

BOOK REVIEWS

Shippers and Carriers of Interstate and Intrastate Freight. By Edgar Watkins. Third Edition. In Two Volumes. Atlanta, The Harrison Co., 1920. Vol. I, pp. 1-852; Vol. II, pp. 853-1778.

Three editions of a law book in ten years obviously prove a market for the wares. The title of Mr. Watkins' treatise is a bit broader than its contents, for intrastate transportation (as the preface carefully indicates) is dealt with only in its relation to interstate commerce. None the less, these two volumes seek to expound the law which governs about nine-tenths of the railroad business of the country. It is not startling, therefore, to find that the book has expanded three-fold since its first edition, and that more than 700 pages have been added to the 1916 edition. Mr. Watkins' aim has been consistent, throughout the history of his book. He has avowed it in unchanging language. "To make the Laws [governing interstate shipments] more easily available and understandable is the purpose of this work." And he aims to reach not only "the legal profession"—"few lawyers have given special attention to the questions here discussed"—but also "traffic men, whether in the employ of the carriers or of those bureaus organized throughout the country to aid and advise shippers."

Certainly the raw material of the subject, which Mr. Watkins has made his own, is all here. The first volume and a chapter of the second contain an ample, clear exposition of the state of "the law" as formulated by statutes and their judicial glosses, down to the date of publication. In keeping with the promise of the preface, "where questions have been definitely determined, liberal quotations have been inserted." And Mr. Watkins' liberality extends to questions that are not "definitely determined," or refuse to remain "definitely determined." The second volume is largely given up to massive annotations of the successive acts regulating interstate transportation, followed by the full texts of the other Congressional acts pertaining to the field of interstate commerce, but otherwise largely remote from the author's subject. A really valuable reprint is the Conference Rulings of the Interstate Commerce Commission. The necessary tools of case and subject indices are well supplied.

An author is entitled to be judged by his aims, particularly one who is equipped to appraise practical needs and has evidently satisfied them. And if Mr. Watkins is interested in producing this work, who is an academic reviewer that he should say he is left hungry at the feast? "It's a nice dog," in the ever fresh old Lincoln observation, "if you like that kind of a dog."

But well as we know that matters of taste are not to be argued, irrational scepticism breaks the bounds of conscience and insists at least on soliloquizing. Do "liberal quotations" help to render more clear the effect of decisions, particularly to lay "traffic men," in the guidance of new situations that are not rigidly within the pattern of the controlling authority? And are inexperienced lawyers to be saved by fat quotations up to June, 1920, in handling cases arising in 1922, or are they not driven to those ephemeral tyrants, "Shepard's Citations?" Can a lawyer's thinking be saved by extracts and annotations that become obsolete quicker than fashions? To the extent that they represent established "law" why not state the rule or standard or principle in telling, succinct language, with the authorities in point? In any case of moment can it be that lawyers would not go to the reports themselves, down to the last advance sheets? The Baedeker to these reports are the familiar mechanical tools with which Mr. Watkins, possessed of a much finer edge, ought not to compete. And yet we are probably wrong. Mr. Watkins' book has gone into three editions, and many a Supreme Court brief bears evidence that

Mr. Watkins' work was the only arsenal of learning that was sacked. Whether Mr. Watkins' book is cause or effect of such briefs we do not venture to guess.

Still soliloquizing, we wonder why Mr. Watkins has not drawn much more than he has upon "the experience of an active practitioner" who has thought acutely, if we may say so, upon the problems of this book. The field is his, both by reason of his equipment and by the substantial vacuum of its literature. Mr. Drinker's scholarly treatise is largely obsolete; and what else, of strictly legal nature, is there to compel attention? Why, then, does Mr. Watkins content himself with the repetitive process and only an occasional expression of scepticism of conventional phrases? Why does he restrict himself to the rare revelation of the insight of which some of his Law Review papers are evidence? Let him compare his first chapter on "State Regulation of Carriers Engaged in Interstate Commerce" with Prof. T. R. Powell's recent essays on *The Commerce Clause and State Police Power* (1921) 21 COL. L. REV. 737; (1922) 22 *ibid.* 28. Mr. Watkins is fully conscious of the sonorous futilities of "the fundamental rule announced in *Smyth v. Ames*" (sec. 84), yet we are denied his help in working out of the morass of words. He tells us the factors of the problem (sec. 131) but he withholds much that he could suggest in appraising the weight and nature of the contending factors, and the process of their adjustment. Ticklish difficulties, like non-compensatory services, are covered by quotations from authorities that have only served to open Pandora's box.

