REVIEWS.

Foundations of Legal Liability. By Thomas Atkins Street. Three Volumes, pages xxx, 500; xviii, 559; xi, 572. Edward Thompson Co., 1906.

In these days, out of the great mass of legal publications comparatively few emerge as real achievements in legal scholarship. The subject of this review is one of the few. Very evidently it is by an academic man and it appeals primarily to academic students of the law; but it appeals equally as much to the practitioner who desires to understand fundamental principles and to know other things than the mere tricks of the trade.

The three volumes deal respectively with Torts, Contracts and Common Law Actions. They purport to contain "a presentation of the theory and development of the common law." Throughout the author shows a knowledge of the best previous thought on the subject, a readiness to adopt and make use of it, and strength enough to depart from it on occasion and come to a different conclusion. It is impossible in a brief review to consider the accuracy of many of these conclusions, nor is it possible to criticise them intelligently without a careful study of the sources from which they are drawn.

The treatment of the subject of liability for torts in the first volume is not revolutionary, but is original and highly enlightening. The classification of torts is in some respects new and is of assistance in gaining an understanding of the reasons for liability. For instance, the author puts trespasses committed not by the defendant directly, but through agents, animate and inanimate, into one class, under the title "secondary trespass formation." This classification, besides grouping several allied subjects not heretofore logically classified, assists the author in working out his treatment of the subject of negligence. The exposition of the principles underlying liability for torts in the various subdivisions of the subject is uniformly good, particularly so in the cases of secondary trespass, defamation, malice and negligence. Perhaps the author is not wholly justified in his criticism of the doctrine that negligence consists in a breach of duty to take care. And perhaps he has not improved upon it as much as he thinks. Is it much of an improvement over "negligence is a breach of duty" to say "negligence is a sort of legal delinquency?" However, he is right in saying that the doctrine that the law imposes a duty to take care is no real explanation of the foundation of liability for negligence.

The subject of Contracts in volume two is not given as complete an exposition as is the subject of Torts; but the results obtained therein by the author are in part more startling and original. Volume two contains four parts and an appendix. The author treats first the history and general principles of con-

tract; second, the history and theory of the law of bailment; third, the history and principles of the law of bills and notes; and fourth, the law of representation or agency as affecting the relations of principal and agent and master and servant. The appendix contains the negotiable instrument's law with annotations. We may dismiss the second, third and fourth parts with the remark that they are adequate and accurate, but not new and unusual. The treatment of agency is much like that of Professor Huffcut. The historical treatment of bills and notes is deserving of especial commendation.

The first part alone of the second volume ought to be sufficient to establish the author's reputation as a brilliant thinker in contracts. After two chapters on the early history of contract, he plunges into an investigation of the doctrine of consideration, its foundation and its character, necessarily involving a discussion of the actions of debt and assumpsit. It is here that he departs most widely from prior accepted conclusions. Consideration in the sense of a detriment to the promise is required only in the case of unilateral contracts. Bilateral contracts acquire their binding character from *consent* alone, and not at all from consideration in the sense of detriment. He abandons the vain effort of determining how it is that a promise is binding because it is a detriment and is a detriment because it is binding. A third form in which consideration for a promise may appear is a pre-existing legal obligation or debt, the doctrine of consideration as a detriment to the promise being here again abandoned. No doubt these conclusions will find strong opposition on the part of those who have been at so much pains to establish the accepted theories of consideration.

The author's mastery of the distinctions between unilateral and bilateral contracts is very gratifying to the reader. His treatment of the foundation of liability on a bilateral contract is beyond question a brilliant achievement in constructive reasoning. He lays down the principle that the obligation of a bilateral contract is based upon consent alone, but he limits the number of enforceable bilateral contracts to those consisting of mutual promises to do acts which, considered wholly apart from the circumstances of the individual case, would be a detriment to the actor. This limitation necessarily destroys the simplicity of the author's construction, but is of course required by the long-established course of judicial decision. By means of this principle the author explains the seeming paradox that a promise to perform an act may be valid consideration for a promise when the actual performance itself would not be. He asserts that a unilateral promise is, for historical reasons, not enforceable unless the act or forbearance given in return amounts to a detriment, but that bilateral promises are binding purely on consensual grounds. However, even though we should agree with him that the basis of liability on bilateral contracts is consent and not consideration, still it seems doubtful whether we should not still further limit the number of enforceable bilateral contracts to those

consisting of mutual promises to act or to forbear, which act or forbearance *will amount to a detriment in the individual case.* This would bring the rule very close to that constructed by Professor Williston, though it would avoid the necessity of showing that the making of a promise is in itself a detriment. It would further be in harmony with those very numerous American decisions to the effect that bilateral promises are invalid where one of them is to do that which the promisor is already bound by contract to do. The author does not give an adequate review of these cases. Instead, he places conclusive weight upon such decisions as *Scotson v. Pegg*, 6 H. & N. 295, and *Abbott v. Doane*, 163 Mass. 433.

