BOOK REVIEWS

Select Cases before the King's Council. Edited for the Selden Society by I. S. Leadam and J. F. Baldwin. Cambridge, Harvard University Press. 1918. pp. cxvii, 156.

A collection of thirty-nine selected cases covering the period 1243-1482. Eight of these cases were left by Mr. Leadam in completed form, with texts, translations, and footnotes. On the death of Mr. Leadam in 1913, Professor Baldwin took up the work and carried it to completion.

In making a choice of cases, the editors aimed to present such a variety as would illustrate as many problems of law and procedure as possible. In point of diversity of material the effort was successful. Nevertheless we cannot help asking the question, which we do not attempt to answer, whether more points of law might not have been brought out? As it stands, the volume is historical throughout, and only secondarily, and to a slight degree, legal. Perhaps this was to be expected from the very nature of the subject, which lends itself most readily to the historical form of treatment—"It was the peculiar function of the council to deal with cases of emergency, especially those beyond the reach of the common law or its means of enforcement. These formed no class, but a series of kaleidoscopic variety, which shifted according to the needs of the particular time. Different from any other court there was in the beginning no field of jurisdiction belonging peculiarly to the council. Contrary to a current impression, it did not receive criminal in preference to civil cases. In fact it gave attention to anything that, because of the incompleteness of the law, required in whole or part exceptional treatment" (p. xxvi). The cases chosen would bear out this statement.

The introduction treats at considerable length, and in an excellent manner, a series of related topics—the council as a court, its relation to other courts, its jurisdiction, and its procedure. Nor is it a disadvantage that there should occur from time to time matter from the editor's earlier book, *The King's Council,* which is used not too frequently and to good effect. There are two subjects to which the discussion must ever and anon of necessity revert, the court of star chamber and the court of chancery. The council was the antecedent of the court of star chamber. And "from the beginning the council was broadly a court of equity, in that its action was a dispensation of the royal prerogative; it received cases on petition, it showed mercy and leniency in the application of the law, it admitted suitors legally disabled, it required specific performance in the restitution of goods and chattels" (p. xxxii). On this basis, two of the most insistent questions—which both the introduction and the cases help to answer—are, what was the connection between the council and chancery? How far did the council share in the development of the equitable jurisdiction of the chancellors?

The second part of the introduction is made up of notes on the selected cases. Here again there is a well-arranged accumulation of historical facts, but there is no commentary in the legal sense.

Except in one minor detail which will be noticed later, the cases themselves (the material is in both Latin and French) have been edited with a noticeable degree of care. The footnotes to the cases are ample, perhaps in places rather too ample and too much in detail, if the relative value of cases and footnotes is considered. However, for those whose interest is primarily in the cases themselves as such, an appendix gives a list of twenty-six other cases published elsewhere.

We do not wish to give anything less than hearty commendation for the very evident care that is shown in the editing as a whole, nor do we wish to detract from a substantial piece of work by making too much of what are in some respects trifles. But from the standpoint of technical bookmaking, the volume falls short of perfection for lack of one of those details which go to make up perfection. The matter is of importance beyond the limits of a single book; it is concerned with the general question of form in the editing of medieval documents; it is worth some attention. In this book the medieval spelling of the Latin and French has been retained. Apparently there was an effort to make uniform the use of those two troublesome letters *u* and *v*. But the different editors did not hit upon the same general plan. The first decided to use *v* as an initial *u* or *v* throughout (*vt, vbi, vel*), and *u* as the medial letter throughout (*breue, aduersus*). For his, the larger, part of the work the second editor chose the usual modern forms of the initial letter (*ut, ubi, vel*), and retained the medial *u* throughout, in theory. In appendix I, however, the method of the first editor was again adopted. Thus there is no uniform scheme for the use of *u* and *v*. But further yet, the use of these two letters is not uniform within the general plan of each editor. Where the first scheme is employed we get *balliuus, avunculus, consuevit* (p. 5); *innodauit, usurpare, vlterius, consideraverit, parva* (p. 6); and many other instances of the same lack of uniformity on pp. 7, 8. The second plan does away with any difficulty from the initial letter, but medial *u* or *v* continues to cause trouble. Thus (p. 22) we have *seruus seruorum* preceded by *universis* and followed by *salvo,* within a space of twelve lines. This lack of uniformity in this respect permeates the whole main part of the book. Not a single page that we have examined is free from it; it is worse on some pages than on others (as see p. 1, p. 44). Even the first appendix is affected by it—*universis* (p. 121), *adversus* (p. 122), *ordinacionibusve privatis* (p. 123). Proper names show it—*Musgraue* and *Musgrave* (p. 60), *Neville* and *Neuille* (p. 54, p. 56), *Danvers* and *Danuers* (pp. 97-101). The French has suffered less than the Latin, yet even here we may find *deuenir* and *diverses* (p. 61), *auaunt* and *perveient* (p. 9).

