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Book Reviews

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BOOK REVIEWS

A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES (1784-1932). By Rev. Patrick J. Dignan. New York: P. J. Kenedy & Sons. 1935. pp. 289. $8.00.

No one who has ever toured this country to any extent can have failed to be impressed with the Catholic churches, parsonages, monasteries, parochial schools, hospitals, seminaries and other educational and charitable institutions which dot and beautify our cities and countrysides. For the lawyer as well as for the ecclesiastic the manner in which the title to these vast properties is held for the church by individuals or corporations is a most interesting matter. The present work is a careful, thorough and concise discussion of the legal history of these properties and is based not only on decided cases and on the constitutional provisions and statutory enactments which are or have been in force in the United States, but includes in its scope archival and printed ecclesiastical material, general and special works on the subject and even periodical and newspaper articles. Copious extracts made from sources generally unavailable enhance the value of the book and give it to some extent the usefulness of a source book.

The great point of attack by the author is the trustee system by which most of these properties are held, particularly where the trustees are laymen. It is obvious, of course, since the Catholic church as such has no juristic personality in the United States, that these properties must be held by trustees whether they are individuals or corporations. Thus Catholic bishops are in many states corporations sole, holding the church property in their diocese not for themselves but in trust. The objection to this system, argues the author, is that it subjects these bishops to the suspicion of arbitrary management of church properties. A trustee system which leaves much discretion in the hands of lay trustees is even more objectionable from a Catholic viewpoint. It places in the hands of these laymen a power which they might use (and in some instances have used) to oppose ecclesiastical authority. The author therefore recommends the present New York statute as a model for other states. Under it the members of the various congregations are not free to choose whom they will as their officers. The bishop, the vicar general and the pastor are *ex officio* officers and they appoint the additional two lay officers. Similar, though somewhat weaker provisions, according to the author, exist in ten other states. In the other states a situation unsatisfactory from a Catholic viewpoint continues to exist largely (according to the author) because those interested have not asked the various legislatures for enactments more in accord with Catholic necessities. The book points the way to obtaining these enactments.

Chapter 7, entitled "The Post Civil War Period," is of the greatest interest to lawyers as it discusses the various decided cases dealing with Catholic church properties. The notorious case of a large Catholic congregation in Scranton, Pennsylvania, which resulted in a defeat of the bishop in the courts (the Supreme Court passing on the matter five times) is explained as resting on the peculiarities of the Pennsylvania statute which requires lay trustees. The discussion of most of the other cases is quite adequate. This, however, cannot be said of the discussion of *Watson v. Jones*, 80 U. S. 679, decided in 1871. This case, though it arose out of a Presbyterian controversy, is referred to with enthusiasm as holding that where a church is of a hierarchial nature the civil courts will look upon its decision as final. The author does not state, at least not in this connection, that the courts have held

that this ruling does not apply where property rights are involved—thus precisely taking the case outside of the scope of the book.[1]

Unfortunately the index of three pages is largely concerned with the names of individuals who have figured in this legal development and consequently does not open up the book to the busy lawyer who wishes to consult rather than read it. The bibliography indeed refers to decided cases, statutory enactments and constitutional provisions, but does not serve as a supplement to the index as it contains no page references. The lawyer will also miss parallel references to the decided cases. That the title speaks of the "legal *incorporation* of catholic church property" instead of speaking of the ownership is of minor consequence, since neither lawyers nor other users of the book will be misled thereby.

CARL ZOLLMAN.†

RESTATEMENT OF THE LAW OF TORTS. By the American Law Institute. St. Paul: American Law Institute Publishers. 1934. pp. lxiii, 1338. $5.00.

At the annual meeting of the American Law Institute in May, 1934, the official drafts of the Restatement of Torts containing the Divisions of Law relating to International Harms to Persons, Lands and Chattels,[1] and Negligence[2] were approved, and their publication authorized. The drafts containing the remaining Divisions[3] of Tort Law will not be ready for another two or three years,[4] but these first two volumes are complete within themselves and so may be evaluated independently of the unpublished parts of the Restatement.

As all who are familiar with the work of the American Law Institute know, Professor Francis H. Bohlen was appointed reporter and was surrounded by a staff of advisers[5] whose names are scarcely less famous than his own in this field of the Law. The appointment of this group of scholars entitles the Institute to make the claim it does,[6] that the Restatement may be regarded as the product of expert legal opinion.

It is the opinion of this reviewer that the technique of statement in the Restatement of Torts has done it immeasurable damage and that, as a result, the Restate-

1. The writer of this review, of course, is not now concerned with the bad logic of this decision and the worse logic of the exception which the courts have made to it. He has expressed his views fully in chapter nine of his "American Church Law" entitled "Church Decisions."

