

# Book Reviews

**FREEDOM OF THE SEAS.** By Earl Willis Crecraft, with an Introduction by Edwin M. Borchard. New York: D. Appleton-Century Company. 1935. pp. xx, 304.

PERHAPS the chief fault of historical writers has been their propensity to exaggerate the part that reason has played in human affairs. This propensity may be largely due to their personal detachment. In his inimitable account of how he ceased to be a vegetarian, Benjamin Franklin pronounces man a reasonable being because he can find a reason for whatever he wants to do. Statesmen when meditating in the closet vast schemes of public benefaction can hardly help thinking of the humors and the predicaments—the brain storms as well as the dust storms—of particular constituencies. Relatively few have had the strength of conviction, the personality and the unselfish disregard of temporary reverses to breast popular clamor and subdue it. Modern inventions have made it more difficult to do this. The greatest boon ever bestowed on the “rabble rouser” is the radio. No less useful is it to the organized and well financed propaganda, devoted to the sale of political nostrums, international and national, as well as of cosmetics, tooth pastes and infantile soothing syrups. By such means are created the mass psychologies which, like the rage of the vulture and the love of the turtle, “now melt into sorrow, now madden to crime.” Woe betide those who breast them in the latter stage!

The author of the present work has deliberately exposed himself to this peril. His very thesis, although it figured among President Wilson’s Fourteen Points, is now anathema to certain organized groups, which ruthlessly assail those who venture still to defend it. Immediately upon the appearance of the book the fusillade began, and this in spite of the fact that its author has merely made a candid statement of the elements of a problem which requires for its solution the most careful, the most comprehensive and the most unbiased deliberation. Nor is it a new problem. It is, as informed persons well know, as old as sea-borne commerce; and the questions it involves can no more receive in detail a permanent and final solution than can other questions of commerce, whether by land or by sea, whether domestic or foreign.

This fundamental truth is implicit in the title of Professor Crecraft’s first chapter—“The Great Compromise.” To the followers of shibboleths, the exemplars of mass psychology, the very word “compromise” is odious, because it is supposed to imply a sacrifice of principle. But real students of the law, whether national or international, know better. Law-making is itself a process of compromise between conflicting views and conflicting interests. It is a process of adjustment, conducted in the spirit of the maxim of the Roman law that one should use his own right in such a way as not to injure that of another.

Professor Crecraft has evidently given offense to some by saying that, while the United States is normally among the nations that contemplate peace and neutrality, England is more inclined to contemplate a condition of war and the exercise of control over the sea-borne commerce of neutrals. Heretofore this has been regarded as a self-evident consequence of Great Britain’s insular situation and the number and extent of her overseas possessions. Until lately Great Britain could not conduct war with any foreign power without using the sea, and, in spite of the recent development of aircraft, the same thing remains essentially true. There are those who seem to think that, in order to avoid a clash with Great Britain, the United States must renounce the law of neutrality; but they overlook the fact that Great Britain has herself shown no disposition to make such a renunciation, and thus to convert every war into a world war. More than once during the past ten years the British government has announced its neutrality in a foreign war. This fact merely shows that fantasies have not yet blinded her statesmen either to the realities of interna-

tional life or to the realities of the Imperial constitution, under which the Home government has not the power to commit the Dominion governments to foreign war without their consent. Beginning with the Declaration of Paris of 1856, the British government in international conventions repeatedly took advanced ground in assuring neutrals against depredations. Only once has the question of neutral rights been the cause of hostilities between the English-speaking peoples. This was in 1812; and when, after nearly twenty years of almost continuous warfare between Great Britain and her allies on the one side and France and her allies on the other, the United States declared the existence of a state of war with Great Britain, she shifted the burden of her complaint from the violation of commercial rights to the impressment of American seamen.

In pointing out the vacillations, the uncertainties and the nebulosities that began to pervade our diplomacy twenty years ago, Professor Crecraft has performed a duty which no one who undertakes to deal fairly or intelligently with the subject can escape. Although the questions at issue are essentially historical and legal, too often do those who assume to deal with them scornfully brush aside all historical and legal evidence, in order to clear the way for the emotional acceptance of some illusory scheme or deceptive slogan offered in the name of peace. Twenty years ago we were told of the "war to end war." We next heard of the "war to make the world safe for democracy." We had both to the limit, and the most striking results now before us are various dictatorships and frantic preparations on an enlarged scale for the next war. Although it is confessed that the "war to end war" and the "war to make the world safe for democracy" did not pan out as predicted, we are now offered, with equal assurance and sincerity, the same remedy in the form of "collectivism," or combined action for the punishment of the "aggressor." Those who, believing with Milton that war breeds war, would allow the world a present respite from devastation, are herded together as "isolationists."

