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Book Reviews

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BOOK REVIEWS

SCIENCE OF LEGAL METHOD. Select Essays by Various Authors. Translation by Ernest Bruncken, Washington, D. C. and Layton B. Register of the University of Pennsylvania Law School. With Introductions by Henry N. Sheldon, Former justice of the Supreme Judicial Court of Massachusetts and by John W. Salmond, Solicitor General of New Zealand. Boston: The Boston Book Company, 1917; pp. lxxxvi, 593.

Although the several volumes of the Legal Philosophy Series have been received with the grateful approval of many lawyers and others who were seeking for a solution of the difficult problems arising on the border land between metaphysics and law, this approval has been by no means unanimous, the criticisms coming from the metaphysicians, the jurists and the lawyers. The first say this is not philosophy (Cf. 13 MICH. L. REV. 715); the second say it is bad law (Cf. 27 HARV. L. REV. 718); the last say it is all nonsense (Cf. 16 MICH. L. REV. 287-375, *passim*). The preceding volumes of the Series have been frankly philosophical. The present volume, however, as its title indicates, if philosophical at all, is pragmatic rather than metaphysical. We are here dealing not with what jurisprudence *is* but with what you can *do* with it, or for it; we are not attempting to investigate the nature of justice, but are trying to see how we may best attain it.

This volume contains essays from the French scholars, Gény and Lambert; the Chilean Alvarez; the Germans: Ehrlich, Gmelin, Berolzheimer, Kohler, Gerland and Wurzel; the Professor of Law at the Law School of Nagyvarad (Grosswardein) Hungary, Dr. Geza Kiss; and our own jurists, Dean Pound and Professor Freund. The editorial preface contains an illuminating discussion of the Judicial Function by Dean Wigmore, and of the Legislative Function, by Professor Kocowrek. There is also a short introduction by Judge Sheldon of the Supreme Court of Massachusetts and another by Solicitor General John W. Salmond of New Zealand. This constitutes certainly a cosmopolitan and imposing array, and it is interesting to note that despite the varying nationalities of the writers and the different characteristics of the legal system under which they are working, the problem of interpretation is the same and its solution under one system is essentially identical with that under every other system. All deal with the practical question as to how statutory law or its equivalent the doctrine of the decided case may be extended by proper methods of judicial thinking to meet new situations and establish new rights.

Gény says in regard to this (p. 45): "the courts are led, without exceeding the well-known limits of private law, whenever they have no formal guidance furnished by statute or established custom, to search for light among the social elements of every kind that are the living force behind the facts they deal with, if they wish to proceed with any assurance of being right." Wurzel, by a psychological devise that he calls "projection," would 'extend

the concept found in formulated law to phenomena which were not originally contained in the concept, without, however, changing the nature of the concept as such'; while Kohler would interpret a rule of law sociologically, that is, 'as a product of the whole people whose organ the law-maker has become.' The French professor, the Austrian jurist and the German legal philosopher are thus in agreement on the doctrine of the interpretation of a rule of law by a proper exercise of free judicial decision. Dean Pound calls attention to the fact (p. 225) that our own Supreme Court has already taken a long step in the same direction. Justice HOLMES' statement in *Lochner* v. *New York*, 198 U. S. 45, that, "The decision will depend on a judgment or intuition more subtle than any articulate major premise," though given in a dissenting opinion seems to have received the endorsement of the Court in *Muller* v. *Oregon*, 208 U. S. 412, in which Mr. Justice BREWER said, "We take judicial cognizance of matters of general knowledge."

If this last decision is good law, it would seem that not only the various continental countries but also our own highest tribunal have by different routes arrived at the same destination and this too, not by any conscious imitation of the one by the other but because of the irresistible logic of the situations in which the courts have found themselves.

The Science of Law and possibly the entire Legal Philosophy Series would thus seem to be justified; philosophically, because jurists in different parts of the world and under diverse systems of law have been inevitably carried to the same goal in their search for a broader and more perfect justice; legally, because the results arrived at are not out of harmony with the several systems of law under which they have been reached. JOSEPH H. DRAKE.

WAIVER DISTRIBUTED AMONG THE DEPARTMENTS ELECTION, ESTOPPEL, CONTRACT, RELEASE. By John S. Ewart, K. C., LL. D. Foreword by Roscoe Pound, Ph. D., LL. D. Cambridge, Harvard University Press, 1917; pp. XX, 304.

