BOOK REVIEWS

LATIN-AMERICAN LEGAL PHILOSOPHY. By Luis Recaséns Siches, Carlos Cossio, Juan Llambías de Azevedo, and Eduardo García Máynez. Translated by Gordon Ireland, Milton R. Konvitz, Miguel A. de Capriles, and Jorge Roberto Hayzus. Introduction by Josef L. Kunz. The Twentieth Century Legal Philosophy Series. Cambridge: Harvard University Press, 1948. Pp. xxxvii, 557. $6.00.

This volume of translations of the works of certain eminent Latin-American legal philosophers is one of the Twentieth Century Legal Philosophy Series, published under the auspices of the Association of American Law Schools. As such it is the special concern of the law teaching profession and, therefore, of the readers of this JOURNAL. The editorial committee in charge of the Series is to be congratulated not merely on its choice of material for inclusion in the volume, but also and in particular on its success in obtaining such admirably competent translators.

Though the present task of the committee is done with the publication of the translations from the Spanish, the same cannot be said for the reader. For him, at least if he has no more than the usual passing acquaintance with phenomenology and existentialism, the work of translation has only just begun. Fortunately, there is an extremely helpful introduction to the general subject of Latin-American legal philosophy and an appraisal of the work of each of the authors included, by Professor Josef L. Kunz. This introduction is both learned and clear, an extremely rare phenomenon in the field of legal philosophy.

In the Introduction, Professor Kunz gives a brief account of the complete absorption of Latin-American legal philosophy with the German philosophical movement known as phenomenology and with Kelsenism. He explains in a few simple words what these doctrines rest upon. Then he outlines very briefly the scope and purpose of each of the translated works. A short estimate of the importance of these writings in the field of legal philosophy closes the Introduction. The reviewer had the feeling that if this excellent introduction had not been included, most American readers would not have gotten beyond a dozen pages of the text.

The volume contains translations entitled "Human Life, Society and Law," by Luis Recaséns Siches of the National University of Mexico; "Phenomenology of the Decision," by Carlos Cossio of the University of La Plata, Argentina: "The Eidetics and Aporetics of Law," by Juan Llambias de Azevedo of the University of Montevideo, Uruguay; and the "Philosophical-Juridical Problem of the Validity of Law" and "Liberty as Right and as Power," by Eduardo García Máynez, formerly Secretary-General of the National University of Mexico. The first-named work, that of Recaséns Siches, is a whole book in itself and takes up three-fifths of the entire volume of translations.

The complete title of Recaséns Siches' book is *Human Life, Society and Law: Fundamentals of the Philosophy of Law.* This title is intended to

be taken seriously. Human life, society, and law are the foundations of the author's philosophy of law. What does it mean, then, to say that "human life" is fundamental for the philosophy of law? Is it conceivable that something other than human life could be the basis of legal philosophy? Obviously not. Therefore the author must mean that in some way or other "human life" is the central core of his philosophy. Not reason, therefore, nor morality—certainly not physical science nor even psychological or sociological science—but just life itself is the fundamental affirmation of Recaséns Siches' legal philosophy. If this still appears a trifle stuffy, the sequel will have to try to show that the "human life" philosophy is an important if not critical modern *Weltanschauung.*

At any rate, the first chapter of the book distinguishes the Universe, Human Life, Society, and Law. A long-drawn-out "genus-species" differentiation, beginning with the literal Universe and ending with juristics, establishes the following fundamental propositions:

> 1. That the Law belongs to the zone of the Universe which [is] characterized as objectivated human life; and that, as such, it is constituted of a complex of significations of a purposeful structure, with a meaning and intentionally directed toward certain values.
> 2. That those significations have a normative form.
> 3. That it constitutes a norm of historical content: the human interpretation, at any given moment of the exigencies of certain values, conditioned by given circumstances.
> 4. That it is something of a social or collective kind: a form of life not individual, but collective, abstract, common, functional.[1]

Now, I suppose it would be asking too much of a scholar trained in German philosophy to start with the four propositions above as generally admitted or, if not, at least as perfectly understood, and thus save sixty-six pages of closely written text.

The sentence immediately following the four quoted above is this:

> But, on the one hand, we fail to learn the difference between the Law and other norms (of human conduct), as, for example, morals, decorum, etc.; and to differentiate it also from other social products. And, on the other hand, we fail as well to inquire what is the essential meaning of juristics, as such.[2]

Determining the meaning of juristics "as such" carries us to page 134. This whole section, the first eight chapters of the book, is an example of modern European—more specifically, German—analytical jurisprudence. When, in the present century, the Germans "discovered" analytical jurisprudence and used it either as a form of Neo-Kantianism or phenomenologism, it quickly circumnavigated the globe, becoming immensely popular in almost all centers of learning in civil-law countries. Kelsen, of course, was the chief exponent of the system. With him the matter took on a logical-positivistic cast and Kantian philosophy was made to serve culture-theory ends. Latin America adopted Kelsen whole-heartedly at first and then later proceeded to nibble away at his vitals. Some rejected his pure theory of law, refusing to believe that norms, legal or other, could exist *a priori* (wholly

[1] P. 67.
[2] *Ibid.*

apart from experience). Others attacked his separation of law and morals and insisted on getting the two together theoretically and on principle rather than in the Kelsenian fashion: "somehow or other."

The influence of Kelsen in popularizing the concept of "norm" as the basic undefined legal conception was and still is paramount in Latin America as elsewhere. What a norm is remains for all writers under the influence of Kelsen an implicitly understood "first cause, itself uncaused."

In as much as logical-positivism is a philosophical outlook rather than a consistent system of metaphysics, its effect on legal philosophy is difficult to assay. But what of phenomenology and later of existentialism? These do purport to be complete philosophical systems. It can be said at once that for the legal philosophers here represented these doctrines are the very foundations of their thinking. In fact there is nothing specifically Latin-American about their philosophy, and Latin-American influences are apparently absent except in the discussions on the subject of liberty.