The author invents (Volume II, page 74) the term "incompetent consideration" for the doing of an act which the actor is under a legal obligation to do. His treatment of this is not altogether convincing. He adopts Sir F. Pollock's reasoning that the doing of such an act is no consideration because it is no detriment to the doer. Later, however (Volume II, page 99), in supporting the doctrine that part payment of a debt is not sufficient consideration for a promise to forego the residue, he cites Professor Ames to the effect that the doing of any act is such a detriment to the actor as will support a promise, and adds: "We admit that payment of part of a debt is an act and that such act furnishes a consideration for the promise to forego the residue. The point, however, is that the consideration is incompetent." This appears to say, part payment is incompetent consideration because it is no detriment, and it is no detriment because it is incompetent. The question turns on whether part payment is actually a detriment, and there is much to be said in favor of the position of Professor Ames.

The author's conception of legal duty as an adequate substitute for consideration in the sense of detriment causes him to classify many obligations as truly contractual even though they are not assumptual. It enables him to throw a clear light upon the situation existing with reference to promises for the benefit of a third person, the chapters on that subject being a distinct addition to its literature. It further requires him to re-classify the subject of quasi-contracts. Among the quasi-contracts he places "promises implied as of fact." It appears to the reviewer that the author's treatment of this term is not altogether clear. Actual, definite promises may be made by conduct as well as by words, in which case the obligation assumed is certainly not quasi-contractual. Yet such promises would seem to be "promises implied as of fact." Of course, the author is right in classifying as quasi-contractual those obligations created by law because justice demands it, even though an actual definite promise cannot be found in the conduct of the parties. But in these cases there is no "promise implied as of fact." Notwithstanding this possible obscurity, the author's basic idea is correct, and his conception of legal duty as contractual is second in importance only to his theory of bilateral contracts.

Of his work on the doctrines of accord and satisfaction the author, in his preface, says: "We have, it is thought, succeeded in giving a rational and consistent account of this subject from beginning to end." It is beyond doubt that in the main his work bears out his statement; but it appears to the reviewer that the author has failed to give due consideration to the distinction between an executory accord, looked upon as a contract in itself and as the basis of an action at law, and an executory accord looked upon as a satisfaction of the prior obligation and a bar to an action thereon by the creditor. It may well be that an action lies for failure to perform an executory accord, even though there remains a right of action on the original obligation. However, the author's account of the historical basis for the rule that an executory accord is no satisfaction is beyond criticism; and his description of the doctrine as one of "the two greatest mysteries of the common law," and as "a fossil that has come down to us from a previous legal formation" is very apt and interesting. In chapter xiii of volume two, the author sets forth in convincing fashion the doctrines of novation, establishing that "in its essence the novation is an executory accord, and the principle underlying it is at war with the hoary rule that the executory accord is invalid."

Volume three treats of the forms of action at common law. It is undoubtedly true that knowledge of these actions and of their history is necessary to an understanding of the substantive common law, and that in getting rid of these forms jurisprudence lost as well as gained. The author's discussion of the origin and scope of the various remedies at common law is entirely proper and satisfactory.

The entire work is written in a clear and entertaining style. The volumes are in dignified form, with good paper, good margins and legible, errorless type. The substance of each paragraph is indicated in notes printed on the margin. Volume three contains a table of some four thousand cited cases and a very full index. In his preface the author frankly exhibits a calm confidence that his work is original and well done. This confidence is justified. A. L. C.

Elementos de Derecho Internacional Privado. Third edition. By Manuel Torres Campos. Madrid, 1906. Pages 549.

With what was contained in the first edition of this work, issued in 1893, has been incorporated much of what was in the subsequent treatise from the same pen, on the Foundations of Extraterritorial Legislation (*Bases de una Legislacion de Extraterritorialidad*, Madrid, 1896). The present edition omits much of the bibliography of the earlier ones and adds many references to the publications of the last ten years, including the doings of the four Hague Conferences for the Promotion of International Private Law, of which the author was a distinguished member.