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1. Vol. 1.

2. Vol. 2.

3. According to the Introduction, p. xi, these divisions will be classified as follows: Liability without Fault; Defamation; Deceit and Malicious Prosecution; Harms to Contract Relations; Legal and Equitable Relief against Tortfeasors.

4. Introd., p. xi.

5. Among those who assisted Professor Bohlen in the preparation of the Restatement of Torts were: Edward S. Thurston, Edmund M. Morgan and William A. Seavey of Harvard University, Robert Dechert and Laurence H. Eldredge of the University of Pennsylvania, Fowler V. Harper of Indiana University and Young B. Smith of Columbia University.

6. Introd., p. ix.

ment does not represent the best work on the subject that was within the capabilities of the reporter or his associates either individually or as a group. The form of this Restatement is substantially the same as that of the Contracts and Agency Restatements. The same system of uniform terminology is used, and the first chapter is devoted to definitions of words and phrases peculiar to the Restatement of Torts. Once again, also, the principles are stated in heavy black letter type and are supplemented with "Comments" and "Illustrations." But whatever may be said concerning the use of this style in the two previous Restatements, it certainly does seem ill-fitted to the treatment of a subject such as Torts. Conceding that the Restatement was never intended as a literary diversion, and that it is no just criticism, therefore, to say that it makes monotonous and tedious reading, there are more important objections to be made to the method of statement used. Tort Law is almost entirely the product of decisions and it requires the liquidity of the Common Law to adapt itself to the policies of the various jurisdictions and times. It is growing, but the mechanical makeup of the Restatement does not allow for growth. We have no quarrel with the Institute in its attempt to supply the needed factors of certainty and clarity to the ever increasing lack of them in the development of the law today,[7] for uncertainty in the law is surely a defect. We think, for example, that the use of the uniform terminology employed by the Restatements should be encouraged, for, if the law is to be made more certain and predictable, there is no better way by which this reformation could be started than by the use of a scientific vocabulary. We also think, however, that the admonition of Holmes[8] that the law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics" is peculiarly applicable to the attempt to restate Tort Law in this form. The language of the Restatement very often has the abstractness of a theorem in geometry and any difficulty in interpreting the rules of the Restatement arises, not from the rules, but from the manner in which they are expressed.

A further criticism in this direction is that although this style was used, among other reasons, for the sake of clarity and conciseness, it has at times resulted in beclouding and making involved, concepts which could have been stated in a much simpler fashion. This is due, to a great extent, to the fact that the authors, in their attempt at exactness, included within the statement of the principle many qualifications of the principle. The general principle involved is not sufficiently isolated from the particularized rules. An example may not be out of place. The privilege of self defence is stated in the Restatement as follows:

"§ 63. INFLICTION OF BODILY CONTACT BY USE OF FORCE NOT THREATENING DEATH OR SERIOUS BODILY HARM.

(1) The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means not intended or likely to cause death or serious bodily injury is privileged for the purpose of preventing the other from inflicting a harmful or offensive contact or other bodily harm upon the actor, if

(a) the other so acts as to lead the actor to know or reasonably to believe that the other intends to inflict such contact or harm upon him, and

(b) the means which the actor uses in self defence are reasonable in view of the character of the contact or bodily harm from which he is attempting to protect himself, and

(c) the actor reasonably believes that such contact or harm can safely be pre-

7. *Ibid.*

8. HOLMES, THE COMMON LAW (1881) 1.

vented only by the immediate infliction upon the other of the offensive or harmful contact or other bodily harm or by retreating or otherwise giving up a right or privilege or complying with a command as described in Subsection (2, b).

(2) The infliction upon another of a harmful or offensive contact or other bodily harm is privileged under the conditions stated in Subsection (1) although the actor reasonably believes that he can avoid the necessity of defending himself,

(a) by retreating or otherwise giving up a right or privilege, or

(b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened."

This is followed by eleven pages of comment and illustrations. While the above statement, when carefully scrutinized is clear, the same idea could have been expressed with equal accuracy and much greater clarity by the use of a better style. Such phraseology as "the use of no more force than is necessary" may be too homely for the redactors of this work, but it is certainly more intelligible to the reader.

