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Book Reviews

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BOOK REVIEWS

CASES ON RESTITUTION. By Edward S. Thurston. St. Paul: West Publishing Co. 1940. pp. xxviii, 964. \$6.00.

This collection of cases and materials is designed to be used in the place of Mr. Thurston's earlier case book on Quasi-Contracts. The title "Restitution" indicates the broader scope of this book. The former book confined itself almost entirely to actions at law to the exclusion of suits in equity. This work on Restitution recognizes that the same fundamental principles applicable to actions of this kind at law are equally applicable to suits in equity. The equitable suit usually involves a prayer for an additional and peculiarly equitable relief, but insofar as the actual recovery of money or property asked in the equitable suit is concerned the principles controlling in equity and at law are similar. Hence the author has borrowed several cases upon reformation and rescission from the second volume of Professor Ames' classical collection.

The author may have been influenced to some extent in his choice of the title by the Restatement title "Restitution", in which is included most of the matter commonly classified as quasi-contractual in previous works by Keener, Woodward, Williston, Laube and the author. The term "quasi-contract" was probably borrowed from the Roman Law—"obligationes quasi ex contractu." The thought underlying the writ of debt and the later *indebitatus assumpsit* was that the defendant had something *belonging* to the plaintiff. Since there was no tort involved the implication of a promise seemed the better theory and in implying that promise Mansfield in *Moses v. McFarlan*¹ borrowed from the Roman Law and placed the tag "quasi-contract" upon these unjust enrichment cases. The original issuance of writs of debt, *indebitatus assumpsit* and account in these quasi-contract cases caused the term "quasi-contract" to gain a strictly legal savor excluding cases in equity. This was unfortunate, because the same fundamental thought underlying the recovery of benefits conferred under fraud or mistake in reformation and rescission suits is present in actions at law commonly designated quasi-contractual. The basic question in both is: Has the defendant something which, in justice, belongs to the plaintiff? It is true that different considerations enter into the equitable suits from those which are material at law, but they are all germane to this fundamental question. The fact that procedural differences originally separated them should not be permitted to perpetuate that separation, particularly when these procedural differences between law and equity are rapidly disappearing in practice. It is to be noted that actions upon judgments, actions under statutory provisions, and actions upon an account stated are not included in this work. This is a proper exclusion, since they are not properly "Restitution".

The author has retained the division he created in the earlier work to a large extent. Not much improvement is possible upon his excellent creation of order out of what must have been a chaotic mass under the over-generalized recovery of that which "in equity and good conscience" belonged to the plaintiff. The division into recovery for benefits conferred in the performance of a contract, under mistake, under compulsion and benefits voluntarily conferred is retained. The order has been changed slightly. Cases dealing with waiving a tort and suing quasi-contractually for benefits acquired by the defendant were placed in the last chapter of the old book. They

1. 2 Burr. 1005 (K. B. 1760).

appear in the chapter following the introductory matter in the new book. The author's purpose was apparently to present matter at the outset, in addition to that contained in the introduction, which would aid the student in grasping the nature of the quasi-contractual remedy.

The chapter on benefits conferred in the performance of a contract maintains the same fundamental division as appeared in the earlier work. However, the section dealing with benefits conferred prior to further performance becoming impossible is not divided as previously between cases where further performance was impossible on the part, first of the defendant, and secondly on the part of the plaintiff. *Holliday v. Coe*² and similar cases are not divided from *Reina v. Cross*³ and similar cases. The new approach in the chapter upon recovery for mistake distinguishing between bargaining and non-bargaining transactions seems to have been made necessary by the inclusion of the new material.

When the book was opened to equitable matter, sufficient comprehension would seem to require *Eaton v. Eaton*⁴ and similar donee cases. In this chapter on mistake there is not as detailed a division of the matter as appeared in the earlier book. Here as in the preceding section upon recovery where complete performance is impossible, there is an abandonment of some of the subdivisions appearing in the other book. The discontinuance of the divisions "Mistake as to the Nature of Subject-Matter of a Contract" and "Mistake as to Existence of Subject-Matter of a Contract" and the grouping of this matter under one heading—"Mistake as to the Subject-Matter of a Contract" may be desirable as placing the student on his own to a greater extent in his discovery and expression of distinguishing features between cases within one section. Yet the writer as a student appreciated the friendly help extended by the more detailed treatment and enjoyed seeing the indicated differences and on occasion had the temerity to believe that he would express the distinguishing feature a little differently. However, the less detailed treatment can be broken down in the class room.