Professor Crecraft's book consists of thirty-two chapters in which the various aspects of his theme, diplomatic, legal and political, are clearly presented and discussed. What he has to say merits careful consideration on the part of those who are capable of dealing with the subject with understanding and with an open mind.

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RESTATEMENT OF THE LAW OF CONFLICT OF LAWS. St. Paul: American Law Institute Publishers. 1934. pp. xli, 814.

The reviewers of Restatements are a sorely-trying lot. Those who have the hardihood to sit in judgement on the work of an Institute are embarrassed by the multiplicity of points toward which their critical attention should be directed. As a consequence, in sheer self-defense, those reviewers who have not been indulged the sea-room of a leading article have been evolving a conventional Restatement review. The reviewer observes that the publication of the Restatement under review marks the  $\alpha$  milestone in the work of the American Law Institute. He then speculates as to the acceptance which that Restatement is likely to be accorded by bench and bar. Although this convention may not yet have achieved the status of a trade practice meet for codification, I shall be loyal to it.<sup>1</sup>

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1. This decision was reached with reluctance; the Restatement bristles with statements inviting comment. What is indicated is not a single review but a series of reviews, one, say, for each of the twelve chapters, to be prepared, I suggest, not by that jack-of-all

The Restatement of the Law of Conflict of Laws, milestone number 4, has been looked to as a means of mending the behavior of this problem child of the common law—offspring, I suspect, of a mésalliance with civilian jurisprudence. Dismayed by the promiscuity displayed by conflicts cases in their relations with conflicting conflicts doctrine, the legal profession has long sighed for certainty and uniformity. The Institute has given them 625 rules. Are these rules calculated to satisfy those longings?

For the purpose of formulating a prophecy in response to this question, it is necessary to divide the Restatement roughly into two parts, those sections bearing on the jurisdiction of courts and those affecting the choice of competing laws. The rules governing the jurisdiction of the courts of any state are for the most part statutory. Accordingly, in that vast majority of cases which are domestic to the United States, if compliance with the statute is undisputed, the only questions open to litigation are whether the exercise of jurisdiction in accordance with requirements of that statute may be attacked as unconstitutional and what effect the judgment or decree rendered shall be given elsewhere. Now these questions, to all practical intents, are questions of constitutional law; they must be decided with reference to the United States Constitution and over them the Supreme Court sits as arbiter. Yet the Restatement is not a Restatement of Constitutional Law, and, with a nice regard for editorial proprieties, the Restatement seeks to keep the Constitution in its place.<sup>2</sup>

It is perhaps because of this endeavor that the black-letter in this portion of the Restatement achieves a degree of generality which elevates many of its propositions to the plane of principles, though they remain cast in the form of rules. An effort to achieve the degree of specification which one expects of a rule would have revealed so open and notorious an association with constitutional decisions and with procedural law as to have inspired doubt of the purity of the conflicts strain.

One need not quarrel with the terms in which these principles have been articulated to question the effect of this essentially editorial policy upon the utility of this portion of the Restatement as a determinant of judicial decision or as a guide to counsel. The problem is rendered the more acute in that the Supreme Court, at least in recent years, has manifested in this field an unwillingness to compromise itself by the promulgation of inflexible doctrine. It, too, has contented itself with the formulation of principles or of rules incorporating standards of marked elasticity.<sup>3</sup> Such a technique enhances the significance of the factor of judgment in the individual case, and to its discriminating employment, the Restatement's own generalizations necessarily can afford little assistance.

It is therefore hard to escape the conclusion that, as to those problems of judicial jurisdiction which are most fertile in litigation, the Restatement will not put an

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trades, the conflict of laws scholars, but, so far as possible, by experts in the municipal law of the respective chapter topics.

For the reader who wishes a genuine review of the Restatement in lieu of this essay on the occasion of its publication, I suggest the stimulating survey by Professors Lorenzen and Heilman, *The Restatement of the Conflicts of Laws* (1935) 83 U. OF PA. L. REV. 555.

2. Sometimes the Constitution is accorded the privilege of black-letter recognition; more often it is relegated to the comments; not infrequently its presence is betrayed only by the more-than-coincidental resemblance of an illustrative case to a decision of the Supreme Court. Occasionally one is reduced to interlinear reading to detect the Court's influence. Doubtless a reason lurks behind this seeming inconsistency in treatment. It is not wholly apparent to one reader, and I think it is likely to elude others.