Finally with respect to form, the absence of argumentative treatment is a very serious defect. The Tentative Drafts contained, in addition to the "Comments" to each proposition, "Explanatory Notes" at the end of each proposed draft. The purpose of these notes was to facilitate consideration of the Tentative Drafts by the members of the Institute, but, while the Official Drafts still contain the "Comments," the other helpful notes have been omitted. All that is left, then, are the naked averments of principles of law, explained, it is true, but unsupported by arguments or authorities. It is submitted that these are not enough. The authoritativeness of a book in law depends not only upon the repute of its author but also upon the soundness of his discussions. The Restatement, on the other hand, to use the words of the director of the American Law Institute speaks "*ex cathedra*,"[9] and relies solely upon the personnel of the Institute and the care with which the work was done to justify it. Whether the courts will be inclined to follow the Restatement when the precedents of their respective jurisdictions are *contra* to it is another matter. May they not take the position that they are at least entitled to be presented with the reasons why the Institute adopted one rather than the other of conflicting views, before they follow the Restatement and perhaps overrule prior decisions? This lack of persuasive appeal not only detracts from the Restatement as an authority, but it obviously lessens its value to the law student.

Though the foregoing observations relate mainly to matters of form, it is very often difficult to draw the line between form and substance. When the style results in inelasticity of expression, lack of clarity and absence of argumentation, the substance of the text is, of course, affected. The reporter, however, cannot justly be called to account for these short-comings in the Restatement. They are, rather, handicaps under which he and his associates were forced to work because of what seems to be the established policy of the Institute, and they serve to emphasize the colossal nature of the task which was undertaken. It is indeed amazing that the Restatement is as good as it actually is when we consider the highly factual character of the subject matter and the almost straight-jacket formula to which it had to be reduced.

If we prescind entirely from considerations of form, we find the Restatement the product of vigorous and forward-thinking minds. There are times, it is true, when one wonders whether the authors are stating what the law is or should be rather than restating the law as it is, but whether they are doing one or the other, they have

9. Lewis, *The American Law Institute and Its Work* (1924) 24 COL. L. REV. 621.

almost uniformly adopted a progressive viewpoint. Quite naturally many of the principles and illustrations are condensed from leading cases of New York, and the influence of this jurisdiction can be seen throughout the work. The majority opinion in *Palsgraf v. Long Island R.R. Co.*[10] has been followed,[11] and, despite the presence of a vigorous dissent in that case, it has been extended, so that negligence towards a man's property does not render the actor liable for unexpected harm resulting therefrom to the other's person.[12] The doctrine of *MacPherson v. Buick Motor Company*[13] has also been adopted.[14] But on the question of the "Last Clear Chance," the Restatement and the New York courts are in disagreement. The former imposes upon the defendant the duty of ascertaining the plaintiff's danger if he can do so in the exercise of reasonable care.[15] But the latter confine the operation of the principle to situations in which the defendant is actually aware of the plaintiff's perilous position.[16]

As for the illustrations, they are for the most part very well done and they help to overcome many of the difficulties which result from the style used in the Restatement. The law student, in particular, will find these neat little fact setups very helpful in properly understanding the text. The ever-present danger that, in the use of examples, too many or too few facts may be given to illustrate the principle involved has been avoided with almost complete success.[17]

The subject has been well classified and divided, and the indices, which too often are neglected in the preparation of a book, in this particular case reveal the entire make-up of the work. At present each volume has its own separate index, but it is the intention of the Institute[18] to index the entire subject as well as each volume when the last one has been published. The fact that the Restatement leaves much to be desired in some respects does not mean that it is not a necessary book for the complete law library. It represents what may well be a pioneering effort in presenting the law as organized knowledge, as science, and its imperfections are by no means irremediable. It is cited more and more frequently by the courts; and this fact alone makes it a necessary reference book for the judge, the lawyer and the law student. When the state annotations have been added to it, these same groups will, of course, find it a much more valuable aid.

THOMAS L. J. CORCORAN.†

THE POWERS OF THE NEW YORK COURT OF APPEALS. By Henry Cohen. New York: Baker, Voorhis & Co. 1934. pp. lxxii, 551. $8.00.

A reading of the current volumes of the Court of Appeals Reports discloses that frequent applications are made to that court for relief, under a mistaken notion

10. 248 N. Y. 338, 162 N. E. 99, 59 A.L.R. 1253 (1928).

11. Illustration at p. 737.

12. § 281, g.

13. 217 N. Y. 382, 111 N. E. 1050, L.R.A. 1916F 696 (1916).

14. § 395. Illustration at p. 1075.

15. § 479 (b) (iii). See also § 498, illustrations at p. 1289.

16. Panarese v. Union Ry. Co., 261 N. Y. 233, 185 N. E. 84 (1933); Storr v. New York Cent. R. Co., 261 N. Y. 348, 185 N. E. 407 (1933).

17. One case in which the Restatement does not seem to have fallen into this error, however, is the illustration at p. 810, § 301.