Professor Kunz gives us an outline of the basic tenets of both phenomenology and existentialism. They are twentieth-century versions of seventeenth-century rationalism. They begin, as did Descartes, with the method of indisputable first principles. For the Cartesian indubitable doubt they substitute indubitable emotion, or indubitable life (Ortego and Siches) or indubitable existence (existentialism). For them science must begin with such inescapable "beginnings" or "first principles." These are never recommended merely as fruitful starting points, or as personal to their originators. Each must be indubitably true, even though they differ one from another.

After the first principle is arrived at, then, by a process which takes the place of the old-fashioned seventeenth- and eighteenth-century "deduction," other truths (indubitable of course) are arrived at. This process is nothing other than the mature and careful reflection of the thinker who happens to be working at the time. That which is furthest from the practice of all phenomenologists is the notion that the product of their thought must be put to the test of experience, and if it is to be truly fruitful, must ultimately form an integral part of experiment. Without saying so, the phenomenologists are in temper and deed anti-scientific and anti-experimentalist.

Recaséns Siches' notions of science are outmoded. His ideas of physical science date back to the middle of the nineteenth century. There is no hint in the book of a realization of the meaning of the "non-Euclidean," post-Newtonian ways of thinking which now characterize scientific speculation. He treats psychology (and with it sociology) as did Husserl. Consequently, the vital influence of European volitional psychology, becoming now an integral part of American social psychology, anthropology, and other social studies, is altogether absent. The anthropology that is evident goes no farther than Levy-Bruhl.[3]

Recaséns Siches follows the logical-positivistic separation of law from morals. This is in the best tradition of analytical jurisprudence and has the same unfortunate results. After law is over and done with and accepted as such, then morals enters to repair the damage.

[3] See p. 119.

Again in the analytical tradition is the notion that the hallmark of law is force ("inexorable imposition" is Recaséns Siches' term).[4] Since this is taken as an essential part of the definition of law, it is not hard for the author (as it was not hard for Austin before him) to show that any alternative social constraint which is not "inexorably imposed" is therefore *ex definitione* not law. Such restrictive definitions have the effect of creating an autonomous "science of law," relatively immune from criticism by other social disciplines, since, as with Austin, these subjects do not touch law proper, but deal only with morals, custom, society, etc.

The human individual is another of Recaséns Siches' sacred entities. With all the fervor of the German romantics, Recaséns Siches cuts off the "ineffable individual" from the society which contains him and places him at the center of the universe. I and the world in relation to me, or conversely, the world and I in relation to it, are the foundation of this type of personalism. Never will this Spanish ultra-individualist let the individual lose himself in order to gain a world. Narcissism is elevated to the position of a world philosophy in a world whose individuals are no longer battling each to save "himself" but rather to save "the whole." Eighteenth-century romanticism helps little in an age which knows that older ideas of the "precious individual" are fatally inadequate for it.

The last section of the book deals with "juridical valuation," the problem of justice through law.[5] In keeping with the tenets of analytical jurisprudence, the determination of the goodness or badness of a law has nothing to do with the law itself. This problem is put "before the forum of conscience."[6] All positive laws aim at justice, says Recaséns Siches. If they fail, it is a matter of failed intention.[7] Conscience, then, must subject the law to rigorous scrutiny to determine whether its precepts are just or not.

The search for a criterion of value is then undertaken.[8] Is the basic foundation of juridical valuation empirical or *a priori?* It is *a priori!* Are the *a priori* ideas psychological or are they objective ideas with necessary validity? They are objective ideas with necessary validity! What then of experience? It must be brought in somehow. But first, the notion of objective ideas existing *a priori* (apart from experience) must be explained.

I shall have to turn over to the reader Recaséns Siches' attempt to combine the new rationalism (objective *a priori)* with the facts of experience. It is hard enough nowadays to make sense of the Kantian formal *a priori,* which seems to the reviewer to be the basis of modern scientific postulational systems, without following the post-Kantian anti-scientific nonsense down to Hartmann in a vain attempt to understand "objective *a priori.*" This must be left to the intuition of the reader, to be grasped "immediately" in a flash of blinding insight or to be rejected in an equally instantaneous and unalterable distrust.

What, then, have American students of law to learn from these Latin-American legal philosophers? If we answer, not much, we must remember

[4] P. 84.
[5] Chapter XII *et seq.*
[6] P. 231.
[7] P. 236.
[8] P. 238.

that we have not much more to learn from our own American philosophers. The failure of American philosophy to enter intimately into the life of the sciences and the social disciplines is notorious. The social disciplines are sending the law teachers increasing numbers of students whose sophistication in social-science matters is causing us much embarrassment. The same cannot be said for our departments of philosophy. They seem to be reviving the ancient Greek distinction between wisdom and science. And whereas psychology and the social disciplines are challenging our notions of what a "science of law" should be like, our philosophers offer us at the best non-scientific and at the worst anti-scientific "wisdom." If we feel as Aristotle did that science culminates in wisdom, that without science wisdom is impossible, the phenomenologists, legal or otherwise, are likely to leave us cold. If we feel, as did St. Augustine, that science really has nothing to do with wisdom, we may seek wisdom wherever we can find it. And certainly these Latin-American legal philosophers are wise! Perhaps we should keep in mind that all modern legal philosophers are wiser than their philosophical systems would lead us to expect them to be. Stammler is a notorious example. Kelsen is another. I hope this means that these particular legal philosophical systems were much too insubstantial for the weight they were designed to carry. I hope it does not mean that philosophy of science is doomed to continue long as an inadequate foundation for science which now is under serious secular attack.

Carlos Cossio's article on "Phenomenology of the Decision" will be exceedingly rough going for the American law-trained reader. It is well to split the work into two parts.[9] Sections 1, 2, and 3 are devoted to general philosophical speculation; Section 4, on Juridical Experience, and particularly Section 5, on Juridical Valuation, are quite readable. Section 6 is a summary which also is not too difficult to understand. The whole is the Introduction to his book, *La Teoria Egologica del Derecho y el Concepto Juridico de Libertad.*[10]

The first three sections of this article are a hodge-podge of German metaphysical nonsense. Some of it appears to have been translated literally from the German to the Spanish. Dr. Ireland had the thankless task then of translating this Germanized Spanish into English. He deserves our sympathy.

