BOOK REVIEWS

Cases and Other Authorities on Equity, Vol. 2. By Walter Wheeler Cook. St. Paul, West Publishing Co., 1925. pp. xvi, 838.

This is the second of the volumes prepared by Professor Cook dealing with the subject of Equity, and constitutes one of the American case book series. It is now more than twenty years since Dean Keener of Columbia, and afterwards Dean Ames of Harvard, prepared their well-known collections of cases dealing with the specific performance of contracts. Judged in the light of our experience in teaching law from case books, both of these earlier collections set a high standard of excellence in the selection and arrangement of material for the appropriate development of the subject by classroom discussion. In the intervening years, however, the law of the subject has developed and expanded, perhaps further than the law in any related field; and progress has been made in the analysis of the problems of equity and in the methods of their presentation, which should be reflected in the materials which are the basis of classroom discussion in the present day law school.

These changes in the law and the demand for a somewhat different approach to the study of it, in which greater emphasis is placed on the analytical and functional method of investigation, have led to the production of the present volume. When one takes into account the increasing attention which is very properly being devoted to these aspects of legal phenomena, he must concede that emphasis upon them in any selection of material for a case book, is justified. The cases in the present volume are for the most part modern. More than one-third of them have been decided since the beginning of the present century—so that the author will not be charged with any undue obeisance to history. Indeed, one could wish, notwithstanding the comparative modernity of the principal development of the subject, that the author was not disposed to treat history so disdainfully as he does in his preface, in which he justifies his abandonment of the historical approach of the earlier case books. Undoubtedly a vast amount of time and energy has been wasted in the effort to justify the present by the past; and too often we incline to the belief that the history of the rule we apply must necessarily determine the limits of its application.

But history is more than a catalogue of events or an appeal to precedent. Rightly viewed and used, it is the record of the past, measured and valued in terms of progress. Knowledge of how that progress has been achieved, as well as insight into the nature and effect of those influences which have hindered and on occasion have thwarted it, is the beginning of that wisdom with which we may hope to insure the progress of the future. The recent case of *Independent Wireless Tel. Co. v. Radio Corporation of America*, U. S. Sup. Ct., Oct. T. 1925, No. 87, decided Jan. 11, 1926, is typical, in that it suggests that a study of the way in which the adaptation of legal devices has contributed to progress in the past may reveal the path of progress in the solution of present day problems. Nor does the historical approach to the study of legal problems, if history be thus viewed, appear to us to be irreconcilable with their study from the viewpoint of function and analysis. The case which marks progress or retrogression in the law often affords the best material for critical analysis and for observation of the way in which the use of legal devices and doctrines may be made to conform to the requirements of the social and economic phenomena with which they have to deal.

These random remarks anent the use of history in the study of law have been called forth by Professor Cook's allusion to it in his preface, rather than by the material which he has gathered. His is not an unnatural protest against the abuses of legal archeology in the last generation. As a matter of fact, the substantial progress in the exercise of equity jurisdiction over contracts has been too recent to admit of much scope in the use of the historical method in its study. With this thought in mind, one must appreciate that the author, in his actual selection and use of the materials, has not treated history as lightly as his preface would lead one to expect.

Nevertheless, the expansion of equitable rights *in personam* upon contract into rights *in rem*—the process by which equity has brought itself to the point where it finds itself doing what a generation ago it said it could not do; the process by which it has avoided the limitations of conditions implied in law, and by which it has gradually thrown off the artificial limitations of the doctrine of mutuality as a defense to specific performance—suggests historical studies which throw a flood of light on present day problems and point the way to future progress.

One must speak in high praise of the skill and thoroughness with which the author has selected and arranged his material, and of the discriminating manner in which he has expanded the traditional treatment of the subject into new fields. He treats in a single chapter mutuality as a ground of jurisdiction and want of mutuality as a defense,—as must be done, if the student is to get any real insight into the relation of the two doctrines; and he very properly includes here cases involving so-called negative contracts, because their real problems are related either to inadequacy of legal damage or to want of mutuality as a defense.

