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BOOK REVIEWS

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Law in the Making. By Carleton Kemp Allen. New York, Oxford University Press, 1927. pp. xxiv, 388.

This book contains seven chapters discussing the following as possible sources of law: the Sovereign, Custom, Precedent, Equity, and Legislation. It deals with one of the most interesting subjects in life; and it is written in an attractive style. It reviews the ideas of former jurists well and criticises them with intelligence. It excites the reader to independent thought on each matter considered and tempts him to write a book of his own in order to do better if he can. This is high praise; and it should be remembered as this review proceeds, inasmuch as the reviewer is forced to fill most of his permitted space with a discussion of differences of opinion. The chief weaknesses of the book—which appear to the reviewer to be fundamental and far-reaching—are a weakness in analysis and definition and an inconsistency in stating the part played by the courts in the making of law.

As to analysis and definition, he knows very little of privileges, powers, and immunities, as distinguished from "rights;" although they as well as rights and duties vastly influence one's concept of law and of legal sanctions. He gives us no clear definition of either law or custom, leaving us to confuse and identify them in our minds, as the author himself at times does and at times does not. He draws no line between law and morality, while appearing to assume that there is a definite and knowable line. And he appeals throughout to supposed "fundamental principle," to "fundamental principles of justice," to "ideal justice," and to "a fundamental sense of justice," apparently assuming that these differ from the existing juristic system, thinking perhaps that they can be known by intuition by any reader and that they require no attempt at definition, comment, or illustration. It does not help much in understanding the science of society to read that among the sources of law "the ultimate source is the natural sense of justice inherent in conscience."

As to the part played by judges, he at times recognizes their function and power as the makers of our common law and the re-makers of statutes; and then later he accepts such statements as that of Lord Esher: "There is in fact no such thing as judge-made law," and makes the weakest sort of distinction between "interpretation" and "legislation." "The process of judicial decision," he says, "may be regarded as either deductive or inductive," without a word to indicate that in every instance, whether he is aware of it or not, the judge has to select his own major premise and the words in which it is stated, often doing this after he decides the case rather than before. The courts have "a certain degree of censorship over the operation of precedent. . . . but it gives them no control over the principles themselves;" a strange statement to be made concerning the selective agents who have made and are still making the common law and whose uniformities of action constitute the "principles" of which that law is composed.

The author's discussion of the nature and origin of custom and its relation to law is at all times interesting; but the reader would like a keener analysis of the many specific "customs" that are collected in an appendix. He shows that in their origin customs are mere "practice" of a community. Later there may develop a conscious "conviction" of their rightness or utility. Thus he makes substantially the same distinction as that made

by Sumner and Keller between folkways and mores. But he gives us no discussion of the development of the process of enforcement of custom by the societal organization and its officers. There are assertions that custom is not morality, that many jurists have failed to weigh accurately the influence of custom upon law, and that custom *is* law. But surely an unconscious folkway is not "law" in his intended sense of that term; and yet he does not define custom so as to exclude such a folkway. Whether or not a "custom" is "law" depends solely upon the chosen definitions of those terms; but the author gives us no such analysis or definition as enables us to follow him.

Before any legal system, he tells us, "the conduct of men in society is governed by customary rules. To call these *legal* rules is perhaps to beg the question, for in very many cases they are equally rules of religion and morality, which have not yet become distinguished from law; but they are 'legal' in this sense, that they are binding and obligatory, and the breach of them is a breach of duty." It is hardly sufficient excuse for begging the question to confess that it is being done. What is his test of "legality," and what is meant by "binding and obligatory?" Is a custom "obligatory" merely because it is in fact the practice of many people? The reviewer believes that the convenient test of "law" lies in the action of the judicial and executive agents of organized society, and that until the custom affects their action it has created no "law." "Duty" consists only in the threatened application of societal force against one whose conduct is to be stimulated. But the author refuses this test, while giving no other.

Again he says,

> "An English merchant of the 17th century was *bound*, in any intelligible meaning of that word, in his foreign transactions by the rules of the Law Merchant before any Lord Mansfield had told him that he was so bound. At the same time, being perhaps a virtuous Christian man, he might consider himself bound to love his neighbor as himself. These two rules of conduct would operate in entirely different spheres with entirely different aims and sanctions."