Carlos Cossio calls his doctrine the "Egological Theory of Law." But what "egological" means successfully defied the analytical powers of this reviewer. Evidently the translator was equally disturbed, because, after corresponding with the author on the meaning of the term, he was forced to set out the reply at length in a footnote.[11] The reader is invited to try his luck with that riddle.

The first section of the article promises a phenomenological investigation of the nature of the judicial decision. We learn that the egological theory rejects legal rationalism (the objects to be known by the jurist are not legal rules, but human conduct).[12] It likewise rejects empiricism

9 Section 4, p. 369.
10 1944.
11 P. 345.
12 P. 348.

(since human conduct is an object of experience radically different from natural objects; it is an experience of liberty in which the creation of something original appears every instant).[13]

That much is clear. Then follows the hodge-podge of Aristotelian, Kantian, Husserlian, Diltheyan, Kelsenian metaphysics. One example must suffice—an attempted explanation of the nature of comprehension:

> . . . Comprehension seems somewhat like intellection: it also is a seeing with the intelligence; but it is not a seeing which implies nothing more than the seeing, for it is a seeing which sees the coming to see which refers the seeing to the I; that is, which sees what it sees as seen, just as what we love we love as beloved and what we desire we desire as desired; something which does not happen in intellection where the seen is seen as it is, but not with the quality of seen since this quality does not constitute the being of what is seen here. On the other hand, in the comprehension of what is seen it is seen with the quality of seen because this quality forms the being of what is seen: if what we love we love with the quality of beloved it is because that being beloved forms the very object loved. This example is particularly illustrative . . . .[14]

In despair, the translator reproduced the Spanish text of the original together with a German version supplied to Professor Cossio by a German colleague.

Beginning with Section 4, the phenomenological influence rapidly wanes and a Neo-Kantian philosophical apparatus appears. "Formal and material," "logical structure and empirical content," "necessary and contingent" are the dichotomies which come into play. The Kantian *a priori,* which seems to be used by Cossio to mean "presupposition" and not "that which is devoid of experience," is the basis for his theory of juridical valuation. The question of justice (value) enters into the very meaning and nature of the decision from the beginning. It is *a priori* in the judge's thought and action. Section 5 elaborates this theme by illustrations taken from Argentinian law. Here Cossio is at his best, in the opinion of the reviewer. He argues very effectively for value (justice) as an integral part of law and thus ranges himself against the analytical jurists. Thus, at least so far as this introduction is concerned, the philosophical influences of Kant and Stammler are really more important for Cossio than those of Husserl and his followers. To the reviewer, they represent by far the best part of Cossio's legal philosophy.

The Introduction to Cossio's work here translated is the same as that which appeared under the heading "Phenomenology of the Judgment" in *Interpretations of Modern Legal Philosophies, Essays in Honor of Roscoe Pound.* It is hard to understand why the editors of the Series felt that this work should be re-issued, even conceding the superiority of Dr. Ireland's translation. It would have been infinitely more informing for American readers to have had translated some of Professor Cossio's less technically philosophical works or even the sections of his book devoted to "Liberty," where the egological theory of law can be more easily examined.

[13] *Ibid.*

[14] Pp. 356-357.

"The Eidetics and Aporetics of Law," by Juan Llambías de Azevedo, is another essay in phenomenology. Following Hartmann, the author divides his problem into three parts: first, to describe phenomena; second, to elaborate the problems which phenomena pose; and third, to investigate solutions.[15] Eidetics is the science of essences. Essence is what is found in the very being of an individual object. But everything which belongs to the essence of an individual another may also have. Therefore "the essence or *eidos* is a new class of object: A universal object or species, ideal, nontemporal, perfectly distinct from the individual object, which is real and exists, consequently, here and now."[16] Aporetics is the science of the analysis of the problem which the *eidos* of a phenomenon raises.

The reader is invited to follow for himself the extended analysis of the nature of law from this standpoint.

The volume of translations closes with two articles by García Máynez, called "The Philosophical-Juridical Problem of the Validity of Law" and "Liberty as Right and as Power." These are further illustrations of the influence of Kelsen and the phenomenologists on Latin-America legal thought. Enough has been said in connection with the work of Recaséns Siches and Cossio to indicate the nature of the philosophical foundations of this important writer. With him as with the rest, Kelsen is the starting point and phenomenology the basic philosophical position.

It is time now to turn to a leading question which contemplation of this exceedingly "foreign" legal writing is bound to raise: Why have the recent German philosophers had so little influence on American legal thought, and why is American legal thought so conspicuous by its absence from Latin-American legal speculation? A volume could easily be written on the subject, but this much at least can be indicated briefly. Phenomenology is arm-chair philosophy. It ignores science—especially experimental science. It is useful therefore to attack science or to speculate with in the absence of science. The same is true of the "pure theory of law" part of Kelsen's teachings. Consequently legal philosophers throughout the world can use these systems or parts of systems *in vacuo*. But as was indicated above, the pressure on legal theoreticians in this country is from the psychological and sociological disciplines which have never had a Neo-Kantian or phenomenological revolt against positivism but which went directly from mid-nineteenth-century positivism to pragmatism and to Deweyan operationalism, experimentalism, and other forms of philosophical creed that come closely to grips with problems of scientific method. To the extent that this philosophical climate of opinion explains the cool reception given to phenomenology and pure theory by American social scientists, it would also explain why American legal and social-scientific "folkways" are uncongenial to the Latin Americans. They have taken our refrigerators and automobiles, but apparently balk at our belt-line productions in psychology, social science, and law.

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[15] P. 406.
[16] P. 407.

CASES ON EVIDENCE. Second Edition. By Charles T. McCormick. St. Paul: West Publishing Company, 1948. Pp. xxii, 1097, $8.50.

It is manifest from this second edition that Dean McCormick's eight years of teaching experience with his first edition left him reasonably well satisfied with its basic qualities as a teaching tool. There is nothing in the way of radical innovation or revision in the new edition.

