Smoot tariff, considered in relation to the Gold Standard, is found on page 63: "Protection is an impossible policy for a creditor country on a gold standard to pursue."

England had made her monetary unit the standard of value throughout the world for 98 years. When the United States replaced England, it failed to realize,

or to observe, the rules of the game. The old "sterling" game was played out. A new game of international exchange, based on the index number of prices, is developing. Gold is no longer currency. It is a commodity—for hoarding.

In the Gold Clause Cases, Chief Justice Hughes of the United States Supreme Court, reading the opinion of the majority of the Court, declared: "We are of opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money."<sup>1</sup>

"We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed."<sup>2</sup>

"If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause. In the light of this situation two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country."<sup>3</sup>

The hoarding of gold, at home and abroad,—that is what has made it impossible to operate trade on the gold standard.

Justice McReynolds in his oral dissent is quoted as having said: "The Constitution is gone." Perhaps this remark might be paraphrased in language suggested by Professor Corwin, of Princeton: "The old Super-Constitution is gone."<sup>4</sup>

In view of the judgment pronounced by the Supreme Court of the United States, the history of the gold standard, as related in this book, is particularly interesting to the lawyer.

JOHN X. PYNE, S. J.†

CANON LAW. By Archbishop Amleto Giovanni Cicognani. Authorized English Version by Rev. Joseph M. O'Hara, Ph.D. and Rev. Francis Brennan, D.D., J.U.D. Philadelphia: The Dolphin Press. 1934. pp. xiv, 887. \$5.

That the Canon Law is not a thing apart, as so many common-law lawyers have come to think, is abundantly shown by a careful reading of these lectures of Archbishop Cicognani, put into book form at the request of his students when he was Professor of Canon Law in the Pontifical Institute of Canon and Civil Law at S. Apollinare, Rome, later revised and enlarged and now translated into simple and exact English for the use of American readers generally. The author has brought to bear upon his subject a wealth of learning gathered through the centuries from the sources and traditions lying behind the Canon Law and from conceptions and doctrines of Roman, Germanic and civil law. Jurisprudence and legal philosophy of the various schools from Aristotle to the time of the present code, though touched upon only incidentally, are marshaled in a way that portrays the author's thorough understanding of the historical, scientific and philosophical aspects of law generally.

This commentary on the Canons of Book I of the Code, with an introductory study

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1. *Norman v. Baltimore & Ohio R. R.*, 55 Sup. Ct. 407, 413 (1935).
  2. *Ibid.*
  3. *Id.* at 418
  4. CORWIN, *TWILIGHT OF THE SUPREME COURT* (1934) 182.
- † Regent, Fordham University, School of Law. Author, *THE MIND* (1925).

and with a comprehensive elaboration of the sources thereof, had for its purpose according to the translators, the presentation of "a complete treatise on the elements of Canon Law" which would serve "the same function in Canon Law as the treatise on Fundamental Theology does in Dogmatic Theology."<sup>1</sup> As the first book deals with the general phases of the subject, it is the most interesting part for students of Roman Law, for jurists, and for lawyers. The following admonition to all canonists might well be taken seriously by many writers in the common law: .

"Some seem to give only the dry bones of law and not the flesh and blood; others bury the genius of the subject under a mass of antiquity; some do not treat at all of the causes of things and the record of antiquity; still others, carried away by a desire to appear erudite, seem to speak of nothing but antiquity."<sup>2</sup>

