

BOOK REVIEWS.

ESSAYS ON CONSTITUTIONAL LAW AND EQUITY AND OTHER SUBJECTS. By Henry Schofield. Boston, Chipman Law Publishing Company, 1921, Volumes I and II, pp. xxiv, 456; viii, 1006.

These two finely printed volumes preserve for the profession the literary contributions of the late Professor Schofield. They were gathered together for publication by his colleagues of the faculty of the Northwestern University School of Law during his lifetime, as a mark of appreciation of his merits, and without his knowledge; his untimely death in 1918 gave them an opportunity to make these volumes a tribute to his memory. Not the least attractive feature about the volumes are the appreciative forewords of Professors Wigmore and Kocourek. As a character delineation Mr. Kocourek's contribution is noteworthy.

Professor Schofield was evidently a learned, very modest and much loved man. Seventeen years of association with him apparently produced in his colleagues an ardent admiration of both character and intellect, which attest the superior man. The profession at large can know him only by his writings, and these appeared in periodical form only. His major interests lay in the field of constitutional law and equity, and if we may judge from his writings, even these interests were specialized. For example, nearly all the articles here reprinted deal with the procedural side of constitutional law and to a certain extent this is true of those on equity. The editors of these volumes have grouped his articles and his numerous comments and notes, mostly published in the pages of the *Illinois Law Review*, into appropriate topics, so that, while scattered indiscriminately through the field, there is a certain order of arrangement, disclosing definite doctrinal ideas. The articles are nearly all critical in character; it is not improbable that this type of contribution is of greater value than the standard text monographs which are usually limited by space and purpose to the dogmatic and expository at the expense of the critical. Many of the articles are necessarily controversial in character, called forth by some recent decision or doctrine. The moderation of the argument and expressions of opinion and the lucidity of the thought, though not always clothed in the most approved literary style, add to the merits of the essays. Not all of them are of equal general interest, for Illinois problems occupy a certain amount of space, as for example, the long essay on the "Street Railroad Problem of Chicago" and the Illinois "Civil Service Act." The most important of the essays deal with the relation between federal and state courts in the interpretation of state laws. Professor Schofield's predilection for unified federal judicial control leads him to advance the proposition that the due process clause so enlarges the scope of Rev. Stat. 709, regulating the appellate power of the Supreme Court to review the judgments of state courts, as to enable that court to review any state decision affecting private rights, in order to determine whether it gave due effect to the existing laws of the state, and

in so doing, to decide independently what the state law is. This startling proposition is qualified by the statement that in order to deny due process, the departure by the state court from established principles must be "so gross as to shock the reason and justice of mankind." Thus, our apprehension that Mr. Schofield's proposal would involve the review of all state decisions tinged with error is tempered by the explanation that only gross error amounting to arbitrariness or lawlessness comes within the scope of the federal judicial veto power. *Scott v. McNeal*, 154 U. S. 34 sustains Mr. Schofield's views.

An essay somewhat related to this deals with the doctrine of *Swift v. Tyson*, which held that when the federal courts obtain jurisdiction over a question involving so-called general law, they are not bound by the rule adopted in state courts, because those judicial rules of decision are not "laws" of the states binding on the federal courts by virtue of section 34 of the Judiciary Act of 1789, now Rev. Stat., Sec. 721. From this Prof. Schofield advances the thesis that the state courts are thus bound to follow the decision of the federal court, both by reason of the grant of judicial power to the federal courts in cases of diverse citizenship of the parties, and of the supremacy of the federal law under Article VI of the Constitution. He therefore criticizes vigorously the position of Justice Miller in *Delmas v. Merchants' Insurance Co.* (1871), 14 Wall 661, who denies the thesis of Mr. Schofield. Justice Miller is held responsible by Mr. Schofield for the existing conflict between state and federal courts in this matter rather than Judge Story in *Swift v. Tyson*, who is charged with the offense by Professors Hammond and Gray. It is believed that Mr. Schofield's view is not sustainable, for the same reason than Story's is, namely, that the word "laws" in Article VI of the Constitution can only by a forced construction be deemed to embrace judicial decisions. Of course, even Prof. Schofield admits that the state legislature can change the rule and make it then binding on state and federal court alike, but he does not attempt to deny that possibly conflicting interpretations would raise the same problem and thus, if his view were followed, effectively impair the powers of state courts in the interpretation of state law.

In view of Mr. Schofield's bias toward the federal power of judicial review on a denial of due process by state courts, one is a little surprised to find him protesting against both the majority and the minority view of the Supreme Court in the *Frank* case (1915) 237 U. S. 309, to the effect that if mob domination were sufficiently great to deny the essentials of a fair trial the Supreme Court would not hesitate to assume jurisdiction (I, 63). Mr. Schofield seeks to show by historical research that the external conditions surrounding a trial, even bribery of judges, would not involve a denial of due process within the meaning of the Fourteenth Amendment. But in the empirical assertion of federal power it is not likely that the Supreme Court will consider itself hampered by formal conceptions in pricking out the vague line between judicial discretion and arbitrary power in the state judicial administration of state law.

