

Book Reviews

CASES ON EQUITY. By Zechariah Chafee, Jr., and Sidney Post Simpson. Cambridge: Published by the Editors. 1934. pp. xiii, 1619.

THIS book may be said to be the superb realization of two propositions.

The first, the authors themselves have made quite explicit; it could not be stated better than in their own words:

"We are aware that there are those who believe that the day of the separate equity course is over. We do not think so. We believe that a thorough and imaginative understanding of the present-day operation and potentialities of equity can best be attained by an historical—a genetic—approach to the subject, and that such an approach may best be made through a course or courses devoted to equity as such. This book is constructed on the basis of that belief."¹

The second proposition is more difficult to state. The authors have nowhere made it explicit; they have nowhere needed to. In general it is that, given a subject matter, the proper way to make a casebook on that subject matter is to make what is virtually a combined encyclopedia, source book and bibliography, in which every aspect of the subject is treated, and treated exhaustively, with a ponderous machinery of notes, sub-notes, and super-notes, in large, small and medium-sized type, containing quotations, problems, lists of cases, and references to everything and anything having the slightest bearing on the subject.

That the realization of these two propositions is superb, has already been said. Indeed, "superb" is hardly an adequate adjective. The work is astounding. Anything comparable can hardly be thought of short of the Restatements, different as they are in scope and form. The reviewer recalls no legal work in recent years in which the result of brilliant and painstaking scholarship is so completely and unmistakably manifest. Within its field² it makes all other sources of information about equity seem amateurish and limited; probably one could omit the "within its field" and say without reserve that it is the most valuable existing work on equity. The editors have shown a positive genius for ferreting out the answers to those troublesome little collateral questions that perplex teachers. Over and over again, since the work first began to appear in paper-covered installments, has the reviewer fumbled through them hoping to clear up some obscurity about which all other authorities seemed to be silent; seldom has he been disappointed.

Doubtless the work has its errata and lacunae. Messrs. Chafee and Simpson are human; they must somewhere have nodded. The reviewer makes no pretence of having used the fine-toothed comb in a search for errors. That type of reviewing would be particularly beside the point here. Any discussion that purports to be critical must direct itself to the underlying propositions mentioned above.

Proposition one was once accepted as gospel. Doubtless it is still the prevailing view, though, at the moment, it seems to be losing ground. Time will tell whether that is an illusion, a passing aberration, or really the manifestation of an enduring development. This matter has been sufficiently aired. Much has been said and written about it. The present reviewer has lately expressed such opinion as he has of the matter³; it need not be repeated here.

1. Preface, x.

2. The full title is CASES ON EQUITY, JURISDICTION AND SPECIFIC PERFORMANCE. Thus the book does not purport to cover such topics as injunctions against tort, bills of peace and quia timet, reformation and rescission, and so on; this is important, inter alia, in considering its size.

3. (1933) 1 U. OF CHI. L. REV. 163.

The second proposition, however, involves a problem that has not been sufficiently aired; quite the contrary. Law teachers are extraordinarily inarticulate about their professional problems. It may be an aspect of that quite adequate sense of their own merit which law teachers have. To many of them teaching is but a regrettable and rather sordid incident in a great career of scholarship and public service; any discussion of teaching methods and materials is not only *infra dig* but unnecessary as law teachers already teach perfectly by divine dispensation. Doubtless the bad odor supposed to emanate from Schools of Education has something to do with it; you can discredit anything by calling it "pedagogy."

In particular do we lack a philosophy of casebooks. Casebooks are hypocritical. They purport to be one thing, which, apparently, few believe in any longer—and come as close as the editors dare to being something else, which, apparently, nearly everyone believes in without quite daring to admit it.

The original story of casebooks seems to have been something like this: whatever unit of time the student spent in the study of a given subject was best spent in reading and pondering a group of carefully chosen cases. If he read them thoughtfully enough and brooded over them sufficiently he was able inductively to discover "The Law." The function of the instructor in the classroom was to give the student the benefit of his longer and better brooding. Naturally, the casebooks consisted chiefly of cases. The notes, few and sparse, were largely formal: the concurring opinion of Baron So-and-So is omitted and the S. C. is reported in 4 Doe & Roe (Old Series) 719n. A few references to other cases were included; such as the more ambitious student might be expected to have time to read and which he would find particularly worth his while. These references presupposed an actual student, and so they were not extensive. Furthermore, there was no desire to impart information in any cumulative sense. Some of the early compilers seem to have thought that they had included all the important cases.⁴

This perhaps was an excellent method; perhaps it still is. A few good modern casebooks still cling to it. But, in general, it is going out. The notes tend now to be neither few nor sparse; they have multiplied so enormously that in some instances the cases are lost among them.

Various explanations might be hazarded as to this development. In the first place, we may suppose that a more realistic, functional and statistical approach to law has had much to do with it. Today, as we try to teach our children the facts of life, we try to teach our students the facts of law. In both cases, perhaps, we fumble and grope; some of us even blush. But still we try, and the effort requires data not to be found in any number of cases that could conveniently be put in a casebook. It requires accumulated and ordered information about legal facts and non-legal facts. And so such facts, variously defined, variously formed and in various stages of digestion or the contrary, have been voluminously shovelled into small-type notes in casebooks.

A second explanation is that such notes afford an outlet for real or spurious erudition. Since the great originators got hold of most of the good cases, their lesser successors have had to do something else to justify their existence and their casebooks. The latter are easier to write than texts and usually more profitable; they achieve an air of scholarly respectability if loaded down with lists of cases, *accord*, *contra* and *cf.*

Lastly, a teleological shift may be noted. The first casebooks were written for students; now they are written for teachers. Nobody knows or cares what students think of the casebooks they have to use; editors and publishers soon find out what

4. See the preface to the first edition of Langdell's Cases on Contracts, quoted by Gardner in a review, 48 HARV. L. REV. 711.

teachers think. Among other things, it seems that teachers like plenty of cases, so that they may assign a picked list. This enables the teacher to appear wise and also to use mostly cases which he likes and understands. And teachers like extensive note material, particularly references to law review comments which explain and place the cases. An unfamiliar and obscure case, with no explanatory notes appended to it, is indeed a *naufragio* without a *tabula*. Hence the guiding purpose is to produce a *teachable* casebook, i. e., one that can be used by the teacher with a minimum of painful effort.