The length is increased by sixty-three pages, better than half of which is accounted for by the reproduction, at the end of each section, of the pertinent rules from the American Law Institute's *Model Code of Evidence.* Addition of sixty-six cases and deletion of eighty-five spells a net reduction of nineteen. In the Preface the author lists his suggestions for omissions which will reduce the materials to about nine hundred pages—that is, in a course of sixty class hours, to a necessary average coverage of fifteen, instead of eighteen, pages per hour.

The book retains the policy of concentration on recent decisions and, in the language of both the new and the old prefaces, "the abandonment of the effort to teach the history and development of the doctrines by cases." About two-thirds of the new cases were decided after publication of the first edition in 1940. Most of the space for them was made available by deletion of cases which were recent when that edition was published—cases decided from 1920 to 1939. Probably the most questionable deletion is that of *Higham v. Ridgway*[1] from the section on Declarations against Interest.

The presentation of topics entirely by textual material has been slightly increased by adopting this method for Dying Declarations. The use of law review materials to supplement cases has also been increased, principally in the sections on Relevancy in General[2] and Scientific Evidence.[3]

The major innovation, not radical, but of some significance, is inclusion in the section on Scientific Evidence of twenty suggested problems for extra-class preparation and classroom report. All are designed to stimulate student interest in the utilization of scientific techniques. The best of them (better than half) are those which concentrate the student's thinking on exploring scientific possibilities in preparing for trial, by contrast with those which pose a question as to whether specific evidence should be admitted or excluded.

In incorporating such problem work into a course there are, of course, two possible values—the major value to the individual student, derived from working on his problem, and the secondary value to students generally, derived from hearing and discussing good reports from their fellows. How much class time the latter deserves is a question not peculiar to this book or this course. Decisions of this reviewer concerning it have always been so tentative that the profession is unlikely to suffer if he refrains from proffering advice.

[1] 10 East 109, 103 Eng.Rep. 717 (K.B.1808).

[2] Excerpts from James, *Relevancy, Probability and the Law*, 29 CALIF.L.REV. 689 (1941), appear at pages 448–459.

[3] Excerpts from Smallwood, *Lie Detectors: Discussion and Proposals*, 29 CORN. L.Q. 535 (1944), appear at pages 575–583.

The organization of the second edition remains virtually identical with that of the first except in one respect. In the first edition, in the chapter on Privilege, the sections dealing with Offers of Compromise and Remedial Measures After an Injury were, respectively, the fourth and fifth of eight sections. In the second edition they are Sections 7 and 8. The result of this shift is to place them in more immediate juxtaposition to the chapter on Relevancy. One wonders, therefore, if Dean McCormick is weakening slightly in his theory that the exclusion of such evidence rests upon privilege rather than upon irrelevancy.[4] It is, incidentally, the opinion of this reviewer that any attempt to cram these exclusions into either a pigeon-hole marked "Irrelevancy" or a pigeon-hole marked "Privilege" involves an appreciable distortion and at least a modicum of conceptual highjinks. They are based upon obvious policy considerations, but it does not follow that they must be made to fit in the same legal slot as communications between attorney and client or between husband and wife.[5]

This reviewer has taught as much of the second edition as he could cover in a summer session. He found it, as he found the first edition, a very satisfactory book to teach. He believes it has been improved for teaching purposes by the addition of the substantial number of very recent cases and the inclusion of the *Model Code* rules. He believes that the continued policy of selecting cases which set forth the critical evidence verbatim, or nearly so, is a distinct advantage; and that, from the standpoint of presenting fact situations which naturally arouse a student's interest, the selection of cases continues to be a very happy one. There are, naturally, a few things which the reviewer would have done differently, but he cannot believe that the profession has such a consuming interest in them as to justify their exposition.

In summary, if for some obscure or inexplicable reason you found the first edition pedagogically unpalatable, you are unlikely to find that the second edition contains enough new ingredients to affect the basic flavor. But if, like this reviewer, you found the first edition more than satisfactory, you will find the second edition better.

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HANDBOOK OF THE PRINCIPLES OF EQUITY. Second Edition. By Henry L. McClintock. St. Paul: West Publishing Company, 1948. Pp. xxxii, 643. $6.50.

The first edition of this book was generally well received, and some reviewers welcomed it with enthusiasm. A good elementary book has been very significantly improved in the second edition. There is abundant evidence, as stated in the Preface, that "every section has been revised and very largely rewritten,"[1] and one is confident that even those sections left

4 McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX.L.REV. 447 (1938).

5 *Cf.* AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, which treats these matters, not under Relevancy, but under Chapter IV, Admissibility as Affected by Considerations of Extrinsic Policy.

1 P. v.

untouched were given careful reconsideration. The limitations imposed by the hornbook form of treatment and, for that matter, any single-volume publication, prevent a full and adequate treatment of a subject as comprehensive as equity. Criticism has been directed at attempts to circumscribe so narrowly the treatment of such subjects. That criticism aside, Professor McClintock has produced an excellent hornbook on this subject. It will be used to advantage by students who desire to consult texts. The Preface to this edition states that there is an "increasing tendency" among practicing lawyers to use the hornbook series.[2] If this is true, this book should provide an impetus to that tendency.

Moreover, the second edition is a much larger volume—643 pages as against 421—than the earlier edition. The expansion is due to a more extended treatment of the topics of existing sections rather than the inclusion of other materials. In fact, there are only seven new sections. In a few instances a particular section is expanded by adding similar subject matter omitted in the prior edition. For example, Section 145, Franchise, is now Section 150, Franchises and Other Exclusive Privileges, and is almost twice as long. The general plan of the book is unchanged. The table of law review articles is increased from four and one-half to ten pages, and each page carries a longer list of articles. Forty-five double-column pages are required to carry the Table of Cases, and the Index extends over thirty-two pages as against twenty-one in the first edition.