3. Two very recent decisions are illustrative of this trend, *Alaska Packers Ass'n v. Industrial Accident Commission*, 55 Sup. Ct. 518 (1935); *Doherty & Co. v. Goodman*, 55 Sup. Ct. 553 (1935).

end to controversy. The Supreme Court will continue to demarcate the bounds of state action. The application of rules which include terms "incapable of exact definition"<sup>4</sup> will continue to depend on judicial judgment, aided, it is to be suspected, more by case law than by black letter, comment, or illustration. This fact should disappoint only those who had failed to appraise realistically the potentialities of a restatement of this branch of conflict of laws.

But what of the choice-of-law problems? Here the wayward propensities of the cases have been most pronounced.<sup>5</sup> Will the Restatement act as an effective disciplinarian? At the outset it must be remarked that if the Restatement fails to do so, its failure will not be ascribable to any lack of determination. The Reporter and his associates faced a situation more forbidding than that presented to the authors of any other Restatement. Their problem was not merely to extirpate provincialisms from a body of doctrine which had achieved general acceptance nationally. Their duty, as they conceived it, compelled them to restate as "the law" what emphatically was not law in a great many jurisdictions, and to resolve many questions for which answers were to be found in the decisions of a very few states. They did not shrink from the task; they carried it out systematically, even ruthlessly. In Chapter 5, Status, there are but three caveats, all relating to legitimacy; in Chapter 6, Corporations, two; in Chapter 7, Property, one; in Chapter 8, Contracts, one; in Chapter 9, Wrongs, none; in Chapter 12, Procedure, none. Perhaps this boldness is a justifiable means to the end, but will it be a successful one? For a time, indeed, it may foster uncertainty. In all jurisdictions where a rule heretofore regarded as settled is in conflict with that promulgated in the Restatement, the question now arises whether the former will yield to the latter. The publication of the Restatement cannot operate as does the adoption of a uniform act. If, however, the courts of these jurisdictions yield to the Restatement, this difficulty will in time be dissipated.

Will the courts accept the solutions to choice-of-law problems proffered them in the Restatement, despite disaccord with the case law of their own states or where hiatus in that law and the paucity of authority elsewhere accord them latitude in decision? This is a question to which experience alone can give a definite answer. Prediction is difficult without recourse to a careful scrutiny of individual sections of the Restatement and to an examination into the sort of litigation likely to arise under them. Obviously such an undertaking is beyond the scope of this review. However, a few general considerations may be suggested.

All the Restatements of the American Law Institute have been subjected to criticism on the score that the form selected for restatement did not permit the develop-

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4. After the assertion in § 12 that, saving some exceptional situations, one's "domicil is the place where his home is," § 13 of the black-letter defines "home," while the comment thereto confesses that "the idea of home is incapable of exact definition." The succeeding comments corroborate the confession. Where, in the comment to § 167, the Restatement defines "doing business," the definition is unaccompanied by such wholesome candor. Granting the impeccability of the definition and aptness of the eleven somewhat dehydrated illustrations which follow, one can scarcely suppose that such exactitude has here been achieved as to bring uniformity and certainty within grasp.

5. Here, too, the analytical purity of the conflicts problem has been sullied by the occasional intrusion of the Supreme Court. Comments to appropriate sections occasionally note such incidents, but a caveat to § 43 withholds the Institute's opinion as to the constitutional implications of a choice of law not conforming to the Restatement rules by a state "having jurisdiction as defined in § 42." The policing of these jurisdictional lines would impose a considerable task upon the Court, but § 43, I submit, does not work a "complete identification of the Conflict of Laws with constitutional law," as is suggested in Lorenzen and Heilman, *supra* note 1, at 564. Cf. note 6, *infra*.

ment of the reasons underlying the rules and principles formulated. In a sense the Conflict of Laws Restatement is not vulnerable to this charge. Logic is the organon of justification for the choice-of-law rules selected for restatement. They conform, for the most part, to a basic theory—call it the territorial theory, pseudo-territorial theory, “vested rights” theory, or what you will. With an occasional concession to expediency, the rules evolved bear the guise of deductions from this theoretical premise.<sup>6</sup> A court accepting the premise may deem itself relieved of the task of searching for independent reasons to sustain the conclusions which the Restatement draws therefrom. The likelihood of acquiescence in this method of deciding choice-of-law cases is augmented by two facts: (1) although the Restatement’s underlying theory has been subjected to acute criticism, that critique remains in the category of juristic esoterica;<sup>7</sup> and (2) little aid is as yet available to the court which might be tempted to seek reasons to sustain a result contrary to that indicated by the Restatement.