The importance of the subject, the growing importance, needs not to be labored. The very volume of the litigation results in diluting the professional and judicial output. The eagerness of the courts for guiding treatises—the phrase is not too arrogant—is amply attested by the response to Wigmore's *Evidence* and the quick triumph of Williston's *Contracts*. The influence of independent analysis and wise opinion upon courts, submerged by the daily grind, Mr. Watkins himself illustrates. The Supreme Court's decision in an important case (*Interstate Commerce Commission v. D. L. & W. Ry.* (1911) 220 U. S. 235, 31 Sup. Ct. 392) was surely influenced by Mr. Watkins' discussion of bulked shipments, in his first edition.

Doubtless this work meets a demand. No less certain is it that a demand will be found by a work that aims to help guide the stream of law-making (legislative as well as judicial) and not merely to report its volume and velocity. And the watchers in the lighthouses give warning, that the stream is becoming more and more turgid and turbulent.

FELIX FRANKFURTER

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International Law. By L. Oppenheim. Third Edition. By Ronald F. Roxburgh. In Two Volumes. London, Longmans, Green & Co., 1920-1921. Vol. I, pp. xliii, 799. Vol. II, pp. xlv, 671.

The standard work of the late Professor Oppenheim now appears in a new edition, the first since 1912. The author's labors upon it were interrupted by death, the edition having been carried to completion by Mr. Roxburgh, who had the advantage of the author's notes on the unfinished parts. The record of events since July, 1919, are the work of the editor. There is little besides this to distinguish the opinions of the editor from the author; the former has apparently taken pains to preserve the author's own thoughts wherever possible. The section numbering of the second edition seems to have been retained, new material being embodied in interpolated fractional sections. Among this new material we find such subjects as the law of the air and aerial navigation, the League of Nations, the "so-called economic boycott or blockade," treaties of peace after the World War, the "so-called long distance blockade," and other topics which the World

War threw into relief. The old sections seem to have been thoroughly revised, though for the most part the author's earlier opinions are retained. One notable exception is found in the author's withdrawal of his advocacy of the ratification by Great Britain of the Declaration of London. Whether the author fully appreciated the fact that nations will not, if their hands are free, permit themselves to be bound by rules which handicap them in time of war or emergency, does not clearly appear. The emphasis placed on such important subjects as aliens, responsibility of the state and related topics, together with detailed bibliographic references throughout, again distinguish this work from most of the other general treatises in the field.

As a reference work for information on the general facts and history of the science of international law, few books compare with that of Oppenheim. Whether he will rank as high among original thinkers and scholars as the editor and others seem to believe may be more doubtful. As an earnest, careful student and master of research, he has few equals among the English-speaking contributors to the science. But as a critical analytical lawyer, careful to distinguish rules *de lege lata* and *de lege ferenda*, the reviewer believes he will not rank with Westlake or Hall. While one cannot expect in a general treatise that exhaustive analytical treatment of a legal doctrine which the special student demands, it yet seems to the reviewer that the keen testing of alleged rules of international law to determine their actual validity in law, a feature which distinguishes the work of Westlake and Hall, is not always evident in the work of Oppenheim. For example, while the facts connected with the series of measures instituted by Great Britain beginning with the Order in Council of March 11, 1915, and designed to cut off Germany from all foreign trade, are well summarized, there is practically no attempt to consider the validity of these "measures of blockade" from a legal point of view or to contest—as the author evidently felt he could (II, 542)—the American view that they were "illegal and indefensible." No reference is made to Sir Samuel Evans' remark in *The Hakan* (1916) 2 Br. & Col. P. C. 210, that the "so-called long-distance blockade" was "not a blockade at all except for journalistic and political purposes," clearly indicating thereby that it was not legal. See Moore, *Principles of American Diplomacy* (1918) 79. In mentioning its antecedents, the author refers to the German war-zone decree of February 4, 1915, but does not mention the previous British Order in Council of Nov. 3, 1914, declaring the North Sea a closed military zone. For the detailed record of events in the Great War it should be said, however, that the author usually refers to the well-stored work of Professor Garner, *International Law and the World War*.