The new book adds a great many later decisions to the former one. The new ones are well edited. The note material here as in the earlier work is most helpful. The author is not a devotee of offering note material in the form of a long list of citations suffixed or prefixed with the words "accord" or "contra". His clear statements indicating distinguishing features are both helpful and provocative to students.

EUGENE J. KEEFE†

JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES. By Harry C. Shriver. Buffalo: Dennis & Co. 1940. pp. xvi, 360. \$3.50.

If his name had not been Oliver Wendell Holmes he would have a place in legal history. Before he had any judicial experience in 1881 "The Common Law" was published. It continues to be a legal classic. In 1883, at the age of 41, he became a Judge of the Supreme Judicial Court of Massachusetts. Lacking less than one month he served twenty years, during more than three of which he was Chief Justice. With

2. 3 Ind. 26 (1851).

3. 6 Cal. 29 (1856).

4. 15 Wis. 259 (1862).

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this judicial experience he became an Associate Justice of the Supreme Court of the United States in 1902, and served until his resignation in 1932, at the age of 91.

It is Justice Holmes' experience as a judge of the highest court of his native Massachusetts that "Judicial Opinions of Oliver Wendell Holmes" attempts to cover. Excerpts of Holmes' opinions from Volume 134 of the Massachusetts Reports to Volume 182 are found in this book. The later opinions written by him as an Associate Justice of the United States Supreme Court should not blind one to his service on the Massachusetts Court. In fact, a reading of Mr. Shriver's collection of cases should prepare one to expect the judicial attitude with which Americans became so familiar between 1902 and 1932.

That the power of the legislative branch of the Government should be upheld unless enactments clearly violated constitutional limitations was a part of Holmes' philosophy. Looking back at the prevailing precedents of fifty years ago the reader must realize that his views frequently required him to make close distinctions between cases, and often he urged the new application of old principles. In fact, the author's note points out that while a state judge Holmes wrote only one opinion holding a state statute to be beyond the power of the legislature to enact.¹

Freedom to act and freedom to urge others to act are matters still debated in the strife between employer and employee. The police power of the State might be invoked by the legislature to prevent public speeches without a permit in Boston. However, Holmes would allow the employees to patrol before an employer's premises and would deny injunctive relief to prevent the boycott and strike. His notion was that combination of laborers to secure better wages and improved conditions is no different than the right of the merchant to reduce prices which may drive his competitor from business.

Cases involving the Massachusetts Bill of Rights found Judge Holmes looking to the spirit of these fundamental guarantees. When in obedience to legislative provision an indictment failed to conclude that the acts of the accused were against the peace of the Commonwealth, Judge Holmes wrote "the Legislature may dispense with a purely formal averment which would give the defendant no additional information, and the omission of which would not prejudice him."²

Many opinions in this collection trace the history of their times. The validity of a divorce secured in a state other than the domicil has perplexed courts for many years; but forty years ago, near the beginning of the divorce era, Holmes left a precedent frequently cited.³ Questions whether a gift of trading stamps to a purchaser is gambling;⁴ whether the State may prohibit spite fences erected for malevolent purposes;⁵ whether it is within the police power of a state to authorize the killing of diseased animals, and if it should turn out that the animals are not diseased whether due process requires compensation be given to the owner;⁶ whether within a small area surrounding the State House in Boston the legislature might prohibit any skyscrapers more than seventy feet in height;⁷ or whether Boston might legally prevent

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1. *Lorden v. Coffey*, 178 Mass. 489 (1901).
 2. *Commonwealth v. Freeloove*, 150 Mass. 66 (1889).
 3. *Andrews v. Andrews*, 176 Mass. 92 (1900).
 4. *Commonwealth v. Sisson*, 178 Mass. 578 (1901).
 5. *Rideout v. Knox*, 148 Mass. 368 (1889).
 6. *Miller v. Horton*, 152 Mass. 540 (1891).
 7. *Parker v. Commonwealth*, 178 Mass. 199 (1901).

sales of flowers in a public street⁸—now well settled by numerous precedents, were of first impression when Holmes began his judicial career.