Throughout this development, certain tabus have been piously respected. Notes are absolutely and positively *not* text. That would involve everybody from the publisher down to the student (though the latter would be happily unaware of it) in the odium associated with "textbook schools." So notes appear in small type; by putting them in a form difficult to read you negative the idea that they were meant to be read. (It is even better to use several sizes of small type.) Organized and readable exposition is to be avoided. Thus, one should not say that in certain states separate courts of equity still persist; one should say: "Cf. the practice in certain states: N. J., (separate court of equity); Miss., (same)." And above all the editor, while quoting the opinion of others, must never give his own.

The result seems to the reviewer to be unfortunate. The casebook gets to be a kind of monstrosity, shapeless, anomolous, amorphous. An outsider, not aware of our totems and tabus, would look aghast at such a nondescript assemblage of different types, styles and forms; he would be inclined to suggest that since the editor apparently wasn't smart enough to do it himself he should have hired some competent person to go through all this rough material, organize it, eliminate what was not necessary, and put what was vital into some compact and usable form.

One consequence, from the standpoint of the student, is that he gets the benefit neither of the casebook method nor of the text method. The cases are still there but they are no longer predominant; they are hardly more than illustrative. The following (or surrounding) note explains the law as well as (if not better than) the principal case itself. On the other hand, the notes are not readily usable as the main working corpus of the book. Typography, style and organization are all adapted to make them as unpalatable as possible. The extent of the matter to be looked up dulls the inclination to look up anything.

The second consequence to the student is an economic one: he has to pay the high cost of something useful only to the teacher. Every one knows that casebooks are expensive, but it is not the part of the book that the student uses that is so costly; it is the vast machinery of notes intended chiefly for and chiefly used by the teacher. And the teacher doesn't complain; the publishers are glad to furnish him with free casebooks.

The book under review contains sixteen hundred and nineteen pages; they cover the same ground as the first four hundred and forty pages of Ames' Cases on Equity. Presumably the Harvard student who takes equity must buy, in addition to these two substantial volumes (costing eight dollars) three others: Chafee's Cases on Equitable Relief Against Tort, Pound's Cases on Equitable Relief Against Defamation and Injuries to Personality and the second volume of Ames' Cases on Equity. (Does he ever ask: Why do they call *that* Equity?) The reviewer has made a rough analysis of Chapter II, "Powers of Courts of Equity." Of its two hundred and twenty-seven pages, the principal cases occupy one hundred and ten and various forms of notes use up the remaining hundred and seventeen. That is, more than half the actual square inches of printed matter are notes; when allowance is made for the smaller type, it appears that a good deal more than half the chapter is devoted to notes. These notes vary in form; they contain extensive excerpts from other cases, numerous decisions put into the shape of questions, lists of citations

of cases pro and con, references to texts, law reviews and so on; at intervals there are what are virtually short essays on certain topics. E.g., the case of *Winston v. Westfeldt*⁵ is followed by a five-page "Note of *Lis Pendens*" which in turn is followed by a two-page "Note on Privity in Equity." This, to make the picture complete, is followed by ten "Problem Cases" covering nearly two pages. And then follows another principal case.

The reviewer has already expressed his high opinion of these notes as sources of information; he does not intend to derogate from that. Nor does he wish by the foregoing comments on casebooks in general to make any oblique imputations on the scholarship or integrity of this one; that should be abundantly clear. Still, it does not seem unfair or discourteous to ask: is this a casebook¹ at all? Or, since names don't matter, is it a well planned and adapted teaching tool? In most disciplines, selectivity counts; is it really true that in legal education we must substitute collectivity? No student taking a course in equity ever would or could avail himself of more than a half or a quarter of this material. Why should he (in several senses) be burdened with it all? Even the most callous professor is likely to wince a little when he requires the purchase of these two volumes for a course running (normally) three hours for one semester. Reference has been made to the detailed index and to an innovation in the form of a thirteen-page "Analytical Table of Contents." No doubt these will be greeted with enthusiasm—but do they smack of student use or suggest rather the complete reference work, for the desk of the practitioner and teacher? The only innovation that really seems to be based on the psychology of living students is the inclusion of illustrations, the subject matter ranging from Lord Eldon to the Salton Sea. This deserves hearty commendation.

The old-fashioned casebook may or may not be obsolete. We may or may not have discovered the need for a combined casebook, text and quizzer. Those are questions the prospective editor will have to decide for himself. But if he decides for the combination, let him produce it frankly. Let him write and print what is meant to be studied as though it really were meant to be read and not to be used as ballast. Let him not put in references so extensive as to discourage looking up any. Let him not use extended quotations to impart information he could more effectively and briefly give in his own words. If opinions are in point let him include his own if he have one. In short, let him abandon the behavior patterns of an aborigine trying to bring on rain and take up those of the scientist trying to use or devise materials in the most effective way to bring about some desired result.†

A TREATISE ON MORTGAGES. By William F. Walsh. Chicago: Callaghan. 1934 pp. xlv, 376.

THIS is a handbook on the legal doctrine about some of the more important real estate mortgage problems. The structure of the book is that of the orthodox law school course.¹ There are fifteen chapters which range, after a prologue on the history of mortgage theory, through "equitable mortgages," interests that may be mortgaged, the mortgage debt, rights and duties of the parties, priorities, discharge, redemption and so on to foreclosure, foreclosure sales, and power of sale mortgages. The author states in a foreword that his purpose is to "restate the

5. P. 21.

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1. Compare, for example, PARKS, *CASES ON THE LAW OF MORTGAGES* (1926). Contrast STURGES, *CASES AND MATERIALS ON THE LAW OF CREDIT TRANSACTIONS* (1930) and HANNA, *CASES AND OTHER MATERIALS ON SECURITY* (1932).

fundamentals" of mortgage law in the light of the "merger" of law and equity and as revealed by history.² Though he recognizes that "no other branch of the law" can boast so much contrariety of decision and confusion of statement, he promises "finally to reconcile or to explain the many conflicting decisions and opposing theories." The book is to provide practicing lawyers with a "carefully developed and logical analysis of the law of mortgages as it is, in its historical perspective" and to be helpful to students as collateral reading.