The occasional unsatisfactory character of the legal treatment is illustrated by the sections dealing with private property of belligerent citizens in the enemy state. After dealing with the rule of international law that such property is immune from confiscation, and pointing out (II, 157) that "the last case of confiscation of private property was that of 1793, at the outbreak of war between France and Great Britain," he goes on (II, 159) to speak of "the readjustment of rights of private property" under art. 297 of the Treaty of Versailles. Not once is it indicated that the measures adopted by the Allies by authority of that article amount to confiscation of private property, and that the result vitally qualifies the statements made on previous pages. In view of these measures of confiscation of foreign investments, the policy underlying which appears difficult to justify on the part of trading and investing nations, it seems at least amusing to find that the Allies, in laying down conditions for the invitation to Soviet Russia to participate in the Genoa Conference, say: "It is not possible to place foreign capital in . . . a country unless the foreigners who provide the capital have a certitude that their property and their rights will be respected and that the fruits of their enterprise will be assured." Too often, in the reviewer's judgment, is the influence of the Great War on the rules of law underestimated, and old rules set out as if they

were still accepted law, e. g. in regard to the position of merchant vessels on the outbreak of war, the doctrine of continuous voyage, and contraband. This defect is hardly cured by the statement in the editor's preface that the "laws of war and neutrality were admittedly in partial suspense."

The invasion of Belgium is dealt with under Intervention for Self-Preservation, because the Germans thus defended it. (I, 220.) There does not seem to be any mention of the seizure by England of the neutral island of Madeira during the Napoleonic Wars to prevent its falling into the hands of the French. There is no notice, apparently, (II, 256-257) of the fact that armament on a merchant vessel has an influence upon the ship's immunity from being sunk without warning by submarines, yet several authorities consider this operative fact as going to the very crux of the legal position. The League of Nations is discussed as an established institution of international law. There is a fairly adequate citation of leading cases, but necessarily few cases are discussed at any length.

In spite of such shortcomings as have been mentioned, the book must be welcomed as the most up-to-date systematic standard work on international law.

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Handbook of Practice under the Civil Practice Act of New York. By Carlos C. Alden. New York, Baker, Voorhis & Company, 1921. pp. vi, 340.

As the author states, this book has been prepared primarily for the use of students. It presents in abbreviated form the substance of those portions of the Code of Civil Procedure dealing with the usual proceedings in an action in a court of record, and, in addition, information abstracted from various other acts outlining procedure in courts not of record and in Surrogate's Courts. Much helpful material gleaned from decisions is incorporated. By a study of this treatise a student will acquire an understanding of the relation of the procedural legislation to the actual mechanics of a lawsuit, which he could never gain by the unaided study of the Civil Practice Act and rules of court.

The work has been done so well on the whole that one hesitates to comment upon its faults. These, such as they are, are doubtless due largely to the effort to compress a tremendous bulk of material into so few pages. For example, in speaking of the designation of parties in a summons, the author says on page 44: "The use of a middle initial is proper, and affords identification, but a mistake therein is immaterial." Where the summons is personally served, there is no question as to the accuracy of this statement. But where service is by publication, it is open to serious question. No doubt it is usually said that the middle initial or name constitute no part of a person's legal name and that an error therein may be disregarded. 29 Cyc. 265. And some cases apply this rule to published process. *White v. Himmelberger-Harrison Co.* (1911) 240 Mo. 13, 139 S. W. 553. But there is a tendency in the late cases to recognize the fact that the middle name or initial is frequently the most distinguishing characteristic of a person's name and to hold that publication of a summons designating a defendant by an incorrect middle initial confers no jurisdiction. *Gibson v. Foster* (1913) 24 Colo. App. 434, 135 Pac. 121; *D'Autremont v. Anderson Iron Co.* (1908) 104 Minn. 165, 116 N. W. 357; *Carney v. Bigham* (1909) 51 Wash. 452, 99 Pac. 21. Consequently, it would seem unsafe to inform a student that he might with impunity be careless in the use of middle initials in a summons. Again on page 51 it is said that substituted service is "in its effect substantially equivalent to personal service." It is true that it has been held that a judgment *in personam* may be rendered upon such substituted service. *Continental National Bank v. Thurber* (1893, N. Y. Sup. Ct.) 74 Hun, 632. But rule 49 of the Rules of Civil Practice specifically provides that after proof of substituted service has been properly filed, "the same proceedings

may be taken thereupon as if it had been served by publication pursuant to an order for that purpose." This provision is taken from section 437 of the former Code of Civil Procedure. That section when enacted changed the law as it was under Chapter 511 of the Laws of 1853, which made substituted service the equivalent of personal service. And it has been judicially declared that under said section substituted service may be regarded as the equivalent of service by publication. *Clare v. Lockard* (1887, City Ct.) 21 Abb. N. C. 173, 175; *Clare v. Lockard* (1890) 122 N. Y. 263, 25 N. E. 391; *Bentz v. Crotona Park Realty Co.* (1913, Sup. Ct.) 81 Misc. 364, 142 N. Y. Supp. 193. It therefore seems misleading to assimilate substituted service to personal service rather than to service by publication. Were these faults characteristic of the book, it would be almost worthless; but fortunately they are not. It has much value for the student.