Part I, Chapter I, deals briefly but informingly with such juristic matters as the essential concept of law, justice and equity, the nature of law, its source and origin, the schools of natural and positive law, the law of nations among the Romans and a general historical view of civil law, as backgrounds for the study of the sources of Canon Law, almost every line of which is quite as valuable reading for students of the common law. In Chapter II a jurist of today would find himself at home at almost every turn, for here again the author in dealing with the sources of Canon Law, touches pertinently, though only incidentally, upon tradition, custom, unwritten law and the juristic conceptions and philosophy of such men as Hobbes, Bentham, Kant, Spinoza, Comte and Bergbohm.<sup>3</sup> Rousseau, Fichte, Savigny, Puchta and others are compared with Vico in the treatment of natural and positive law.<sup>4</sup> The author objects to the historical school's casting aside the theory of natural law when in reality the two schools are not in any way inconsistent, as the former seeks the immediate source of law in tradition and custom, whereas the latter deals with the ultimate sources which have their roots in philosophy. Nor are the relations of natural law, the law of nations and civil law overlooked as backgrounds.<sup>5</sup> The divisions of the Corpus Juris of Justinian are also explained,<sup>6</sup> and finally the conclusion is reached that Canon Law is a science involving sources of and basic relations between Roman, Germanic and modern civil law, evidenced by an historical approach to such topics as prescription, conjugal fidelity, divorce, paternal authority and so on.<sup>7</sup> For example, the method of computing degrees of consanguinity as found in Canon 96 came from the Germanic law.<sup>8</sup> Case study by historical and analytical methods is urged, and the author in exfoliating the doctrines under each Canon deems it necessary to go into the cases in which it has been applied.<sup>9</sup> This method is consistently applied in Part III, which is a commentary on the first book of the Code. The sources of Canon Law, extensively treated in Chapter III, are of course of less interest to the common-law lawyer.

Part II, Sections I and II, deal again more extensively with the history and sources of Canon Law, including internal and external history, classifications of

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1. P. v.

2. P. 6. Quoted by the author from Devoti's "Preface to the Eager Young Student of Canon Law."

3. P. 18 *et seq.*

4. P. 20 *et seq.*

5. P. 34.

6. P. 38 *et seq.*

7. P. 47 *et seq.*

8. P. 51.

9. P. 57.

canonical collections, with a note on public collections, historical notes on the authority of the Supreme Pontiff and a treatment of Oecumenical and Particular Councils.<sup>10</sup> Section III is devoted to the history and classification of collections and of the science of Canon Law. Herein the author gives a very thorough treatment of the collections in three parts: (1) from the Pseudo-Apostolic through the Oriental and Ancient Latin Collections to those from the ninth to the twelfth century, followed by a treatment of the science of Canon Law in this epoch;<sup>11</sup> (2) From the twelfth to the fourteenth centuries, including herein the *Decretum* of Gratian, collections of the Decretals before Pope Gregory IX, those of Gregory, and those following, which include the "Liber Sextus" of Boniface VIII, the Constitutions of Clement V, the "Extravagantes" of John XII, the "Extravagantes Communes," and the Corpus Iuris Canonici, followed by the Rules of the Apostolic Chancery and by a survey of the science of Canon Law in this second epoch;<sup>12</sup> and (3) Collections and other materials from the Council of Trent to the Pian-Benedictine Code, including among other matters the sources of law relating to the Protestant Sects, and followed by a treatment of the science of Canon Law in this epoch.<sup>13</sup> Finally, in Section IV, the reasons and necessity for codification, the form, order, authority and interpretation of the Code, are dealt with.

What will attract at this point the attention of the American lawyer, over and above the high degree of scholarship inherent in the author's work, are the reasons for codification,<sup>14</sup> which are on the whole quite similar to those given for codification of the German Civil Code, of our Uniform Laws, and of our Restatements by the American Law Institute—all characteristic of periods of maturity of law.

Part III, which is a commentary on each Canon of Book I of the Code, completes the volume. After an extended treatment of the first Eight Canons, this division deals with the Ecclesiastical Laws,<sup>15</sup> Custom,<sup>16</sup> Computation of Time,<sup>17</sup> Rescripts,<sup>18</sup> Privileges,<sup>19</sup> and Dispensations.<sup>20</sup> Book I of the Code is of especial interest to common-law lawyers as it deals with basic conceptions and doctrines applicable to the entire Code. For those interested in statutory interpretation Canons 12-15 are pertinent, but Canons 17-20 have a substantial similarity to our own canons of construction in the common law. Similarly, the treatment of the nature of law,<sup>21</sup> its elements, the division of law,<sup>22</sup> its sanction or obligation including its promulgation, cessation or repeal<sup>23</sup> show theories quite familiar to anyone dealing with problems of the relation of the common law to legislation.