We challenge him to state those aims and sanctions. In so doing he would give us his definition. But it would then be seen that the only distinction between a rule of morality and a rule of law lies in the kind of "sanction." It is indeed true that Lord Mansfield was not the first judge who put the force of organized society behind the rules of the Law Merchant. Nor is the existence of "law" dependent upon its acceptance by a Court of King's Bench. The merchant of the 17th century was "bound" because there were local courts and merchant courts to apply the strong arm of societal organization. There are "trade usages," he tells us, that "are followed and obeyed because the *utentes* believe they must be followed and obeyed in order to effect certain *legal* results." What are these "legal results" but the action of societal agencies? And again we approach a test of law, as opposed to either morality or custom, that the author does not give us. By assuming the existence of "legal results," we assume the existence of "law" and again beg the question.

"Law" was not the sole function of the King's Bench and the Common Pleas. Nor is "law" required to be "common" law. There is such a thing as local law and admiralty law, church law and merchant law. It is even desirable to assert the existence of customary law; but this should be so defined as not to identify it with custom itself. While no definition is absolute or eternal, it is believed that convenience and clarity of thought are served by reserving the term "law" for the rules of uniformity of action by societal agents with respect to individual citizens. One might

say the rules for which there is a societal sanction, except that this might lead one to suppose it to include mob punishment and social ostracism, which should not be included among legal sanctions. Further, it might also be understood as restricting "law" to societal commands, as Austin and others have done, and as denying the applicability of the term "legal relations" to everything except rights and duties; whereas society constantly gives permissions as well as commands, and creates powers, privileges, and immunities as well as rights and duties.

With respect to Savigny's theory that the judges are mere representatives of the "Volksgeist," while admitting that the entire British community may have convictions as to such a matter as the freedom of the individual, he strongly asserts that in the details of the law the judge's own will is the determining factor. He says:

"But when a Judge decides a disputed question of property according, let us say, to the Rule in Shelley's Case, in what real sense can he be said to be a representative of the people? Can it be pretended that a pious faith in the sanctity of seisin burns in the bosom of the Commonwealth, suffusing all its members with a healthy glow? Is the community plunged in gloom when an Act of Parliament incontinently sweeps the rule out of existence? The truth is that the Judge who has played a new variation on the Rule in Shelley's Case is operating in a sphere as remote from 'popular consciousness' as a mathematician who has discovered a new law of Elliptical Functions. The present writer cannot go the whole distance with those who say that the Rule in Shelley's Case has been merely 'made' out-and-out by Judges; but its origin is certainly not to be found in mass-psychology. Yet it is no less the law of the land than Habeas Corpus, and may affect a citizen's rights no less. It is impossible to believe, in view of plain facts, that what is in *gremio iudicis* is necessarily *in gremio populi* or that the *vox iurisconsulti* is the *vox populi.*"

While the reviewer sympathizes with the views expressed by the author, he believes that there is no essential difference between the rules of law determining the limits of the "freedom of the individual from unlawful restraint" and the "Rule in Shelley's Case." Neither of the expressions has much meaning, even to a learned jurist, in its generalized form. And if the common citizen thinks he has convictions about "freedom of the individual from unlawful restraint" he is merely having feelings about the vaguest sort of a generality. A rule prescribing such "freedom" is the veriest kind of begging the question, just as is *sic utere tuo ut alienum non laedas,* or where there is a right there is a remedy, or a man has freedom to act as he pleases so long as he does not infringe on the rights of another. No "Volksgeist" that has any definable meaning and no "convictions of the community" determine when a particular restraint is "unlawful" and when the individual has a right to be unrestrained. Doubtless each individual feels a lively conviction against any restraint upon himself and he will usually express it by saying that he has a divine "right" to be free. But it is not a set of "convictions" such as this that determine the law of freedom and restraint. Just as in *Shelley's Case,* that law consists in the specific applications by judges and executives, in the permissions of freedom and the enforcements of restraint.

The author says "Law exists in order to be applied." The reviewer would go further and assert that the only "existence" that law has is in its applications, that law is merely uniformity of application. A physical law is merely a statement of uniformity in physical matters. A social law is merely a statement of uniformity in human conduct—to be described as customary, or as folkways and mores, so long as not involving the action of a judicial organization, and to be described as "The Law" when it is a statement of the uniformity of judicial conduct. Indeed, at page 80, the

author writes: "*Mores et consuetudo* cannot become law without the intervention of jurisprudence." Human conduct in society is merely that part of the physical world in which there appears to be a greater possibility of variation from uniformity according to the will of individuals; and in this process of variation or of imitation the choice lies to a much greater degree with the judges than with anyone else.