18. Introd. p. xi.

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as to the court's powers. As an illustration, at page 88 of volume 267 we find: "Motion for leave to appeal to the Court of Appeals denied, on the ground that appeal may be taken as of right."[1] Again at page 90 of the same volume: "Motion for leave to appeal to the Court of Appeals is denied on the ground that the order is not final."[2] That there should be confusion among the members of the Bar is not surprising, for the jurisdictional questions involved are highly technical in nature. To enlighten, by defining and restating the court's jurisdiction, in the light of its recent decisions, is the object of the author of this work. He brings to his task, a valuable experience gained as secretary to Judge Irving Lehman of the Court of Appeals.

At the outset, the author points out, the question of the court's powers seems disarmingly simple, for the court is one of limited jurisdiction, the source of its powers being found in an article of the state constitution,[3] the language of which is restated and affirmed by certain Civil Practice Act sections.[4] Simplicity gives way to intricacy however, because of the "amazing complexity in operation" of the principles which control the powers of the court. In the author's estimation the principles governing the court's jurisdiction may be simplified by dividing them into three categories: "First, there is the problem of appeal to the court of appeals, either as of right or by permission; second, there is the question of the extent of the court's powers to pass upon the issues of law or fact, in a case properly before it; third, there is the question of the disposition which the court may make after decision of the appeal."[5] Mr. Cohen addresses himself to "the modern solution of these problems as they have developed since enactment of the Constitution of 1925.

To correctly grasp the extent of the court's powers, there must be a thorough understanding of the limitations which have been placed upon it by the fundamental law. At several periods of its existence the court fell far behind in its work due to the overwhelming number of appeals which were brought before it. To cut down its work and make the burden commensurate with the capacity of the court, was the controlling reason for the limitations placed upon its powers. Mr. Cohen analyses the nature and consequences of these limitations. His method of approach to the subject is to divide it into two main headings: Book I, "Appeal," which relates to the cases which are authorized to be brought before the Court of Appeals, and Book II, "Review," which refers to the nature of the issues which the court is permitted to consider in a case properly before it.

The ordinary concept of the Court of Appeals is one of a court of law. In discussing the function which the Court of Appeals performs in our judicial system, there comes to mind the words of its former Chief Judge: "It is briefly stated, the function, not of declaring justice between man and man, but of settling the law."[6] To some, there may seem to be a bit of inconsistency in restricting the exercise of the court's jurisdiction to certain selected classes of cases. Would it not be more in keeping with one's notion of a court of last resort, the idealist might say, to leave with the court itself the power to decide what cases it should hear, and what cases it should reject, rather than to have its hands tied by constitution and statute.

1. Matter of Albano v. Hammond, 267 N. Y. 88 (1935).
2. Austin v. Atlantic Beach Bridge Corp., 267 N. Y. 90 (1935).
3. N. Y. CONST. (1925) art. VI, § 7.
4. N. Y. CIV. PRAC. ACT (1921) §§ 588, 589.
5. P. vii.
6. CARDOZO, JURISDICTION OF THE COURT OF APPEALS (1903) 11.

To this, as the author intimates, there is the rejoinder that, as the history of the court has shown, if all who came to its doors could claim a hearing in the name of justice, the burden thrust upon the court would become so great that its usefulness would cease. As an alternative, by provisions of the fundamental law, the court has been made one of limited jurisdiction, and as a device to limit the jurisdiction of the court and equalize its labors to its capacity, what the author calls "the finality rule" has been brought into play. Originally the rule manifested itself in the form that only final judgments or final orders in special proceedings were made appealable to the Court of Appeals. The narrowness of the rule in its original form proved unsatisfactory and gradually it gave way to a more generous formula which is the system in effect today: "Only final judgments or final orders are appealable to the court as of right but any decision which does not finally determine may be appealed to the Court of Appeals by leave of the Appellate Division on certified questions."[7]

The meaning of the word "final" assumes great significance in comprehending the court's jurisdiction. Possible embarrassment will be saved an attorney if before applying for leave to appeal he can assure himself that permission is necessary, or conversely, that he can prosecute his appeal without first obtaining leave of the court. Mr. Cohen in the first two chapters of his book, covering 115 pages, painstakingly reviews "the finality doctrine." What is the scope of the requirement as to finality, when further judicial action is ordered? What is an action, as distinguished from a special proceeding, and when is there finality in a judgment or order? These questions are answered in the first two chapters of his book.