On the question of sanction the author makes clear that "a command, in no sense a mere exhortation, which a subject is morally obliged to obey,"<sup>24</sup> is what distinguishes a law from mere counsel. To the analytical jurist this definition would not

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10. Pp. 131-181.
  11. Pp. 182-264.
  12. Pp. 265-342.
  13. Pp. 343-412.
  14. Pp. 413-418.
  15. Canons 8-24.
  16. Canons 25-30.
  17. Canons 31-35.
  18. Canons 36-62.
  19. Canons 63-79.
  20. Canons 80-86.
  21. Pp. 523-531.
  22. Pp. 532-533.
  23. Pp. 536-640.
  24. P. 524.

of course be acceptable in any way, as the only sanction he can see for law is the physical force of the superior behind the command to his subjects. The primary sanction for Canon Law is, on the other hand, the reason, intrinsic moral force, and justice of the command. The essential difference of course between the Canon and civil law in this respect is that the former can bind the conscience, although the power of excommunication at certain points is a sanction characteristic of the analytical jurists; whereas in the latter the moral sanction, though extremely important, can not alone make law enforceable. At this point in the discussion sharp clashes between the concepts of analytical jurisprudence and those of natural law are clearly discerned. The treatment of legal, commutative and distributive justice, beginning of course with Justinian's three precepts, has also a modern ring. For example, "since an individual is part of the community," says the author, "every individual, in all that he is, belongs to the whole, wherefore nature inflicts a loss on the part, in order to save the whole; so that on this account, enactments which impose proportionate burdens are just and bind in conscience and are laws."<sup>25</sup> This would seem to be about as far as we should care to go in present legislation today, and some unquestionably would hesitate to go so far. Whether this basic doctrine is laid down by the author for Catholics only in respect of their obligations, moral and legal, to the Church or whether he would apply it to civil law generally is hardly in doubt inasmuch as, at this point, he is writing on the nature of law in general. Interesting also to the common-law lawyer is to compare the author's treatment of internal acts with juristic acts of civil law, the legal significance of which is so largely dependent upon the states of mind accompanying them.<sup>26</sup> Basically the internal act or state of mind as distinguished from its non-judicial character in the civil law when not accompanied by overt action is all that is necessary to a contravention of certain portions of the Canon Law for the very reason that this law not only binds the conscience, but the conscience from the standpoint of enforceability can also be examined. This process is naturally beyond effective legal action in the civil or common law. Similarly, discussion of personal and territorial theories of law<sup>27</sup> and the position of the conflict of laws as we find it here takes for the common-law lawyer a peculiar turn in meaning in that it signifies apparent conflict in the laws themselves, although it also may mean of course at certain points a choice between competing Canons as well; whereas for the common-law lawyer the term signifies, first of all, a choice of law from competing systems of independent sovereigns and secondarily a choice of the proper precept or precepts of the system so chosen. It never means actual conflict—only an apparent conflict—within a single body of law; for within a single system of law as a unit there can never be an actual conflict in the law. Doctrines of prospective and retrospective interpretation<sup>28</sup> including questions as to when retrospective interpretation can affect vested rights, are quite interesting to us, because the reasoning and premises at this point are similar to our own. And so the author goes on, through repeal,<sup>29</sup> custom in relation to law<sup>30</sup> and the counting of time,<sup>31</sup> all of which every common-law lawyer might do well to read thoroughly, for these doctrines as interpreted for Canon Law are of daily occurrence in common-law practice. They are conceptions and doctrines which are wholly basic in our own law.

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25. P. 525.

26. P. 528.

27. P. 533.

28. Canon 10, pp. 555-559.

29. Canons 21-23.

30. Pp. 641 *et seq.*

31. Pp. 666 *et seq.*

In short, the whole work is done extensively and intensively with a high degree of scholarship, authority and scope of juristic understanding; and, as the author deals with the history and sources as well as general doctrines of the entire Code, it is indispensable to any student, teacher or priest who has to interpret and apply the Code. For the common-law lawyer this work has an abundance of instructive doctrines not irrelevant by any means to a basic understanding of his own law. What is more important, however, than all of this is (to repeat what was said at the outset) that the work demonstrates the fact that the Canon Law is not a thing apart, but must be considered with all seriousness in the study of comparative law today.