There is new and useful material dealing with agreements for arbitration, co-operative marketing associations, and the feasibility of specific performance—a recognition of modern tendencies.

The space allotted to the material dealing with so-called equitable easements or servitudes seems somewhat limited. From the point of view of the purely theoretical and historical development of the subject, this is regrettable. But this curtailment is doubtless due to the common practice in law schools of dealing with this subject, in part at least, in the property courses and to the inexorable limitations of time and space.

One may venture to predict that the next important development in the law on this subject will be a clearer recognition of the economic functions performed by those contracts which equity specifically performs. So-called ownership or title is the legal conception through the application of which we give legal sanction to the appropriation of economic benefits by the individual, and impose upon him economic burdens with respect to specific things. Transfer of title is only a legal device for shifting economic benefits and burdens from one member of society to another. Through the device of contract, we impose obligations looking to the future shifting of economic burdens and benefits. Equity, when it enforces them, not only makes the ultimate shifting of these burdens and benefits certain, but in some respects anticipates the shifting, which is accomplished by the actual transfer of title. A study of the subject from this point of view must lead to a re-analysis and ultimately to some readjustment of the doctrine of marketable title, hardship, and the burden of loss pending actual performance. There is abundant material in the present volume for carrying on this necessary investigation.

Changes in emphasis in dealing with the subject matter which are due to progress in the law, as well as in methods of study and teaching—to which Professor Cook has made his own noteworthy contribution—will

make this book an important aid to the teacher of equity. He will find it necessary to use it, or in any event to make use of the leading ideas which have influenced the selection and arrangement of the material.

HARLAN F. STONE.

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A Manual of Year Book Studies. By William Craddock Bolland. Cambridge, England, Cambridge University Press, 1925. pp. xix, 157.

On more than one occasion hitherto Dr. Bolland has successfully transformed a series of lectures into a readable and interesting book. This volume is the result of another metamorphosis of the same kind. The lectures on which it is based were delivered at Cambridge University in 1922–3, while the author was Sandars Reader in Bibliography. This latter fact, which gave form and direction to the original lectures, makes doubly fitting the inclusion of the most distinctive feature of the whole book—a series of eleven facsimiles of manuscript Year Books, together with an extended transcription of each and an accompanying English translation. These facsimiles were inserted with the intent that "some apparatus might be included in this volume which would enable a student to teach himself just so much of the mediaeval scripts in which the Year Books are written and of the contractions which the scribes used as would enable him to make an intelligent beginning of a study of the manuscripts, if he so wished." The carrying out of this project is to be commended, all the more so because of the manifest care and fine workmanship displayed in the actual reproduction of the manuscript page. It is to be regretted, however, that the necessity of limiting the size of the facsimile to fit the printed page, has, in the case of some of the plates at least, led to such a reduction in the size of the original script as to be likely to prove discouraging to a beginner in Year Book paleography.

Dr. Bolland has a knack of telling the story of the early Year Books in a vivid way, the result no doubt of his having so long lived, in mind at least, with Sir William Bereford and his contemporaries. It is his intimate knowledge of the subject, and his sympathetic appreciation of medieval English life, that makes him peculiarly fitted to talk or write on such topics as "The History and General Characteristics of the Year Books" and "The Year Books in Manuscript: their Birthplace and Authors: their Evolution", the subjects of the first two chapters in the book. A good, but avowedly brief, account of the printed editions of the Year Books makes up chapter three. The remaining chapter is concerned largely with a discussion of the Year Books as source material not only for legal history, but for the history of medieval life in England generally. It is interesting to note that Dr. Bolland's estimate of the etymological and philological value of the Year Books is so high as to cause him to lament the fact that the editors of the New Oxford Dictionary assigned no readers to examine the Year Books.

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The New Annotated Federal Judicial Code. By James Love Hopkins. Second edition. Cincinnati, W. H. Anderson Co., 1925. pp. 375.