How is all this accomplished? The author's method is, as his preface would indicate, in the absolutist tradition.³ What he offers is not an objective description of conflicting decisions with an analysis of their social, psychological, or economic bases but rather an exposition, with much effort at "reconciliation," of technical legal doctrine. His ideal is that of "logical consistency" and he obtains initial premises by the usual formula. From all the forked doctrine that abounds in the cases and older texts, he picks out certain symbols which, for reasons unexplained, he labels "fundamental." Symbols pointing in opposite directions he attacks with invective or relegates to footnotes as perversions.⁴ The basic assumption of the book is of course that "true" doctrine springs from the "nature" of a mortgage. This nature is revealed to the author in the fecund concept of "lien." All decisions that can be fitted into the ramifications of doctrine spun out of this concept are good. Other decisions that can be more easily fitted into doctrine spun out of "title" or "intermediate" theories are bad. Courts are castigated in strong language for having yielded to conflicting economic interests and contradictory social ideals.

This approach appears even in the opening chapter on the history of mortgage theory. A study of the tortuous course of judicial decision could have been used to show that there are mortgages and mortgages and natures and natures. Yet it is here used to show ineluctable revelation by equity of true nature. Not only does the author repeat again and again that the true nature of a mortgage is that it is "security" only, but he even suggests that the common law judges had recognized—though they often ignored—this true nature before the intervention of equity and that the chancellors were working from it when they began to grant relief to mortgagors because of fraud, accident, and mistake.⁵ This reaches an extreme when he chides Mr. Turner for intimating that the Chancellor in extending redemption to all cases was more concerned about expanding his jurisdiction than about the proper conception of mortgage.⁶ The Chancellor, like any normal person of his period, must have known that a mortgage was security only; the true nature of the mortgage relation just did not happen to be discussed in the earlier cases! Finally, by manipulation of well-chosen premises the author attempts to establish that "security" must mean "legal title" and "beneficial ownership" in the mortgagor and "legal lien" only in the mortgagee.

What liege service Professor Walsh can make weighted symbols like these perform is demonstrated throughout the rest of the book. An example typical of his argumentative technique is his discussion of the problem of who is to have the possession and fruits of the mortgaged premises pending foreclosure sale. To begin with, he suggests that the English courts in granting the possession and fruits to the mortgagee failed to recognize "the *actualities* of the mortgage relation."⁷ Later he finds it "quite evident that the recovery of possession by the mortgagee is in violation

2. p. iii.

3. For aught the book reveals the "realists" might never have written a line. That is the reviewer's apology for comments which to some may appear all too obvious.

4. See Chapter IX, notes 18 and 20, pp. 212, 214.

5. Pp. 6, 11.

6. P. 11, n. 30.

7. P. 17. All italics and comments in parentheses are inserted by the reviewer.

of the *spirit* and *purpose* of the *normal* mortgage relation."⁸ He minimizes the mortgagee's right to apply any rents he may collect to the debt and states that "it is quite absurd to revert to the discarded title theory merely to give the mortgagee a possession of little or no practical use to him in fact."⁹ His strictures on the "intermediate theory" are vehement. This compromise that puts "legal title" in the mortgagor before default and in the mortgagee thereafter is without support in *principle*, ignores the *actual rights* of the mortgagor and mortgagee and the *actual ownership* of the mortgagor, *indefensibly* combines two *utterly inconsistent doctrines*, and is a "survival having no relation to modern conditions"¹⁰ In sum:

"*Good sense and expediency* as well as *uniformity* and the recognition of the *actual law* as it is all unite in demanding that this 'legal title' doctrine be eliminated as completely outgrown and without significance today except to cause confusion and *positive injustice* since giving effect to it is *necessarily* in direct violation of the *fundamental character* of the mortgage relation as that of a secured loan."¹¹

To establish his thesis that nature's livery of seisin pending foreclosure sale is to the mortgagor, the author must struggle not only with the ejectment cases that begot the "title" and "intermediate" theories but also with four other varieties of hostile decision. There are the cases that allow the mortgagee (a) to collect rent from tenants of the mortgagor, (b) merely by adding a few words to the mortgage agreement to obtain possession any time he wants it, (c) to come into possession by means of a receiver, and (d) if he has obtained possession peaceably, but without valid foreclosure, to stay in until he is paid. Of these decisions at least the (b), (c), and (d) varieties are indigenous to so-called "lien" jurisdictions. How does the author overcome such obstacles? His efforts are worthy of textual criticism. First, the (a) decisions. These are assailed as "futile" and "stupid."

"It ought to be perfectly clear to anyone having any *real understanding* of what the *mortgage relation* is and has been since the latter part of the seventeenth century that it does not involve the *transfer of any beneficial interest* in the mortgaged property other than the *right of security*. . . . In the case of the prior tenant the collecting of the rent by the mortgagee as grantee of the reversion before enforcement of the mortgage for default is in direct violation of the *essence* of the transaction which is to give the mortgagee *security* and security only." . . . (But what is the mortgagee's "right of security"? Is not the question how much "beneficial interest" it should include? Why is collecting rent not "enforcement of the mortgage"? Where did this "essence" come from? Is it not strange to describe a wished-for-holding as of the "essence" when there are so many decisions to the contrary? What social policy, if any, is there behind "essence"?). . . . "In the case of the subsequent tenant it is an outrage to ordinary common sense to treat him as a *trespasser* and to permit the mortgagee to divert from the mortgagor the rents he is *obviously entitled* to by compelling the tenant to hold under a new tenancy from the mortgagee enforced by the threat of actual eviction." . . . (By what standard "obviously entitled to"? An assignee of the mortgagor's interest could enforce the lease. Why is the mortgagee a more undesirable landlord? Suppose the mortgagee is also assignee?). . . . "All these absurdities follow from the attempt to apply even as between the parties the technical form of the mortgage as a conveyance of the legal title. . . . Where third parties are involved the mortgagor is held to be *legal owner* practically everywhere. It is high time that this position of the courts in the title theory states, directly opposed to the title theory, should be carried to its logical conclusion by eliminating the title theory and adopting the lien theory."¹² (Why must a court that has for some purposes in disputes between the mortgagor or mortgagee and third parties said that "legal title" is in the mortgagor say the same in totally different disputes between different parties? Must "legal

8. P. 92.

9. P. 28.

10. P. 93.

11. P. 94.

12. Pp. 95, 96. Contrast TEFFT, RECEIVERS AND LESSEES SUBORDINATE TO THE MORTGAGE, 2 UNIV. CHL. L. REV. 33 (1934).

title" be reified into some sort of an absolute that, despite all the evidence of the cases, dictates decisions? Is not greater particularization of problems and more analysis of social considerations needed? . . . What would the adoption of the "lien theory" accomplish? Does the author mean to suggest that the mortgagee cannot get rents accruing before foreclosure in a "lien theory" state? How would he dispose of the last three varieties of decision listed above and discussed below?)