All that Mr Shriver pretends to do is to reprint portions of a few of Judge Holmes' 1300 opinions written during his twenty years on the State Court. These samples portray Holmes' fundamental philosophy, his epigrammatic flair, his attachment to principles, and his belief that the Courts should not restrain the will of the people as expressed through legislative enactments unless it is clearly contrary to the Constitution's prohibitions. His views are recorded principally in the majority opinions, which indicates that Judge Holmes on the State Court was a dominating figure or else that he was as conservative as his associates. He served longer than any other Judge on the Supreme Judicial Court during his time, but he was the fourth greatest dissenter between 1883 and 1902, and never wrote in excess of two dissenting opinions in that Court during any one year. An appendix cites all Massachusetts Reports in which Holmes wrote any opinion.

The reader of this volume will probably conclude that Mr. Justice Holmes' reputation while a member of the United States Supreme Court will not suffer from a familiarity with his opinions recorded in the Massachusetts Reports.

E. C. ARNOLD†

ORGANIZATION OF COURTS. By Roscoe Pound. Boston: Little Brown & Co. 1940. pp. ix, 322. \$5.00.

This excellent work by Dean Emeritus Pound, which forms the second work published in the Judicial Administration Series, might well have been entitled, "The Disorganization of Courts in America", for it is only the author's plea for organization that justifies the title. For seven out of the book's eight Chapters the author gives in exhaustive detail the various points of variance and defects in the American judicial system commencing with the English model and continuing down throughout the early and late colonial periods, the formative stages of federal and state courts after the Revolutionary and Civil Wars, up to and including the present time. The eighth and last chapter presents the principles and outline of a modern organization of courts based on an integrated and simplified judiciary having control over each element of the judicial process.

Dean Pound is at his best in the handling of the historical details that form the basis for this book. His scrupulous handling of original sources is typical of the author who for so long has enjoyed recognition as an exhaustive and authoritative writer. The source materials which he uses have been collected in no other volume of similar size and content. As a research work it is invaluable.

I believe, however, that praise of Dean Pound's book, no matter how eloquent, would not be appreciated by him. Similarly, I believe, that no matter how many of his readers become impressed with the need for reorganization of our courts he will consider the book a failure unless reorganization is realized in fact. I think the only satisfaction possible to him who has fought this fight for thirty years will come from action on his proposals. Let us then not stop at praising Pound and his ideas, let us do more than become impressed with the need for reform, let there be activity to

8. *Commonwealth v. Ellis*, 158 Mass. 555 (1893).

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bring about the needed reform. This book presents us with our brief, let us plead the case.

JAMES J. KEARNEY†

STUDIES IN FEDERAL TAXATION: THIRD SERIES. By Randolph E. Paul. Cambridge: Harvard University Press. 1940. pp. xvii, 539. \$6.00.

This study of problems in federal taxation will probably prove to be the most popular and valuable of the three excellent studies published by Mr. Paul,¹ for it deals with the impact of the income tax law upon corporate reorganizations, trust arrangements and life insurance plans.² There are no more practical, no more difficult, fields of federal taxation than these three, so any illumination of them is most welcome. Probably the light will never be so bright upon these fields that he who runs may pass the brambles and the pit-falls in his way without scratch or stumble. But Mr. Paul has thrown enough light upon them to enable the cautious traveler to thread his way across with some chance of safe arrival at the other side. When the taxpayer and his government meet face to face on the steps of the Treasury there is likely to be a clash of utterly different philosophies. The taxpayer demands that tax statutes be framed solely with the view to raise revenue for the customary operations of the government. In case of doubt as to the scope or meaning of taxing statutes he says they should be interpreted in his favor. But the government is apt, in these days (although it was not always so), to view revenue raising for customary purposes as only one of the objects of the tax system. Other objects are to secure the redistribution of wealth and to put a brake on the concentration and exercise of economic power. Sometimes downright punitive action is intended in order to satisfy certain "hates". Doubts, the government says, should be resolved in favor of the revenue collector. One cannot evaluate the current tax system and its fate in the courts, as Paul does, without betraying a sympathy with one or the other school of philosophy.

The "principle justification for increased taxes may be psychological rather than fiscal", the author says in his preface. Thus, "war millionaires are bad for national morale";³ so tax war profits to the limit. Probably most people will agree that the captains of industry and the coupon clippers should not be permitted to exact their pound of flesh from the nation's effort to preserve its existence. It is somewhat curious though that many of those who cry out the loudest against the profiteers on the capital side of industry at the same time look with indulgent eye upon the effort of some of the labor side to take advantage of the same emergency to exact their pound of flesh. Why not also an excess wages tax for national morale?

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1. The First Series was published in 1937 and contained studies of "Tax Avoidance," "Valuation" and the "Bad Debt Provisions." The Second Series was published in 1938 and contained studies of "Federal Tax Compromises," "Res Judicata in Federal Taxation," "Ascertainment of 'Earnings or Profits' for the Purpose of Determining Taxability of Corporate Distributions" and other subjects.