So long as the choice-of-law problem is formulated in terms of jurisdiction-selecting rules, I believe this situation will persist.<sup>8</sup> Such rules operate without regard to the effect of the competing laws upon the controversy at issue. But, since the law chosen determines the result of the case, to disregard its content in the process of selection is to invite injustice. Militating against the gravitational pull of the Restatement theory, accordingly, is the certainty that the number of hard cases which will follow from unbending conformity to its rules will be large. It has been to escape from embarrassments arising from the operation of jurisdiction-selecting rules that the courts have been so astute to invoke “public policy” or so assiduous in searching for evidence of a choice of law by contracting parties. The Restatement

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6. Actually, in a number of situations, the choice-of-law rules restated are not necessary deductions from a principle of territoriality, but represent a choice between competing rules both of which would be compatible with that principle. This the Restatement expressly concedes in comments to §§ 65 (“Events Consequent on Acts Done in Another State”) and 66 (“Communications Sent from One State to Another”). And see Introductory Note, c. 3. That even “the familiar rule that the validity and effect of deeds to land are to be determined in accordance with the rules of law of the *situs* of the land does not follow by mere logic, *i.e.*, cannot be deduced by syllogistic reasoning, from the [territorial] postulates enumerated by Story,” has been urged by Professor W. W. Cook. See Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 *COL. L. REV.* 369, 383.

7. An illuminating instance of judicial reaction to the arguments of Professors Cook and Lorenzen is revealed in *Gray v. Gray*, 174 *Atl.* 508 (N. H. 1934). In that case, those arguments were pressed upon the court which, after examining them at length in its opinion, boldly stated: “Once the doctrine of *obligatio* is disregarded, and recognition of *lex loci* is put upon its true foundation, there is no difficulty. The *lex loci* is applied because this is deemed the sensible course to pursue. . . . No rule or set of rules has been devised which will make the conflict of laws a logical whole. There are places where logic has to give way to evident facts. In these places horse sense has prevailed over the deductions of the schoolmen.” But the court very evidently had reference to a horse with scholastic leaning, for after thus evoking the spirit of uncompromising realism, it applied the law of Maine to deny a New Hampshire wife the power to sue her husband in New Hampshire in an action arising out of an accident in Maine on the ground that an analysis of Maine decisions revealed that the acts complained of constituted “no breach of legal duty.” The “doctrine of *obligatio*” dies hard.

8. In suggesting in this paragraph a criticism of the formulation of choice-of-law rules which I have set forth at length in *A Critique of the Choice-of-Law Problem* (1933) 47 *HARV. L. REV.* 173, I am revealing a source of bias for which the reader of this review is warned to make due allowance.

snubs the "public policy" doctrine<sup>9</sup> and affords little or no play to the intent of the parties. The efficacy of this tactic will soon be put to test.

Whatever the acceptance accorded the choice-of-law rules of the Restatement, there are not a few situations in which uniformity and certainty in the law governing interstate transactions cannot be achieved by this work for the reason that the prevailing disorder results from rules which "constitute no part of the Restatement of this Subject." Thus, the power of a corporation to perform a given act in a foreign state may depend on (1) whether the law of the state of incorporation prohibiting such an act applies only to corporate activity within the state of incorporation and (2) whether a similar prohibition in the law of the state where the act is to be performed is restricted only to corporations of that state.<sup>10</sup> To the solution of such questions of statutory interpretation, conceded to be often "of the greatest difficulty," the Restatement contributes only a disclaimer of responsibility and a few hints.

This difficulty becomes acute in the debated boundary dividing "substance" from "procedure." The substantive character of a presumption will depend on the qualification accorded it by the forum.<sup>11</sup> The applicability of the statute of frauds of the place contracting and of the forum will depend on whether they prescribe rules of procedure or rules affecting the formal validity of contracts or both.<sup>12</sup> Whether limitations on the time in which actions may be brought<sup>13</sup> or the damages recoverable therein<sup>14</sup> are applicable in foreign actions again must depend on statutory construction. Unfortunately for the searcher after certainty, the determination of these questions, which the Restatement is contented merely to pose, is a task likely to provoke disagreement among the courts essaying it.

The Chapter on Administration,<sup>15</sup> dealing with decedent's estates and receiverships, seems more certain of acceptance, despite the admission that much of it lacks the support of "direct case authority." The basis for optimism lies in the facts that, as the Introductory Note points out, "the problems are for the most part administrative" and the rules adopted tend to facilitate administration through their recognition of the unitary character of estates. The employment of these rules will work for the elimination of hard cases, not invite them.