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Simon Van Leeuwen's Commentaries on Roman-Dutch Law. Revised and edited with notes by C. W. Decker. Translated from the original Dutch by the Hon. Sir John G. Kotzé. Second edition. Volume I. London, Sweet & Maxwell, Ltd., 1921. pp. xlvii, 504.

Roman-Dutch law enjoys a certain distinction as one of the few systems of modern civil law which have not been superseded by codes. True, it no longer flourishes in its native habitat; in 1809, and again in 1838, the law of the Netherlands was codified. But in South Africa, thanks to the loyal application of Roman-Dutch principles to modern problems by a series of able judges, and to a lesser degree in Ceylon and Guiana, Roman-Dutch law is still recognized as the common law. However, Roman-Dutch law has other and, to American students of legal history and jurisprudence, even more compelling claims to attention. We are likely to forget that the Netherlands of the seventeenth century occupied a position of strategic importance in Europe, politically, commercially, and culturally. But we need scarcely be reminded that the then Roman-Dutch school of jurisprudence held an equally strategic position in continental legal history, a position fully comparable to that of the French school in the sixteenth century, or of the German school in the nineteenth century. Not the only but perhaps the most striking contact between Dutch jurisprudence and American legal history is the influence of the Dutch statutists and Ulric Huber in particular upon Justice Story, and through him upon American theories as to the conflict of laws.

The efforts of the Dutch jurists of the seventeenth century extended in two principal directions. On the one hand, a series of systematic treatises, commencing with the *Commentaries* of Donellus and culminating in the monumental work of the younger Voet, approached the problem of jurisprudence through the Roman law, and set forth the entire system in a way that could scarcely be improved upon by a Domat or even a Pothier. Other writers, following the example of Grotius, addressed themselves to the task of elaborating a national law largely upon Roman principles. Of works thus written, the *Commentaries* of Simon Van Leeuwen, first published in Dutch in 1664, occupy a position in Roman-Dutch law only inferior to that of Grotius' *Inleydinge*. It is to be remembered that these and similar treatises are more than textbooks: they enjoy an authority analogous to that of the *Institutes* or Blackstone's *Commentaries* in the Common Law.

A second edition, therefore, of Judge Kotzé's translation of Van Leeuwen's *Commentaries* with the standard notes by Decker is welcome. As expected, this edition, which has been revised throughout, offers as elegant and accurate a rendition of the original as did the first edition of some thirty-five years ago. The most important changes are in the addition of the useful *Epitome* and in the translator's notes which have been placed in appendices at the end of the volume.

Special mention should be made of the notes as to the reception of Roman law in the Netherlands, on the organization of the Court of Holland and the Supreme Court, on custom, and on judicial precedent, as being the most interesting and valuable. It should be added that the plan of the *Commentaries* is roughly the same as that of the *Inleydinge* of Grotius, which in turn follows that of Gaius. Hence, this first volume covers the introductory matters relating to law and magistrates, the law of persons, and the acquisition of property including succession. The second volume is announced to appear shortly.

It remains to add a few suggestions, more or less obvious. In the note as to the reception of Roman law in Holland, the *De Cura Reipublicae* of Philip of Leyden is obviously misdescribed as a commentary upon the charters of the Counts by reference to Roman law (p. 461). It is rather a quite systematic discussion of certain problems of public law taken from the Code and the Novels of Justinian. Also, to certain of the statements on page 471 qualifications should be added. Thus the proposition that by the civil law "the ordinary judge could not be recused," is questionable. Certainly under the formulary procedure a defendant could by oath reject a *judex*: analogous provisions were added by the *lex Cornelia*: and in any event we have to account for the *ius revocandi* enjoyed by *legati* and other privileged persons. This rather obscure point is discussed at length in Voet, *Commentarius*, lib. v, tit. i. Nor is the statement that "By Roman law *litis contestatio* is the beginning of the suit," quite accurate, unless by "suit" is meant the *iudicium*. Nor is it as clear as the translator states that in the earlier Roman-Dutch law specific performance of all contracts was in the last analysis enforced: as to the difficulty and the procedure in the enforcement of *obligationes faciendi* see Lee, *Introduction*, 252, and G. Grotius, *Isagoge*, lib. ii, cap. viii. Certain more obvious slips may also be noted: the Dutchified "*Romisch*" for "*Romish*" (p. 469) and *Böckelman* is left to go without the necessary umlaut (pp. 462, 470). But these are venial errors in an excellent work the first function of which is to provide a trustworthy version of Van Leeuwen.