2. Also included are studies entitled: "Federal Income Tax Problems of Mortgagors and Mortgagees" and "Use and Abuse of Tax Regulations in Statutory Construction."

3. P. vi.

The author evidently approves Frankfurter's *dictum* that there is nothing in the Constitution "to bar even a conscious use of the taxing power for readjusting the social equilibrium".⁴ Nothing indeed except that when the Constitution was adopted by the people it was universally understood that the power of taxation was the power to raise revenue to defray the expenses of the executive, legislative and judicial branches of the government. But I doubt if the power to tax as granted in that instrument was thought to include the power to expropriate money from Peter in order to give it to Paul.⁵ Taxes, the author reminds us, are the price we pay for the benefits of civilization.⁶ The late Justice Holmes is asserted to have said, when asked if he didn't hate to pay taxes, "No, young feller, I like to pay taxes. With them I buy civilization."⁷ Taxes do buy civilization; for the record it may also be noted that taxes support the activities of wasteful bureaucrats and buy political and economic nostrums of all sorts. The author looks with approval on the recent tendency of the Supreme Court to interpret the statutes broadly in favor of the government, even to the extent of rounding out the incomplete pattern of legislative policy with judicial legislation if necessary.⁸

Thus it appears that the author looks with indulgent eye upon the new philosophy of taxation. Nevertheless, he does appear to be a man of goodwill with compassion for the taxpayer after all. "Taxpayers are entitled to a fair definition of their responsibilities."⁹ "Mortgagors and mortgagees deserve a better fate."¹⁰ "We have an alarming multiplication of meticulous detail in overloaded statutes and regulations."¹¹ The welter of conflicting decisions is deplored and simplification of the statute is urged. A critical appraisal follows each of the five studies and as often as not the author pleads for reforms that will aid the taxpayer by removing confusion or by bringing about a more equitable distribution of the tax burden.

The historical development of the "almost unbelievably complicated" reorganization provisions is painstakingly traced in the first of the studies and the cases are fully covered. The "continuity of interest theory", "the *Gregory* rule" and the "*Hendler* doctrine" receive extended attention. Should the reorganization sections go? The author hesitates to say, but in any event, they need substantial revision. "There is something wrong with provisions which remain so obscure, in spite of filigree detail in the statute and regulations, that hardly any prediction as to their meaning can be made without the feeling that it is little better than a dignified guess. . . . Perhaps this is the underlying problem of taxation today."¹²

The study of revocable trusts and the income tax is interesting and informative. The provisions of the law, the author says, attempt "to reach Indian-giver grantors who retain substantial dominion or control over the trust and grantors who remain the true beneficiaries of the trust by reason of the possible application of the corpus

4. P. vii.

5. No pun intended.

6. Preface, *passim*.

7. P. 165, n. 4, quoting from Frankfurter, Mr. Justice Holmes and the Supreme Court, p. 42 (1939).

8. See for example p. 175 *et seq.* *Helvering v. Clifford*, 309 U. S. 331 (1940).

9. P. 295, in connection with revocable trusts.

10. P. 348.

11. P. 164.

12. P. 164.

or income for their benefit. . . . It may be fairly concluded that on the whole they have failed to accomplish their objective, and that trusts are still a successful tax avoidance mechanism."¹³ But *Helvering v. Clifford*¹⁴ indicates that a new day is dawning for the Treasury in its struggle to defeat the deep laid schemes of the tax-avoiders. What Congress has failed to do in Sections 166 and 167 of the Internal Revenue Code, the Court has done with Section 22(a). The author takes a short flight into the realms of jurisprudence when he comments on the implications and criticisms of the *Clifford* case. He thinks uncertainty is not to be decried when it is used by the courts to defend the revenue; when the legislature has been inept or has blundered a little judicial legislation is in order.¹⁵ Changing the rules in the middle of the game is all right when the Indian-givers oppose the Treasury. But later the author concedes that there is something to be said for putting taxpayers reasonably "upon notice of the law's command." But "what should be done is more than one person should venture to say."¹⁶

The chapter on the "Income Tax Problems of Mortgagors and Mortgagees" is written jointly by Mr. Paul and George S. Allan. The confusion in the authorities as to whether income is realized or a deductible loss occurs in a foreclosure and as to whether a loss is an ordinary or a capital loss is pointedly brought out. The authorities in this field, as in the others studied, are well analyzed. The authors conclude that statutory amendments are badly needed. And so it goes through the studies of "Life Insurance, Annuities, and The Income Tax" and of "Use and Abuse of Tax Regulations in Statutory Construction". Conflicting authorities; tax-avoidance loopholes; uncertainty; realism here; transcendentalism there. As Ko-Ko might say: "Here's a how-do-do! Here's a pretty mess! Here's a state of things!" The tax consultant's life is not a happy one.