Until the appearance of the illuminating discussions of Dr. Ewart in this and allied fields began to appear, that word the meaning of which was least well understood, the word most often used in judicial fog and legal delirium, was "waiver." In the whole territory of the law there was no other so popular a "city of refuge" for a soul lost in the legal wilderness as that one over whose wide open gates was written "waiver."

It seems not too much to say of this book, "Waiver Distributed," that it is entitled to take its place among the modern legal classics, of which, in this age of digests and compilations, it is a satisfaction to believe we have a few. It is a study, not so much upon authority in the sense that the author is attempting to discover in judicial utterance or other authoritative discussion the principles involved, as it is an attempt to show that jurists and other legal writers have failed to discover the legal concepts hidden in the term "waiver," and in this his attempt amounts to a demonstration.

While the treatment is notably that of a scholar it is not academic but intensely practical. In this book Dr. Ewart has rendered a real and very substantial service in several branches of the law. This is peculiarly true as to the law of insurance and that of landlord and tenant where the term waiver is almost ubiquitous. Had this book been written a half century earlier many of the vagaries now found in the law of insurance would never have developed. Although the faulty and inaccurate use of this term may not be so outstanding in other branches of the law, it is all too common in that of landlord and tenant and in some other phases of the law of contract.

It is too much to hope that courts are at once going to make clear distinctions between "election" and "waiver," "estoppel" and "waiver," "contract" and "waiver," for "waiver" is too convenient a word for the loose thinking lawyer. But the ideas here promulgated and distinctions drawn are bound gradually to work their way into the law to its real enrichment and to the great satisfaction of the discriminating lawyer.

The reader can by no means afford to miss the scholarly, pungent and characteristic foreword of Professor Pound.

As is appropriate for so good a book it is attractively printed and serviceably bound.

VICTOR H. LANE.

EQUITY IN ITS RELATIONS TO COMMON LAW, by William W. Billson, of the Minnesota Bar. Boston. The Boston Book Comapny, 1917; pp. xii, 283.

The thesis which this book is written to support is that in the last analysis equitable rights are proprietary. Mr. Billson is under the impression that the contrary teaching of Langdell is still accepted without question in most law schools and that hence the time is come for a careful study of questions "which appear never to have received as systematic discussion as they deserve. . . " . To anyone who is familiar with Dean Pound's masterly exposition of equity, or with Professor Hohfeld's articles, Mr. Billson's thesis will not appear as novel as he naively assumes. His book comes too late to inaugurate a revolution; though the author's conclusions will perhaps find general acceptance, it is because of arguments other than his own. The discussion of the development of equitable interests in Huston's "The Enforcement of Decrees in Equity" is much more convincing.

Had Mr. Billson confined himself to modern cases, his book would be briefer but more valuable. In the last two chapters he shows distinct ability in analysis and his conclusions are stated forcefully. But the foundation upon which he seeks to build is thoroughly unsubstantial. Without any first-hand acquaintance with mediaeval English law he attempts to write history; with a very imperfect knowledge of Roman law he devotes a chapter to "Law's Dualism in Rome and England." The result is what might be anticipated: there is neither history nor comparative law. The weakness of this portion of the book goes far to destroy the usefulness of the whole.

WILLARD BARBOUR.

THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES, INCLUDING ELECTRIC LAW. Second Edition, by S. Walter Jones, Dean of the University of Memphis Law School. Kansas City. Vernor Law Book Co. 1916; pp. xxiv, 1065.

The first edition of this work appeared in 1906. That it has survived for a decade and has been used by lawyers and cited by the courts sufficiently to justify a second edition is in itself a favorable criticism of the author's efforts to gather into one volume the legal rules and principles likely to arise in connection with the use of the telegraph and telephone. In the second edition the author has included "Electric Law," whatever that may be. It seems to be, as used in this work, the law applied to the use of electricity for power and light in so far as it is similar to or identical with the law of the telegraph and telephone. As power and light companies, like telegraph companies, use poles and wires, and serve the public directly, or else furnish current to electric railways that serve the public, it is manifest there will be many common topics. This is especially true in such subjects as Liabilities for Injuries, in Chapter IX, and Duty to Furnish Equal Facilities, in Chapter XI. An examination of the latter chapter, however, shows how little value the book has outside the field of the telegraph and telephone. The duties of other electric companies are so inadequately treated that they might as well have been omitted.

