BOOK REVIEWS

Handbook of Equity (Hornbook Series). By Henry L. McClintock. St. Paul: West Publishing Co., 1936. Pp. 364. $5.00.

Cases on Equity. By Henry L. McClintock. St. Paul: West Publishing Co., 1936. Pp. 1263. $6.00.

The treatise is a work which is a real joy to read. Professor McClintock gives abundant evidence of voluminous reading, and of a most intimate understanding of the whole "soul" of equitable doctrine. It is still curious, from the point of view of an English lawyer (though less so to one who is, from actual visits, familiar with the refinement of specialization in vogue in American law schools, and indeed in most professions in America), to find that the subject of trusts is entirely absent from a book on general equity. In England the trust, being regarded as historically the mainspring of equity, finds an honorable and roomy place in any textbook on equity; and it must be put down to the insular prejudice of an English reviewer that the excision of trusts, though it undoubtedly makes for brevity, seems nevertheless to militate against the cohesion of the treatise. But one is less conscious of this lack in Professor McClintock's treatise than in any other we have read, owing to the comprehensiveness of his general treatment and the lucidity of his style. It was a source of real pleasure to find that he devotes a whole chapter to the arrangement of equitable doctrines and institutions under the heading, Maxims of Equity. These do not all, it is true, go to the root of equity. The majority are, as Dean Pound has shown, of comparatively recent date, and so equity cannot be said to have been built up on them as foundations; they are rather the fruit of observation of developed equitable doctrine, or, if they can be in any way regarded as the architects of it, they were inarticulate architects. The ideas embodied in them are far older than their articulate expression. But whatever their history, their practical value in a scheme of arrangement is immense.

The learned author has taken immense pains in historical research, and he has in generous quality the gift of compression. The important truth that the early common law judges in the Twelfth and Thirteenth Centuries, and the justices in eyre until still later, enunciated equity as well as law, is conveyed by him with the utmost clarity in less than two pages. It is surprising, however, to find no reference to the work of the late Dr. Bollard on the equity of the justices of eyre, a storehouse of learning which, though its conclusions are now not generally accepted, is indispensable for the student of legal history.

With a few of the learned author's interpretations of English cases we feel inclined to differ. He overestimates the effect of Lord Eldon's judgment in *Lane v. Newdigate*,[1] when he says of it that the evasive device which Lord Eldon adopted in that case, of granting an injunction prohibitive in form, but admittedly intended to compel the performance of affirmative acts, "has since often been followed." Certainly Lord

[1] 10 Ves. 192 (1804).

Eldon gloried in the contemplation of this effect of his injunction, but surely this object has been kept carefully out of sight in all subsequent cases, except possibly in *Catt v. Tourle.*[2] It was certainly not uppermost in the mind of Lord St. Leonards in *Lumley v. Wagner.*[3] That great chancellor stressed the point that the harshness of the injunction was more apparent than real for two reasons: firstly, it was open to Miss Wagner to approach Lumley with a proposal for a new contract to supersede the old one if she were dissatisfied with it; and secondly, had Lumley sued her at common law for damages, the measure of damages would undoubtedly have been high. The views of the learned author on the very recent decision of Branson, J., in *Warner Bros. Pictures, Inc. v. Nelson*[4] would be full of interest, and will perhaps be revealed to us in the second edition which, we feel sure, will at no distant date be necessitated by the success which his book is certain to obtain.

A cleavage between English and American law is envisaged where none can surely be said to exist, by these words: "contracts for the sale of corporate stock are enforced in England almost as a matter of course, unless the stock is that of a public nature. In this country, such contracts are enforced only when the value of the stock cannot be easily ascertained, or other stock in that particular corporation cannot be obtained which will answer plaintiff's purpose equally well." As authority for his view of English doctrine he cites *Duncuft v. Albrecht,*[5] but this is really a case laying down not a rule but an exception. The rule is undoubtedly that which was enunciated in *Cud v. Rutter,*[6] that specific performance of an agreement to transfer stock will not normally be granted on the ground that "there can be no difference between one man's stock and another's;" But, where, as in *Duncuft v. Albrecht,* stock or shares are such as cannot always be bought in the market, this reason disappears and the court will order specific performance of an agreement for the purchase of such securities.