The choices made by the judges must not be such as to give dissatisfaction to powerful numbers of individuals. If they do give such dissatisfaction, other judges have always made a different choice. The "erroneous" opinion is "overruled." Herein lies the only basis for asserting the existence of a "Volksgeist." Ideas such as "freedom" enter into the consciousness of large numbers of people. Ideas such as the "Rule in Shelley's Case" enter the consciousness of a smaller number. The detailed and specific action of a court in the case of *A* against *B* may affect very few indeed. As to the first there will be excited feelings and "convictions," and as to the last there may be next to none. In neither, however, are they universal, and as to all alike the variation is merely in degree and not in kind. The "Volksgeist" is a variable consisting of the feelings and convictions of varying numbers of persons on each matter that excites their attention. Variations in the numbers of people whose attention is excited are of vast importance; and the action of courts will depend in a greater or less degree thereon. In many instances there will be no feeling or conviction other than a desire of the lawyers and judges themselves for logical consistency. And in many instances, the community adjusts itself to rules and practices laid down by the jurists antecedent to any other custom.

In his chapter on the Authority and Operation of Precedent, the author becomes surprisingly timid in his discussion of judge-made law. While admitting that in deciding a "case of first impression" the judge "is certainly making a new contribution to our law," he says that in the main the judge's whole effort is,

> "* * * to find the law, not to manufacture it. He is always working with materials which exist in the present or the past; his concern is not with the future effect of the rule he is laying down, but with the application of what he conceives to be an existing rule to a concrete case before him. He cannot, however much he may wish to do so, sweep away what he believes to be the prevailing rule of law and substitute something else in its place. In this sense, it is no 'childish fiction' to say that he does not and cannot 'make' law, and it was not without reason that Lord Esher M.R. said: 'There is in fact no such thing as judge-made law'."

This timidity is not shown when he is dealing with the functions and the history of the courts in other parts of the book. How can the foregoing, quoted from page 173, be reconciled with the following:

> "It is equally well known to all legal historians nowadays that the 'custom of the realm' was in a very large measure the custom of the Courts, not of the people—Gerichtsrecht rather than Volksrecht." (p. 81)

> "An English statute is not very old before it ceases to be a dry generalization and is seen through the medium of a number of concrete examples." (p. 108)

> "It is no secret that a strong and uniform line of decisions may modify or even completely reverse a rule of legislation, and that far-reaching principles may establish themselves quite independently of enactment in that behalf." (p. 120)

> "* * * it (primogeniture) seems to have been established as a general custom of the realm by the deliberate encouragement of the judges." (p. 83)

"The Statute of Uses itself became a plaything in the hands of conveyancers, energetically seconded by the Court of Chancery. The widow could be barred from her Common Law right to dower by the ingenious manipulation of uses, the express provisions of statutes could be nullified by the employment of such devices as bargain and sale and lease and release." (p. 157)

It is believed by the reviewer that the difference between the legislator and the judge in their processes of "making" law is merely in the mode and rapidity of their procedure. That of the judge is piecemeal, the generalization that constitutes the rule of law usually being the result of a series of decisions, occurring perhaps over a long period of time. The legislature can fulminate generalizations without a single precedent and in short order by a majority vote, though the effectiveness of this legislation in its application to living facts depends chiefly upon the courts. But the great body of rules of the common law is the work of the jurists and not of parliaments, as the author himself admits.

"In regard to the substance of English law as a system of jurisprudence —the underlying principles of right and duty—it is the Courts who take the lead. It is comparatively rarely that the legislature interferes in this domain." (p. 175)

This being so, it is hard to understand why he should say that,

"The legislature can 'make' new law in a sense which is quite precluded to the Judge. It *legislates* where the Judge *interprets*. By no possible extension of his office can a judge introduce new rules for the compensation of injured employees. . . . The legislature can project into the future a rule of law which has never before existed in England. The Courts can do nothing of the kind."

Did not the courts in the United States make rules for the compensation of injured employees when they created the fellow servant rule and the assumption of risk doctrine?