His discussion of the choice to be made between personal and territorial law as the criterion of individual rights and duties is

especially interesting to Americans. Europe, he says, naturally adopted the former in its reaction against feudalism (page 91). The United States as naturally rejected it, because it was a country of immigrants (page 90). Emigration on a great scale, a universal phenomenon belonging only to modern society, has brought a new factor into the law of the world—the mobilization of the human race (page 92). Wherever a country receives large accessions of this sort it inclines to the supremacy of its own law; if it has few, it contends for that of the law governing the person. Thus Italy, with less than 60,000 foreign residents, but which has sent forth two millions of her people to live elsewhere, stands strongly for the latter (page 93). The Argentine Republic, on the other hand, in which the population of the chief city—Buenos Ayres—is more than half foreign, follows the United States in insisting on the former (page 94). The maxim for both nations, he declares, is "No one is a foreigner in America" (page 97).

The work of several of the Spanish and Spanish-American Congresses of jurists and economists, held in Spain in the last few years, is described, and shows the strong attachment still subsisting between Spain and her former American possessions. Such a "social and economic congress," held at Madrid in 1906, under the auspices of the "Spanish-American Union," voted to recommend the ratification of all the treatises of Montevideo (of 1888–9) in regard to matters affecting private international law, both by Spain and by all the Spanish-American states which had not already signified their adhesion (page 141). The ties of language, religion and history are often stronger than any that wars of independence can make or break.

Professor Torres Campos is of the opinion that there should be no real difficulty in the establishment of a uniform law for the world as to bills of exchange, since no subject can be freer from national prejudices, or from all bonds imposed by moral, religious, or social ideas, while none of the differences relating them in the present laws of the nations depend on reasons that can be called fundamental (pages 385, 386).

Whatever point the author discusses, he illumines by his clarity both of thought and expression. It is to be regretted that, like so many works of European jurists, the volume is without an index.

S. E B.

The Elements of Jurisprudence. By Thomas Erskine Holland. Tenth edition, Oxford, 1906.

Holland's Jurisprudence, first published in 1880, marked a new phase in English legal literature. The success with which Prof. Holland then analyzed the theory and subject matter of law is quite sufficiently attested by the fact that since the first edition appeared his book has had no serious competitor in the distinctive field of formal scientific statement of the principles underlying modern law, and the classification of rights recognized in modern egal systems. That a tenth edition of a legal treatise which does ot appeal directly to practitioners, has been called for in twenty-

five years, is in countries where the common law prevails, somewhat remarkable. The book is so well known to those who make any use of that class of legal literature that any general analysis is not now required. The present edition is about one-fifth larger than the first edition and about one-tenth larger than the eighth; a very modest increase in size and quite largely accounted for by the enlargement of the citations in foot notes. Full use has been made of recent cases, the tenth edition containing a third more citations than the eighth edition published in 1896. The chapters upon "The Sources of Law," "Analysis of a Right," "Antecedent Rights 'In Rem,'" and "Antecedent Rights 'In Personam,'" are those in which the changes have been most material, whether the present edition is compared either with the eighth or first editions. These changes are not, however, so much changes in substance as more elaborate citations or expansions of originally brief discussions.

Since the first edition the chapter on Sources of Law has been somewhat enlarged. Religion has been added as a source, but the larger editions have been made in the discussion of adjudication and equity. In Chapter VIII, Analysis of a Right, the subject of "acts" was in the 1886 edition first worked out fully from the point of view of the will, consciousness and the manifestation of the will, and is a highly practical discussion. In Chapter XII, the subject of the agreement in contract was also expanded in 1886, and what was termed the "newer theory" of "the reasonable man" as the one to determine the construction to be put upon the acts of another with reference to his intent, was recognized as the luminous principle which "at once sweeps away the ingenious speculations of several generations of moralists." (p. 256-7). This is illustrative of the adoption of external standards for the determination of legal intent. This theory was elaborately worked out by Mr. Justice Holmes in his Common Law, published in 1881. In the chapter on Public Law there is a new subdivision "Civil Precedure by and against a State."

Upon the whole it is unusual that an institutional writer should, after twenty-five years development in law by formal codes, miscellaneous legislation, adjudication and exhaustive discussion of the history and theory of law in various fields by such writers as Dicey, Pollock, Maitland, and our own Holmes, find so little necessary to be done to retain for his book the first place in the literature of elementary jurisprudence. This fact is, in itself, the best answer to those who question whether legal systems are collectively capable of formal scientific treatment. Some of his classifications have been criticised, but the author admits that in certain respects this is matter of convenience and not of fundamental theory. To the writer the earlier part of the book in which the nature of law and of legal right are discussed with great clearness, has always seemed the most valuable.

The line of separation between conduct as regulated by law, and conduct as regulated by the rules of morality and religion, is drawn with a sure hand. The result is that the book is not spec-

ulative nor a priori in method. Those with a taste for the metaphysic of law, as to its origin, validity or purpose in the abstract sense will find little. It is an actual system that is scientifically treated, and not a theoretical, and this element of concreteness, of actuality, is doubtless the element that accounts for the favor with which the book has been received by English and American students.