Following his analysis of the finality rule, Mr. Cohen has a short chapter on the history of the Court of Appeals in relation to its modern jurisdiction. Carrying out the general scheme of his treatise, to first dispose of the question of "appealability," the author then takes up in succession appeals as of right and the limitations thereon; appeals on constitutional questions; appeal as of right from orders granting a new trial, where stipulation is for judgment absolute; appeals by permission; and concludes the discussion of "appealability" with chapters on who may appeal, and limitations of time to appeal.[8]

The author's method of dividing his subject up into two main headings proves logical and understandable. Thus far in his book he has been discussing the limitations on the jurisdiction of the court from the standpoint of "appealability," namely, what appeals may properly come before the court. The equally important phase of the court's jurisdiction, "reviewability," that is, what issues are available for review after an appeal is properly lodged with the court, is now taken up in Book II. That this part of the subject is not free from complications may be gathered from the author's statement that "the statutory restrictions on the right to appeal, are many and involved as has been shown in the preceding discussion, but they are matched in breadth and intricacy by the limitations which have been put upon the scope of review in the Court of Appeals."[9]

One of the most important problems presented under the heading of "reviewability," relates to the power of the court to review questions of fact. The conception that the court should act purely "as oracle for the law, into whose province the facts of the case should come already beyond dispute" was rigorously adhered to prior to 1894.[10] The severity of the rule, the author concludes, has been modified

7. P. 12.
8. Cc. IV-X, inclusive.
9. P. 289.
10. P. 290.

by the constitutions of 1895 and 1925. Sometimes one hears the assertion made that the court, if it feels that the equities of the case warrant, will not confine itself to the law, but will strive to find a way to review the facts in order to work out justice. Is this an idea based on misapprehension, or perhaps resting in the imagination of some enthusiastic litigant? The author in one of the most interesting chapters in his book which he entitles "Review of Law and Facts" traces the limitations placed upon the court to review questions of fact from the earliest constitutional provisions and legislative enactments, down to the present constitutional mandate. He says, "briefly, the legislative development has reflected the slow pursuit of an ideal of the court of appeals as a law tribunal aloof from consideration of mere facts, and with the ideal once attained, a comparatively swift retreat in the interest of more immediate justice."[11]

In the forefront of the problems arising in connection with "reviewability" are those which relate to the review of "discretion" by the Court of Appeals. The author points out in a chapter entitled "Review of Discretion"[12] that the doctrine concerning discretion finds expression in the statement "that an exercise of discretion in the courts below is not reviewable in the Court of Appeals."[13] He calls attention to the significant fact that no reference to the doctrine is found either in the constitution or the statutes governing the Court of Appeals, but that only in the opinions of the court itself is there found any mention of the word "discretion." The doctrine has an important bearing on the power of the court to review, and the author addresses himself to the task of investigating its sources and seeks to fix the meaning and applicability of the doctrine as precisely as can be. He concludes that the doctrine had its inception prior to 1895 when there were no stringent limitations, so to speak, upon the court's jurisdiction, and an appeal was permitted to the Court of Appeals, as of right, from any determination "affecting a substantial right." The court was overwhelmed with business and, says the author, "it seems reasonable to suppose that the doctrine concerning discretion was brought into play to ameliorate the situation."[14] It was conceived by the court itself for purposes of self defense in order to avoid undertaking to review questions whose nature is generally unsuitable for review in the highest court. It is difficult to define the doctrine, however, because it has never been carefully formulated by the court. What is really meant by the doctrine as it exists today may be learned by the study of three problems: "first, what is meant by discretion; second, what are the particular issues whose decision lies in discretion; and third, what is the precise effect of the doctrine in general on the jurisdiction of the court of appeals." The solution of these three problems forms the basis of the chapter on review of discretion.[15]

The author concludes and "rounds out" his discussion of "reviewability" with a chapter on "review of new questions on appeal."[16] Analogous to the doctrine that the Court of Appeals will not review the exercise of discretion by the courts below, in that it does not rest in statutory provision but finds expression solely in the decisions of the court, is the rule that the Court of Appeals is prohibited from considering questions not presented to the court below. While the limitations of the rule have never been definitely formulated, the doctrine has been stated many times in

11. P. 293.
12. C. XII.
13. P. 352.
14. P. 353.
15. P. 354.
16. C. XIII.

the opinions of the court in one of two general forms: "first, that a party may not on appeal, change his theory of the case; [and] second, that he may not, on appeal, raise questions neither presented to the courts below nor passed upon there."[17] Mr. Cohen explores the decisions of the court, with a view to ascertaining the true scope of the rule and he finds that the prohibition against raising new questions on appeal, in some cases is not applied with strictness, for to do so would reduce the judges to mere automatons, but is subject to qualifications which confine its operation. The problems arising from the application of the rule are analyzed and the way to their solution pointed out in this chapter.