Perhaps the next most important contribution of Prof. Schofield's involves his consideration of the full faith and credit clause (I, 153). He

believes that the Supreme Court's support of the view that "comity" justifies a state in refusing to enforce causes of action arising under statutes of a sister state deemed contrary to its public policy or to enforce a judgment of a sister state when the Supreme Court determines that it lacked jurisdiction, as in *Haddock v. Haddock*, is a denial of the efficacy of the full faith and credit clause and therefore erroneous. While as to the former the argument is not without merit, though contrary to the decisions, it is not convincing as to the latter, either to sustain the Supreme Court's independent power to pass on the requirements of jurisdiction or certainly to sustain the much wider claim of federal power to pass a uniform divorce law, which Mr. Schofield advocated (I, 211). The due process clause would seem to support sufficiently the Supreme Court's power to pass on the essential requirements of jurisdiction or the enforceability of a decree. Mr. Schofield's criticism of the Supreme Court's asserted distinction between a local rule of state jurisdiction and of decision is original and suggestive. Few of the court's leading decisions under the full faith and credit clause escape his criticism. Students of the conflict of laws will find these articles of great value.

A notable essay on the case of *Slocum v. New York Life Insurance Co.*, (1912) 228 U. S. 364, is entitled "New Trials and the Seventh Amendment," in which the author discusses critically the limitations on the power of courts to find facts differently from the trial jury (I, 251). He criticizes the district judges who held the first federal Employers' Liability Act unconstitutional, though they were later sustained by the United States Supreme Court. Under the head of "cruel and unusual punishment" (I, 421) he deals with the *Weems* case, 217 U. S. 349, and analyzes the doctrine of the majority that "cruel and unusual" signifies "disproportionate." Mr. Schofield's argument on religious liberty and Bible reading in Illinois public schools—in criticism of the case of *People v. Board of Education*, (1911) 245 Ill. 334, where the legislature was denied the power to authorize such reading—has just been adopted with long quotations from Mr. Schofield's article by the Supreme Court of Georgia (1922), 110 S. E. 895, which concluded that such reading was not violative of religious freedom. His article on the "Freedom of the Press" (II, 510) is an excellent historical and analytical contribution. His discussion of the element of motive as immaterial is suggestive. But in times of political and social stress—the only times when the guaranties of free speech and press need to be invoked—it may be doubtful how effectively and dispassionately the assumed standards or tests of truth in statement of fact and fairness of comment can be applied.

About 250 pages are devoted to articles and comments dealing with various subjects of equity. Among the most important are the article on specific performance (II, 739), arising out of certain Illinois cases and dealing with the word "not" as a test of equity jurisdiction in the enforcement of negative covenants; the several comments on the rule of mutuality (II, 774); the article on the equitable jurisdiction to construe and reform wills and his comments on the same power as applied to other written instruments; and the articles on the power to enjoin illegal saloons as public nuisances and the

privilege of workmen to have a threatened strike enjoined, together with various contributions on special topics.

The volumes exhibit a profound grasp of constitutional history and of the decided cases. If all the essays are not of equal merit or importance, this is largely due to the irregular and casual way in which they appeared. The purpose of the editors—to bring all of Prof. Schofield's writings together—accounts for the inclusion of several comments and briefer notes that might otherwise have been omitted. In making Mr. Schofield's many contributions readily accessible to the profession, the editors have performed a useful service.

Edwin M. Borchard.

CASES ON INTERNATIONAL LAW, PRINCIPALLY SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS. Edited by James Brown Scott; American Case Book Series. West Publishing Company, St. Paul, 1922, pp. xxxvi, 1196; Appendices, Index, Table of Cases.

Scott's Cases on International Law needs no introduction to American students of this subject. This new edition has the virtues of the earlier one and the additional one of being up-to-date. The incorporation of the work in the excellent American Case Book Series should enhance the reputation of both parties to the amalgamation.

A divided purpose will be apt to govern a compiler of judicial utterances in the field of International Law. There being no international tribunal with final power of decision over members of the Family of Nations, the only decisions available are those of municipal tribunals in cases of local provenience and dealing with the interests of private persons. The question thus arises whether the object to be sought in the study of such cases is knowledge of a branch of municipal law through study of the doctrines of International Law, or *vice versa*. The opening words of Dr. Scott's Preface would make us believe that it is the former objective to which he looks in the compilation, but inasmuch as he endeavors to cover the entire field of International Law and to that end includes many British decisions, one suspects that the alternative objective is the one really in the forefront of his mind.

Thus the further question occurs, as to the precise value of judicial decisions as evidences of International Law. It is certainly true that there is no single agreed source for most International Law, and for such as there is, that source is not municipal adjudication but international agreement. In ordinary times doubtless the judge is usually a more reliable reporter of International Law than the diplomatist. Yet when there is sharp divergence between their views it is the diplomatist's view which is apt to prevail; and in extraordinary times the best of judges sometimes capitulate to the local basis. In this connection Dr. Scott quotes an utterance of his famous namesake, who later became Lord Stowell, repelling "the imputation which is sometimes strangely cast upon this court, that it is guilty of interpolations in the Law of Nations." Yet the imputation remained, even in British minds, as one