In spite of the uncertainty in some directions, there are many doctrines that are becoming well established and which are not likely to change. The author's analysis of the cases is excellent and many a lawyer will get help from his pages. It is a service, too, to have the uncertainties and shifting doctrines clearly indicated. The author's style makes the text not only clear but interesting, which is something of an accomplishment in writing upon so abstract and generally dry a subject as taxation. The footnotes are exhaustive. Certainly nearly a thousand cases, if not more, from the courts and the Board of Tax Appeals are cited. One very valuable feature of the book is the list of law review articles and other sources of material on the subject. With the author's admirable text and this list of authorities the student of the Federal Income Tax will not want for assistance in this most baffling field of present day law.

GEORGE W. BACON†

13. Pp. 180-81.

14. 309 U. S. 331 (1940).

15. Pp. 207-13.

16. P. 294.

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ELECTIONS AGAINST WILLS. By Glenn C. Beechler. New York City: Matthew Bender & Company. 1940. pp. xix, 751. \$10.00.

The author of this book must be a proselyte of the school of writers which produced *Anthony Adverse* and *Gone With The Wind*. This does not mean that he is a producer of fiction, nor yet that his product is likely to become the bone of contention among those acquiring the names of future moving pictures. When it is recollected that Section 18 of the Decedent Estates Law of the State of New York, which constitutes the author's central theme, occupies only four printed pages in the McKinney edition of our statutes, one is compelled to marvel at the ingenuity of an author who can produce a book two inches in thickness from such a small beginning. The mustard seed of Biblical narrative has been indeed outdone.

It is not difficult to dissect the process by which the author has thus developed his point of departure into his port of accomplishment. He has included forty-six forms occupying eighty-three pages, an appendix of fourteen pages containing the text of the statutes given and discussed piecemeal in the book, and a second appendix of sixty pages containing decisions reprinted from the *New York Law Journal*. An index of forty-seven pages facilitates access to the balance of the book. Thus the actual text is a trifle under 550 pages in length. In this textual part the author has at the beginning of each of his nineteen chapters a "Summary of the Chapter," consisting usually of one to three pages of text. This gives the substance of the entire chapter, the balance consisting of material more commonly put into the footnotes of a text book. In order to give an exactly correct picture on this point the reviewer worked over the first 148 pages of the text. Of these, twenty-one pages, or approximately fifteen percent, consisted of the above described "summary material." Of the remaining eighty-five percent, seventy-seven pages (constituting fifty-two percent of the 148 pages) appeared within quotation marks and consisted of the text of statutes, the text of Commission Reports and excerpts from court decisions. If these proportions hold for the entire book—and a non-mathematical inspection indicates that it does—the 550 pages of text would break down into some eighty pages of statement of the author's conclusions on the law, 286 pages of quoted excerpts and 184 pages of other material in footnote and text form constituting the author's arguments in support of his conclusions.

The facts already stated do not, in any way, justify a conclusion that this book is not worth its price. In fact, the reviewer believes that it is almost a necessary book on the shelves of any lawyer who draws wills or handles the estates of decedents. It is, in reality, a source book, bringing together within two covers the products of the legislature and of the courts during a trifle more than a decade of time, on a most important topic. It makes available to a large fraction of the bar many otherwise inaccessible decisions printed in the *New York Law Journal*. The chapter entitled "The source of the 'intestate share' and abatement" (Chapter X, pages 253-306) is a helpful exposition of a most difficult aspect of this law. The least valuable parts are Chapter III on "Elections in Sister States" (pages 30-80) and Chapter XVIII on "Drafting the Will" (pages 478-488). In both of these chapters the treatment is unevenly incomplete and quite inadequate. Occasionally the author indulges in highly useful suggestions for improvement in the law, as for example concerning the desirability of a differentiation between ordinary spouses and a second (or subsequent) spouse married late in the life of the intestate.