The translators have done an excellent job in turning this work into simple, clear and understandable English. The retention of the Canons in the Latin likewise prevents error in meaning. They have made a leading treatise available to American scholars, many of whom might not otherwise have access to it, and for this in itself they deserve much credit. A tripartite index by names, subjects and Canons is given. This will also make the book a manual of ready reference for those applying the law directly to new situations.

FREDERICK J. DESLOOVÈRE.†

UNAUTHORIZED PRACTICE OF LAW. By Frederick C. Hicks and Elliott R. Katz. Baltimore: Lord Baltimore Press (American Bar Association). 1934. pp. xi, 207. \$1.

As the author of the foreword states, there has been a rising tide of discontent over the growing encroachment of corporations and laymen upon the field of the legal profession. And complaints have been directed not only against such corporations and laymen, but as well against those lawyers who have cooperated in such encroachments.<sup>1</sup> In 1930, the American Bar Association created a special committee on the Unauthorized Practice of Law. In 1933, this was made a standing committee. In the Annual Convention of 1934, the committee reported that "interest in the Unauthorized Practice of the law has never been greater throughout the country than at the present time".<sup>2</sup> The committee further notes that the situation remains highly controversial as evidenced by litigation existing between the Bar and corporate fiduciaries "in St. Louis, Detroit, Colorado, and California", and the committee further points out, "the most acute problem at the present time lies in the field of commercial law."<sup>3</sup>

In view of this aggravated situation, the authors have published what they describe as "a handbook for the use of laymen and lawyers needing information concerning the Unauthorized Practice of Law."<sup>4</sup> The book is divided into four parts: the first part (47 pp.), sets forth all the existing statutes relating to Unauthorized Practice; the second part (60 pp.), contains a digest of cases relating to Unauthorized Practice under many different headings, but grouped chiefly under "natural persons" and "corporations and associations." The last pages of this section give the seven types of remedies which have been invoked against such abuses; the third part (50 pp.), gives a statement of principles adopted by Bar Associations, Trust Companies, and Associations of Fiduciaries; and the fourth part (35 pp.), contains an excellent bibliography of writings on Unauthorized Practice. The work concludes with a Table of Cases and Index.

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† Professor of Law, New York University Law School.

1. Foreword, J. G. Jackson, p. 3.
2. American Bar Association, Advance Program, 1934, p. 191.
3. *Id.* at 198.
4. Foreword, p. 7.



This is the first work of its kind and furnishes an excellent starting point for all further investigation and writing upon the subject. It merits the vote of appreciation which it received from the American Bar Association committee, and the further endorsement which it received from the American Bar Association.

By its very nature the work is a compilation. The authors have indicated in the foreword the omission of any controversial articles. They seem to have made the omissions reluctantly, and the reviewer regrets that they did not include a number of representative articles by parties on both sides of the controversy. Assenting to the compilers' statement that such inclusion would have led them away "from the impersonal and the objective," the reviewer feels that such material is necessary for any well-informed consideration of the issues involved.

It is interesting to note that practically every state has enacted legislation relating to Unauthorized Practice. The digest of cases covers a wide variety of situations and will be a real time-saver to one searching for authorities. The digest is done well in the main, although in a few instances the statement is too compressed to give the desired information.<sup>5</sup>

The section which deals with statements of principle adopted by Bar Associations, Trust Companies, and Associations of Fiduciaries, while it is restricted simply to the reprinting of such agreements, gives a graphic picture of the whole situation. The language varies from preambles and professional professions of "a spirit of mutual helpfulness and cooperation"<sup>6</sup> to straight statements of fact that "it is a fundamental principle of this relationship that trust institutions shall not engage in the practice of law".<sup>7</sup> The statements vary greatly. Some confine themselves to a statement of principles. Others enumerate specific instances of forbidden conduct.<sup>8</sup> It is interesting to note that some of these statements are by Bankers' Associations or Bar Associations. Others are working agreements, and one in particular is an agreement between the Title Insurance Company and the Governors of the State Bar of California, in consequence of which an action against the Company was dismissed.<sup>9</sup> Four statements of principles are included for organizations in the states of New York and Ohio.

