

BOOK REVIEWS

A History of Continental Civil Procedure. By Arthur Engelmann and Others. Translated and Edited by Robert Wyness Millar. With Introductions by William Searle Holdsworth and Samuel Williston. Boston, Little, Brown & Co., 1927. pp. lxiii, 948. Vol. 7 of the Continental Legal History Series.

This is one of the last of the notable Continental Legal History Series of which eight volumes have already been published. It not only maintains the very high standards set by the others but it has a special interest of its own. It opens to American lawyers and legal scholars an almost unknown field of study of the utmost value in the administration of the law; and as an introduction to that study it contains reprints of Professor Millar's law review articles where in clear, concise and yet complete form he sets forth the likenesses and differences between our own system of procedure and the various continental systems. It is perhaps a question which will prove of more interest to American scholars, the reprint of material from various continental sources or Professor Millar's own contributions to the study of comparative civil procedure. The reviewer inclines to favor the latter and he takes this opportunity of expressing the very great debt which he believes is felt by the profession generally to be owed to Professor Millar for his devoted scholarship in this all too unknown field.

The volume begins with an editorial preface by Professor Millar in which he gives the setting of the subject in the general field of law and a brief resumé of the continental systems of procedure, accompanied by biographical notes on the continental authors represented in the volume. Then follow appreciative introductions by Professors Holdsworth and Williston. Next is a reprint of Professor Millar's articles from the *Illinois Law Review* entitled "Formative Principles of Civil Procedure," where the author made an extensive comparative study of the procedural principles of the continental and Anglo-American systems. The general idea of this comparison may be shown by reference to section 3, "Party-Presentation and Judicial Investigation," section 4, "Party-Prosecution and Judicial Prosecution," and section 7, "Orality and Documentation." In these sections Professor Millar indicates perhaps the most notable differences between our procedure and that in vogue in continental Europe.

In the latter much more responsibility in pushing a case along to trial is placed upon the judges than under our practice; so much so that Professor Millar refers to our method as "party-prosecution" and the continental method as "judicial prosecution." In connection with this difference is the further one that unlike our written pleadings the policy of framing issues by oral pleadings at the trial is followed on the continent. It is true that written claims or notices may be required of the parties but these are not binding on them and the issues are finally settled before the court. The net result of the differences is obviously that more responsibility for the conduct of the case rests upon the judge and that decisions upon procedural points are comparatively few in number. Any one viewing the continental system as a whole, and from a distance at least, would feel that he had arrived at a paradise where the waste of time of our system upon disputes of mere form is eliminated.

The remainder of the book contains selections from different authors, giving a history of the various continental procedures from early times

down to the present. Thus there is considered the Germanic procedure, the Roman procedure, the Romano-Canonical procedure and the modern continental procedure of Germany, Austria, France, Italy and Sweden. More than half of the volume is devoted to extracts from the well-known—at least continentally—master work of Arthur Engelmann, *Der Civilprozess, Geschichte und System*, the selections being taken from volume two, "Geschichte des Civilprozesses." Engelmann was a judge for over 30 years, and for the last decade of his life was a member of the law faculty of the Silesian Frederick Wilhelm University at Breslau. His scholarly disposition is shown by this work, written, or at least begun, fairly early in his career. Parts of this subject were brought down to date by Rudolph Hermann, a much younger man, but a thorough German scholar, now a judge of the first instance in the same city. The material from the other sources, though less in bulk, is all from able scholars in their respective fields and countries. It is notable that some of the sketches of the present day systems were prepared by Professor Millar himself. We may congratulate ourselves upon having an American scholar who is sufficiently familiar with continental sources to perform such a task. The present volume is intended to be only a general survey and does not deal with particular cases or problems. It will, however, be very helpful in pointing the way to much material on such problems.