It is gratifying to observe that the author continues and perhaps even extends his policy of taking a specific position on controversial topics. He is not deterred from advocating the real necessity for the existence of discretionary powers in the chancellor despite the undemocratic origin of that doctrine and the historic difficulty experienced in its control.[3] He still believes that a remedy which does not produce satisfaction because of the insolvency of the defendant is an inadequate remedy, making possible resort to equitable remedies which would otherwise be unavailable—[4] a position opposed by worthy authorities. Apparently, he is untroubled that the "rule has been relaxed" which required the assignee of a purchaser in a land contract to tender the purchaser's note and mortgage in a specific performance suit, thus favoring the realistic view that the land is the real basis of the credit extension and not the personal credit of the purchaser.[5] He favors Professor Pomeroy's view that community of interest in law and fact is sufficient jurisdictional basis for bills of peace,[6] subject to the carefully guarded limitation later approved in Pomeroy's work. He approves Professor Chafee's suggested reforms which would remove as essentials to the bill of interpleader the requirements of privity, same thing, debt, or duty, independent liability, and non-interest of the applicant.[7] He would go even further, and remove as a requirement the affidavit of non-collusion for which "no satisfactory explanation has ever been given";[8] nor would he require

2 *Ibid.*

3 See §§ 54, 144, and 145.

4 See § 47.

5 See p. 311, § 115.

6 See c. 17.

7 See c. 18.

8 See p. 508, § 188.

the applicant to drop out at the first stage of the proceeding. As to the test of a cloud on title, he considers that to be a cloud which factually might interfere with the sale, including oral claims, wild deeds, defects appearing on the face of the instrument, etc.[9] He unhesitatingly champions the minority view which permits an injunction to restrain the enforcement of a judgment secured by perjured testimony, and thinks that "we cannot expect a lay public to have a very high opinion of a system of justice which can give no relief against perjury if the perjurer is successful in concealing his fraud during the first trial." [10]

On the other hand, it is disappointing to find the maxim, "Equity regards that as done which ought to be done," made the basis of equitable conversion.[11] If the chapter on equitable conversion were part of the chapter on specific performance the real basis would be obvious. Harder blows might have been struck at equity's self-imposed limitation requiring a property right to support jurisdiction in cases involving interests in personality,[12] and at the notion that licensed practitioners acquire with their license a property right, called a franchise, and relying thereon can proceed in equity to protect that property although the statutes concerned were designed for totally different purposes. The author very properly criticises equity's failure to protect adequately against defamation of property and indicates that the cases do not effectively support the "social policies" involved.[13] It is to be regretted that the declaratory judgment is not presented as an easy device for disposing of many of the questions arising in cases involving the termination of equitable servitudes because of changed conditions,[14] as is so effectively done in connection with the protection of associational relations,[15] in certain interpleader problems,[16] and in some phases of statutory substitutes for quieting title.[17]

Following the hornbook formula, Professor McClintock has lucidly and succinctly stated the principles of equity in the black-letter paragraphs. In a direct and perspicuous style he elaborates those principles in a text amply documented with notes and citations. The volume is an authoritative presentation of the elementary principles of equity, and a careful reading of the book is both a pleasurable and profitable experience.

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9 See § 196.
10 P. 462.
11 See § 106.
12 See cc. 13 and 14.
13 See § 156.
14 See § 128.
15 Sec. 161.
16 See § 190.
17 See § 199.

CASES ON EQUITY. By Walter Wheeler Cook. Fourth Single Volume Edition. By M. T. Van Hecke. St. Paul: West Publishing Company, 1948. Pp. xxxii, 1192. $8.50.

The only justification for a review of the fourth edition of a casebook as well known as Cook's *Cases on Equity*, single volume edition, is a consideration of its differences from the last edition. Professor Van Hecke, in the Preface, states that these differences consist of the use of materials since 1939 to point recent trends and developments, changes in order of treatment, and a more extensive use of textual materials.

Approximately 315 of the cases in the third edition have been retained, and about 110 omitted. In many instances recent, well selected cases have been substituted, or text materials used. Occasionally a topic has been omitted or its treatment contracted, as, for example, vendor and vendee liens and strict foreclosure. Among the old friends which will be missed are *Lowndes v. Bettle*,[1] *Great Northern Railway v. Brosseau*,[2] *Prudential Assurance Company v. Knott*,[3] *American Mercury, Inc. v. Chase*,[4] *Commonwealth v. McGovern*,[5] and *Whitwood Chemical Company v. Hardman*,[6] to mention only a few. Space considerations probably account for the failure of so many of the omitted cases to find their way into the footnotes. Since the volume is reduced by 105 pages, it is disappointing that the footnotes, which have always been rather meager in this work, were not expanded, at least to include these leading cases.

Three minor changes in the order of the treatment of materials deserve mention. The nuisance problem presented by the *Tennessee Copper Company* cases is taken from the chapter on Adequacy of Remedies and placed in the Relative Hardship chapter, in which the balance of equities is the main theme. Declaratory Judgments is made a separate chapter, but it consists of an introductory text note, statutes, and the *Haworth* case only. The Preface indicates and the Index shows that a considerable number of declaratory judgment cases have been selected primarily for other purposes; in some instances these are the same cases used and brought together by Professor Cook to develop this remedy. Pedagogical difficulties in the presentation of this important and expanding remedy are involved in this change, in so far as remedial matters are discussed in the cases. An improvement results from the shifting of the cases on "election between remedies" from the section on Misrepresentation and Nondisclosure to the section on Defenses as the subtopic Election of Remedies, although some preciseness of application to the former topic may be lost.

The most significant change in the order of treatment, however, is the placing in Part 6, at the very end of the book, of materials heretofore found at the beginning. Chapter 1 of Part 6, The Meaning of Jurisdiction as Used in Equity Cases, comes from Chapter 3, Part 1, of the third edition,

1 33 L.J.Ch. 451, 3 New Rep. 409 (1864).
2 286 Fed. 414 (D.N.D.1923).
3 10 Ch.App. 142 (1875).
4 13 F.2d 224 (D.Mass.1926.)
5 116 Ky. 212, 75 S.W. 261 (1903).
6 2 Ch.D. 416 (1891).