But words of commendation are not needed for a book in its tenth edition. The lawyer with any scientific or philosophical tendency, who has not read and studied Holland, has missed a valuable aid to his general understanding of the subject of his profession. *E. B. G.*

A Treatise on the Law of Municipal Corporations. By Howard S. Abbott. Sheep. Volume 3, Pages XIX, 3045. Keefe-Davidson Company, St. Paul, 1905.

This topic of the law has had such a variant growth, developing in different parts of the country to meet the conditions as they there arise and depending in many instances upon the legislative action of bodies made up of men of all degrees of legal learning, as well as all degrees of common sense, that it is difficult to classify the subdivisions of the subject in a manner the logic of which will appear to all. Judge Dillon, in his work on the subject, seems to have based much of his arrangement upon general historical development, the author here discussed appears to have made his arrangement, wherever possible, upon the basis of an imagined composite, or typical municipal corporation, taking it from its original inception up through its growth and future life. From a legal standpoint this is an improvement, as a lawyer's mind more readily follows the sequence of events in a properly conducted legal procedure, than it does the actual, though sometimes illogical, sequence of events in history.

This work is, in a great measure, to Municipal Corporations what Wigmore is to Evidence, Thompson to Negligence and Page to Contracts. It is not entirely analagous to any of these works, and could not be. The peculiar and unique condition of municipal corporation law prevents that. The work does not seem quite as exhaustive as either Wigmore or Thompson, but is more nearly like Page. It differs from Page in that it has in its notes more quotations from the important cases, thus putting the lawyer in possession of the basic law even in the absence of a good library of reports. The author realized that of those lawyers, the main part of whose practice is in municipal corporation law, the majority dwelt in the smaller towns and cities, where law libraries containing complete files of all the reports are not easily accessible, and by wisely following the example set by Judge Dillon of inserting many and lengthy case quotations, he has made his work especially valuable to this class of lawyers. It would be well for every such lawyer to have this work as well as that of Dillon, for though of necessity they do to a certain extent cover the same ground, they are by no means entirely co-exten-

sive; for where another author has given a good discussion of a sub-topic, the present author instead of giving a long discussion, merely cited, or possibly gave a short quotation from, the other work, and a very thorough knowledge of former books on the subject is shown.

The style of this book is not the same as that of Dillon's. Judge Dillon's work contains more meaning per word, but it requires earnest and closely applied study to extract the meaning, while in this work of Mr. Abbott's the sentences are not as a rule quite so meaty, but the principle expressed is generally more easily grasded at first reading. Judge Dillon seems to have put more of his heart into his work, also more of his personal opinions, while Mr. Abbott has to a great extent stated the law and not his personal opinions thereon. The place where his individual ideas most frequently creep in is in the hypothesis from which he deduces the reason for the law, as for example at page 685, "The less government they have, the more independent and prosperous they are, etc," is used in explaining the rule against Municipal Corporations engaging in private enterprises. In general, Mr. Abbott's style seems studied and academic, rather than spontaneous.

Many authors make the mistake of trying to harmonize decisions that are not at all in accord. It is, of course, nice to think of our chosen profession as the great, consistent and logical set of authoritative rules, which in theory it of course is. But practically it is far from that. In fact the harmonization of the rules is, and has been, the life-work of many thousands of judges, and they are far from perfecting their task. For a single author to attempt to work out a perfectly consistent set of rules and have them law is impossible. Mr. Abbott has been very successful in steering clear of this shoal-Charybdis, but in doing so has approached its Scylla, the leaving of apparent rather than real inconsistencies unexplained. For example, to the mind young and seeking in the law, it is somewhat disconcerting to read in one sentence that "the expense, etc. . . . . must be paid wholly by the state," and then to follow on into the next sentence and discover that " by law, however, a certain portion of the expense may be chargeable against the county or district, etc." (p. 2461.)

The two hundred page index is very full and complete and almost large enough to require a sub-index. In the several p oints looked up through it, by way of experiment, it seemed to lead one by a path shorter than is usual to a discussion of the points sought. However, this matter of close relation between the index and point sought, is one that is difficult to judge by experiment; it takes the heat and zest of seeking law for an actual conflict to bring forcibly to one's attention the great virtue of an index, or its inadequacy, as the case may be.

On the whole, this work, although not the best of its kind, is one upon which an enormous amount of very well directed work has been spent, and the possession of it will save many a lawyer the necessity of doing that work, when he desires some part of it for a case. *S. W. B.*