In making evident my belief that this Restatement will not prove the disciplinary influence it was designed to be, I have reckoned without regard to an extrinsic fact of great significance. I refer to the impending publication of Professor Beale's long-awaited treatise on the Conflict of Laws. Keyed for use with the Restatement, it will put flesh and blood on the bare bones of that work. One can look for argument in the treatise where one finds assertion in the Restatement; discussion in lieu of comment; case analysis instead of illustration. A treatise of the sort which we know Professor Beale will give us will provide an answer to many of the complaints which are directed to the Restatement's form. Indeed, I predict that use of the treatise will tend to the atrophy of the Restatement. But equally do I believe that neither treatise nor Restatement can mechanize judgment, and unless and until that is done, the seekers after certainty and uniformity will secure but partial satisfaction.

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9. The Restatement, § 612, states "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." Comment c, "Situation in United States," adds "The application of this Section is extremely limited." Might it not have been more appropriate to strike out "is" and substitute "it is hoped will be"?

10. *Id.* §§ 156, 165.

11. *Id.* § 595 (a), Comment c.

12. *Id.* §§ 334, Comment b; 598, Comment a; 602, Comment a.

13. *Id.* §§ 604, 605.

14. *Id.* § 606.

15. C. 11.

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THE CONNECTICUT PRACTICE BOOK OF 1934; A Compilation of Rules and Forms Pertaining to Civil and Criminal Actions, together with the Code of Professional Ethics. Hartford: Printed by the State. 1934. pp. 430, lxx.

THE Connecticut Practice Act, effected January 1, 1880, has established what has generally been considered one of the most effective systems of civil procedure in existence.<sup>1</sup> There were various reasons for this success. The Act was adopted after considerable experience in the various states with the Field code or reformed procedure inaugurated in New York in 1848 as well as with the reform in England accomplished by the Judicature Acts of 1871 and 1873. Profiting by the teachings of this experience it avoided some of the pitfalls met with elsewhere and developed a simple and effective union of law and equity.<sup>2</sup> Fairly extensive rule-making power was continued in the courts, the benefits of which, while not fully realized, have become increasingly apparent since the creation a few years ago of a Judicial Council. But perhaps as important was the state publication of an official Practice Book, available to lawyers and law students, containing not merely the practice provisions, but official forms of pleadings for the guidance of bench and bar.<sup>3</sup> Unfortunately even a fine practice system, like all orderly processes involving an increasing number of technical requirements, tends to petrification, and some danger may be discerned lest the originally excellent Connecticut system becomes overtechnical just at a time when a ferment of reform activity is remolding the procedure of several states and of the federal trial courts. The publication of a new Practice Book compiled by a Committee of Superior Court Judges, containing over 300 forms of complaints and a total of 680 official forms, affords perhaps a fitting occasion to express some concern lest Connecticut lose its procedural preeminence.

The figures as to the numbers of forms in this official publication will indicate the nature of my criticism. Official forms should not be handy short cuts for the lawyers to avoid thought of their own. They should be the models which point the way to effective presentation of the case; or they should furnish the yardsticks by which good and bad pleadings can be measured. Unfortunately with each new issue of the Practice Book the pleading forms tend to become more and more prolix and involved. Instead of being models, they well might be presented as examples to be avoided.

When the last revision of the Practice Book, that of 1922, appeared, I commented upon this very point, criticizing specific forms and expressing regret at the subordination of some of the simple forms of the original edition taken over from the common law.<sup>4</sup> Some of the forms whose validity I questioned have been retained;<sup>5</sup> other

1. So regarded by even the master himself. David Dudley Field, quoted by Simeon E. Baldwin (chief draftsman of the Act) in *TWO CENTURIES GROWTH OF AMERICAN LAW 1700-1901*, p. 317, and (1912) 35 N. Y. ST. BAR ASS'N REP. 833; HARTSHORNE, *COURTS AND PROCEDURE IN ENGLAND AND NEW JERSEY* (1905) 172; KEIGWIN'S *CASES IN CODE PLEADING* (1926) 13. See also citations in note 3, *infra*.

2. Described above. Clark and Moore, *A New Federal Civil Procedure—II. Pleadings and Parties* (1935) 44 YALE L. J.

3. ROSSMAN, *Approved Forms of Pleading* (1932) 12 ORE. L. REV. 3, citing CLARK, *CODE PLEADING*, 162; Cook (1921) 21 COL. L. REV. 416 and Sunderland (1917) 14 MICH. L. REV. 551. Issue with Judge Rossman on the effectiveness of the Connecticut forms was taken by King, *Possibilities of Simplified Code Pleading and Practice* (1934) 14 ORE. L. REV. 14, on the basis of figures taken from Clark and Shulman, *Jury Trial in Civil Cases* (1934) 43 YALE L. J. 867.

