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Book Reviews

Edson R. Sunderland
University of Michigan Law School

Willard Barbour
University of Michigan Law School

Horace LaFayette Wilgus
University of Michigan Law School

Edgar N. Durfee
University of Michigan Law School

Edwin C. Goddard
University of Michigan Law School

BOOK REVIEWS

THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT, by Samuel Rosenbaum. Boston, The Boston Book Co., 1917, pp. xiv, 321.

This volume is the fourth in the University of Pennsylvania Law School Series, and is the work of a fellow of that school during the years 1913-1915. In common with the other books of the series, its object is to aid the scientific study of legal problems and to help to improve the law. No subject, surely, is more worthy of presentation to American readers than this, and none is more full of important suggestions for the improvement of our practice.

American pleading and practice is in a very chaotic condition. We have every variety represented among our States and further variations in the federal courts. Some systems give reasonable satisfaction. Most of them do not. The Code, after two-thirds of a century of experiment, has not realized the hopes of its friends, and for many years no new recruit has joined the ranks of the Code States. The difficulty with the Code is its inflexibility, due to the fact that it is a system of legislative rather than judicial rules. The common law itself did not tie the hands of the courts so completely as do the provisions of the Code. And most of those American States which have not adopted the Code are provided with some other system of legislative rules of practice no less rigid and mandatory.

Recently, under the leadership of New Jersey, the question of freeing the courts from the arbitrary and inefficient control of the legislature over their rules of procedure has come strongly into the foreground, and it may be said, I think, that there is at the present time a strong current of public opinion setting in the direction of procedure by rules of court. The Board of Statutory Consolidation of New York reported in favor of the adoption of such a system in 1915. Colorado (Laws 1913, Ch. 121), Virginia (Laws 1916, Ch. 521), and Alabama (Laws 1915, No. 537), have recently enacted legislation looking toward the same end. And there is now pending in the Congress of the United States legislation putting the entire procedure on the law side of the federal courts under the control of the rule making authority of the Supreme Court. (H. R. 7572.)

In view of the wide-spread dissatisfaction with legislative systems of procedure, and the definite trend toward court control which is apparent in this country, a book for American readers upon the rule-making power of the English Supreme Court is exceedingly timely The English system is the model for all modern efforts toward court-made procedure in this country, and only by a study of the English rules can one become familiar with the possibilities of the system and the progress which has been made under it.

The book under review is the best, and one might almost say the only, treatment of the subject from the viewpoint of the American lawyer. The author treats the subject historically, and traces the gradual growth, through forty years, of the English system of judicial control of procedure. The direction in which that development has been the most fruitful, the imperfec-

tions which were gradually eliminated by changing old rules and introducing new ones, the vast ingenuity displayed by the judges in discarding outgrown precedents and in constantly holding the practice abreast of the exacting demands of the day, are all set before the reader in a most scholarly and interesting way. It might be regretted that the author has not found it advisable to argue more agressively the availability of the fundamental principles of the English system to the needs of the United States. Missionary work along this line seems to the writer of this review a duty incumbent upon all who are qualified to undertake it. But one must, of course, set limits to any book, and within the limits adopted, Mr. Rosenbaum has performed a real service. The dissemination of information about the highly successful court-rule system of procedure will of itself constitute an effective propaganda in its favor, and will help to educate the American public to demand something better than the technical and cumbersome procedure which has long tended to make every American law suit a contest of endurance.

EDSON R. SUNDERLAND.

MAGNA CARTA AND OTHER ADDRESSES, by William D. Guthrie, New York. Columbia University Press, 1916; pp. 282.

Some time ago an English historian whose studies of Domesday Book are a monument to erudition and exact research spoke somewhat disparagingly of excursions into history by lawyers. To his mind it too often involved a desertion of science for mere superstition, with the result that legal history became not a presentation of facts as they were, but what some bygone judge or writer supposed the facts to have been. And in conclusion he said he could but "gaze in wonder at great intellects bowing themselves in homage before the blunders of the past, acute minds submitting to the fetish worship of 'our books' and helpless in the presence of what I have termed 'the long ju-ju of the law'." The address which gives title to the present volume is scarcely a good answer to this stringent criticism.

Mr. Guthrie has sought to perpetuate the numerous myths which have grown up round the Great Charter. For there is a purely fictitious Magna Carta. During the struggles between parliament and the first two Stuarts, perhaps through the influence of Coke, it seized the popular imagination and became to the free Englishman the fundamental guarantee of his liberties. This notion was further developed and fastened upon English lawyers by certain writers, notably Blackstone, in the uncritical eighteenth century. Now this would be harmless enough were it not that it attributes to the charter what is in reality the slow and painful development of six hundred years.

Of this traditional view Mr. Guthrie is an exponent. He assumes that the charter was a great popular document because it was exacted from a king. To him the principle of Habeas Corpus is implicit in it and he even goes so far as to say that "the idea that the fundamental laws of the land * * * were unalterable and that any governmental regulation or edict to the contrary should be treated as void and null is plainly enunciated in the first chapter of Magna Carta." Of course Mr. Guthrie knows that despite some

dicta and the strange doubtful case of Dr. Bonham the English courts have never assumed the power of declaring a statute void because it conflicted with any provision of Magna Carta. But one passes from one surprise to another. *Judicium parium* of chapter 39 refers to trial by jury and *lex terrae* means "the law of the land" or "due process of law." This is to perpetuate an error that even Coke did not make. Probably of the whole charter no single clause is more distinctly reactionary, and in after days these words were worshipped because, as Maitland has pointed out, it was possible to misunderstand them. In brief Mr. Guthrie takes the position that in Magna Carta we have an enunciation of fundamental principles which is valuable for all time. This rests upon the assumption that there is no substantial difference between the social structure of the thirteenth century and that of today; moreover it treats law as something static instead of a growing living organism.