The final chapter of the book concerns itself not with "appealability" or "reviewability,"[18] but with a problem of practice, to wit, the problem of the court's power to dispose of a case after deciding it. Here the author seeks to answer three questions: "When must the court of appeals order a new trial or a new hearing? When can it make a final judgment or order? When is it required to remit the case to the appellate division for further consideration?"[19]

In answering these questions the author finds no respite from the difficulties which have beset him in the preceding chapters of his book. There is no ready norm or standard to follow. Success can only be approximated, by analyzing the intricate statutory background and comparing the Civil Practice Act sections which govern the Court of Appeals with those which regulate the exercise of corresponding powers by the Appellate Division.

In appraising Mr. Cohen's book, it is fitting to refer to two other works on the same subject, well known to every practitioner. Cardozo's "Jurisdiction of the Court of Appeals" was first published in 1903. A second edition appeared in 1909, the author stating in the preface, that since the publication of the first edition there had been many changes in the law both by statute and decision, and that this rendered desirable a new edition of his book. Mr. Van Bergh published his "Jurisdiction of the Court of Appeals" in 1928. He pays tribute in his preface to Cardozo's "classic" and states that it is his object to restate the law, so as to incorporate the judicial and statutory changes of the twenty-five years which have elapsed since the first publication of Cardozo's book. Seven years have passed since the advent of Mr. Van Bergh's treatise. During that period numerous opinions of the court have been written, relating to the jurisdiction of the Court of Appeals under the new constitution of 1925. There would seem to be a need for some new and up-to-date survey of the principles governing the jurisdiction of the court. Mr. Cohen, sensing this need, has brought forth the present book. He shows a thorough grasp of his subject, and the pages reflect careful and exhaustive analysis and research. The author states in his preface that his method of approach may be more conceptualistic than is customary in books on adjective law, but after all this is not a source of weakness, for one cannot be expected to be dogmatic, when the boundaries of the subject are not entirely limited by statute, but are continually changing with the decisions of the court. It is a fitting characterization of Mr. Cohen's book to say of it that chronologically it is a valuable addition to the efforts of Cardozo and Van Bergh, and also that it is not mere repetition, but is an original commentary on a most important and complicated subject.

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17. P. 407.

18. C. XIV.

19. P. 425.

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RESTATEMENT OF THE LAW OF CONFLICT OF LAWS. By the American Law Institute. St. Paul: American Law Institute Publishers. 1935. pp. xli, 814. $3.75.

With the publication of the Restatement of the Law of Conflict of Laws, the American Law Institute has taken another long, and one should unhesitatingly add, difficult step in the direction of its appointed objective. That is the preservation of the common law system of developing law, not by means of the preparation of codes to have the stamp of the legislative authority, but rather by the writing of a clear and accurate statement of the common law in the simplest of terms. For eleven years and upwards the committee in charge has labored and struggled with numerous tentative drafts and redrafts of the various chapters of the restatement of Conflict of Laws and now after this length of time the finished volume is offered to the legal profession.

Although its great practical importance, especially in the United States with its forty-eight sovereignties, cannot be denied, the subject of Conflict of Laws was long neglected not only by eminent writers on legal subjects but also by our law schools. Furthermore it must be admitted that there has been a dearth of textbooks of any importance written on the subject and, until a comparatively recent date, if it was taught at all in the law schools, it was taught not as a separate topic but in connection with some other subject in the law. This necessarily resulted in uncertainties and confusion in the law and renders the publication of the Restatement, at this time particularly opportune.

The book follows the same general form of the previous Restatements prepared by the American Institute of Law. There are twelve chapters in the volume, the first of which serves as an introduction to the subject and gives its meaning and the rules for its application. Then follow chapters on individual subjects such as Domicile, Jurisdiction, Corporations, Property, Contracts, Wrongs, Judgments, Administration and Procedure. There is no chapter on Taxation. The subject of taxation has probably and I dare say more properly, been reserved for an individual restatement. Each of the chapters is divided into topics. The topics used are for the most part complete and exhaustive of the subject, but at times their development is thinly drawn or sketchy in appearance. Under the topics, in separate, numbered paragraphs, are the statements of the law. They are generally simple, terse and quite understandable, but at times the terseness appears to be accentuated to such an extent that they become almost cryptic and, consequently, less understandable. On the other hand, some of the statements are long and involved with divisions and subdivisions, sections and subsections, all with exceptions, limitations and references to other numbered paragraphs and statements rendering the easy reading and proper understanding difficult, to say the least. There are liberal comments and illustrations, with careful reference to the proper division or subdivision and these should be of great assistance to the reader. There is a very complete index at the beginning of the book which is repeated for each chapter at its head giving the title, topics and subject matter of the numbered paragraphs of the chapter. There is in addition a seventy-five page general index at the end of the book which has been very carefully and accurately prepared and should prove a great aid for reference purposes. As in the other Restatements that have been published by the Institute there are no annotations or citations. They are in the course of preparation for the individual states, but in the meantime and until they are available the use of the Restatement by the Bar must of necessity be very limited. For example, in the chapter on Contracts there is no indication of the confusion that exists in the Common Law in regard to the law determining the validity of a contract; whether such determinant