The fourth part contains a rich bibliography with brief notes concerning the articles mentioned. The Table of Cases and an Index complete the work.

As a factual compilation this work is deserving of unqualified praise. The reviewer may venture to suggest, however, that there is a real need for an added critical collection of excerpts from available writings upon the subject for a clarification of the issues involved. A volume of such writings compiled by the scholarly authors of this work would certainly be welcome as a useful addition to the source-material on this important and irritating legal problem.

REV. ROBERT J. WHITE.†

CASES ON COMMON LAW PLEADING. By James P. McBaine. St. Paul: West Publishing Co. 1934. pp. xi, 300. \$3.00.

THIS case-book is meant for law students who are beginning the study of law and is intended to give them a foundation upon which to build a well-rounded, but not

5. *E.g.*, *Lapique v. Superior Court*, p. 63; *People v. Hubbard*, p. 64.

6. P. 130.

7. P. 125.

8. P. 132.

9. P. 130.

† Lecturer of Law, School of Law of Catholic University of America. Author, *THE LAWYER AND HIS PROFESSION; THE LEGAL EFFECT OF ANTE-NUPTIAL PROMISES*.

exhaustive, knowledge of the procedural side of the common law in both its historical and practical aspects. The book is divided into two parts. The first two-thirds of the volume is devoted to cases discussing the forms of action; the remainder deals with the subject of pleading at common law. The editor estimates that it can be covered in about thirty-two class periods.

The amount of space given to the forms of action is not disproportionate to that given to the rules of pleading. It is generally agreed that even in the jurisdictions which have abolished the common law forms of action in favor of the formless action, the common law forms cannot be ignored. The student who aspires to be a well-educated lawyer is bound to be interested in the history and development of the system of law which now governs the English speaking countries, and in this history and development the forms of action occupy a central position. One who commences a study of the substantive law is apt to be surprised to find that goodly portions of it first developed out of the forms of procedure. It seems to have been characteristic of most legal systems that attention was first directed to the matter of remedy and that it gradually came to be perceived that behind the remedy were rights and duties.<sup>1</sup>

Professor McBaine evidently had this in mind when he arranged the cases in the first part of his new case-book, for we find that in each of the chapters dealing with the actions of Trespass, Case, Replevin, Detinue, Ejectment and Trover—the forms of action classified as *ex delicto*—a section under the title "The Defendant's Act" is followed by a section under the title "The Plaintiff's Right." By this arrangement he neatly leads the student to see how the substantive law grew out of the struggles over form, and, when the chapter is finished, the reader also finds that he has learned not a little substantive law. This classification of the cases under "The Defendant's Act" and "The Plaintiff's Right" is unique, so far as the writer knows, and it seems to be a sound and logical arrangement.

Another innovation in this book is the addition to every chapter dealing with the forms of action of a section containing a case which brings out the modern significance of principles developed in the preceding cases. This is done "because," to quote the preface, "it has seemed desirable to demonstrate to beginning law students that vestiges of the old system remain in modern procedure." Even in the jurisdictions which, like New York,<sup>2</sup> have abolished the *forms* of action as such, cases are constantly cropping up which show that an understanding of the *nature* of the old actions is still necessary to the practicing lawyer. So late as 1931 the New York Court of Appeals found it necessary to look into the old form of action in Debt when it was called upon to construe Rule 113 of the Rules of Civil Practice.<sup>3</sup> One who reads the cases which the editor has collected under the title "Modern Significance" will be convinced that a general knowledge of the common law forms of action has a "bread and butter" value as well as a cultural one.

The editor states that he has sought to put before the student well-known or frequently cited cases in the first part of the volume. Not only has he succeeded in that aim, but he has also selected cases which can be understood after a fair amount of study. Here and there unfamiliar words and latin phrases are met with which might have been profitably explained or translated in notes, but the reader can, of course, look them up in the law dictionaries.

The last third of the book deals with the rules of pleading relating to the demurrer,

1. MAINE, EARLY LAW AND CUSTOM 389; POUND, SPIRIT OF THE COMMON LAW 204; III STREET, FOUNDATIONS OF LEGAL LIABILITY, c. I.