Now the (b) decisions. Though these provide the mortgagee with an easy device for rendering of no avail all the protection that courts have in the name of "lien" worked out for mortgagors, the author strangely attempts reconciliation.

"Just as in states applying the title theory an agreement between the parties that the mortgagor shall have possession is recognized and enforced, so also a like agreement in lien states that the mortgagee shall have possession is given effect, as in an agreement that the mortgagee shall have the right to have a receiver of the rents appointed in any foreclosure action which may be brought."¹³ . . . (What has the enforcement of agreements in "title" states got to do with "nature" in "lien" states? Why allow "nature"—or whatever social policy the author is hiding behind "nature"—to be thwarted by a few additional words in the mortgage document? Why do the additional words evoke such a different social ideal? If these added words make the agreement something other than a "mortgage," what difference does it make what a mortgage is? If one agreement should not let the mortgagee into the premises and the fruits thereof, why should two agreements? Does not this result make all talk of "title" and "lien" theories academic?)

Next the (c) decisions. These too, though contrary to the author's fundamental premise, are reconciled. This time the miracle is achieved by invocation of the all pervading power of equity.

"It seems clear that the lien theory is simply the establishment at law of the equity theory of mortgages, and therefore equity's power to protect and conserve the income during the period required for the foreclosure proceedings in cases of clearly established inadequacy of security for the mortgage debt is in no way affected by the lien theory and by the mortgagor's right as owner until the sale, equity having always recognized him as beneficial owner prior to the enforcement of the mortgage."¹⁴ . . . (Again if it is of the nature of "lien" security that the mortgagor shall have the possession and rents before foreclosure, why tolerate courts that thwart this nature by the simple expedient of appointing a receiver? Can it be that there is no inconsistency in thwarting this nature which is the product of "the equity theory" by another doctrine merely because the other doctrine is also "equitable"? If the mortgagor must give up the fruits, why not give them to the mortgagee without the cost of a receivership?)

Finally, the (d) decisions. True to his premises at last, the author scores these soundly.

"How can he (the mortgagor) be fairly kept out of his possession by a mortgagee who has entered without legal or equitable right and is therefore a trespasser, even though unintentionally so, is not adequately explained by Pomeroy's doctrine of expediency. . . . These cases give the mortgagee a right to possession in fact though acquired without right, and force the mortgagor to redeem long before he is required to do so under the general principles of equity applying to the action to redeem. They are anomalous, without explanation other than that an undefined equity or feeling of abstract justice is the basis of them."¹⁵ . . . (Without "legal or equitable

13. Pp. 96, 97.

14. Pp. 329, 330.

15. P. 100. Further examples of reasoning that fails to pierce the none too imposing facade of judicial rationalization could be taken from almost any portion of the book. Two more must suffice. . . .

"If the legal ownership of the mortgagor as to third persons is recognized in every other situation between him and any person other than the mortgagee there is surely no valid reason for not applying the same doctrine to these cases of fixtures or other parts of the mortgaged property detached and removed by a third person. The anomalous result of permitting the mortgagee to maintain conversion or replevin, completely out of accord with

right" by what standard? To what does "right acquired without right" appeal? Should not this "undefined equity" be investigated? It might prove more compelling than the logic of lien. Might not a simple and efficacious remedy for the mortgagee be of advantage to all parties? Why deprive the mortgagee of one remedy only to give him another more expensive to both him and the mortgagor?)

These criticisms are not intended to suggest that the premises and symbols manipulated by Professor Walsh are not important. The contents of appellate opinions would indicate that such premises and symbols are still too often the mainsprings of judicial behaviour. Students must be taught all this doctrine—but not from the point of view that some of it is "fundamental" and some of it not. They should be taught how to tear it up and how to run it both ways. The practitioner interested in winning a particular case may find any kind of an incantation useful. Yet, however important the rationalizations by which courts explain their decisions, should not even (or especially) an elementary text cut deeper? From the point of view of a scientist trying to describe social or business fact or of a counsel trying to predict future decision, talk about "title" and "lien" theories—save in one narrowly limited situation where convention may have made the terms useful shorthand—is hardly more intelligible or informative than would be talk about "round" and "flat" theories.¹⁶ Equally without other than emotional content are most of the premises that make up the great bulk of explanatory generalization that does not hinge about the two well-worn theories. What is needed today is a book that will get beneath the technical legal doctrine about mortgage problems to the conflicting economic interests and contradictory social ideals that now shape a doctrine and again make it meaningless. Though such a study might not reveal any "scientific" or other standards whereby to guide a choice between competing ideals, it would at least present a more accurate description of what courts and people are doing. The mortgage problems and decisions undoubtedly partake of what Santayana has called the "profound absurdity of things" and are probably just as little amenable to any "ought" as the bewildering economy that brought them forth. Yet—eternal verities aside—he who sets himself up as a reformer might well be required to offer some ideal more appealing than that of consistency with the fundamental nature of phantom concepts.