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Cases on Contracts. By George P. Costigan, Jr. Chicago, Callaghan & Co., 1921. pp. xxviii, 1489.

Professor Costigan has given us in one large volume a scholarly and interesting compilation of cases on contracts along orthodox lines, the fruit of many years of teaching and writing on this subject.

The almost entire omission of section headings for fear of giving too much aid to the student seems a mistake. If there is an orderly development of topics in the various chapters it is easy for the student to overlook it, even with the aid of section headings. This is particularly true in the difficult maze of implied conditions. The heading "General Principles Applicable to Conditions in Contracts" covers pages 722 to 1009.

In his preface Professor Costigan tells us that emphasis is laid on the historical side of the subject, although more than two-thirds of the principal cases are American. A novel feature consists in giving passages on the historical points from the writings of leading legal scholars, particularly as introductory to the topic of consideration. Helpful references are given to leading legal articles in connection with other topics. There is a convenient table of articles referred to as well as a table of cases printed and cited.

To present sealed contracts in Chapter I is historically sound and has certain advantages in teaching, though many will consider that the force and effect of a seal should be taken up after the subject of mutual assent and either before or after the subject of consideration.

A better heading for Chapter VII than "The Performance of Contracts" would be Duties of Performance, as the topic is concerned with the question how far the duty of performance is affected by the breach of express and implied conditions and by impossibility of performance.

The cases on anticipatory breach beginning on page 989 belong not under performance but under a different topic which might be designated as Remedies for Breach, the question being whether repudiation before performance gives rise to an immediate right of action. The important subject of remedies for breach, as given by the law and the agreement of parties, might be more fully recognized in case-books on contracts.

The reviewer would prefer to postpone Chapters IV, V and VI dealing with assignments of contracts, beneficiaries of contracts, and joint contracts until after the more fundamental questions relating to duties and impossibility covered by Chapter VII had been dealt with.

This book of 1489 pages is clearly printed on excellent paper. The cases seem generally to be well selected and the notes are unusually suggestive and valuable. In numerous cases the christian names of the parties are given but in other cases not. It would be much more convenient to omit the christian names in all titles of cases.

In a case-book the important thing is to have cases which raise the crucial and vital problems of the subject, in an interesting way, to stimulate thought and discussion. In any argument the first thing to do is to define the issues. It may be suggested that historical materials should be introduced at a point where they will shed light on these crucial questions. They frequently make a poor introduction to a subject because the student cannot appreciate their use and bearing, or what the problem is that they are intended to elucidate. The beginner can often go better from the present to the past than from the dim and uncertain past to the present.

It may also be suggested that more problem material should be included in our case-books and more cases without opinions to stimulate the individual and creative thought of the student, and to make him read his cases as the lawyer and investigator do, with some question in his mind of which he is eagerly seeking the solution. Our case-books and case method of instruction still have undeveloped possibilities.

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The Law of Torts. By J. F. Clerk and H. B. Lindsell. Seventh edition. By W. Wyatt-Paine. London, Sweet & Maxwell, Ltd., 1921. pp. cxli, 955.

The seventh edition of this well known English work on Torts appears as a companion volume to the seventeenth edition of Chitty on Contracts by the same editor and by the same publishers, thus continuing the policy inaugurated in earlier editions of issuing the combined treatises as "a comprehensive statement of the various legal obligations arising ex delicto and ex contractu."

No important change in form or substance appears in this edition, the same chapter and topic headings that appeared in the sixth edition being continued, while the index is almost a duplicate of that in the previous edition. Necessary alterations in the text resulting from changes in the law are introduced with a minimum alteration in language. The notes are brought up to date and herein lies the only difference of importance between this edition and the sixth.

Owing to a slightly larger page, and economies in mechanical arrangement, the number of pages in this edition is considerably less than in the last in spite of the introduction of a considerable amount of new material.

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