2. NEW YORK CIVIL PRACTICE ACT § 8.

3. Rule 113 provides for summary judgment "in an action to recover a debt or liquidated demand." The case is *Waxman v. Williamson*, 256 N. Y. 117, 175 N. E. 534 (1931).

declaration, negative pleas in bar, the specific and special traverse, affirmative pleas in bar, pleas in abatement and replications. It is not the object of the editor in this part to make the student an expert common-law pleader, but to acquaint him with the nature of the system and its major features. In line with these objects, only the declaration and affirmative pleas in the two important actions of trespass and assumpsit are studied.

Throughout the book the editor has, on the whole, avoided cases containing law French, latin tags, and elliptical Chaucerian English, which have been so common in case-books of common law pleading, and which have been the despair of beginning law students. The object of the book being to sketch the major features of the system and not to compile a source book of cases which first laid down the rules, it would seem desirable to select more modern and understandable cases to illustrate the workings of the rules than has been the custom in the past. Professor McBaine occasionally trespasses in this regard, however, and a few of the good old mysteries like *Cole v. Maumder*<sup>4</sup> are found. No doubt a case-book on common law pleading without a few cases which no beginning law student could be expected to understand even after a reasonable amount of study would be unconstitutional.

The growing practice of printing problem cases in the notes has been adopted by the editor throughout the book. At the end of each section the facts of several cases are stated together with the judgment of the lower court. The citation of the case on appeal is then given, but the result of the appeal is not stated. The student is thus encouraged to "attempt a solution, and later read as many of the cited cases as time will permit for a deeper and wider understanding." Citations to helpful texts and law review articles are frequent and well chosen.

GEORGE W. BACON.†

THE LIBERTY OF THE PRESS. By Harry Weinberger. Berkeley Heights, N. J.: Oriole Press. 1934. pp. 39. \$1.50.

THIS little book is extremely interesting and should be read by every person who believes in the now cherished principles of freedom of the press and independence of the Bench and Bar. It consists of two addresses, "The Liberty of the Press" and "Andrew Hamilton," delivered by Harry Weinberger, Esq., a gifted member of the New York Bar, and one of the directors of the New York County Lawyers' Association. The former address was delivered before the Philadelphia Bar Association in Independence Hall, Philadelphia, on March 9, 1934, upon the occasion of the unveiling of a tablet to the memory of Andrew Hamilton. The second address was delivered at the "Home of Law" of the New York County Lawyers' Association, when a tablet was dedicated and presented to the Association in memory of Hamilton.

It was in the "Areopagitica" that John Milton uttered the famous words "Give me liberty to know, to utter, and to argue freely according to conscience, above all liberty."

Almost 200 years ago, in 1735, no New York attorney could be obtained to defend John Peter Zenger, accused of criminal libel, because his two New York lawyers, who had challenged the jurisdiction of the court, had been disbarred for that reason. Zenger had published a newspaper in which he printed criticisms of the British Government and its Colonial officers in New York. Zenger was arrested, charged with criminal libel. The Governor of the Colony of New York and all

4. 2 Rolles' Abridgment 548.

McBAINE, CASES ON COMMON LAW PLEADING (1934) 170.

† Associate Professor, Fordham University, School of Law.

of the forces of the British Government were seeking to obtain a conviction. On Zenger's side were most of the citizens of the Colony. Zenger's friends asked the aid of Andrew Hamilton of Philadelphia, at that time eighty years of age and the leading advocate of America. Although in bad health this great lawyer undertook the defense of Zenger without compensation.

The trial was held August 4, 1735, in the Supreme Court of New York Colony at the old city hall, which at that time was located at the corner of Wall and Nassau Streets. Hamilton contended that the language had to be false as well as scandalous and seditious in order to obtain a conviction of criminal libel. He cited the precedent of the great trial of William Penn in England, telling that though the court in that case ordered the jury to find Penn guilty, "the jury did not think fit to take the court's word for it" and acquitted Penn.

Hamilton pleaded to the jury:

"Let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition the blood of the best men that ever lived."