It is only confusing to say that the judge is a law-maker "only in a derivative and secondary sense . . . *In this secondary sense,* but only so the Judge does undoubtedly 'make' law. It is not an original act of creation. Every act of interpretation shapes something new, in a secondary sense." (p. 174) The judge's work is that of "creation" in every sense of that term. And when the judge "shapes something new" in the way of law, the present reviewer cannot admit the existence of any "secondary sense." The only difference lies in the method of the creation. It is true that the judge applies his rule of law in the very act of making it and a legislature does not; but only an incompetent judge fails to concern himself with the future effect of the rule he is laying down.

The present reviewer is not an authority upon M. Duguit's theory of the State and of the "fact of social interdependence;" but he is convinced that the author of the present volume is obsessed by traditional mystical notions of "State", "law", "right," and "ethics" of which M. Duguit is happily free. The author fears that the abandonment of such mystical conceptions will result in a disintegration of society and increasing conflict between groups. This may be true. Men have always had to learn by experience. But the decentralization process, the disintegration of great national groups into smaller and conflicting industrial or religious groups, itself proves that the mystical conception of a personalized "sovereignty" is nothing but a fanciful conception. As the smaller groups fight for their existence and for control of the means of existence, some one of them may overpower all the others and compel their subjection. Thus we witness the phenomena

known as Fascism, the Soviet, and the Trade Union. In the success of such a group we should again find our old friend "the State," asserting "sovereignty" and inculcating from very babyhood the age-old mystical notions of "right", "duty to the State," and "ethical basis of law." On the other hand, if the groups merely destroy each other, the "fact of social interdependence" may force itself into the minds of the miserable survivors, with a resultant new grouping for the maintenance of existence; and again we should build up theories of "the State," of "right," and of "ethics." The only way to avoid a debacle is the realization of the "fact of social interdependence," the fact that without the help of others we die, the fact that conflict means death and misery to us and ours, the fact that we can gain only by also giving. This involves large groupings and smaller ones within, and continual adjustment and readjustment. It involves legislation by parliaments, by local councils, and by courts. It is the process of evolution of law, of government, and of mankind.

ARTHUR L. CORBIN.

The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States. By George G. Reynolds. New York, Columbia University Press, 1928. pp. 434.

This is an extraordinarily penetrating, lucid and accurate study of the most important constitutional problem of present day American federalism. While the title confines itself merely to the distribution between state and nation of power over interstate carriers, the study so adequately draws in the problems lying at its periphery as to give a balanced treatment of the division between state and federal control in the whole field of interstate commerce. It is certainly a very important contribution to the literature of American constitutional law.

The book is divided into six chapters of unequal length. The first analyzes the historical background and the purpose of the constitutional grant of federal power over interstate commerce, a power designed to furnish adequate protection to national interests, to keep pace with the expanding technique of commercial intercourse, and yet not intended to oust the states from all concurrent authority over interstate commerce. The next three chapters, comprising the bulk of the book, give a clear and thorough analysis of the decisions of the Supreme Court of the United States bearing on federal and state power over interstate carriers. The subject matter is divided into three chronological periods: 1789-1887, 1887-1920, and 1920-1927, with the Interstate Commerce Act of 1887 and the Transportation Act of 1920 serving as division points. A fifth chapter deals with federal statutes which have affected state power over interstate commerce. The concluding chapter presents an evaluation of the present distribution of power and a consideration of various proposals for change.

With a sureness of touch derived from a painstaking analysis of the cases, the author draws for us the characteristics of the three periods of judicial interpretation just mentioned. Down to 1887 the federal government exercised little legislative control over interstate commerce. After some uncertainty, in the well known *Cooley* case in 1851, the Court reached a working compromise between two conflicting views, one that federal power over interstate commerce is exclusive, the other that the states may regulate that commerce in ways that do not conflict with positive federal law. This compromise consisted in a division of the field of interstate commerce regulation between subjects which demand a single uniform rule and must therefore be dealt with by Congress, and those which permit diversity of control and may be handled by the states in the absence of federal action.