RICHARD R. POWELL†

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THE LIFE OF SIR THOMAS MORE. By Cresacre More. London: 1726. Edited and Modernized by James L. Kennedy. Penn: Riverside Press. 1941. pp. xvi, 211. \$3.75.

The express aim of the editor of this highly inspirational book is to facilitate access to one of the great classic biographies of the immortal lawyer-saint, and to heighten its popularity in the twentieth century by modernizing such mechanical and accidental aspects of the eighteenth century edition as spelling, punctuation, and the like. In pursuance of this objective, the editor has replaced the footnotes of the eighteenth century edition, "invaluable to the researcher, but unnecessary for the present purpose", with an index and a valuable, up-to-date bibliography of important works which have been written about Saint Thomas More. The inclusion of a beautiful reproduction of the famous portrait of him, as Lord High Chancellor of England, by Hans Holbein in the Frick collection, materially enhances the attractiveness of the volume. But "streamlining" has been achieved without any sacrifice of the thought or beautiful language of Cresacre More, so that "the substance, the spirit, the graceful prose poetry of the original remain sacred and intact".

Cresacre More, who died in Rome in 1649, while on a business and diplomatic mission, did not publish the biography which, however, he had completed. Publication followed posthumously. This is supposed to have taken place in London in 1651 and previously in Louvain. The present reprint has been made from the eighteenth century edition of 1726.

Despite seizure of important papers by Henry VIII, which rendered difficult the accurate tracing of such matters as the genealogy of the More family, Cresacre More was in a position to write a correct and authoritative account of the life of his distinguished ancestor. It was based on an intimate knowledge of the matters presented. This was made possible by Cresacre's relatively close lineal relationship to Sir Thomas. Ample documentation is further assurance of the authenticity of the work, which "has been consulted and admired by scholars since its first publication". But in presenting precise historical materials, Cresacre has at the same time produced a literary gem which affords unmistakable evidence of his wide cultural background and scholarly attainments.

This biography of Sir Thomas is the careful effort of a manifestly devout, religious and competent author who is rightly proud of his descent from his martyred forbear, and who undertakes lovingly to create for posterity a living record of the character, private and public life, and intellectual and moral greatness of a truly remarkable personality. As the life of Saint Thomas More unfolds with the deft and critical presentation of events in chronological order, his many-sided genius is revealed in such diverse spheres as law, philosophy, letters, diplomacy, statecraft and even theology. Beneath a unity of character essentially dependent upon a rational but complete submission of will to God, whose representative on earth he recognizes in the Pope of the Catholic Church, there is an inner balance of opposites which defies analysis, for example, his austerities, yet buoyant, irrepressible wit and humor, the fatherly affection he had for all in his household, yet his insistence upon firm familial authority, his life of contemplation, yet his career of immense activity, his contempt for wealth, yet his great earning capacity as the foremost barrister of his time. The dominating fullness of Saint Thomas More's life, which included a multitude of activities, is the crucial thesis constantly but unobtrusively impressed upon the reader. The success of the biographer results from his power to sense and express the spiritual

implications of the crucial decisions which determined the direction of the Chancellor-Saint's life.

Cresacre's work is intended as a general biography with no attempt to specialize with respect to a particular phase of his ancestor's career. The legal phases, as such, of the life of Saint Thomas More, therefore, are not stressed. But these aspects of his career naturally loom so large upon the horizon of his historic fame that it is impossible in any narrative of his life to slight them. This generalization is verified in the present instance because Cresacre has devoted considerable space and attention to the early legal studies, legal practice and astounding skill and success, as a barrister, of Sir Thomas. An entire chapter has been allotted to a narration of the chief events which lead to his elevation to the Lord High Chancellorship, his exemplary personal behavior while on the Woolsack, and his profound wisdom in the administration of justice. Another chapter deals with his arraignment, trial and condemnation on the charge of treason for failure to take the oath of supremacy and thereby acknowledge Henry VIII as head of the Church of England. This latter chapter contains fascinating evidence of the juridical maturity and judicial qualities of mind which influential legal historians unanimously ascribe to the martyred Chancellor. Hence the book has a special appeal to the legalist, regardless of the particular branch of the legal profession to which he may have dedicated himself.

But this book affords lawyers and legal scholars far more interesting reading and valuable material concerning the life of a towering jurist, credited by Professor Holdsworth with the inauguration of a new era in the history of English Chancery. It holds up to them, as well as those in such related public realms as politics and statecraft, which many lawyers enter, a model, embodying both an ideal of professional success and a moral example which if kept in mind will not fail to be a source of personal encouragement. Here is an illustration of the proposition that integrity, indeed sanctity itself, is not a barrier but rather an aid to the attainment of the highest worldly success. In so far as that success was at the bar and on the bench in the case of Sir Thomas More, he becomes the perfect model for the Anglo-American lawyer, his most appropriate patron saint and sympathetic inspirer to do the right and to promote justice without fear of physical or financial consequence.