Principles Governing the Exercise of Equitable Powers. Chapter 2 of Part 6, The Powers of Courts of Equity, consisting of four sections covering methods of enforcing equitable decrees, the legal effect of such decrees, and powers over persons and things within and without the jurisdiction, is taken from the old Chapter 2 of Part 1. The section on the "conflict" of equity with common law, a favorite theme of Professor Cook, is gone. Chapter 3 of Part 6, The Procedures of Courts of Equity, consists of "fusion" statutes and pages 91–112 from the second edition of Clark's *Code Pleading.* The reason given for this radical change is that the materials "seem to have greater significance after the class has seen the various remedies in operation." [7] One who thinks that, notwithstanding the difficulty involved, the student should study these materials first may still use this book by assigning Part 6 after Part 1. A teacher in a state school who desires to do so may find it quite satisfactory to supplement the text material in Chapter 3 with cases from his own jurisdiction.

Finally, in line with the trend evidenced in recent casebooks, there is a considerable increase in materials other than court opinions. Extracts from legal periodicals, Restatements, and textbooks, and text notes constitute approximately 130 of the 1179 pages of the book. To this should be added about fifty instances of paragraph extracts from recent cases, which have value largely as test materials. These plus the many statutes which are included cover thirty-five to forty pages. No non-legal materials are used.

A new edition of a casebook should preserve the general pattern and essential merits of the old. It should manifest further investigation, research, and scholarship, evidencing serious effort to improve the old as a teaching tool. Professor Cook's chief purpose was to present to the student the place and function of equity in our law today in as comprehensive a form as possible in a single volume. The fourth edition is still Cook's *Cases on Equity.* Professor Van Hecke has given us a real revision of a book which has been improved by his mature and fruitful scholarship. The book should continue to hold its prominent position among the casebooks on equity.

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ESSAYS ON THE CONFLICT OF LAWS: By John Delatre Falconbridge, Toronto: Canada Law Book Company, Ltd., 1947. Pp. xxi, 730. $8.00.

Students of the conflict of laws are familiar with the articles and comments by Dean Falconbridge in the *Law Quarterly Review,* the *Canadian Bar Review,* and other leading legal periodicals. The present book is essentially a collection of articles and case comments that have previously appeared. However, new introductory chapters have been written, other portions have been added, and substantial revision and deletion has avoided the duplication that would arise from a mere collection of articles and comments. Remaining, none the less, a collection of such material, the volume possesses certain more or less inherent characteristics. It is not a continu-

[7] P. vii.

ous text, and there is sketchiness and repetition. It is, however, a valuable collection and a reference book of importance in the field.

Of great interest to the reviewer is the development of the author's ideas through the years. This is particularly true, for example, with respect to the *renvoi* problem. Chapter II, written as one of the introductory chapters for this collection, seems only mildly hostile to *renvoi.* The author apparently feels that the technique may be valuable in many types of cases, and should be an instrument available to the competent workman. In Chapter VII, however, which reproduces a 1930 article with some revisions, the general attitude is that the "supposed authorities for the *renvoi* are, to say the least, singularly weak, and that any advantages it is supposed to possess either disappear on examination or are outweighed by its disadvantages." In Chapter VIII, reproducing an article first appearing in 1939, the author admits that the doctrine may "afford a useful, sometimes even an inevitable, device in some exceptional classes of cases." He states that perhaps, if attention were focused on these special classes, there would be less need to put oneself absolutely in the camp of the advocates or of the opponents of the doctrines. This mellowing, though still doubting, attitude toward *renvoi* seems to be further exemplified in Chapter IX, which reproduces a 1941 article.

Certain disagreements are bound to arise in the discussion of *renvoi.* Room for disagreement arises when Dean Falconbridge speaks of a reference to what seems to be the totality of the law or the conflicts law of a certain system as if it were a reference to a domestic, local, or municipal law. For example, a reference to a treaty provision that the national law shall control citizens of one of the signatories seems to be a reference to a conflicts rule, since it is a reference to a particular rule of the system of law governing a conflict situation. The same seems true of a reference to a rule that the local requirement of registration of conditional sales does not apply to sales in other states, and to the "borrowing statutes" relating to the formal validity of wills and the statute of limitations.

It is suggested that one of the best arguments for *renvoi* is stated by its objectors when they point out that in the case of status and immovables *renvoi* is good and necessary because of the desire for uniformity. It seems also that *renvoi* is frequently useful in other situations where uniformity is desired, and where an honest analysis would disclose that only one foreign system of law is concerned at all. This, of course, is hard for some courts to recognize, but there are many conflicts situations in which a supposed local policy has no validity at all, even though the local policy may be very strong when it deals with a situation which actually touches local interests.

Dean Falconbridge repeats several times the point, which is obvious but frequently overlooked, that the Bealeian vested-rights doctrine is itself logically committed to the complete acceptance of *renvoi,* although of course that school denied its general applicability.

Substantial portions of the book are devoted to the problems of characterization. This is extremely desirable since, as Dean Falconbridge points out, much, if not most, of the characterization done by courts is done unconsciously. It is important that emphasis be put upon the inherent necessity of characterizing at various levels in all conflicts problems. There is bound to

be some disagreement with the author's views on characterization, particularly his proposition that characterization on the basis of comparative law is theoretical and unsound. It is submitted that some knowledge of comparative law is necessary for even a primitive approach to the problems of characterization. So much of the characterization by the courts is unconscious because so many judges and lawyers are not aware of the possible divergent characterizations which another system might use. Without that basic awareness, courts must continue to characterize unconsciously. Note that characterization will be performed, because it is inherently necessary. In some places, Dean Falconbridge seems to approve of Robertson's third step of accepting the classification of the system to which the conflicts rules of the forum refer, but he definitely thinks that the doctrine of the "preliminary question" is illusory. He seems to be afraid that secondary characterization involves *renvoi* and a delivering "over to the tender mercies of a foreign law the construction and application of the conflict rules of the forum."