Many another modern printed volume of medieval Latin has failed in this same matter of *u* and *v*. The reviews have been silent on this point; perhaps silence on the same matter would have been better here. But the present reviewer, wholly aside from the book under discussion, cannot forego this opportunity of stating his deep-seated conviction that one who has become accustomed to the modern use of *u* and *v* can hardly hope to make a uniform text of a medieval Latin document except in either one of only two different ways. He may accept the modern use of *u* and *v,* or he may follow the method adopted in *Bracton's Note Book,* and use *v* only as the initial consonant in proper names. It seems psychologically impossible to arrive at absolute uniformity in any other way.

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The Workmen's Compensation Laws of Virginia and West Virginia. Compiled by James F. Minor. Charlottsville, The Michie Co. 1919. pp. xci, 691.

Workmen's compensation law is best treated as a local subject rather than in a form which purports to cover the system in the abstract and to include the law of all jurisdictions. It is all statutory and what is a vital principle in one state may be non-existent in another. Even the underlying theories take on the varying forms which the legislatures have given them. In the preparation of the present volume the author has had an opportunity which is generally denied to others, as the commercial demand for a local work is rarely sufficient

to justify the undertaking. His modest preface is written with a freshness and snap which make one turn to the subsequent pages in the hope of finding something out of the ordinary.

The book begins with a general discussion covering nineteen pages. The next fifty-three pages are given up to a reprint of the West Virginia act. The remainder of the book reproduces the several sections of the Virginia act and under each a repetition of the relevant position of the West Virginia act and a citation of authorities from other states. This statement of the parts of the book is the result of quite a little study which might have been saved by a clean-cut note following the title page.

An introductory chapter would naturally concern itself with the history of the act, a characterization of its spirit and a statement of broad underlying principles enunciated with accuracy. As it is worked out, it is a jumble of principles, near principles, pseudo-principles, mere casual incidents, and discussions of points obviously peculiar to other states. It opens (p. 1) with this remarkable sentence, "An employer operating under the Workmen's Compensation Act is liable for all injuries sustained by his employees acting within the scope of their employment, regardless of questions of negligence, proximate cause or accident." This is a pretty tough letter of introduction to the reader. What is meant by the phrase "within the scope of their employment"? It is not customarily employed in compensation legislation and no reference is made to such a phrase in the law of either Virginia or West Virginia. From the index we get a definition from Illinois and the rule as to how it is determined in Michigan. The phrase obviously has a broad meaning and must exclude the limitation of liability to injuries "arising out of the employment." We find, however (p. 113), that this familiar limitation appears in the Virginia act—sec. 2 (d)—and that in West Virginia (p. 48) the injury must be one "resulting from . . . . employment" (sec. 25).