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the mortgage relation as it actually exists, needs no further discussion. It is simply another result of the effort to maintain as a reality the fiction of the mortgagee's ownership of the property". (Pp. 114, 115. Why should doctrine derived from different cases be allowed to deprive the mortgagee of these remedies if he needs them for the protection of his interests? Where does the "mortgage relation" actually exist? Must it permit successful looting of the premises? What is the fiction? The mortgagee has a financial stake in the property and is given some of the legal protection loosely described as "ownership"? Why not give him this protection?) . . . "Decisions in some states in which the court states that the mortgage cannot be enforced if the debt is barred because the mortgage is an incident of the debt attached to it merely by way of security, are contrary to the law clearly established even in those states that the bar of the statute does not extinguish the debt, and that the action to foreclose a mortgage is an action in rem involving the disposition of the land and jurisdiction over the land not requiring personal jurisdiction over the mortgage debtor, differing radically from the personal action on the debt". (P. 176. Compare statements on p. 300. Why are the symbols of "surviving debt" and "action in rem" more persuasive than the symbol of "security as incident to debt"? What, if anything, is beneath these symbols? How does their use affect the policy of the statute?) See also examples on pp. 30, 34, 70, 80, 135, 171, 207, 210, 219, 231, 245, 248, 251, 261, 276, 292, 343.

16. See STURGES AND CLARK, *LEGAL THEORY AND REAL PROPERTY MORTGAGES*, (1928) 37 *YALE L. J.* 961. The author refers to this article in a footnote (p. 26, n. 94) for a quotation from Pomeroy's *Equity Jurisprudence*, but he ignores the purpose for which Sturges and Clark were quoting and their careful "exposure" of the theories.

THE CANON LAW OF WILLS. By Rev. Jerome Daniel Hannan. The Catholic University of America: Washington, D. C., 1934. pp. ix, 517.

"AND what should they know of England who only England know?" It is a trite but true implication of Kipling's poetic maxim that the jurist is handicapped who knows only a single system of law; while thrice fortunate is the scholar who, in addition to his own legal system, has mastered, as a fruitful basis of comparison, a system other than his own. So the reviewer feels that American lawyers owe a debt of gratitude to the Catholic University of America for sponsoring an impressive series of Canon Law Studies. Probably no other university in these United States is so admirably equipped for this task. And legal scholars should welcome the volume under review. Confessedly without available statistics at hand, this reviewer believes that, outside of the catholic clergy, there be few among us learned in the canon law, and that, outside of the series mentioned (of which the instant volume is number 86), our literature in this field is meagre indeed. Hence our obligation to Father Hannan for a book on the canon law of wills, perhaps the most practical and most interesting aspect of canon law to our scholars and lawyers. In this field, the canon law has left a real impress on our own law. The wonder is not that the testamentary jurisdiction of the English Ecclesiastical Courts died in the early part of the last century but that it endured so long.

Father Hannan's book, bound in paper covers, is a dissertation submitted to the Catholic University of America in candidacy for the degree of Doctor of Canon Law. The volume contains a two-page foreword, a six-page index, an elaborate bibliography and a list of the Canon Law Studies mentioned above. A brief table of contents lists the titles of the twelve chapters and of the articles into which each chapter is divided. The text contains 826 consecutively numbered sections, of which no mention is made in the table of contents. In some instances, the text contains titles to the sections; in other instances, the subject of the section is indicated by black-faced type at the beginning of the text of the section; sometimes, no indication of the section-title is given. There is also a brief biographical note of the author. From this we glean that he has an impressive list of academic and theological degrees, that he has served as parish priest and as Secretary to the Catholic Bishop of Pittsburgh, whose *imprimatur* the book bears, and that he graduated from the law school of Duquesne University with the degree of LL.B. Certainly here is strong evidence of the author's fitness for the task undertaken in his book.

On the title page, the book is described as "An Historical Synopsis and Commentary." In the foreword, we are told, "The conclusions that will be presented in the subsequent pages are the result of a serious attempt to compare the principles of Roman law, modern law and canon law, with a view to establishing a rather complete juridical theory of wills under the canons." Surely that is a large order for a single volume of some five hundred pages. There are copious notes, with references to actual cases decided by the courts, statutes, the writings of well known writers on canon law and authoritative sources of this law. Many of the canons are quoted *ipsissimis verbis*, but, unfortunately for many readers, in Latin without an English translation.

This reviewer is glad to admit that he read this book through from cover to cover with interest and profit. Probably some readers will complain that parts of the book are devoted to subjects that will primarily interest only those who are either members of the Catholic Church or those who are particularly interested in the doctrines and history of that church, to which latter class belongs this reviewer. But such a line is rather difficult to draw. Thus, Chapter X is devoted to Bequests for Masses. As the author shows, such bequests have frequently been before the courts in the United States, and they are discussed in the American Law Institute's Restatement of *Trusts*. Indeed this reviewer regrets that Father Hannan devotes so much space to the modern

law of the States of the United States. Thus Chapter VI, dealings with our modern law as to Testamentary Formalities, is considerably longer than Chapter VII dealing with the Canonical Attitude Towards Formalities. Again in an effort to cover our law in brief compass, the author has in several instances stated generalities that require qualification, as he has failed to make distinctions that are rather essential. Sometimes, too, his nomenclature does not conform to the best modern practice.

Possibly American lawyers will be most deeply interested in those parts of this book which throw light on our modern doctrines of testamentary law. Many such instances might be cited. The canon law of the *donatio mortis causa* is of deep import in connection with that somewhat anomalous device which has given our own courts no little trouble. Again, discussion of the Falcidian Fourth and the *Legitima Portio* of the Roman law is first set out by the author before he proceeds to discuss the limitations imposed on our own testator's power to dispose of his property as against the claims of his wife and children. Commutation under the canon law presents genuine points of contact with the application of the *cy pres* doctrine in our courts. Of real import is the historical origin of the one-year period as the time within which legacies are to be paid.

The reviewer is strongly tempted to set out in this review many marginal comments that he made as he read this interesting book, but considerations of space demand that this temptation be sternly resisted. Father Hannan's treatise is strongly recommended to American legal scholars, and particularly to teachers who, like the reviewer, give courses on Wills and Administration. Such teachers will find much in this book that will be food for real thought. This author writes easily and clearly as one to whom the literary pen is no novelty, as one to whom scholarly research is a joy rather than a discipline. He marshals and arrays his authorities, yet on disputed points he does not hesitate to set forth both his own opinion and his reasons for the legal faith that is in him.