The New Federal Equity Rules. By James Love Hopkins. Fifth edition. Cincinnati, W. H. Anderson Co., 1925. pp. xvi, 335.

The work of the annotator does not bring the distinguished recognition that is freely given to the author. Yet the swelling stacks of reports

make the work of the former hardly less necessary; and the cry for labor-saving devices has been heard in the land of the law as well as in domestic and industrial fields. The cry has not been unanswered. When, then, some law publisher issues some piece of admirable annotation, lawyers will not only buy it, but will be swift to cry "well done" to the good and faithful annotator.

The first of these volumes reproduces, with annotations for each section, the Federal Judicial Code. There is, in addition, an introduction of 18 pages of which a greater part deals with the historical origins of the inferior federal courts and the development of their jurisdictions. Mr. Hopkins (pp. 1, 16) pauses to lavish some encomia upon the draftsmen of the Judicial Code, which, in the opinion of the reviewer, are far from being deserved. The annotations consist of enumerations of the holdings of the courts interpreting the sections in question, with some attempt to classify these under black-letter headings. These annotations are far, very far, from being complete. Section 51 of the Judicial Code, for example, is the great general section dealing with venue in civil cases in the federal district court. Very many hundreds of cases have dealt with this section; Mr. Hopkins mentions only twenty-three of these.

One misses, accordingly, the meticulous completeness of books of the type of Shepard's "Federal Citations" and the thoroughgoing accuracy of Rose's "Notes on the United States Supreme Court Reports." To one who has the money to buy and the industry to search through either "The United States Compiled Statutes" or "the Federal Statutes Annotated," with their unusually elaborate and well-classified annotations, there will be little need for this book of Mr. Hopkins. But these works are quite expensive and the last two cover ponderous volumes.

The lawyer, student or author, who has some problem arising under the Judicial Code, will do well to consult this book. There he will be led to some representative cases that at least will paint in the background of the particular section in question. But this same lawyer, student or author who stopped there would be rather recreant to his trust. Yet this little book has real value if only one recognizes its scope and its limitations. The reviewer, in the preparation of a book on federal procedure which he is now writing, has very frequently consulted this little volume; he bears cheerful testimony to the aid he has thereby received in finding starting points for more extended researches.

The second book is believed to be a more creditable performance than the first. Its field is not so broad, the annotations are more complete, the author in it becomes more of a commentator. One hundred and forty-six pages are given to the New Equity Rules of 1912 with annotations; there are eleven pages of forms. In the introductory chapter is a brief treatment of the rules in general, an outline of the English Chancery practice and Mr. Justice Lurton's questions submitted to Lord Chancellor Loreburn and the answers to these. Also are given the Equity Rules of 1822 and the Equity Rules of 1866–1911.

A handy and useful compendium, its popularity attested by the fact that it has gone through five editions, this volume will be found on the shelves of a great majority of those lawyers who have frequent occasion to practise on the equity side of the federal courts. It is not a treatise on federal equity procedure, yet the author appears to have succeeded in the useful though not very ambitious task which he has set for himself.

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Congress, the Constitution and the Supreme Court. By Charles Warren. Boston, Little, Brown & Co., 1925. pp. vii, 308.

Readers of the author's *Supreme Court in United States History* look for wide and accurate research in any of Mr. Warren's historical studies. The amassed gleanings from unfamiliar sources in this work are striking. The author makes clear that the idea of a written constitution, amendable only by the people, was an invention strictly American. Before this the word "constitution" had vague meanings—something set up, as an ordinance, as civilians spoke of the "constitutions of Justinian", or as in England they refer to the "Constitutions of Clarendon" promulgated by Henry II. The idea of a limit on legislation by a compact with the people had not been before known. Mr. Warren, however, refers to a passage in *Oceana,* wherein Harrington, writing in 1656, in the first years of the Protectorate, speaks with a happy optimism of the effect of popular government, and used the term "An Empire of Lawes", in which the idea of a written constitution may be foreshadowed. Harrington's words were:

"But seeing that they that make the Lawes in Commonwealths are but men, the main question seems to be how a commonwealth comes to be an Empire of Lawes, and not of men; or how the debate, or result of a commonwealth, is so sure to be according unto reason, seeing they who debate, and they who resolve, be but men." *The Commonwealth or Oceana* (1st ed.) p. 12.