4. C.E.C., *Pleading Negligence* (1923) 32 YALE L. J. 483.

5. Cf. CONN. PRAC. BK. (1934) Form 232, *ibid.* (1922) Form 208, "Negligence in Operation of an Airplane," which, for reasons stated in (1923) 32 YALE L. J. 488, is believed to contain too many and too few allegations.

new and doubtful ones have been added; and perhaps more to be regretted, some of the simple forms have now been omitted.<sup>6</sup> Pleading in auto negligence actions perhaps best illustrates the point. There is a recurring similarity in the cases, and outside of indicating the few different types of accident (auto and pedestrian, auto and auto on open highway, the same at a street intersection) nothing is gained by requiring lengthy allegations of speed, lack of control, and so on. In fact the common law action on the case for driving so negligently that the defendant's carriage struck the plaintiff's, thereby causing the damage claimed—which is adapted to the automobile age in the admirable forms set forth in the Massachusetts statute—gives all that is necessary.<sup>7</sup> To attempt to procure more is to delay the case to secure theoretically better paper essays, but no more real information to any one; and a skillful pleader may actually convey less information than otherwise by piling detail on detail. This is well exemplified by the new form herein of model paragraphs of allegations of negligence in the operation of motor vehicles, containing fifteen detailed kinds of negligence,<sup>8</sup> as well as the other negligence complaints.

Even though an opportunity to instruct the profession in good pleading and to stimulate it into emulation thereof may thus have been lost, is it likely that the Connecticut system has been prejudiced by the suggestion of these forms? One cannot be sure, of course; and the foundations of the Connecticut system were so well laid that it is still most simple and effective. Nevertheless one senses a somewhat greater regard for pleading technicalities than formerly. There seems less of a tendency to hold that procedural rules are only a means to an end, where if the end is attained the means need not be stressed, and more of emphasis upon the rules as conditioning the contest itself. We may illustrate by pointing to the development of the rule that one may take upon himself a burden of proof not otherwise his by affirmative pleading. So far has this now gone that even the salutary statutory reform placing the burden of proof of contributory negligence in wrongful death actions upon the defendant, may be overturned by the plaintiff's careless explanation of his case in some detail.<sup>9</sup> Thus unfortunately that pleader is penalized who most nearly meets the pleading objective of stating his full case.

One dislikes to seem overcautious, and the natural tendency of pleading rules to crystallize and harden must be recognized. But the Connecticut system is too fine a thing to allow it to fall into decay. An official practice book affords one important means of correction. It is obvious that much devoted time and effort has gone into the organization of this edition—perhaps overmuch if the views herein set forth are

6. E. G., the common law forms of negligence in driving on the highway, *CONN. PRAC. BOOK* (1922) p. 452.

7. *MASS. GEN. LAWS* (1932) c. 231, § 147, No. 13; *Williams v. Holland*, 10 *Bing.* 112 (C. P. 1833); 2 *CHITTY, PLEADING* (7th ed. 1844) 529.

8. Form 222, and compare a similar form as to allegations of damages, Form 238, and the negligence complaints generally, Nos. 217-238. For allegation of "last clear chance" contrary to *Mezzi v. Taylor*, 99 *Conn.* 1, 120 *Atl.* 871 (1923) see Nos. 223 and 227.

9. *Hatch v. Merigold*, 119 *Conn.* 339, 176 *Atl.* 266 (1935) *contra* to *GEN. STAT. COM. SUPP.* (1933) § 1149, which had changed the rule of *Kotler v. Lalley*, 112 *Conn.* 86, 151 *Atl.* 433 (1930); (1931) 40 *YALE L. J.* 484. The earlier cases criticized in *Comment, Effect of Unnecessary Affirmative Pleading Upon the Burden of Proof* (1929) 39 *YALE L. J.* 117, are not, however, cited. For an apparent tendency to the "theory of the pleading" doctrine, see *Rochon v. Preferred Accident Ins. Co. of N. Y.*, 118 *Conn.* 190, 171 *Atl.* 429 (1934).



sound. One may hope that the judges on their next editing of this official book will consider with care whether the objective of a pleading model, rather than a lawyer's handbook, is not the preferable one.<sup>10</sup>

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PROCEDURE AND FORMS, COMMON LAW PLEADING. Students' edition. By Roger O'Donnell. (Forms prepared or compiled in collaboration with John A. Bresnahan). Washington: National Law Book Co. 1934. pp. xlix, 459.