Is not Judge Gager correct in his view, noted in the opinion in *Fiarenzo v. Richards* (1919, Conn.) 107 Atl. 563, that the use of the phrase "proximate cause" is of doubtful value in discussions of the meaning of a compensation act which does not contain it and which proceeds upon a different series of conceptions than those underlying the law of negligence? Presumably when the author says that there is a liability "regardless of questions of . . . . accident," in construing an act which says that "personal injury shall mean injury only by accident" (p. 113), he is using the word "accident" in a different sense. As he does not tell us, however, what that sense is, his statement is meaningless. What value is added to it by the citations from Illinois, California, Texas and Kentucky? In the next sentence we see a gleam of a principle and we look for the basic idea, for the *raison d'être*. We are told, however, only that "the Workmen's Compensation Act is based upon the principle that the employer should pay certain fixed amounts for accidental injuries irrespective of negligence." Is not this in line with defining the doctrine of a church as that the members should pay their pew rents?

Two pages on, we are told that if the contract of employment is not in writing, "its terms are to be ascertained from the evidence reported by the committee on arbitration and the cross-examination of the alleged employee in regard to his work and relation to the alleged employer introduced at the hearing on review" and a Massachusetts case is cited. Without reading through the acts of Virginia and West Virginia with reference to the details of practice —no references to which are given and as to which the index gives little aid— the guess may be hazarded that it is extremely improbable that the forms of procedure in those states are enough like those of Massachusetts to render the statement either accurate or valuable. If both accurate and valuable, it is a most fragmentary and narrow statement of the law of evidence as applicable

to this subject. These illustrations are typical of the entire contents of the introductory chapter.

The opening discussion of the two acts treated together (p. 76) is devoted to a statement as to the meaning of the word "subscriber" as used in the Massachusetts act. It is hard to see why the Virginia or West Virginia lawyer should be curious on this subject. All through this discussion, and in fact throughout the book, there is one very vital defect. The decisions of other states are of interest only as they lay down general principles or construe phrases similar to those of Virginia and West Virginia. The citation of a large proportion of the cases is rendered useless by blind references to statutes. If an attempt is made to state a general principle, it is robbed of its value by a reference to some legislation, probably inaccessible, without any clue as to what it is and what effect it has upon the general principle enunciated.

The discussion of individual questions, as for instance, sun stroke, which may be taken as an example, is, when general principles are not obscured by blind references to statutes, of some value as giving a few of the cases which one may look up. The citations are not inclusive, nor do they represent discriminating selection. They, however, point the way. Much allowance should be made for the fact that, as the author frankly says, the book has been hastily prepared. Its great trouble is that it represents industry rather than thought. If the author had stopped to think what use would be made of each of his citations and what meaning would be conveyed by each of his sentences, his book would have been better.

The question naturally occurs as to whether after all, the book was worth writing, and whether it is useful. These questions will have to be answered in the affirmative. Almost all of the books on compensation are upon much the same model as the present one, and few private libraries contain them. As to the encyclopedias, we are between hay and grass; the earlier ones were published too early and the later ones were begun too late to be of present assistance. The various series of annotated cases contain that haphazard treatment of isolated questions familiar to users of such series. They are sometimes useful if they hit the point, but they generally do not. If one has patience and time enough he can dig the authorities out of the many volumes in the American Digest Series, but comparatively few libraries contain them. After all, therefore, the book fills a long felt want although it fills it pretty indifferently.

G. E. B.

The State and the Nation. By Edward Jenks. New York, E. P. Dutton and Co. 1919. pp. viii, 312.

Mr. Jenks' book is primarily an evolutionary study of the origins of political institutions, intended for the general reader rather than the scholar, and confessedly making no effort at evaluation. As such it is readable, and conveys a good deal of interesting information, though the attempt to popularize is not always in the interests of precision of thought. The least successful portion is the account of primitive and patriarchal institutions which occupies a full third of the volume. This is a field in which everybody is at liberty to do his own guessing, but the author's guesses are in general not such as to inspire much confidence; there is little evidence of any intimate appreciation of the peculiarities of savage psychology. Thus whatever the origin of the puzzling institution of totemism, it seems highly improbable that it will be found in anything so simple and rationalistic as a device for guarding against marriage between near relations, due to the discovery somehow by the savage mind of the evils of such a practice. And one hardly knows what to make of such a suggestion