The author and the publishers deserve special commendation for avoiding that rock on which most new editions of law books have been falling with the calamitous result that each volume is broken into two or three. The second edition is kept within substantially the same compass as the first, typographical condensations largely offsetting the added matter of text and notes.

If it was not suggested by the subject of the book, it would become apparent on a glance at the table of contents that this, like many another legal volume found convenient by the profession, is not a treatise on any branch of the law, such for example, as contracts, pleading, agency, or evidence. It does not even on a logical plan develope the law of related subjects, like a work on public service law or insurance law. Instead it is a handy collection of chapters from various branches of the law, in which are involved problems a lawyer must deal with in actions by and against telegraph and telephone companies. Such a lawyer, whatever the nature of his case, or the relation of his client to his adversary, whether the case arises out of a message or the location of a wire or pole, will naturally look in such a book as this for aid, and he is pretty sure to find something, and to find it well and clearly stated and well supported by authorities. E. C. GODDARD.

AMERICAN CIVIL LAW CHURCH LAW, by Carl Zollman, LL. B. New York, Columbia University, Longmans, Green & Co. Agents 1917, pp. 473.

Here at last is a book covering a field hitherto neglected. Most books merely add another to an already long list in the same field. Not only is there no book on American ecclesiastical law as it has grown to the present, but

there never has been an adequate treatment of the subject. Because of the separation of church and state in this country we have no ecclesiastical courts and ecclesiastical law in the sense in which they exist in England, and it seems to have been quite generally assumed by writers that there is no American ecclesiastical law. But this is far from the fact. Various church bodies are in a sense courts, and pass on ecclesiastical questions with final authority. But there are many ecclesiastical questions affecting civil rights, and these have given rise to a great number of cases in our civil courts. As is shown in the title, it is of the law governing these latter questions that the present work treats. And the treatment is adequate and satisfacory, a real contribution. Of only a few books can as much be said with assurance.

After a consideration of religious liberty under our Federal and State Constitutions and laws, the author discusses church corporations and constitutions. One of the most interesting subjects is treated under implied trusts, scisms and church decisions. The power of dead and buried donors of money to church property and uses to lay their dead hands on the present day users of such property and for all time limit its use to the propagation of ideas and beliefs that may long since have become practically obsolete is serious enough in case of express trusts in which the intent of the donor has been clearly expressed. It might be still more so if the courts really carried out the doctrine of implied trusts by restricting the use of church funds and property in ways which are often quite contrary to any proved or probable intent of the donors. As a rule they do not. As the author points out in Chapters VI and VIII courts usually find a way to avoid results of the doctrine of implied trusts that are absurd. To paraphrase, if they did not it would be to command religion to halt in its progress, and to stretch the church upon a veritable bed of Procrustes. We cannot but regret that the author felt it was necessary to omit the discussion of charitable trusts as affecting various denominations, and express the hope that he will carry out his intention to cover that very interesting field in a separate volume.

E. C. GODDARD.

IMPORTANT FEDERAL LAWS. Compiled by John A. Lapp, LL. D., Director of Indiana Bureau of Legislative Information; Member of Executive Committee of the National Drafting Conference. B. F. Bowen & Co. Indianapolis. 1917; pp. xv. 933.

This is an addition to the handy reference library which is alawys growing by the addition of compilations many of which are obsolete, or so out of date as to be untrustworthy, almost as soon as issued. The compiler of this single volume collection of Acts of Congress which seems to him of general interest calls attention to the significant fact that of the important acts in the volume more than two thirds have been enacted or completely revised since 1910, and more than one-half since June 1916. It was plain that by June, 1917 so many more changes would be enacted that the volume would be out of date when it left the press in 1917. Such was the fact, and the publishers met the situation by issuing almost simultaneously with the book

a pamphlet supplement of 1917. If sales are enough to justify such action, it is to be presumed further supplements will be issued at frequent intervals, to be succeeded at longer intervals by new editions of the book itself.