THE book contains 283 pages of text, and differs from the lawyers' edition by devoting 163 instead of 512 pages to forms. Every part begins and ends with what is regarded as common to common law. Part one consists of three introductory chapters on the historical development of pleading, the formulary system and theory of the case, and the classification of actions. Conventional forms of action are treated in nine separate chapters, which also include "essential averments" in each action. The next fifteen chapters concern pleading miscellany. Attachment and garnishment and service of process, in two chapters, are treated last. Part two is devoted to forms for the District of Columbia, Maryland and Virginia.

The type is clear and readable. It is doubtful whether the reversion to a modified form of black marginal headings, reminiscent of the star page days, gives either the continuity or outline attained by the hornbook style. Footnotes, in the same type as the principal text, sometimes confuse, particularly as the note line is usually not extended across the page. The repetition of references to forms at the foot of each page in chapters 4 to 12, instead of at the beginning of each chapter, serves no useful purpose. The text and forms are separately indexed.

The text shows incomplete investigation, for example: the statement that detinue is not used in Maryland,<sup>1</sup> that detinue will not lie where the bailee accidentally lost the bailed goods before demand,<sup>2</sup> that a bailor cannot bring trespass,<sup>3</sup> that the defense of title in a third person requires notice by the third person to the defendant,<sup>4</sup> that a landlord out of possession must use an action on the case,<sup>5</sup> that negligence in general is only sufficiently alleged in *res ipsa loquitur* cases,<sup>6</sup> that the tort may be waived regardless of whether there has been a sale by the wrongdoer,<sup>7</sup> that an assignee

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10. May I express a preference for the older plan of making the PRACTICE BOOK complete by including not merely the Rules of Practice, but those statutes going to make up the Practice Act. The present separation I find confusing. Still better would be a complete revision of both Practice Act and Rules to present a single modern unified system.

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1. P. 43. Detinue was brought in *Mylander et al. v. Page*, 162 Md. 255, 260, 159 Atl. 770, 771 (1932).

2. P. 45. *Contra*: Keilway 160, pl. 2, 72 Eng. Rep. 334 (1511); *Southcote's Case*, 4 Co. 83 b, 76 Eng. Rep. 1061 (1601).

3. P. 58. A bailor at will may maintain trespass. *Lotan v. Cross*, 2 Camp. 464, 170 Eng. Rep. 1219 (1810).

4. P. 60, 148. For conflicting decisions, see Comment (1929) 27 MICH. L. REV. 936.

5. P. 69. For conflicting decisions, see AMES, LECTURES ON LEGAL HISTORY (1913) 228, n. 13.

6. P. 75. Specific allegations of negligence were not always required by common law precedents. Clark, *Pleading Negligence* (1923) 32 YALE L. J. 483, 485.

7. P. 121. For conflicting decisions, see THURSTON, CASES ON QUASI-CONTRACT, (1916) 596, n. 21, 599, n. 25.

must sue in the name of the assignor,<sup>8</sup> that a special appearance must be in proper person,<sup>9</sup> that the fourth section of the Statute of Frauds applies to leases,<sup>10</sup> that the act must be tortious where the action is brought as well as in the place where it was committed,<sup>11</sup> that there are five exceptions to the rule allowing a record to be searched on demurrer, some of which do not except,<sup>12</sup> and that a defective pleading can be aided only by express averment.<sup>13</sup> Similarly, some references to code pleading are inaccurate. For example, it is said that the attempt to abolish forms of action has proven abortive,<sup>14</sup> that the doctrine of the theory of the case is necessary today in Code states, as it was before forms of action were abolished,<sup>15</sup> that defendant may defeat a legal title by showing a better equitable title,<sup>16</sup> and that demurrers have been abolished.<sup>17</sup>

Except for references to illustrative cases found in casebooks, and the citation of a few other cases, there is dearth of supporting authority for the text. The cases cited are not criticized or compared, nor are contra holdings given. No reference to periodical material appears in the footnotes, nor is there any reference to the rules of civil procedure proposed by the American Judicature Society. The forms are not annotated, nor is it indicated whether they are liberal translations of, or are taken *literatim* from reported cases. And there is no bibliography or appendix. As simple pleading problems not infrequently consume hours of research and study of single instances, new and old, grave doubts rarely being resolved by any other method, the text treatment, coupled with the use of unannotated forms, may readily prove misleading to students.

As pictured, the system of common law pleading took form during the reign of Henry II, growing and expanding up to the nineteenth century, all defects being in some way removed.<sup>18</sup> The principles are likened to the law of gravity<sup>19</sup> and the un-

8. P. 131. For statutes permitting the assignee to sue in his own name, see MD. CODE (1924) art. 8, § 1; VA. CODE (1930) § 5768; D. C. CODE (1929) tit. 2, c. 1, §§ 1-4.