In the remaining nine addresses Mr. Guthrie shows to better advantage. A sturdy conservative, an able defender of the courts in the face of popular criticism, he combines unusual power of exposition with a style which even the most controversial subject cannot rob of its urbanity. He is a vigorous defender of the older conception of constitutional law; he would maintain our political institutions *in statu quo*. Naturally he attacks such innovations as the Workmen's Compensation Act, the referendum, the recall of judges, etc. With much that Mr. Guthrie says the reviewer is in sympathy but, as already indicated, he cannot accept the general point of view. If our legal system is to survive the stress of present conditions, it must be through the efforts of lawyers who combine an intelligent knowledge of the past with vision for the future. And in view of the eminence of Mr. Guthrie's position one has the greater regret that his convictions should lead him to assume the rôle of *laudator temporis acti*.

WILLARD BARBOUR.

VOTING TRUSTS: A CHAPTER IN RECENT CORPORATE HISTORY, by Harry A. Cushing, of the New York Bar, New York. The Macmillan Company, 1915; pp. 215.

This book discusses the subject of Voting Trusts under the titles of the significance of Voting Trusts, their contents, and the law relating thereto, together with forms thereof.

Under the first part there is traced a history of the subject and some of the advantages and disadvantages and the most usual terms of such trusts are pointed out.

The second part is an extensive review of the important provisions in a very large number of recent Voting Trusts, and the third part reviews in a rapid way the decisions relating to the subject, and points out the different views of the courts in reference to the policy and validity of Voting Trusts.

Mr. Cushing is unquestionably favorably inclined toward such trusts so long as their purpose is not clearly illegal; he points out wherein they have been and usually are beneficial, especially in the reorganization of corporations and the adoption of a policy that is likely to insure success through a

series of years. He, however, also notes that there have been some cases in which these desirable results have not been attained. The forms given include four complete voting trust agreements, many special provisions included in trust certificates, and the provisions for the extension and termination of such trust agreements.

This will be found of value to any one who is interested in drawing up documents for purposes of this kind, and in part II there is described the business side of the matter, as it has actually been worked out in many cases.

The book will be valuable to any lawyer who has need of information upon the legal phases of the question, and will also furnish interesting reading for the layman who is anxious to learn something of the process of control of corporations by such methods. H. L. WILGUS.

THE ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS (IN ENGLAND AND WALES), by G. Glover Alexander, M.A., LL.M. Cambridge University Press, 1915; pp. x, 235.

The preface of this small work tells us that "it is intended as a first book for newly appointed justices of the peace, superior police officers, and law students; that it is hoped that it will also appeal to a larger class of general readers who are interested in subjects bordering on the domain of law, history, politics and sociology." Hardy as that broad purpose seems, it is fairly accomplished, for, while readers other than justices, police officers, and law students, of England, will find that some of the material is not grist for their mills, the mechanical construction of the book will facilitate the process of selection.

Parts I and II deal with the judicial administration of criminal law, the organization of the courts and the procedure therein, particular attention being given to the justice of the peace. Part III deals with the relation of the executive to crime—the prerogative of mercy, extradition, police, prisons, etc. Part IV contains a discussion of some recent legislation, dealing with parole, and with special classes of offenders, children, lunatics, and habitual criminals, together with some meager statistics of crime.

It is obviously impossible to cover such a broad field as is indicated by this synopsis with any fullness of detail. Yet, in spite of this the outstanding feature of the work is its realism. To the lawyer, especially, who so seldom finds in his professional literature anything except the positive rules of law, with reasoning more or less technical and artificial in justification of the rules, it will be almost a shock to read this author's practical discussion of the actual working of the English criminal law. The following illustrates the point: "The jury have a right to return a general verdict of Guilty or Not Guilty; and that being the case, however legislators and lawyers may define and refine as to the legal distinction between murder and manslaughter, and however well an intelligent jury may appreciate the subtle differences between them, as lucidly explained by a learned judge, it always remains open to the jury so to find the facts as to bring the case under either head. Hence it has been said that murder is a crime for which a jury of twelve of his

fellow countrymen unanimously think that a man ought to be hanged, and manslaughter is a crime for which such a jury think he ought not to be hanged, but to receive some lesser degree of punishment. Only so are the dry bones of *malice prepense* articulated into a working system, yet how seldom are we presented with anything more than the bones.

EDGAR N. DURFEE.

THE LAW OF ELECTRICITY, by Arthur F. Curtis of the New York Bar, Albany, N. Y. Matthew Bender & Co., 1915; pp. lxxxiv, 1033.

The author realizes that he is not dealing with any recognized branch of jurisprudence. Rather he follows the legal problems arising by reason of the use of electricity through many branches of the law, such as contracts, torts, corporations, municipal corporations and many others. The fundamental principles of these subjects are largely assumed, except as they may find special application in cases involving or growing out of the use of electricity. In this manner the author undertakes to include discussion of electrolysis, electrical injuries, powers, duties and regulation of electrical companies, eminent domain, taxation, electrical contracts, municipal ownership, abutting owners, interference with currents, injuries to appliances, conduits, street railways, master and servant and evidence. As possibly more than half of the decisions have been rendered in the last ten years, the timeliness of a collection and discussion of these cases in a single volume is apparent. The work covers the decisions of the United States, England and Canada.

EDWIN C. GODDARD.