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ROLLS OF THE JUSTICES IN EYRE FOR LINCOLNSHIRE AND WORCESTERSHIRE, 1218-19 and 1221. Edited for the Selden Society by Doris Mary Stenton. London: Bernard Quarich. 1934. pp. lxxxiii, 786.

IN editing these rolls Mrs. Stenton has enriched our printed source material for the study of English legal history by the addition of some thirteen hundred new cases which, in point of time, fit in between the *Curia Regis Rolls of the Reigns of Richard I and John* and the bulk of the cases in *Bracton's Note Book*. A careful reading of every case has convinced the reviewer of the high standard of excellence on which the transcription from the original manuscripts has been done. Why these particular rolls, rather than others, have been chosen by the editor, is made plain in the introduction. They are marked in a certain way.

When Maitland was editing that thirteenth century collection of nearly two thousand cases taken verbatim from the plea rolls, which we now call *Bracton's Note Book*, he went to the rolls themselves to check up on the cases. To his surprise he found that on several of the rolls the cases he was looking for were marked in the margins—marked, he came to believe, for the copyists who were later to copy them into the *Note Book*. A further search revealed two other marked rolls, extracts from which were not in the *Note Book*. These two rolls are those which are now before us.

It is clear at the outset that the editor is thoroughly, and we may say enthusiastically, convinced that the markings on these rolls were made by Bracton himself. In her enthusiasm she even goes so far as to tell, in most instances, why the cases are

marked—though it may be questioned whether the apparent reason for the markings are always the real ones. She believes also that these cases were copied from the rolls and formed at one time an additional portion of the *Note Book* which has since been lost. The matter of connecting the markings with Bracton, and the rolls with the *Note Book*, has seemed so important to her that the subject has been stressed at considerable length. It is hard to understand, however, how the actual value of the rolls as historical material can be at all affected by the markings, whether these markings were made by Bracton or by some one else; or how that value is in any way dependent on our knowing whether or not extracts from them once formed quires of the original *Note Book*.

As a matter of fact we can not be at all certain who it was that marked these rolls. They are said to be marked with the "familiar mark" of Bracton. But what is that mark? Even the rolls from which the cases now in the *Note Book* were taken, are marked, for those cases, by so many different varieties of markings that no one kind can be called typical of any one man to the exclusion of all others. Of twenty-five marked rolls tabulated in the introduction,¹ fifteen are marked by a mark "of the simplest type, a straight line down the margin"; six are marked by an N (for *Nota*), with a line drawn from it (or to it, or through it)—this also being a common medieval method of marking.² This leaves only four of the rolls which are not marked by the most usual types of markings, such as any one might make; two of these are said to be marked by some one other than Bracton. The situation is complicated by the fact that, for the most part certainly, the cases marked are those which stand out in general interest—they are of the type that any one might mark.

But even if it could be proved that the markings on these two rolls before us were Bracton's, that fact by itself would not at all settle the question of the extra quires. All that we actually know about quires in the *Note Book* is that today there are twenty-four complete quires in it, and that in the fifteenth century it contained the same number.³ One of the editor's reasons for believing that quires have been lost is that "when Bracton used it, it was probably a collection of loose quires";⁴ but no evidence is given to support this assumption, which is hardly in line with such evidence as we have, namely that the very fact of the quire arrangement would indicate at least an intention to proceed with the usual binding, to keep order and proper sequence in the quires. Usually where medieval manuscripts have lain around unbound for any length of time, they indicate that fact by signs of damage of one kind or another and by the loss of a single leaf now and then. But in this manuscript the twenty-four quires, with the exception of the outside sheet of the first quire, have come down to us both intact and well preserved. Certainly the book itself makes no suggestion that it once had more quires than it has now; in Maitland's own words, "The text now breaks off at the very end of a quire and at what may or may not be the end of a case. From the book itself we can not learn whether anything has been lost."⁵

Whence then comes the idea of extra quires? Clearly from the markings in these two rolls. Once we believe that these marks were made by Bracton as a direction for some copyist, and that this copyist did copy the marked cases as a portion of the *Note Book* for Bracton's use, the belief in one or more extra quires in the original book becomes practically inevitable, especially if we still further believe, as our editor does, that Bracton discarded his rolls and depended for his citation of cases entirely upon the extracts from the rolls which were in the *Note Book*.⁶

1. Pp. lxxv-lxxxii. Cf. pp. xiii-xv.

3. I Note Book 62.

5. I Note Book 63.

2. I Note Book 67 n. I.

4. P. xii.

6. P. xii.

This belief that Bracton discarded his rolls in favor of the *Note Book* is not easy of acceptance. Take the actual facts as represented by his citations from Michaelmas term, 9-10 Henry III (1225). Twenty-nine cases from this term are to be found in the *Note Book*. Three rolls, an unusually large number, are extant. One of these is marked with the common N mark.⁷ We are not informed whether more cases are marked on the roll than are found in the book. In his treatise Bracton cites nine of the twenty-nine cases in the book. In addition he cites nine other cases from the same roll which are not found in the book. No one of these nine is an *addicio*, but each is part of the text as originally written. In other words, the writer of the *De Legibus*, assuming him to have made use of the *Note Book*, has used only one-third of the cases from this particular term copied into that book, and for an equal number of cases from the same term he has gone directly to the roll, discarding in this instance not the roll, but two-thirds of the cases in the book. The situation in its entirety is even more disparaging to the *Note Book* in this respect. There are approximately two thousand cases in that book. Just about two hundred of them, a meager ten per cent, are cited in the treatise. But some three hundred other cases, not found in the book, are also cited. Under such circumstances the editor's contention is hardly convincing. We are asked to believe—not on account of anything connected with the *Note Book* itself, not on any statement in the treatise or on any roll, but simply on account of the marginal markings found in these rolls—that at one time the *Note Book* contained enough additional matter to furnish Bracton with all his citations. If that were so, and if these allegedly lost parts of the book were being used as sparingly as the extant part, it would be necessary to assume that at one time the book was about twice its present size. We should have to believe, also, that in this lost second part there were cases copied from terms already represented in the previous term—as Michaelmas term, 9-10 Henry III, just referred to. Such an inference seems hardly to be warranted by these not unusual marks, whose authorship, to say the least, is still something to be proved.