There is an excellent analysis of the vital and controversial question of who should determine when uniform regulation is necessary and the significance of a congressional declaration that diversity of regulation is permissible. The second period, from 1887 to 1920, was marked by a vast increase in the exercise of federal power over interstate commerce, particularly regulations designed to foster and promote such commerce. Here begins the movement toward the federal regulation of local commerce as a means of protecting interstate commerce, a movement which reached its culmination and received the Supreme Court's stamp of approval in the famous Shreveport case. Among Dr. Reynolds' most valuable contributions are his excellent analysis of the constitutional theory underlying the Webb-Kenyon Act and his able treatment in this and the following chapter of the whole complicated problem of state taxation of interstate commerce. In the third period, under the Transportation Act of 1920, and the multifarious orders of the Interstate Commerce Commission authorized thereby, conflicts between state and federal authority affecting interstate commerce became more numerous. These conflicts were almost uniformly resolved in favor of the federal government and in such a way as to enlarge vastly the federal control over intrastate transactions. This expansion and penetration of federal control has been, of course, broadened and intensified by the numerous federal statutes which are considered in detail in the fifth chapter.

Interest centers naturally in Dr. Reynolds' final analysis of the present status of his problem and his contructive proposals for its solution. The centralization of federal authority over interstate commerce in its vast ramifications has had salutary economic effects. It has established and maintained the financial stability of the national transportation system, it has protected the carriers from discriminatory state action, it has prevented multiple regulation. But it has been attended with serious administrative defects. Among these are the serious overburdening of the Interstate Commerce Commission, the necessary delegation of much of its important work to subordinates, the long delay in the rendition of its decisions, the handling of problems of local concern by unfamiliar agents, and the failure promptly to meet the need for adequate regulatory legislation. Can a plan be devised which will preserve the advantages and eliminate the defects of the present system of control? Three proposals are considered: the creation of regional federal agencies, the use of state commissions for the administration of federal laws, and the curtailment of the scope of federal control. Dr. Reynolds wisely recognizes that no abstract rule of thumb can determine the selection of a remedial measure. He makes clear that, where national interests predominate, federal regulation is imperative; where local interests predominate, regulation by the state should be prescribed. The dual system of control necessary to handle the whole problem can, he thinks, best be attained by the second proposed plan—under which a basic federal control is to be supplemented and rendered efficient by the utilization of state agencies.

A word should be added as to the plan and technique which the author has followed. The reader will be inclined to feel at the outset that the chronological arrangement of the material covered is objectionable. It involves repetition and often separates into segments the discussion of a problem which might well be treated as a whole. One's second judgment, however, is likely to be that the view given of the steady unfolding through more than a century of the Court's attitude toward the complicated problem under review is more illuminating and more accurate than that which could be gained by a rigidly logical cross-sectional treatment of the same material. Too high tribute cannot be paid to the shrewd insight, the sound sense,

and the essential lucidity with which Dr. Reynolds has handled the vast body of decisions, frequently incapable of mutual reconciliation, with which he has had to deal. He has neither been smothered nor confused by the volume and variety of these cases, nor has he burdened us with artificial categories and principles which have reality only in his imagination. He has achieved a genuinely realistic synthesis. The book is practically without documentation, save the citation of cases. The author refers to some two dozen books and one law review article. It is to be regretted that he did not give us an adequate bibliography for reference purposes, even if he did not himself feel the need of an acquaintance with the work of others in the same field. The usefulness of the book is enhanced by an elaborate analytical table of contents and an adequate index. The title is both ambiguous and clumsy.

Cornell University. ROBERT E. CUSHMAN.

Abhandlungen zum internationalen Privatrecht. By Franz Kahn. Edited by Otto Lenel and Hans Lewald. Munich, Duncker & Numboldt, 1928. Vol. I, pp. xv, 503. Vol. II, pp. viii, 449.

Franz Kahn, a brother of Otto Kahn of New York, died in 1904 at the age of 43. Notwithstanding his premature death, Kahn achieved the distinction of having become one of the outstanding figures in the field of the conflict of laws. Among the German writers, since the middle of the last century, only v. Bar and Zitelmann can be compared with him in the grasp of the subject. Due to his studies abroad, he acquired a knowledge of the law of foreign countries which stands out conspicuously among the writers on the conflict of laws of his time, if not of all time. In his treatment of the subject, Kahn sets forth a point of view which appeals to the student of the common law. He was an ardent realist. He was interested in the positive law. He was opposed to all theorizing which would lead too far away from the actual or the practical. He was a nationalist, not an internationalist. The rules of the conflict of laws, according to him, were a part of the municipal law, and were not dictated by nor derived from any theoretical international law. He was interested in the greater unification of the rules of the conflict of laws, but he saw that this was possible only in fields where there was similarity in the municipal law of the countries. Hence his interest in and study of the municipal law to which the rules of the conflict of laws were to be applied. He sums up his theory by declaring that: "Private international law is national law; but it requires international methods for its study and development."