While the phrase "Empire of Lawes" or "Commonwealth of Lawes" was caught up eagerly in America, it is not certain that this expression then meant a written constitutional check on the power to enact or to change legislation.

We are shown in detail how cautiously the Constitutional Convention of 1787 avoided any attempt at original or experimental measures. The federal form of divided control between State and the United States was partly an adaptation of the distinction between a general and a local authority, as was recognized between the English Government and the Colonies here, and had been evolved in the decade before the Revolution. The division of government into legislative, executive and judicial branches merely followed the terms of the Bills of Rights in six of the thirteen states, in which these divisions were not entirely independent, but formed a useful check upon one another. Claims of originality in the forms and wording of the Constitution are thus met:

"Any one who will lay the Federal Constitution side by side with the State Constitution of Massachusetts (adopted in 1780) and the State Constitution of New York (adopted in 1777) will be startled by the extent to which the members of the Federal Convention not only followed the principles, but used the exact phraseology, of those state documents." p. 31.

The verbiage also of many grants of power to Congress, and clauses imposing restrictions upon the States are shown to have been taken *verbatim* from the Articles of Confederation.

On the mooted issue as to when the courts began to hold a statute unconstitutional, Mr. Warren cites three state decisions, printed and circulated in pamphlet form in Philadelphia, at the time of the Federal Convention. These are *Trevett v. Weeden,* in Rhode Island in 1786; *Holmes v. Walton,* in New Jersey in 1785; and *Bayard v. Singleton,* in North Carolina in May, 1787, in which a statute of a state had been held unconstitutional by the highest Court of that state. The special and higher merit of this work, however, is the able discussion of the more recent theories of Senators La Follette and Borah, who would limit the powers of the Supreme Court

in holding legislation unconstitutional. One should not fail to read Chapter V, entitled "Congress as a Final Arbiter".

Considering the effect of these decisions, often by state courts, annulling remedial laws, we cannot forget the warnings of Professor Thayer in 1908:

"No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the Constitution allows. And, moreover, even in the matter of legality, they have felt little responsibility. If we are wrong, they say, the courts will correct it. Meanwhile, they and the people, whom they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation, and they are belittled, as well as demoralized." *Legal Essays*, (1908) 38, 39.

Mr. Justice Holmes has said that, if the power of judicial review were destroyed, "the United States would not come to an end." However, if the so-called "Reconstruction Acts", passed just after our Civil War, had not been judicially annulled, it would be hard to conjecture what the United States would have become!

Mr. Warren points to the recent spread of this judicial power to check legislation in other countries. Those that have in their constitutions authority given to the courts to interpret the Constitution, and prevent violation of its provisions, are Colombia, Czecho-Slovakia, Honduras, Irish Free State, and Portugal. The power of judicial review is exercised today in the highest Courts of Australia, New Zealand, South Africa and Canada, also in Argentina and Brazil. In a more, or less, modified form, it exists in Roumania, Bolivia, Costa Rica, Cuba and Venezuela.

Space does not admit of an adequate review of this recent heresy of "minority decisions"—where unless seven justices of the Supreme Court shall concur in declaring an act invalid, the Court shall hold it valid. In this way a minority of three could control the other six justices!