Though the *Note Book* itself gives us no indication, direct or indirect, as to whether or not it at one time included cases taken from these Lincolnshire and Worcestershire rolls, a considerable amount of indirect evidence on that point is to be found in Bracton's treatise. It is all in one direction—decidedly against the likelihood that Bracton was using a note book which contained cases from these two rolls. We are told that "reference is made in Bracton's Treatise itself to some of the marked entries on both rolls."⁸ Now the Lincolnshire roll is not only not represented in the *Note Book*, but it is not cited in the treatise as originally written. On that roll, if we have counted correctly, there are ninety-four marked entries. In the printed text of Bracton there is reference to one, and only one, of these cases. But this citation most certainly was not in Bracton's first text. It occurs in a later added interpolation or *addicio*.⁹ The passage is omitted in all the better manuscripts of the treatise, and is sponsored only by those which represent the least reliable of the three main traditions—the tradition most responsible for the many non-Bractonian interpolations to be found in the printed text. These facts point to some one other than Bracton as the writer of the *addicio*.¹⁰ Certainly such references to the Lincolnshire roll as may be found in Bracton does not suggest that its ninety-four marked cases, or any substantial portion of them, ever formed part of a book upon which he depended for his citations.

The Worcestershire roll, which has fifty-eight marked entries, is somewhat more closely connected with the treatise. Bracton seems to cite five cases—two of them twice over, or seven citations in all—as coming from this roll. That he had at least

7. P. lxxvii.

9. F. 298, 11, 10-17.

8. P. xi.

10. See I Bracton (ed. Woodbine) 367-370.

looked over the roll can not be doubted. Yet all but one of these seven citations are made anonymously. Now if the table of Bracton's citations prepared by Maitland is consulted, it will be seen that when Bracton cited a case now found in the *Note Book* he almost always gave the name of one or the other of the parties; only very infrequently did he cite it anonymously. In citing cases from the rolls and not in the book his practice was the same. So it happens that for any given term, the cases, whether in the book or not, are usually cited by name. Thus in the cases for Michaelmas term, 9-10 Henry III, already referred to, the name is given in each instance, whether the case comes from the book or from the roll. Such a citation by name being usual with Bracton, the anonymity of these cases cited as from the Worcester roll is all the more striking; we get the impression not only that these cases were not in a portion of the *Note Book* now lost, but that Bracton did not even have the roll at hand; he seems to be recalling them from memory. The one name which he did give, the church of St. Mary of Droitwich, was one easily remembered.¹¹ That this case, which is marked in the roll, is not fully in point with the text of the treatise, seems likewise to suggest a reliance on memory only. So also do the anonymous cases cited on fs. 54b, 246b, 332b. The first two of these citations have to do with an involved point of law which Bracton discussed at length in more than one place.¹² In two of these places, each time within the space of a page, he cites several cases bearing on the subject. Six cases, cited once, are in the *Note Book*. So also is a case cited at both places. A case not in the book, but from a term from which cases appear in the book, is likewise cited at both places. All of these ten citations are given by name. A case cited as from our Worcestershire roll is given in both places, but each anonymously. However, there is no case on the roll clearly in point.¹³ It seems clear that Bracton had neither the roll nor an extract from it immediately before him when he cited this case. To assume otherwise would force us to believe that after having carefully looked up, in book or roll, the names of the other cases, he had deliberately refused to follow the same procedure in regard to the Worcestershire case—and this at not only one, but at two places, far apart in his treatise.

The third of these anonymous cases just mentioned (f. 332b), is cited to support a statement in regard to a certain privilege of the Templars and Hospitalers in an action begun by a writ of right. We have not been able to find, either in the roll itself or in the editor's index to it, a case, or reference to a case, which fits the requirements. Though the editor would choose case 980 as the one referred to by Bracton, the choice is difficult to support. It is a case of mort d'ancestor, which would have to be begun and ended in the king's court, and nowhere else. On f. 332b Bracton is writing about an action in the county court begun by writ of right. This might be, and often was, terminated in the county court. His anonymous citation of the Worcestershire case has to do specifically with the point that the demandant had the privilege of removing such a case from the county court into the king's court — a point which would in no way apply to a case of mort d'ancestor. In making this citation Bracton seems again to have been relying on a faulty memory, and on nothing else.

All in all, the probability of extracts having been made from the Worcestershire roll for Bracton's use, seem to the reviewer to be as remote as in the case of the Lincolnshire roll.

The standard of the notes and comments which accompany the text is in general high. The comparatively few slips are almost always due to some legal technicality involved. Some of these technicalities are interesting in themselves. Thus in case 667, entry *dum fuit infra aetatem*, William brings the action against *H.* alleging that

11. Case 1271.

12. See 2 Pollock and Maitland 139 n. 3.

13. See the editor's comment to this effect for case 992.

the latter has no entry in the land except through *A.* It comes out in the pleading that *H.*'s entry was not through *A.*, but that *A.* leased to Richard who then handed over the land to *H.* the tenant. Consequently the demandant fails to recover. The editor's note says that "William should have brought his writ against Richard." But Richard was not the tenant. William was correct in bringing the action against the tenant, but he should have said that *H.* had no entry except through Richard to whom *A.* leased, etc. In other words the action failed not because it was brought against the wrong person, but because the writ of entry should have been in the *per et cui* instead of in the *per* only.