as that the widespread legends of a virgin birth may be due to prehistoric racial memories of a time when a-sexual generation was the rule. When he gets to the period of medieval and modern institutions—more particularly in England—Mr. Jenks speaks with much more authority, and his account of the gradual development of the present forms of political life and action is the best part of the book; though even here the explanatory conjectures seem occasionally more facile than convincing. Mr. Jenks however is considerably more successful in dealing with the facts in detail, than he is in throwing light on the larger principles of political development; indeed from the standpoint of a philosophy of history the book is perplexing. Especially surprising is the lacuna between the account of the more general features of a patriarchal society and the beginnings of modern Europe; and the consequent absence of any discussion, and almost of any mention, of the Greek and Roman states, to say nothing of the great empires of the East. Indeed the reader is apt to carry away the impression, whether intended or not I find it hard to make sure, not only that the conception of a State, which quite properly is distinguished as one special form of social institution, from the Community or the Nation, is inseparable from that of military headship but that States did not exist until the barbarian overthrow of the Roman Empire. The book concludes with two chapters which lie somewhat outside its general evolutionary plan, one a logical analysis, good so far as it goes, of the various types of state, and the other a brief glance at some of the recent proposals of change in the political field—the idea of a league of nations, proportional representation, and the more prominent tendencies of industrial radicalism. The comments here are judicious enough, though of course little can be done in so narrow a compass except to sketch the nature of the proposed programs. The writer indicates a greater sympathy with the ideal of Guild Socialism than might perhaps have been anticipated from other parts of the volume.

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The Life of John Marshall. Volumes III and IV. By Albert J. Beveridge. Boston, Houghton, Mifflin Co. 1919. Vol. III, pp. x, 644, Vol. IV, pp. xiii, 668.

The first two volumes of Mr. Beveridge's great work brought his hero only to the threshold of his real career; the two volumes before us consequently cover the entire period of Marshall's chief justiceship, and so are of especial interest to lawyers.

The first half of Volume III deals with the Republican assault on the Judiciary, of which Marshall's decision in *Marbury v. Madison* was an episode. In this connection Mr. Beveridge has unearthed a document of capital importance, a letter from the Chief Justice to Justice Chase, written while the latter's trial for impeachment was pending. In it the writer, evidently in great trepidation for the safety of the Court, proposes in effect that Congress give up its powers in relation to impeachment and receive in return the right to review the decisions of the Supreme Court! (See III, pp. 176-177.) It should be noted in passing that this letter is evidently misdated January 23, 1804, instead of 1805.

The second half of Volume III is devoted for the most part to the Burr Conspiracy and Burr's trial for treason. On the question of whether an "overt act" was found against Burr, Mr. Beveridge joins his voice to the chorus of approval in the addresses that were compiled by Dillon on the occasion of the Marshall Centenary. It is indeed curious that so many eminent and excellent lawyers should have become involved in so deep befuddlement regarding a comparatively clear issue. Marshall's position may be justly stated thus: admitting *arguendo* that the common-law doctrine that in treason all are prin-

cipals was controlling, that the assemblage at Blennerbassett's Island, proved by several eye-witnesses, was an act of war, and that Burr had procured it, he yet ruled that Burr must be acquitted because his procurement of the assemblage was not testified to by two eye-witnesses. It is submitted that this is an utterly untenable position. The common-law doctrine has to-day been extended by statute to many other offenses, and its application is perfectly clear. It may be stated in the following words from a decision rendered only the other day by the Indiana Supreme Court: "One who connects himself with an existing conspiracy and joins in carrying out the common purpose and design will be deemed, in law, 'a party to every act which had before been done by others and a party to every act which may afterwards be done by any of the others in furtherance of such design.'" *Roberts v. State* (1919, Ind.) 124 N. E. 750, 752. Section 4 of Title I of the Espionage Act adopts the same principle. If, therefore, this principle applies to treason by levying war, and Marshall did not venture to say that it did not, the assemblage at Blennerbassett's Island was Burr's overt act, provided he was a party to the conspiracy which produced that assemblage.