Kahn's writings do not include any general treatise on the subject of the conflict of laws. It is fortunate, therefore, that the principal articles on the subject which he wrote for various periodicals should have been collected and offered to the public in the present volumes. The first volume contains his most important contributions to the theory of the conflict of laws, of which those entitled "Gesetzeskollisionen", "Der Grundsatz der Rückverweisung im deutschen Bürgerlichen Gesetzbuch und auf dem Haager Kongress für internationales Privatrecht", "Die Lehre vom Ordre Public," and "Inhalt, Natur und Methode des internationalen Privatrechts" are the most noteworthy. In the articles entitled "Gesetzeskollisionen," Kahn was the first to point out that uniformity of result could not be reached, even though all countries should adopt the same rules of the conflict of laws. He called specific attention to the fact that there would still be differences in the initial points of contact, in the "qualification of legal transactions,"

to use Bartin's phrase,[1] which would lead to the selection of different rules by the courts of different countries. Special mention may be made also of the article on "Ordre Public," in which Kahn showed conclusively the futility of any attempt, made especially by French and Italian writers, to develop general rules governing the subject of "public policy," by means of which rules the character of particular provisions of the law of the forum as mandatory, in the sense that they prohibit the application of the normal rules of the conflict of laws to the matter in hand, is to be tested.

The second volume contains various articles relating to the Hague conferences and conventions on private international law. Kahn planned to write a complete treatise on these conventions, but did not live to see the work completed.

ERNEST G. LORENZEN.

The Historians of Anglo-American Law. By William S. Holdsworth. New York, Columbia University Press, 1927. pp. 175.

We have here in printed form the five lectures on the Carpentier foundation delivered by Dr. Holdsworth at Columbia in 1927. Taken as an entity the book is an unusually readable narrative of the growth of interest in English legal history and of the work that has been done in that field by English, American, and foreign historians. We say historians advisedly, for the emphasis throughout the book is upon the side of the legal training and practice of most of these writers. That a knowledge of things legal, even a considerable knowledge, is essential to the legal historian no one will dispute; but that legal training is as all-important for him as it is for the lawyer is a thesis that can hardly be maintained. The mental attitude of the trained advocate in action is diametrically the opposite of that of the trained historian. The work of the legal historian who is also a lawyer will be valuable in proportion as the historian predominates over the lawyer. Legal history written by one who is merely a lawyer, or even primarily a lawyer, can never rise above the standards set by Coke (pp. 14, 15, 52), and for the same reasons; the lawyer who would write legal history worthy of the name must also be, as was Selden, "a first rate scholar and historian." (p. 50) It seems hardly correct to call the two greatest legal historians of the past (p. 52) lawyers in the usual understanding of that term, for Hale devoted practically all his time to the study and writing of history, while Maitland entirely abandoned the bar as early as 1884 (p. 134), and before his first legal-historical book appeared.

With a bare mention of what is designated as the "prehistoric age," the whole period previous to the latter part of the sixteenth century, a time during which "what history there was takes, for the most part, the form of traditional legends," the first lecture is mainly concerned with the establishment of the professional tradition of the historical development of English law. This tradition took form in the time of Coke and was largely the result of his influence, an influence not altogether for the better because of Coke's lack of historical instinct and his unrestrained bias. How historical knowledge gradually replaced legend and tradition, how contributions were made in the seventeenth and eighteenth centuries to the common stock of knowledge of the history of English law, is told in the second lecture. Dr. Holdsworth marches in review before us the old time worthies who are now too little known: Lambard, Somner, Prynne,

[1] Bartin, *De l'Impossibilité d'Arriver à la Suppression Définitive des Conflits de Lois* (1920) 24 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 225; see also Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247.

Madox and Dugdale, together with the more generally remembered Hale, Selden, Blackstone and Reeves. The third lecture reviews the more recent work of Maine, Dicey, Pollock and Vinogradoff. American and Foreign Contributions is the subject of the fourth lecture, while the fifth is devoted to the story of Maitland's life and writings, and, in closing, to an evaluation of the actual worth of the work that has been done in English legal history.