At the close of his address the court wished the jury to bring in a special verdict that Zenger printed and published, leaving to the court the question of law whether there was a libel. Hamilton argued, the jury had the right and power to decide the law and the facts. The jury brought in a verdict within ten minutes of not guilty. The trial first established in North America the legal principle that in prosecutions for libel the jury are the judges of both the law and the facts.

The liberty of the press thus was secured from assault and destruction. The right of criticising the conduct of public men was confirmed and fortified. In recognition of Hamilton's services the Common Council presented him with the freedom of the City of New York.

Mr. Weinberger has performed a valuable public service in publishing his two interesting and eloquent addresses, which commemorate, as he so well puts it, the memory of a great lawyer in "rededication to the ideal of freedom and a free people."

I. MAURICE WORMSER.†

A TREATISE ON THE LAW OF TORTS. By Fowler Vincent Harper. Indianapolis: The Bobbs-Merrill Company. 1933. pp. cxi, 714. \$5.

A perusal of the table of contents of a treatise on Substantive Law not infrequently affords a revealing and accurate knowledge of its value and worth as a text-book. This book is no exception. Its table of contents discloses that the author has a considerable grasp upon the doctrinal outlook of his subject. Its grouping and integration are logical and rational and display a power of analysis which is indicative of the scholarship and virtuosity which would be expected from one who has for years been conspicuous in this field of the law.

Avowedly, Professor Harper makes no claim or pretense of presenting a work on the law of Torts of any great originality. His preface announces that the *raison d'être* of the volume is two-fold: first, to correlate under one cover modern ideas about tort law; second, to emphasize the many notions of social policy underlying the development of this branch of the law.

With respect to the first major objective, the author admits that his chief source

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† Professor of Law, Fordham University, School of Law. Former editor of NEW YORK LAW JOURNAL. Author, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS (1927), FRANKENSTEIN INCORPORATED (1931).

has been the great mass of material that has found utterance through the media of law periodicals during the last quarter century. The annotations of his text give ample evidence of this admission.

In the attempted attainment of the second major objective, the burden of his thesis is that the unitary character of tort law is to be gleaned, not from its doctrinal development but from the broad notions of policy from which these doctrines are derived. "It is this social, rather than legalistic basis of tort law that affords the unifying principles." (p. vi).

When he commences, however, to expound his ideas about the social policy of the law of torts, it is obvious that he rejects all attempts to interpret social phenomena upon an appreciation of purely subjective values. He is actuated by the idea that any effort to make the criteria of social good necessary and *a priori* will inevitably lead to the canonization of indefensible error. "In attempting to set forth any body of knowledge in logical and systematic form," he says, "it is highly desirable that the postulates be explicit at the outset. These postulates are *a priori* propositions, incapable of final demonstration from a rational point of view. They are to be regarded as tentative assumptions set up, not because they have any validity as proved propositions, but because they afford the equipment to make an intelligible organization and presentation of the material to be studied. . . . The rational aspect of the law is *ex post facto*. . . . Law is relational. This is an implication concealed in the notion of law. It derives from the empirical fact that law arises out of or emerges from social activity. . . . Just how the genius of the race conceived of law as a device to effect a part of this control is a great mystery" and referring to society as composed of interested men, he says "it is these interests that demand and dictate the mores, habits and laws of a community." (pp. 1-3).

Such a theory tells us nothing about ends and little about means. It rejects anything like invariant laws. In it only a purely functional theory possesses or offers any prospect of adequacy. Excluding with abhorrence the natural or moral law, based on immutability of principle which brooks no change and knows no compromise, the postulates of such a school operate on the theory that right and wrong depend solely upon positive legislation and judicial decision. Pragmatism is made a principle of law; expediency a principle in the interpretation of the law.

Now it is conceivable that opinion might rationally differ as to the value of a purely functional approach as a pedagogical method of teaching law or legal principles, provided the basic postulates of such a teaching method recognize the immutable laws of nature, which Blackstone characterizes as "the Eternal Laws of Good and Evil which the Maker has enabled reason to discover for the conduct of human actions." This so-called functional approach in method is merely an attempt to synchronize education more closely with life. It is part of an educational ferment extending from the grade school to the university. In the mind of Professor John Dewey, the school should be a miniature workshop and its students should learn through trial and error.