In case 859 *A.* brings a writ of right for land against a parson, who insists that the land in question is the free alms of his church at *L.*, and who says he does not wish to answer to the writ. By award of the court the parson goes without day, the court adding that *A.* may sue in another way if he wishes. The editor's comment on this case is, "The other way in which Simon must sue if he wishes to go further with the case is by an action in court Christian, since the land is free alms of the church of Leake." Now the difficulty with such an explanation is that it accepts as true the mere allegation of the parson that the land is free alms, and that it fails to take into account the fact that since 1164 a statute of Henry II has made it obligatory to settle the question of free alms or lay fee in the king's court.¹⁴ The point of this case, and of its companion case 862, would seem clearly to be that the question of free alms could not be settled by a writ of right. By "the other way" the court did not mean that recourse should be had to court Christian, but that the case should be tried by an *assise utrum* in the king's court — an *assise* which, as between the parties, would settle the right to this land. Both these cases show that this court, as Bracton and Patteshull also, would allow a layman to bring the *assise utrum*.¹⁵

Case 998 is a case of novel disseisin which brings out an interesting point. The defending parties say that the land is king's demesne, in which no *assise* lies, and in this they are supported by the jurors and the county. "And therefore by consent of the parties let it be enquired by the oath of sworn men if they disseised her after the aforesaid term." A verdict is reached in favor of the defendants, and the complainant takes nothing *per hanc juratam*. The editor's note to the case seems to make the original *assise*, through an act of judicial discretion, the enquiring body in the case; *juratam* is translated "assise." But a very real distinction must be made between the *jurata* and the *assise* in this case, one just as real as that which we have to make when an *assise* brought for freehold land outside the ancient demesne is turned into a jury, again by consent of the parties.¹⁶ Nor is there any act of judicial discretion in either case — in each instance it is compulsory that a *jurata*, as distinguished from an *assisa*, find the verdict. The point of the case, that *assise* does not lie for land in the king's demesne, is amply supported by Bracton and by other cases.¹⁷

Case 1036 is one of the not too frequent cases of debt on the rolls of this period. It discloses a local custom to the effect that if one makes profert of a tally with suit, the defendant may not deny the debt; but if one proffers a tally without suit, or produces a suit without a tally, then the defendant may deny the debt. The editor makes the observation that "apparently a tally could sometimes be evidence of a debt as well as of its payment." As a matter of fact, our early cases show us that it was quite the customary thing to offer a tally as an evidence of a debt.¹⁸ At common

14. Constitutions of Clarendon, c. 9.

15. See the editor's note to case 976.

16. Bracton, fs. 181b-206b, *passim*.

17. Cf. cases 929, 971, 1061, 1065. For a general discussion of these points see Bracton, f. 200. Cf. fs. 168, 170; Select Civil Pleas, no. 123.

18. 2 Rotuli Curiae Regis 102; Note Book, pl. 177, 325, 568, 830; Y. B. 20-21 Edw. I. 330.

law, a debt demanded by suit or tally,¹⁹ or even by suit and tally²⁰ — contrary to the local custom just mentioned — could be met by the debtor by wager of law; that is, if the tally was not sealed.²¹

Technicalities on the legal side have likewise caused difficulties at times in the otherwise excellent translation. Most noticeable in this respect is the use of "attorn." For this word a new meaning has been coined. Approximately one out of ten of the cases on these rolls has something to say about one person having made another person his attorney. In the translation this first person is said to have "attorned" the other. Such a usage has apparently resulted from the frequent appearance of the Latin *attornare* on the rolls. Among its meanings this word has both that of "to attorn" and that of "to appoint an attorney." In the index will be found scores of page references under the title "attornment," but these refer not to cases of attornment, but to attorneyship only. While attornment was not quite the same thing in thirteenth century England that it is in modern law, its general significance was along similar lines — a turning over of the services of the tenant to the new lord of the land.²² "Interrogetur," used in connection with the non-appearance of the defendant in cases of felony leading to outlawry, is regularly translated "let him be interrogated (or questioned)". But "in our records *interrogetur* = *exigatur* = let him be demanded."

There is such an unusual number of cases of particular interest on these rolls that the reviewer feels unable to do justice to them by making a selection of any reasonable length. They have to do not only with matters of law and legal history, but in almost as great measure with the intimate things of everyday human existence. For the historian they constitute sources of the highest rank. It is to be hoped that the publication of these rolls in such attractive form and under such competent editing will make all students of medieval English history more conscious of what they miss in not having available in print more of this incomparable material.

New Haven, Conn.

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POLICE ADMINISTRATION IN BOSTON. By Leonard V. Harrison. Cambridge: Harvard University Press. 1934. pp. viii, 203.

THIS admirable study of the Boston Police Department by Mr. Leonard V. Harrison, begun in 1927, is the third work thus far published in the Harvard Law School Survey of Crime in Boston.

Beginning with a description of the policing problem in Boston, Mr. Harrison discusses in a highly informed and critical manner the history of the Boston police system, the problems of selection of personnel, theory and practice in training, discipline and promotion, patrol, station houses, criminal investigation, special services and a metropolitan police system for Greater Boston. In critically examining the existing

19. Note Book, pl. 1693; Y. B. 20-21 Edw. I. 68, 222, 304; Y. B. 21-22 Edw. I. 456; Y. B. 3 Edw. II. 191; Y. B. 2 Eyre of Kent. 40; cf. Fleta, lib. II. c. 63.

20. Select Civil Pleas, no. 146; Note Book, pl. 645, 897.

21. Y. B. 30-31 Edw. I. 235; Y. B. 3 Edw. II. 46-47; Y. B. 4 Edw. II. 153-156.

22. 1 Pollock & Maitland 347-348; Note Book pl. 126, 338, 393 etc.; Bracton, fs. 81 b, 82 b.

23. 2 Pollock & Maitland 581. n. 1.

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structure of the Boston Police Department the author makes suggestive comparisons with police administrations in various other large American and European cities. The author finds the Boston police system seriously defective in methods and facilities for criminal investigation, in methods of preparation of cases for court, and in lack of departmental facilities for the education of men already in service. Agreeing with August Vollmer, he finds the present system of combining the control of vice and drugs with the control of other forms of major crime as well as petty misdemeanors to be defective and advocates that the control of vice and drugs should be placed in the hands of a separate organization.

Mr. Harrison takes issue with the Civil Service scheme of selection of personnel, preferring that applicants be first professionally rated by the police superiors, and then turned over to the Civil Service authorities for certification, rather than relying on the less informed and more mechanical method of Civil Service rating. Similarly, he suggests that promotions, increases in salaries, selection of men for coveted posts and the awarding of merit for praiseworthy service are all matters that should be adjusted professionally within the department, without reference to Civil Service. In dealing with these difficult problems the author has made a clear-headed study of all the complications involved in developing efficiency and rewarding true merit. A personnel unit under the supervision of a deputy commissioner, would, Mr. Harrison thinks, result in a vast improvement in service.

Boston, Mass.

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