But, Mr. Beveridge urges, the common-law doctrine leads to "constructive treasons." The answer is, that the escape from constructive treasons is not a rule of proof exonerating procurers of treason but a proper definition of treason itself. The treason with which Burr was charged is one specifically recognized by the Constitution, namely, the levying of war against the United States, and as we have seen, Marshall did not deny that the assemblage at Blennerbassett's Island constituted an act of war. The fact of the matter is that it is Marshall himself who is chargeable with introducing, in this very case, the doctrine of constructive treason, in his futile efforts to save himself from inconsistency. Thus in the earlier case of *Ex parte Bollmann and Swartout* (1807, U. S.) 4 Cranch, 75, 126, Marshall had said: "If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." In his opinion in Burr's case he endeavors to explain away the natural force of these words, by treating the phrase "perform a part" as demanding an individual "levying of war" on the part of the performer. In other words, a part "however minute" may be an "act of war"! If this is not constructive treason, it would be difficult to imagine what is. Nor is Mr. Beveridge's second argument for Marshall's position more persuasive. The essence of it is embodied in the following statement from Marshall's opinion: "If in one case the presence of the individual makes the guilt of the [treasonable] assemblage *his* guilt, and in the other case the procurement by the individual makes the guilt of the [treasonable] assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses." Appendix, note (B.) (1808, U. S.) 4 Cranch, 470, 499. The answer obviously is that it is not presence—that, indeed, may be entirely innocent—which fastens the guilt of a treasonable assemblage upon an individual, but proof of the individual's participation in the conspiracy which produced the assemblage. That fact being shown by legally acceptable evidence, the assemblage, by the common-law doctrine, becomes the individual's own overt act, and the only overt act required by the Constitution, which knows absolutely nothing about "component parts" of overt acts.

The reader of this review may very well feel, however, that I am dwelling at disproportionate length on a somewhat incidental feature of Mr. Beveridge's splendid work. I admit the charge; my apology is my interest in the issue raised. Of the great merits of these volumes as a whole there can be no question. Through an always interesting, often dramatic narrative is skilfully winnowed

the results of the widest research, and the final product is the finally authoritative account of Marshall's great work, furnished with its proper historical setting. Mr. Beveridge has made two fames grow where one grew before, for his own name is henceforth inextricably linked with that of the great Chief Justice.

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The Actual Government of Connecticut. By Nancy M. Schoonmaker. New York, National Woman Suffrage Publishing Co. 1919. pp. 122.

This is a manual designed for the use of "High Schools, Colleges, Normal Schools, Clubs and other groups in which an interest in Government should be aroused," and especially the women, "whose enfranchisement may confidently be expected very soon." The title chosen does not seem happy. It leads one to expect a description of the practice rather than the theory. What one finds is material from the statutes and printed documents. This does not always show the practice. For example, in at least one large town, blanks for application to be made a voter are not used. The practice is much less formal. In no case did the reviewer notice a description of the actual as distinguished from the theoretical government.

It also seems unfortunate that the author has accepted unreservedly a theory of the historical relation of town and colony and state in Connecticut which has been repudiated by the latest and best historians, viz., Professors C. M. Andrews and Farrand of Yale and the writer of the article on Connecticut in the last edition of the Encyclopedia Britannica.

Apparently the author has not lived long in Connecticut. This has some advantages, for it gives a basis for comparison with conditions elsewhere. It has the disadvantage of unfamiliarity with the unwritten history of the state. For instance the statement (p. 39) that boards of finance, established in many of the towns, are proving adequate for the handling of such matters as formerly came under borough dispensation. Actually they are designed for no such purpose, but to constitute a check upon hasty or ill-advised action by towns in town meeting or by the legislative departments of cities, etc.

Lack of familiarity with law leads to odd mistakes, as, where it is stated (p. 57) that cases are appealed to the Supreme Court "on questions of legal procedure, that is, the court only determines whether or not a case has been conducted without error in the lower court" and where the description of the process of having one's personalty taxed where rates are low (p. 108) omits entirely the element of domicile.

On the whole, however, the work is well done, and should be of great assistance to anyone who will read it carefully.

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