In estimating its value on the practical side Dr. Holdsworth says that "legal history is essential to all lawyers." (p. 152) While this may be true of English lawyers, we can not agree with the statement as far as American lawyers are concerned. We have known many of the latter, able and successful—and otherwise; almost without exception they have been as innocent of any knowledge of the history of English law as the average garage helper is of the history of the Industrial Revolution. It would seem that in the reading, as in the writing, of legal history, lawyers as such have but little interest.

GEORGE E. WOODBINE.

International Law as Applied to Foreign States. By Julius I. Puente. Chicago, Burdette J. Smith & Co., 1928. pp. xxiii, 209.

This volume purports to be "an analysis of the juridical status of Foreign States in American jurisprudence," done with the purpose of meeting "the requirements of that 'legal precision' so indispensable with courts of justice." Unfortunately, however, there is considerable doubt as to whether this work has accomplished its purpose. The method followed is exactly that of Corpus Juris or Ruling Case Law, and the practitioner who owns either of them will probably not find it necessary to add this volume to his library.

About one-third of the volume is devoted to Recognition, and Suability of Foreign States; the remaining two-thirds is given to the treatment of Ambassadors and Public Ministers, and Treaties. The introductory chapter defining and justifying International Law is rather muddled and often contradictory. This is perhaps due to the author's attempt to combine into one sentence the language of several different courts.

The author's point of view, and his acquaintance with modern legal developments seem to be reflected in such statements as:

"Courts do not *make*, they simply *declare*, the pre-existing state of the law; and this they have done, as well in this country as in England, with admirable learning and impartiality."

"Sovereignty imports the supreme, absolute, uncontrollable power by which any State is governed."

"Were it not for the protection which this doctrine (of sovereign immunity from suit) affords, the government would be unable to perform the various duties for which it is created * * *."

The author also seems to hold that Customary International Law is obligatory only on those nations which have actually adopted it, and though he distinguishes three kinds of International Law—General, Conventional, and Customary—he makes no distinctions in his discussion which follows.

The subject of de facto governments, more important now than ever before, is hardly as well settled as treated by the author who opines that:

"There is, however, no occasion to accord the privilege to sue to a foreign government which has not been recognized by the political department of the United States."

With due deference, it is suggested that *Russian Socialist Federated Republic v. Cibrario*, cited by the author, was an excellent occasion to allow such a suit. The able articles of Professor Dickinson on the subject in 22 Michigan Law Review are not referred to, to say nothing of Professor Borchard's trenchant comments in this Journal.

The important and very practical subject of extradition is treated in three pages. No reference is made to our statutes on the subject, and such important matters as extradition without treaty, irregular recovery, rules of evidence, trial for offense other than that extradited for, decrees *par contumace* etc., are ignored. Nor is there any mention of the appeal to the Secretary of State.

The "most favored nation" clause, another subject of great practical importance, is likewise sketchily treated. The reviewer is of the opinion that our Federal Supreme Court is not yet definitely committed to the so-called "American Doctrine" in interpreting the "most favored nation" clause. In an unreported decision rendered this year, Judge Duval West of the Federal District Court for the Western District of Texas rejected the traditional American theory and accepted the Continental view, in escheat proceedings brought by the State of Texas under the Texas Alien Land Law against a British corporation. Judgment was against the State. The opportunity to present the matter directly to the Supreme Court was unfortunately lost, however, by a procedural blunder of the State's attorneys. Professor Puente also erred in failing to note that appeals from the United States District Courts direct to the Supreme Court in cases involving the validity or interpretation of treaties were abolished by the Act of February 15, 1925. (p. 215)

Professor Puente accepts the clause "rebus sic stantibus" as a settled doctrine of International Law despite the fact that it has no basis in practice whatever. He supports his view by citing two cases which hold that courts are bound by Congressional Acts violative of prior treaties.

Some confusion may result from the indiscriminate commingling of Municipal and International Law. Perhaps the most imposing example of this mixture is found in the author's principal justification for the immunity of foreign States from suits—that being none other than Justice Holmes' famous dictum that "there can be no legal right as *against the authority that makes the law* on which the right depends." (Italics the writer's)

The volume, as a working tool, would have been materially aided by references to a few at least of the number of able law review articles which have in the past few years paid particular attention to the decisions of courts in the application of International Law.

The book contains an index, but unfortunately lacks a table of cases.

Houston, Texas. JOHN P. BULLINGTON.

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