There are in the compilation acts on eighty subjects, grouped under twenty heads and involving considerably over one hundred Acts of Congress. One having access to a good law library can, of course, readily find all these and many more in the United States Statutes at Large, Compiled Statutes, or Federal Statutes Annotated. He may however find it convenient to have on his own shelves in a single volume some statutes to which he will have most occasion to refer. Evidently the compiler has in mind the need not merely of the layman who might want to read the law on interstate commerce, taxation, labor and food regulations, etc., but also the lawyer, for he includes the Federal Judicial and Criminal Codes, Bankruptcy Act, trademark and copyright laws. He omits the patent laws and some others that another compiler would have preferred to some of those included. The ordinary citizen, however, will find here most of the Federal statutes concerning him as an individual, especially the recent legislation growing out of the war, and those having to do with labor and business. E. C. GODDARD.

HANDBOOK OF CRIMINAL PROCEDURE, by Wm. L. Clark, Jr., Second Edition, by William E. Mickell, B. S., L. L. M., Professor of Law in the University of Pennsylvania. St. Paul: West Publishing, Co., 1918.

Clark's Criminal Procedure has been well and favorably known to students preparing for the profession of the law and in less degree to lawyers for more than twenty years. It is an elementary work of the Hornbook Series. The second edition now given to the public is the outgrowth of facts and events stated by the learned Editor substantially as follows: The law governing criminal procedure has undergone considerable change in the two decades since the original edition appeared. This change has been brought about partly by statutory enactment and partly by judicial legislation. The change wrought by both these agencies has been in the same direction—toward a more rational system of procedural law. The super-technicalities once dominating criminal procedure are yearly attacked by legislatures and daily meeting with less respect by the courts.

Out of these facts and events the learned editor finds reason for concluding that this second edition is not only justified but necessary. The second edition differs from the first in no very material or substantial way. Some few changes in the original text have been made. These changes consist in the main of amplification of the statement of the rule or principle rather than in change of its essence. With comparatively few exceptions the cases cited in the first edition are repeated in the second. Something like a thousand additional cases are cited. These form the basis of new notes.

This second edition does not give the impression that any wholesale or wonderful transformation has taken place in the substantials of criminal procedure during the last two decades or that startling or exceptional changes

have been made in the essentials, but it does give evidence, of what would be desired and expected, a wholesale, moderate, sane, conservative reform no so much of the essentials as of the non-essentials of criminal procedure, to the end always that exact and speedy justice may be done alike to prosecutor and accused R. E. BUNKER.

THE ARGENTINE CIVIL CODE (Effective January 1, 1871). Together with Constitution and Law of Civil Registry. Translated by Frank L. Joannini, from the Original Spanish Texts as Officially Promulgated. Revision Committee: Phanor J. Eder, Robert J. Kerr, Joseph Wheless, Boston, U. S. A. Boston Book Company, 1917, pp. xxxii., 732

This volume is published under the auspices of the Comparative Law Bureau of the American Bar Association, in the Foreign Civil Code Series. The translator, who has already proved his capacity in several translations for the Bureau of Insular affairs, has wisely transliterated civil law terms instead of attempting to find common law translations for them, and has then put into an extensive index—more than one hundred papers—the necessary help for those unacquainted with civil law phraseology. The well written introduction by Mr. Eder gives a sketch of the history of Argentine law, the sources of the codes and the relations of the Civil Code to other parts of the law, together with a very good bibliography of Argentine law. This Argentine Code is a "one man code." It was drawn up by Dr. Velez Sarsfield, one of the most distinguished of the Argentine jurists of his day, and "was enacted into law, without any discussion whatsoever, on September 29, 1869." He used as the basis for his codification the Project of Civil Code for Brazil, by Freitas, and drew from this source more than fifteen hundred of the four thousand and eighty-five articles. The remaining articles were taken from various other codes and commentaries on Roman law, and include eleven hundred articles from the French Code and fifty-two from the Louisiana Civil Code. The classification is one based on rights rather than on rules of law, the first book being on persons and personal rights in family relations, the second on personal rights in civil actions, the third on real rights and the fourth on the transmission of rights in general. Whether this is more than a mere change in phraseology seems doubtful; at any rate, as being only a matter of classification, it is not very important. The translation is clear and in general free of the foreign idiom. The original avoids wherever possible the abstract definition of a legal institution but instead states concise premises on which the institution rests, thus avoiding the feature of our Louisiana Civil Code that has been so often criticised and giving due heed to the warning of Javolenus that *omnis definition in jure civili periculosa est.* The translation is a timely and welcome addition to our legal apparatus for dealing with our great sister republic to the south in the many readjustments of world relations that are to come after the war. JOSEPH H. DRAKE.