The picture presented by the whole volume of the principles of civil procedure from a foreign viewpoint is one which should fascinate everyone interested in the administration of justice. Professor Holdsworth does not state the matter too strongly when he says in his introduction of Professor Millar's own contribution,

"I think that it is no exaggeration to say that this Prolegomena will introduce Anglo-American lawyers to a department of legal thought, of the existence of which most of them have no conception—a department which concerns itself with the science of procedure. For the first time some of the conclusions of this science are explained to them; and, for the first time, they are applied to our peculiar system of procedure by a lawyer who is as well acquainted with the continental system of procedure as with the Anglo-American system."

While there are some striking differences between the continental procedure and our own, Professor Millar correctly points out that our system has gone very far from the heyday of common law pleading in its approach to the continental forms. It is probable that the presence of the jury may prevent us from ever completely taking over that system, but it is interesting to note the many points of similarity that may be found in the solution of particular problems. Questions of joinder of parties, for example, brought to the front by modern reforms of procedure following the English practice, may find their counterpart under the German code, and it is interesting to note the summary procedure of countries such as France and Italy for the expeditious settlement of certain causes, particularly commercial causes, in comparison with efforts made by pleading reforms in England and in this country to achieve similar results. In one respect at least we may envy our continental brethren, for they have gone very far in developing procedure as a science and a jurisprudence.

It is to be hoped that this book will be only a preliminary volume to other extensive studies by an increasing number of scholars interested in the possibilities of work in this field of comparative law. Legal procedure is but a means to an end, and that the administration of the substantive rules of law. The machinery which is most effective to achieve that end should be the one which is to be employed. It is perhaps su-

prising, in view of the number of laboratories we have for experiments as to the relative efficiency of various types of judicial machinery, that we have so little scientific study of the effectiveness of each type. In this country alone, we have some 48 different laboratories in the various states, not to mention the federal and territorial courts, in which such tests are possible. When to these are added the field opened by such a work as this the possibilities of research are great. One of the difficulties in the way of developing a better administration of justice has been the attitude of insularity and chauvinism of the lawyers and judges. Each fondly believes that the system under which he has grown up is the best and only possible one, whereas others not so far away may be much more effective. This attitude of mind as reflected with reference to reforms in the law of evidence has been strikingly shown by Professor Morgan and his Commonwealth Committee upon a poll of the bench and bar of several states.¹ Continental procedure with its entirely different approach should prove particularly valuable in giving us a point of view and a check upon our own methods.

While the average lawyer is not prone enough to accept reforms from outside, sometimes the reformers themselves too easily assume the perfection of any system but their own. In this connection we should be on our guard to be quite sure how the foreign practice operates before we too strongly advocate it for adoption in place of our own. On the surface the continental systems seem to have eliminated much waste in the administration of justice. Yet it appears, among other things, that a very great increase in the number of judges is necessary to administer them. It is now thought to be a reproach that so many more judges are needed for the trial courts in New York City than are needed for the administration of justice in all of England. But, as the reviewer is informed, in the city of Frankfort alone there are more than double the judges needed to administer the system than in the much larger city of New York. The principle of judicial prosecution also may result in some difficulty, for as the reviewer is also informed, the possibilities for delay and continuance while the judge is attempting to settle the issue between the parties are very great, perhaps comparable to our own system in that respect. It may be that the principle of self interest upon which we rely to force a case to actual trial may prove to be as effective as the principle of official duty relied on in Germany. Other subordinate results are at least conceivable. Thus, under our system where the parties are compelled to thresh out the issues themselves in advance of trial, it would seem that they might thereby obtain a better comprehension of their case before the witnesses are heard and hence that they would be better prepared either to try the case or to effect a compromise thereof. These and other similar matters can only be discovered by a very careful and thorough detailed examination of particular procedural points in each country and also an extensive fact research into the actual operation of the procedural rules in each country in comparison with similar research in our own. It is hoped that means and personnel will be available in the future for this new type of investigation. In the meantime this present volume may be hailed as the first and essential beginning of such a development.

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¹ MORGAN AND OTHERS, *THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM* (1927) Appendices A, B, C, D, showing that the great majority of lawyers answering the questions strongly preferred their local rules.