is the place of making, or, secondly, the place of performance, or thirdly, the place that the parties intend. The first of these, the soundest on principle, is the one urged in the Restatement, although the Courts that adhere to this rule are in the numerical minority. No reference by note or otherwise is made to the second or third although either of them is more widely followed, resting as they do upon the authority of Mr. Justice Storey[1] and Lord Mansfield[2] respectively. It is probably true that the nature of the books calls for a treatment of this kind of these differences in the Law but at the same time it renders it less of an aid to the Student or Practitioner. The publication of Professor Beale's recent work[3] in a great measure will cure this difficulty. He was the chairman of the Committee of the American Law Institute in charge of the preparation of the Restatement and his exhaustive and scholarly work is printed in the form of a commentary on it.

Needless to say a review of this length forbids any more than a general survey of the work as a whole. It is likewise true that no real estimate of its value or appreciation of its merits or, by the same token, no adequate criticism of its shortcomings can be had unless it is carefully studied chapter by chapter and the separate statements of law considered and analyzed. Although the limitations of the work are as apparent to the mere reader as are its accomplishments, still a careful study of the individual chapters, topics and statement of law will disclose equally well the merit of its achievement and at the same time the inherent difficulties necessarily met in its preparation.

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LAW AND THE LAWYERS. By Edward Stevens Robinson. New York: The Macmillan Company. 1935. pp. 348. $2.50.

THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE. September, 1935. $2.00.

THE OPEN DOOR AT HOME. By Charles A. Beard, New York: The Macmillan Company. 1935. pp. 331. $3.00.

TSAR OF FREEDOM—LIFE AND REIGN OF ALEXANDER II. By Stephen Graham. New Haven: Yale University Press. $3.50. 1935. pp. 317.

Three of these publications are books, and the other is a magazine. They are not law books, but they all concern law, either as law is or somebody thinks law ought to be.

LAW AND THE LAWYERS.—This book is a well-written satire on the law. The author is a "natural science" psychologist, with a fundamentalist belief that "natural science" can solve all life's problems. His quarrel with the law is that it does not take into consideration all the facts that should be considered. What those facts may be, the reader is allowed to guess. The author does not state them.

A generation ago William James declared[1] that natural science psychology "is no science, it is only the hope of a science." Dr. Robinson assumes, but does not prove, that this hope has been realized, that natural-science psychology is now a science.

1. STORY, CONFLICT OF LAWS (1834) § 280.
2. Robinson v. Bland, 2 Burr. 1077, 97 Eng. Reprints 717 (K. B. 1760).
3. BEALE, CONFLICT OF LAWS (1935).

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1. PSYCHOLOGY (1893) 467.

I suspect the practicing lawyer will demand the credentials of the science which, so recently as thirty years ago, was no science, before submitting to its dictates. And I suspect also that the lawyer will deny responsibility for the field of legislation, for which Dr. Robinson holds him liable. The lawyer has a lingo of his own, which is bad enough as it is. The learned doctor would add, as embroidery to the present fabric, the vocabulary that has been spun out by Watson, Freud, *et al.* He is not, however, satisfied with changes in vocabulary. He wants action. Apparently he would have the judge psycho-analyzed every morning before ascending the bench. On this point he would probably find the lawyers in agreement with him.

He begins by dubbing law "an unscientific science," and ends by questioning law's title to be considered a science at all. It all depends upon what is meant by "science," and the author is not strikingly clear on this point. Nearly all his propositions are universals which law students in their examinations are accustomed to mark minus.

THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE.—This number of the Annals, which discusses "The State Constitution of the Future," has three articles on the Judicial System which are likely to be of interest to lawyers, and to be intelligible to them.

The first of the three articles is written by Dr. Cushman, Professor of Government at Cornell. He advocates the selection of judges by a special judicial ballot, which will tell the voter what organizations endorse the candidates. Evidently the voting machine would not suit his purpose. He would have a unified court under an administrative justice, as England has. He would eliminate the many technicalities which now reduce the trial to the level of the old fashioned Trial by Battle, where the issue was determined, not by the rights of the parties, but by the skill of the champions. He would also have a Judicial Council, such as we now have in New York State.