The author is, apparently, generally writing for Canadian readers. At times he abandons an ideal analysis to enunciate the English or Canadian law. Frequently, however, he evaluates English and Canadian cases and criticizes them for reaching results that are not consistent with a sound system. The short comments on specific cases have long afforded teachers many interesting additions to their lecture notes.

The author has several favorite views in addition to those already discussed. He repeats frequently the point that there is a difference between the question of the existence of a status and its incidents. While this is undoubtedly valid in a certain sense at least, it seems to overlook the fact that the only reason we ever seek to determine status is to decide some question of incident. It is suggested that when a court says that a foreign status exists, which looks and sounds similar to a local status but has different incidents, in reality the court is saying that the two statuses are in fact different, or that the particular incident is really an incident flowing from some other operative fact and not an incident of the status.

One of the most important points which the author emphasizes is the rather simple one that there is no such thing as the law of a British subject, of a citizen of the United States, or of a Canadian domiciliary. In all such cases, in which more than one "state" is comprehended in the national state, the larger governmental division has, normally, no local rules, and no conflicts rules at all, and the reference must be to Northern Ireland, or Ontario, or New York, or some similar governmental unit. Not only continental courts but English and American courts have made the same error and have from time to time taken "imaginary journeys into foreign countries."

In dealing with property, the author admits that the distinction between *jus ad rem* and *jus in re* is not logical and may be non-existent. He assumes its validity, however, though he returns to the invalidity several times. One might wish that the author had been more critical in examining this. Perhaps his conclusion as to the objection to exercising jurisdiction in cases involving foreign land would have been altered if he had.

Other objections could be found to specific points and to specific analysis. As the author states, however, conflict of laws is still in a primitive state. It follows that any scholarly analysis and collection of authority can claim a

right to a hearing and a receptive mind. Mere disagreement, or casual question as to validity, is no adequate reason to cast aside a proffered analysis or study. Dean Falconbridge brings to the subject a scholarly, experienced familiarity, and a mind that is willing to reconsider a previous position and abandon it if former estimates later appear to have been ill-founded.

The best parts of the collection are the portions dealing with the analytical problems, the general considerations, the teleological functions, and the basic concepts. Less vital but of real interest are the specific studies of particular English and Canadian cases. It would have been desirable if Dean Falconbridge could have extended his analytical critique to more numerous fields, rather than in some portions contenting himself with finding what the "law" is.

Lest the criticisms here made seem unduly unappreciative, let it be made clear that the collection of material found in the book is scholarly, vital, and interesting, and can be read and studied with great profit by anyone who seeks to know more of the available material in the field and to test and check his own thinking. It is only through scholarly studies of this sort that conflict of laws will, as rapidly as is consistent with proper growth, mature and develop into an honest, reasonable, intelligent, and fairminded offspring of the law.

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THE JURISPRUDENCE OF INTERESTS. Selected Writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, and Hermann Isay. Translated and edited by M. Magdalena Schoch; with an Introduction by Lon L. Fuller. The Twentieth Century Legal Philosophy Series. Cambridge: Harvard University Press, 1948. Pp. xxxii, 330. $5.00.

Fifty years ago the dominant legal method was that of conceptual jurisprudence. Today this method is discredited, and legal thought is dominated by the method of determining evaluating, and balancing conflicting interests. The period in between has been filled with copious, lively, and sometimes heated discussions about the judicial process and legal methodology.

That story, which forms the subject matter of the present book, sounds familiar to American lawyers; only, it is told not for the United States but for Germany, where there have taken place during the last five or six decades methodological changes and inquiries which present startling parallelisms to simultaneous developments in this country. This fact alone should indicate the relevancy to American lawyers of the German developments and discussions. What renders the matter even more pertinent is the fact that there have been stressed in Germany certain aspects which, while they have been less emphasized in this country, would seem to deserve the careful attention of American lawyers, too.

In both countries, here and in Germany, and, one might add, in France as well, twentieth-century lawyers have reacted violently and decisively against the nineteenth-century methods of conceptual jurisprudence. In this country, the fight was principally carried on by the Realists, whose vigorous and sometimes intemperate attacks successfully demolished the superstitious

belief in the ability of classificatory concepts to yield rules for the decision of novel cases. Realism has had its counterpart on the continent in the School of Free Law. The achievements of both have been primarily negative. They successfully destroyed the old methods of spurious conceptualism, but in its place they offered to the judge only the advice that each case be decided upon its own peculiar merits. The judge was thus elevated to the leading position in the administration of justice, but he was left without guidance, and legal stability and predictability would have been effectively destroyed if judges had taken seriously the unfettered freedom that was postulated for them. While agreeing with the Free Law jurists in their criticisms of the old jurisprudence of concepts, the scholars of the German school of jurisprudence of interests also undertook to elaborate a new method which would serve as a guide in the judicial process, but which would simultaneously safeguard judicial faithfulness to the law, and thus legal stability and predictability, as effectively as the old jurisprudence of concepts, or even more so. This school had its origin and for a long time its center at the University of Tuebingen in South Germany, where it was represented primarily by Max Rümelin (1861–1931), Philipp Heck (1858–1940), and a group of younger scholars trained by them. While Rümelin's writings constitute incisive studies of basic single problems, Heck undertook to elaborate a systematic presentation of the new method. A condensation of his book on *The Formation of Concepts and the Jurisprudence of Interests*[1] constitutes the centerpiece of the present volume. Around it are grouped several other essays by representatives of the Tuebingen school (Rümelin and Stoll), an additional essay by Heck, and criticisms of the jurisprudence of interests by two more conservative scholars (Oertmann and Binder) and by a radical representative of the School of Free Law (Isay).