But when the basic predicates of a philosophy of law are empirical and when its implication derives from the empirical fact that law arises solely out of or emerges from social activity, as Professor Harper audaciously states, then criticism must transcend mere method and attack basic philosophy. It is obvious that Professor Harper has been infected with the virus of the Realist school with all its attendant errors.

When the author takes leave of theory, however, and undertakes the discussion of the doctrines applicable to invasions of interests in personality and property, which is only another way to state the compass of the field of tort, the book is commendable. Concededly, the work is designed primarily for law students and its structure suggests a teacher to choose and expound. Its exposition is authorita-

tive and its style graceful. It is copiously annotated and documented and includes, as already stated, generous references to articles in law reviews and law periodicals. Neither has the Restatement of the Law of Torts been neglected, and both in text and note, the rules adopted by the American Law Institute are advocated by Professor Harper, especially where the interests of liberalization suggest or require.

From the legalistic point of view, the volume is a noteworthy addition to the text law of torts. It is an adequate tribute to the influence and thought which Professor Bohlen has contributed to this branch of Substantive Law, and Professor Harper in his preface gives frank and honest attribution and credit to this acknowledged master for the general direction and, in many instances, the particular conclusions arrived at in the volume.

ARTHUR A. MCGIVNEY.†

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† Associate Professor of Law, Fordham University, School of Law.

### BOOKS RECEIVED

- A STUDY OF THE BUSINESS OF THE FEDERAL COURTS. By the American Law Institute. Philadelphia: The American Law Institute. 1934. pp. Part I: xxxix, 153; Part II: xxvii, 217.
- ADMINISTRATIVE LEGISLATION AND ADJUDICATION. By Frederick F. Blachly and Miriam E. Oatman. Washington, D. C.: The Brookings Institution. 1934. pp. xv, 296.
- AIR LAW, OUTLINE AND GUIDE TO LAW OF RADIO AND AERONAUTICS. By Howard S. LeRoy. Washington, D. C.: Randolph Leigh Publishing Co. 1935. pp. 120.
- AN OUTLINE OF THE NEW DEAL ADMINISTRATION. By Kingman Brewster. Washington, D. C.: Kingman Brewster. 1934. pp. 125.
- CASES ON BUSINESS ORGANIZATION. VOL. II. By Roswill Magill and Robert P. Hamilton. St. Paul: West Publishing Company. 1935. pp. xxiv, 1349.
- CASES ON OIL AND GAS. (Second edition.) By Victor H. Kulp. St. Paul: West Publishing Company. 1935. pp. xiv, 663.
- CHARITABLE EXEMPTION FROM TAXATION IN NEW YORK STATE ON REAL AND PERSONAL PROPERTY. By John Godfrey Saxe, M.A., L.L.D. New York: Lincoln Engraving and Printing Corp. 1933. pp. 77.
- CRIMINAL LAW. By Justin Miller. St. Paul: West Publishing Company. 1934. pp. xiii, 649.
- CRIMINOLOGY. By Albert Morris. New York: Longmans, Green & Co. 1934. pp. xii, 590.
- NEW JERSEY CHANCERY REPORTS 1684-1696. By George J. Miller. Perth Amboy, N. J.: H. E. Pickersgill. 1934. pp. xv, 110.
- PRINCIPLES OF LEGISLATIVE ORGANIZATION AND ADMINISTRATION. By W. F. Willoughby. Washington, D. C.: The Brookings Institution. 1934. pp. xiv, 657.
- RESTATEMENT OF THE LAW OF CONFLICT OF LAWS. By the American Law Institute. St. Paul: American Law Institute Publishers. 1934. pp. xli, 814.
- TWILIGHT OF THE SUPREME COURT. By Edward S. Corwin. New Haven, Conn.: RESTATEMENT OF THE LAW OF TORTS. By the American Law Institute. St. Paul: American Law Institute Publishers. 1934. pp. lxiii, 1338.
- Yale University Press. 1934. pp. xxvii, 237.



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