The second of the three articles is written by Mr. Stuart H. Perry, a lawyer, now publisher of the Adrian, Michigan, "Telegram, evidently a republican in politics. He tells the story of a crisis in the fortunes of the judiciary in Detroit, when the terms of eighteen judges expired simultaneously. In Detroit judges obtain their seats by election. It so happened that all of the republican candidates were elected, seventeen of them incumbents. The results showed good management on the part of the republican leaders. The writer concludes that the travesty at Detroit, where there were about four hundred candidates for primary nominations, most of them totally unknown to the electorate, "demonstrates the evils of the elective plan of choosing judges." I think his conclusion is too broad for his premises. It demonstrates the absurdity of the Detroit plan in Detroit, not "the elective plan of choosing judges." In New York State the judges of the Court of Appeals are elected, while the city magistrates of New York city are appointed by the Mayor. Who will maintain that the appointed city magistrates are superior in mentality or character to the elected judges of the Court of Appeals? Much depends upon established tradition. The system of appointing judges works well in Massachusetts. The system of electing judges works well in New York. What the state needs is a plan of selection suited to its character, and supported by good traditions.

The third article is written by Clarence N. Callender, lawyer, and professor of business law in the Wharton School of Finance, of the University of Pennsylvania. After outlining the provisions for the establishment of a judiciary in the Constitution of the United States and in the constitutions of various states he concludes that constitutional provisions for the establishment of a judiciary should be few and simple, and that the application of the general constitutional provisions should be worked

out by the legislature, and should not be incorporated in the constitution itself. He proposes as an ideal for the whole world the English judiciary system in which all the various courts of the country "are united and consolidated" so as to form one Supreme Court of Judicature in England. This system he recommends for the several states of the United State of America.

THE OPEN DOOR AT HOME.—In the first of the thirteen chapters of this book the author discusses the "Crises in Modern Thought," and finds:

"The spell is now broken. The tragic sense of the conflict between the ideal and the real becomes the centre of world-wide interest. The utter incapacity of the scientific method, or of any other method, to cope with it, or to provide from the 'data' with which the positive elite insists upon working, unequivocal directions for policy, is now openly acknowledged."

In chapter III the author sets forth the thesis of Industrial Statecraft in eight propositions. In the text which follows he takes up for separate consideration each of these eight propositions. In chapter IV he analyses in like manner the Agrarian Statecraft, after he has reduced it to three propositions. Throughout the remaining chapters he speaks of nationalism and internationalism. In chapter X, discussing the Roosevelt Recovery Program, he writes: "There is, in fact, no way of demonstrating that under any kind of foreign trade policies adequate outlets can be found for American commodities now produced in amounts beyond domestic requirements or buying power."

In the concluding chapter he writes: "Already the vision of things that can be achieved by the talents and energies of the Republic applied to its natural resources is caught by millions of the American people." There you have the thesis of "The Open Door at Home" in a single sentence: with the development by Americans of talent and energy of the natural resources of the country, we shall have a new and greater prosperity than in the past.

TSAR OF FREEDOM—LIFE AND REIGN OF ALEXANDER II.—The title of this book is an index to its contents. It is a very interesting story, fused with very excellent philosophy. The hero, Alexander II, is the Abraham Lincoln of Russia, emancipator of the slave, and martyr. The book might be entitled: "The Antecedents to the New Deal in Russia." The causes of that effect which is known as Russian Communism are here laid bare. The author is a master of style. It is a book which will interest lawyer-statesmen.

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BOOKS RECEIVED

CANON LAW OF WILLS, THE. By Jerome Daniel Hannan. Philadelphia: Dolphin Press. 1935. pp. ix, 517. $3.50.

CANONICAL EVIDENCE IN MARRIAGE CASES. By Rev. Francis Wanenmacher. Philadelphia: Dolphin Press. 1935. pp. xxi, 412. $3.50.

CASES AND MATERIALS ON CONTRACTS II. Two volumes. By Edwin W. Patterson. Chicago: Foundation Press, Inc. 1935. pp. xv, 337; xxii, 663. Vol. I, $4.50; Vol. II, $5.50.

CONFLICT OF LAWS. Three volumes. By Joseph H. Beale. New York: Baker, Voorhis Co. 1935. pp. cxii, 645; xix, 646-1440; viii, 1441-2127. $30.00.

CONTEMPT OF COURT IN LABOR INJUNCTION CASES. By C. O. Swayzee. New York: Columbia University Press. 1935. pp. 145. $2.25.

CONSTITUTIONAL GOVERNMENT IN THE SPOTLIGHT. By William H. Hirst. New York: Fleming H. Revell Co. 1935. pp. 200. $1.75.

EFFECT OF AN UNCONSTITUTIONAL STATUTE, THE. By Oliver P. Field. Minneapolis: Minnesota University Press. 1935. pp. xi, 355. $5.00.

MR. JUSTICE CARDOZO, A LIBERAL MIND IN ACTION. By Joseph P. Pollard. New York: Yorktown Press. 1935. pp. 327. $3.00.