Professor McClintock tells us that "the Restatement of Contracts says that a contract cannot be avoided for a unilateral mistake unless the other party knew or ought to have known of the mistake. This, in effect, denies any relief for a unilateral mistake, since taking advantage of the known mistake of another party is included in the definition of fraud." This accepts the view taken by Farwell, J., in *May v. Platt,*[7] of what should have been the ground of the decisions in *Garrard v. Frankel,*[8] *Harris v. Pepperell,*[9] and *Paget v. Marshall.*[10]

Professor McClintock raises a question which in England at the present day is a very pressing one, and on which Professor Lauterpacht has recently written a most learned article entitled "Contracts to Break a Contract."[11] If a contract cannot, to the knowledge of both parties, be performed without breaking a prior contract binding upon one of them, is the subsequent contract valid? If Mr. Justice Holmes' famous theory of contract is correct, an affirmative answer would seem to be indicated, on the ground that a contracting party is not definitely bound to perform his contract but is committing a perfectly lawful act if he elects to break it and pay damages. Professor McClintock reminds us that the same view was taken by Lord Coke, who "in one case issued a prohibition to prevent specific enforcement of an agreement for the reason

[2] L.R. 4 Ch. App. 654 (1869).
[3] 1 De Gex, M. & G. 604 (1852).
[4] [1937] 1 K.B. 209.
[5] 12 Sim. 189 (1841).
[6] 1 P. Wms. 570 (1719).
[7] [1900] 1 Ch. 616.
[8] 30 Beav. 445 (1862).
[9] L.R. 5 Eq. 1 (1867).
[10] 28 Ch.D. 255 (1884).
[11] 52 L.Q.R. 494 (1936).

that it nullified the intent of the covenantor to perform or pay damages." The learned author's estimate that "that construction of the contract was not in accord with the purpose of the parties, nor the historic position of the common law," is in accord with the view recently expressed by Du Panca, J. in *British Homophone Co. v. Fury and Crystallate Gramaphone Record Manufacturing Co.*[12]

The case-book is an extremely valuable one, and the selection made by the learned compiler is most judicious. A student who can master the contents of both books will not only be a formidable antagonist in the courts, but will have donned much of the panoply of an accomplished jurist. Professor McClintock is to be most heartily congratulated on his achievements.

H. G. HANBURY*

* Lincoln College, Oxford.

Handbook of Anglo-American Legal History. By Max Radin. St. Paul: West Publishing Co., 1936. Pp. xxii, 534. $5.00.

Whatever Professor Radin does will be well done. Before we open this book we know that it will be the product of intellect and scholarship, couched in a clear, simple and graceful style.

Apart from the preface and the first two chapters, the book does not deal with the history of the law by periods. No attempt is made to study the development of the common law as a whole; that is, to study the interrelated development of substantive law, courts, and procedure, by periods. If the student who uses this book wishes to get an idea of the condition of some topic of substantive law, such as real property or contract, at any given stage of the development of the common law courts, or if he wishes to get an idea of the corresponding methods of trial, or of procedure, he must work it out himself. In doing this, he will be helped greatly by the tables at the beginning of the book.

Whether each separate topic should be developed as an entirety from beginning to the end, as is here done, or whether the whole law should be developed as an entirety, its development necessarily divided into suitable periods (if any such really exist), is a matter of opinion. Continuity in presenting each topic is undoubtedly secured by this arrangement: but unless the student makes diligent use of the tables, and of Chapter I on the political history of England, he cannot get a picture of any period of the development of Anglo-American law. He cannot see a living, working system of law develop, unfold, and broaden down. If law is a unity, that unity is cut through and through in many different places; and before us we find not a living body, not an entire dead body, but many different organs dissected neatly from the once living body; with a chart by which we can place most of the organs, and with informaiton which makes it possible in most instances, to understand the effect of one upon the other. But it is a matter of opinion, of judgment, of sentiment to decide between these two methods of presenting the history of Anglo-American law. It is impracticable, and in a book of this size, impossible, to attempt to superimpose one on the other.

The inevitable result of this treatment, as the author points out,[1] is that the development of law in the United States is never considered as an entire subject. It is but

[12] 152 L.T.R. 589 (1935).

[1] Preface, p. vi.