The presentations of the Tuebingen school clearly indicate those features which constitute its positive achievements, viz., its inquiries into the reasons why the old conceptualistic method was unsatisfactory, its guiding principles for the elaboration of different and more helpful legal concepts, and its insistence upon the "legal system," *i.e.*, the intrinsic structural unity of the legal order. It is exactly in these respects that the German discussions will be helpful to American lawyers. In contrast to continental Free Law jurists and American realists, the Tuebingen scholars have recognized the necessity—nay, indispensability—of the use of concepts for all thinking in general and legal thinking in particular. The old school erred not in that it emphasized the use of concepts but in the way its concepts were formed and utilized. Out of the innumerable simple commands of the legal order were distilled major group concepts which were useful in the law teachers' task of presenting the legal order to students and practitioners. Not only was the scope of the material to be memorized or held ready for practical reference greatly reduced in this way, but many a valuable insight into the formal structure of the rules of law was made possible. However, classificatory concepts of this kind are unable to yield new rules for new cases; they are shorthand expressions of those existing rules from which they were inductively derived, but they could not yield new insights in addition to those which had gone into their formation. The belief that such new

1 BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ (1932).

insights could be derived from the classificatory concepts was the fundamental error of the old school.

Following and elaborating ideas first effectively enunciated by Jhering, Heck and his colleagues and disciples have emphasized the obvious but long-forgotten truth that every rule of law constitutes the solution of a conflict of interests. This conflict may exist between interests of individuals or groups of individuals, or between interests of individuals and the community, or even between different community interests—as, for instance, the interest in the most equitable solution of a case and the sometimes incompatible interest in facile applicability or certainty of the law. According to the Tuebingen school, the task of the lawyer is that of recognizing the interests at stake in a given problem and to reconcile them in the way demanded by the community. In his article reprinted in the present volume, Isay, the Free Law jurist, charges Heck with having failed to establish a method in which the evaluation of the conflicting interests and their reconciliation ought to be achieved.[2] This criticism indicates that Isay has misunderstood the most essential aspect of the method of Heck and Rümelin, who insist time and again upon the judge's subjection to the law. In evaluating and balancing conflicting interests the judge is not allowed to apply his own value judgments but only those of the community of which he is a functionary. The one source for the recognition of these social value judgments is the enacted law. Every one of its rules constitutes the result of an evaluation of interests made by the legislator. Judges and, as their helpers, legal scholars must discover those hidden value judgments, must estimate them, must express them in language with the help of concepts—yea, concepts—and then use them in the decision of conflicts not yet expressly solved by the legislator. In other words, the official value judgments underlying the solution of conflicts envisaged by the legislator must be applied by the judge in the decision of conflicts not so provided for. This approach is thoroughly positivistic and it is predicated upon the continental idea of the predominant role of statute law. It may be too narrow and it needs further elaboration when it is to be applied to a legal system of the type of the common law, where the role of the legislator is a much more modest one. Even here, however, there remains in force the postulate that the judge is not to follow his own value judgments but those of the community, with the qualification that the sources for the recognition of these value judgments are more comprehensive and more varied than the body of enacted law. There arises, furthermore, the even more delicate problem of whose value judgments the judge is to follow if, as is the case in modern democracies and especially in the United States, different and sometimes conflicting social ideals are held in the community. In these respects, it is true, the work of Heck and his fellow scholars gives little help, and much elaboration will be needed if, as it ought to be, it is to be utilized in this country. Important efforts have already been made in this respect, however, in the United States, especially by Roscoe Pound, whose "sociological jurisprudence" and interest re-

2 Compare the well-known incident reported to have occurred in a Harvard classroom. Student: "We have to balance the interests." Professor: "Go ahead and balance them!"

search are closely akin to the endeavors of the German jurisprudence of interests. In studying these endeavors American lawyers should pay special attention to their German colleagues' consistent emphasis upon the interest of inner consistency of the legal system as such. In a case-law system this interest is only too easily overlooked. Having before him an individual case and isolated precedents cited to him by opposing counsel, the judge naturally seeks to find that decision which appears to him best to reconcile the conflicting interests of the individual parties. The problem of whether the decision thus formed is consistent with over-all policies of the community does not readily present itself. Thus it happens that such over-all policies, even important ones, are being hollowed out by incompatible individual decisions. It is one of the over-all policies of American law, for instance, that the assets of a decedent shall not be distributed to his beneficiaries until, in proper proceedings, his creditors and the taxes have been paid and the surviving spouse has had an opportunity to obtain his or her indefeasible share. This policy is being endangered and can easily be defeated through decisions upholding third-party-beneficiary contracts *mortis causa, inter vivos* trusts with extensive reservations for the settlor, and similar subterfuge transactions. The policies of marriage registration statutes are undermined by decisions recognizing the validity of common-law marriages in the teeth of such statutes or by the excessive use of judicially created presumptions of the validity of a marriage. The policies of statutes requiring registration for chattel mortgages are jeopardized by the judicial preference for the mortgage over a bona fide purchaser acquiring the chattel in another state. The illustrations could be continued ad infinitum. Sometimes it seems that the only policy consistently maintained in American law is that of the Rule against Perpetuities. Of all the differences alleged to exist between common law and modern civil law, the one which really can stand close analysis is that between the internal consistency of the civil law systems and the inconsistency of the common law. This fact can hardly be regarded as an advantage of the common law. By the case method of legal instruction the tendency toward inconsistency is even increased. Law teachers who are aware of the danger and wish to counteract it will find valuable suggestions in the work of Heck, his colleagues, and his critics.

American lawyers will find the book, with the sole exception of one chapter, not only most highly profitable but also easily readable. The task of translation was not an easy one. Doctor Magdalena Schoch has solved it with superb skill. She has further facilitated the reader's use of the book by numerous explanations of foreign terms and by other scholarly notes. A fascinating introduction by Professor Fuller summarizes the various essays and elucidates their special significance for the methodology of American law.

The one essay which one or the other reader may, perhaps, find difficult is that by Binder. Yet he should not be deterred. The study will prove profitable not only because of the author's fine historical observations and his allusions to case law, but also as a typical exposition of Hegelianism. An acquaintance with this philosophical system which will help in the understanding of recent and contemporary world events—Hegel, it might be re-

membered, being among the ideological progenitors of both National Socialism and Marxism. As for the essays of Heck and his other colleagues, I know no other work which I would regard as more helpful in the further development of a sound American theory of legal method and the judicial process.

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