Even here the message of the work does not end. It compresses within its pages a mighty challenge to those of our day who would fight on for the underlying philosophy for which St. Thomas More went to the block without complaint. His was a protest against the omniscient state, the usurpation by the state of the right to command men's consciences, and the twisting of reason into an instrument with which to justify unbridled desires, interests and claims. In contemporary language, he was "purged" or "liquidated" for refusing to subordinate the dictates of his conscience to the morally illegal will of the political dictator; he refused to go along with the "party".

The philosophy which Saint Thomas vindicated by his martyrdom was reinforced by the stamp of divine approval which the Catholic Church placed upon his choice of alternatives. On December 29, 1886, Sir Thomas was beatified during the pontificate of Leo XIII, (i.e.) was declared to be holy. The final declaration of his sanctity, so that it was recognized throughout the whole Church, was made by Pius XI on May 19, 1935. By this canonization, Sir Thomas was elevated to the glory of Sainthood. For those of his religious faith, therefore, additional evidence of an irrefutable character became thus available to demonstrate the falsity of all types of political philosophy which deify race or state.

The editor of this modernized version of Cresacre's biography deserves well merited congratulation for bringing it to the world's attention in these crucial hours in which the future ethical structure or organization of every state and nation upon this earth is being decided. The issue faced and decided by Saint Thomas More has become the present problem of all mankind. The psychosis of an influential and strong willed ruler of one people, conjuring up delusions of grandeur, has evolved into the madness of millions. In sixteenth century England, the decision of a whole people, both clergy and laity, practically speaking, to combine religious and temporal authority in one man, resulted in the suppression of minorities, the confiscation of property, and bloodshed. The same drama has been enacted in twentieth century Germany and Russia where complete infallibility with respect to all matters of life was conferred upon a dictator.

As citizens of America and residents of the world, let us cling tenaciously to the ideals of Saint Thomas More. Now is the time to re-study his life and re-dedicate ourselves to the advocacy of a supreme law of God to which the will of every human being is subject. Let the cult of this saint encompass humanity. Then will there be a definite guarantee that the legions of anarchy and chaos will not prevail and that a spirit of relative peace, based on order and harmony, will permeate the earth.

BRENDAN F. BROWN†

INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY. By James A. Gathings. Washington: Amer. Council on Public Affairs. 1940. pp. 143. \$3.00.

This is a thorough and well founded summary of the history of treatment of alien enemy property,—in the world at large as well as in the United States,—leading up to 1914 and the generally accepted principle that aliens entering in good faith were entitled to decent treatment even though two nations might be at war. This was a gradual change from the earlier doctrine, so often followed by the courts, that all enemy property is necessarily hostile property. Vattel in Europe and Alexander Hamilton in the United States in earlier days, and John Bassett Moore and Edwin Borchard more recently have been its strongest protagonists. Treaty and custom throughout the 18th and 19th centuries tended to break down the harsh earlier rule.

At the same time, however, the course of warfare in the 19th century was changing circumstances. War was no longer an affair of merely professional armies, a difference to be decided by battlefield success or defeat. War became total war. In the early 20th century, we began to hear of "the nation in arms" and now we hear of "total war." Every element of economic as well as military strength, weighs in the balance. So it has happened, as the author of this excellent book points out in his next major group of chapter, the attitude toward alien enemy property harshened. To prevent aid and comfort being given to the enemy, alien enemy property at home might be sequestered. So sequestered, it might be used for the benefit of the home nation, but the state might be considered to be under an obligation to return the property or reimburse the owner, when war was no longer flagrant. This was the theory on which the allied powers acted until the Treaty of Versailles. The modern rule of international law was still held sound and valid. The only purpose of re-

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strictions on enemy property at home was, as the New York Court of Appeals said in *Techt v. Hughes*, to prevent the property being of use to an enemy in a war in which all resources might be important.