A valuable Chapter, VII, entitled "Labor and the Supreme Court" shows that out of over one hundred Supreme Court labor decisions not more than twenty were decided in such a manner as to be regarded as adverse to labor. Out of these twenty decisions, only six involved the constitutionality of an Act of Congress. All of these that touched Federal Statutes are clearly analyzed, especially those under the Clayton and the Sherman Acts. Mr. Warren reminds these critics that Congress may amend these statutes so as to meet the Court's objections. It appears further that at least sixty decisions in the Supreme Court have upheld state labor laws. Indeed, that Court has upheld every state employers' liability law that has come before it, also every other state statute that has abrogated or modified the fellow servant doctrine. Mr. Warren also adds that the Federal Workmen's Compensation Law (Act of June 10, 1922) affecting Admiralty, which was held void (*State of Washington v. Dawson* (1923) 264 U. S. 219), can be cured by a properly drawn federal statute.

This latest work of Mr. Warren is not alone for courts and lawyers. A perusal of its valuable data should dispel much of the unfounded prejudice that is growing up regarding the functions of our highest Court.

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Cases on Evidence. By James Bradley Thayer. Revised edition by John MacArthur Maguire. Cambridge, Harvard University Press, 1925. pp. xv, 1033.

The third edition of Thayer's *Cases on Evidence* is so called in order, apparently, to honor a great name in the history of law teaching. It may

come to be known as Maguire's *Cases on Evidence*. If so, the title will be a more accurate description and at the same time a deserved compliment.

So far as the writer's brief and limited experience goes Mr. Maguire has set a new and a high standard in case books. His case book is one that any practitioner who desires to be thorough should have in his library. There is a collection and an apt citation of law review articles and notes. This feature seems to be complete in so far as it concerns law magazines that have more than a local circulation. Add to this case book Wigmore's great treatise and the practitioner should be prepared to face the world with confidence. This is also a very valuable feature for a teacher of law, particularly for the teacher who is not an expert of long experience in the law of evidence. How many teachers of that subject possess such a complete collection as Mr. Maguire has furnished?

The feature known as "problem cases" would also be valuable to the lawyer in practice. It should be more valuable (if the writer be permitted a guess) to the teacher and the student. The guess is offered because experience will be necessary before judgment can be rendered. It is easy enough for a teacher, even a conscientious one, to pass by problems that may be hidden in cases cited in a footnote. Too often cases so cited are only in accord or contrary to the decision printed in the case book. Mr. Maguire seems to have placed his "problem cases" in such prominence that the instructor can hardly avoid an investigation of them. If he does not, may not interested students ask about many of them? Furthermore, this feature seems to be designed to complete the material on the various topics. The serious danger in the "problem cases", so far as the writer has anticipated, is that they may impede progress in the teaching of the course. Only a few case book courses are ever finished and most students go out with no acquaintance of the omitted topics.

Mr. Maguire has introduced a simple device of numbering every fifth line. One teacher, at least, frequently wishes to call attention to a particular statement, and he has had the conviction that the attention of the students was not secured in an adequate manner unless time was lost by counting lines from the top or bottom of the page or from top or bottom of a paragraph otherwise identified. Occasionally a student wishes to ask an instructor about a statement in an opinion and the same fumbling process frequently ensues. Mr. Maguire has solved the difficulty by using a method already known. It is hoped that case books in the future will profit thereby.

No emphasis on the historical method has its place in Mr. Maguire's selection of cases. On the contrary it is strictly up to date. In his preface the author states that most of the two hundred and eight cases which appear for the first time have been decided in recent years. With this point of view in the teaching of the law of evidence the writer agrees. His experience has been that, on the whole, cases which are inserted for their historical setting are usually ignored or not understood by the students. That is a good reason for omitting them. The historical background (so thoroughly developed by Thayer and Wigmore) can best be developed by the instructor in explaining the way the courts function today. But what a paradox is this for Thayer's *Cases on Evidence*.

It seems to be customary to review a case book by uttering a compliment which is followed by many objections and regrets. This topic is slighted. The arrangement is undesirable. The instructor may be sorry that this case or that with which he is familiar is no more. There is a slight error here or there in spelling, punctuation or what not. Some suggestions of this sort might be offered and space be wasted thereby. Suffice