9. Pp. 138, 139. A special appearance may be entered by attorney. *Harkness v. Hyde*, 98 U. S. 476, 479 (1878).

10. P. 155. The fourth section of the Statute of Fraud applies only to executory contracts to lease. TIFFANY, LANDLORD AND TENANT (1910) § 25.

11. P. 174. It is usually said that the law of the place where the act was committed governs. RESTATEMENT, CONFLICT OF LAWS (1934) § 378. But see Cook, *Tort Liability and the Conflict of Laws* (1935) 35 COL. L. R. 202.

12. P. 206. For a clear statement of the exceptions, see BALLANTINE'S SHIPMAN, COMMON LAW PLEADING (3d ed. 1923) 285-287.

13. P. 209. The prevailing rule is said to permit aider by express denial of a necessary omitted allegation. Shipman, *op. cit. supra*, n. 12, at 292, n. 48.

14. P. 16. A few decisions resulting from too much digging in the legal graveyards represent the only instances of the survival of the forms of action.

15. Pp. 17-19. "The suggestion seems clearly modern philosophizing and not a contemporaneous view of common law pleading." CLARK, CODE PLEADING (1928) 179, n. 146. For conflicting decisions in common law and code states, see Comment (1935) 83 U. OF PA. L. REV. 654.

16. P. 116. For conflicting decisions, see Hutchins, *Equitable Title in Ejectment* (1926) 26 COL. L. REV. 436.

17. P. 139, n. 6. Demurrers are used in all code states except New York, New Jersey, Michigan, Iowa (law cases) and Illinois. CLARK, CODE PLEADING (1928) 371 n. 124; ILL. CIV. PRO. ACT (1933) art. 4, § 45.

18. P. v.

19. P. 13.

changeable spots of a leopard.<sup>20</sup> Thus this system, embalmed in perfection, is yet a "speaking, militant thing."<sup>21</sup> Considering that the system has been discarded by statute in England and in twenty-nine American States, can it be validly contended, as the author states,<sup>22</sup> that its study is indispensable for the student of code pleading?<sup>23</sup>

The author indulges in some special pleading for the text method, contending "that very few, if any, persons can acquire a knowledge of common law pleading and procedure solely by the use of case books."<sup>24</sup> The fact that only four approved schools employ the text method in the course in common law pleading, however, shows that the consensus of opinion among law teachers is to the contrary. In justification of the treatment of the subject as attempted in his own text, in particular, the author assumes "that the pleader" using it "has a working knowledge of the substantive law or (sic) Torts."<sup>25</sup> This assumption as to the necessary preliminary preparation for the study of common law pleading is widely concurred in, and explains why practically all approved schools have substituted a first year course in modern pleading and procedure for the course in common law pleading.

For clear statement and simplicity of treatment, the book has merit. The author has made it possible for students to become acquainted with some of the outstanding features of the common law system of pleading without becoming immersed in ancient rules which are of little or no importance today. It may be that he has achieved his stated purpose<sup>26</sup> of bringing "the blind by a way that they knew not," leading "them in paths they have not known," and making "darkness light before them and crooked things straight."<sup>27</sup> But the student of pleading and the neophyte in practice should not be unmindful of the words of the prophet of old, appearing in the next verse,<sup>28</sup> lest they describe his experience more accurately. There Isaiah said:

"They shall be greatly ashamed, that trust in graven images, that say to molten images, ye are our gods."

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AIR LAW; OUTLINE AND GUIDE TO LAW OF RADIO AND AERONAUTICS. By Howard S. Le Roy. Washington: R. Leigh Pub. Co. 1935. 120p.

The author of this book is a member of a Washington law firm which specializes in aeronautic and radio law. He was legal adviser to the American delegation at the International Radio-Telegraph Conference in 1927, and has lectured at the National University Law School on air law.

As the title indicates, the book is in outline form. Under the headings of radio

20. P. vii.

21. P. v.

22. P. vi.

23. Cf. Book Review (1933) 47 HARV. L. REV. 148. Dean Clark, while stating that history should be used to explain the development of modern rules, has said: ". . . inculcation of common-law pleading doctrines is the worst possible approach to modern pleading conceptions, for it gives the student so much more to unlearn. . . ."

24. P. vi.

25. P. 62.

26. P. v.

27. ISAAH 42:16.

28. Id. 42:17.

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and aeronautic law are listed statutes and ordinances of the United States and of individual states and cities, as well as decisions of the courts and opinions of attorneys general; all of these are in chronological order. Foreign and international law are treated in the same manner. There is an excellent bibliography at the end of the book, which lawyers and law librarians should find indispensable.

J. S. G.