The Treaty of Versailles (and America's Treaty of Berlin) took direct action against this property. They made Germany admit her fault and responsibility for the war and for all damages caused by the war. Claims were to be submitted for the evaluation of those damages. It was then determined legislatively that, if Germany failed to pay those claims, the alien enemy property in America might be held as security for such payment—making a third party financially responsible for the delinquencies of one of the parties to the claims adjudications. Such determination by the political department of the government—however distorted and however at variance with established principles of international law—was binding up the judiciary. Aliens deprived of their property were unable to recover it by legal means. Even if it is acknowledged that part of that property was returned, there was some still unreturned, and the eventual result is not much different from confiscation.

Against such a contingency the author plans. He recognizes that courts must act under national rather than international law. He recognizes that the alien enemy is without recourse so long as international law be the only support he has for his case. He therefore proposes that by effecting a multitude of joint treaties, it be agreed by nations—and so become a part of the "law of the land" in the United States—that although private property may be sequestered in the interests of military success it must be returned upon suit brought against the government by the alien who was temporarily deprived of it. The suggestion is not without merit. It avoids many of the faults of other procedure which might be devised. It provides specific legal channels. It implements in national law the doctrine in international law which is all too often promoted only by vague phrases and crippled by debilitating "reservations."

The suggestion may work. It would be some brake against the onrushing force of modern total war and conquest as it seems to be waged in Europe since 1938. How effective it would be against the whims of dictatorial governments who have no concern for their former promises, is problematical. At any rate, we welcome the volume. With prospects of declarations of war in the not very distant future, and with the Trading with the Enemy acts still on our statute books, the volume is worth the perusal of the profession, and may be handy to have by for reference, when clients may be faced with future sequestration or confiscation. There is no flying in the face of public policy expressed in the legislative acts of politics, but there is opportunity to foresee what may transpire and to learn in advance of what disabilities might be imposed upon property, apparently "innocent" which may become "hostile."

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LA PORTÉE THÉORIQUE DU GLISSEMENT DU DROIT VERS LA SOCIOLOGIE. N. Kralyevitch. Paris. 1939. pp. 323.
 ELÉMENTS DE SOCIOLOGIE JURIDIQUE. G. Gurvitch. Paris. 1940. pp. 267.

Two books which almost simultaneously appeared in France¹ testify to the increasing interest in the sociological treatment of problems which, for centuries, were considered to be the exclusive domain of jurists.

The first, written by N. Kralyevitch, a young Yugoslav scholar, analyses the causes of the changing approach to the problems of law. In his opinion, the traditional science of law is not science, but the theory of a special art. Up to a quite recent time, this art was based on the general acceptance of the hypothesis of the law of nature; now, this acceptance is vanishing, and another foundation must be found which can only be social reality as studied by sociology.

From the standpoint of sociology, law is not an independent social force, but the equilibrium of such forces. By means of law, this equilibrium may be rationalized and positive forces given supremacy. Having no force of its own, law can achieve this result only by opposing one set of forces to another. In every particular situation, a number of regulations are possible; the law selects one of them. Being a regimentation of social forces, law, in its efficacy, depends on the actual correlation of their relative strength.

The author obviously belongs to utilitarian school considering human activity merely from the standpoint of interests and their conflicts. Jhering is frequently quoted, and the French institutional school of law rejected because of its affinity with scholastic philosophy. The sociologists who constitute the author's chief authorities are the extreme "positivists", especially Gumpłowicz and Oppenheimer, and in some places their special teaching is presented as that of sociology in general.

The second book written by G. Gurvitch, a prominent philosopher of law of Russian origin who, for many years, has taught in France and is now a refugee in this country, is a concise, but systematically complete treatment of the field of sociology of law. The author begins by analysing what he calls "the microsociology of law"; the correlation between different forms of human relations and the different types of law is submitted to a stimulating study. Then, there follows a "juridical typology", where the different forms of the integration of individuals in groups and their impact on law are studied; a natural hierarchy of legal orders, as emanating from different groups, is thus established. As particular social groups are integrated in "total societies", ideal types of legal systems are created; their analysis forms "the microsociology of law". Finally, the tendencies of the development of law and the factors determining this development are submitted to an enlightening analysis. The finding is that tendencies may be established only within each of the individual legal systems and that they express only probabilities, not necessities. Between legal systems there is a kind of hiatus, and prediction of change becomes impossible.

The book is obviously an important contribution to the very young science of the sociology of law. Its main defect is the unduly broad concept of law used throughout the work: Gurvitch identifies law with any form of regulation imposed by social groups on their members; in this manner, all that is called folkways, mores, and a large part of morals comes under this concept.

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1. In addition to a French translation of the writer's "Introduction to the Sociology of Law".

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