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Book Reviews

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A public policy in favor of allowing force on no greater provocation than abusive or insulting language may be indicated by the statutes passed in at least three Southern states, Georgia, Alabama, and Mississippi. By these statutes provocation by words alone may be shown as a defense to prosecutions for criminal assault. MISS. CODE (1906) § 1501; *Brown v. State,* 74 Ala. 42 (1884); GA. CODE (1933) § 26-1409; *Murphy v. State,* 92 Ga. 75, 17 S. E. 845 (1893); *Behling v. State,* 110 Ga. 754, 36 S. E. 85 (1900). In Mississippi and Georgia the statutes, though worded so as to apply to criminal actions only, have both been applied to civil actions by the courts. *Thomas v. Carter,* 148 Miss. 637, 114 So. 736 (1927); *Choate v. Pierce,* 126 Miss. 209, 88 So. 627 (1921); *Hutcheson v. Browning,* 37 Ga. App. 276, 129 S. E. 125 (1925). In Louisiana, 1933, the court held that a person can not sue where he gave provocation for the assault by words. *Finkelstein v. Naihaus,* 151 So. 686 (La. 1933).

In general, provocation may be shown in mitigation of damages, even when the provocation consisted of words alone. In some jurisdictions it may be shown in mitigation of damages, both compensatory and punitive. *Palmer v. Winston-Salem Railway,* 131 N. C. 250, 42 S. E. 604 (1902); *Ward v. White,* 86 Va. 212, 9 S. E. 104 (1889); *Berkner v. Dannenberg,* 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559 (1903). In by far the majority of the states, however, it may be shown only in mitigation of punitive damages. *Donnelly v. Harris,* 41 Ill. 126 (1866); *Mahoning Valley Ry. Co. v. De Pascale,* 70 Ohio St. 179, 71 N. E. 633 (1903); *Daniels v. Starnes,* 61 S. W. (2d) 548 (Texas, 1933); *Morache v. Greenberg,* 165 Atl. 684, 116 Conn. 549 (1933); *Royer v. Belcher,* 100 W. Va. 694, 131 S. E. 556, 47 A. L. R. 1089 (1926); *Metzinger v. Perry,* 197 Wis. 16, 221 N. W. 418 (1928); *Benjamin v. Walton,* 181 Cal. 115, 183 Pac. 529 (1919); *Bond v. Williams,* 279 Mo. 215, 214 S. W. 202 (1919); *Terry v. Richardson,* 123 S. C. 319, 116 S. E. 273 (1923). In those states which do not allow mere words to serve as a justification of an assault and yet allow the provocation by the words to mitigate the damages, both compensatory and exemplary, the courts are allowing the defendant to do indirectly what they will not allow him to do directly which is, to say the least, an illogical privilege. Undoubtedly the reason the courts allow the mitigation of damages at all is because they feel that no one should be allowed to profit by his own wrong. The law does not encourage those who go around insulting others and later sue to recover the damages suffered through the assault that they themselves provoked. Recognition is found in the old common law which made it a disdemeanor to challenge another to fight. The courts in general, on the other hand, refuse to go so far as to say that words calculated to provoke an assault will serve as its justification.

Frank E. Bright.

BOOK REVIEWS

CASES ON CODE PLEADING. By Archibald H. Throckmorton. Second Edition. St. Paul: West Publishing Co. 1938.

The reader expects a review of a standard case book to be fascinating and instructive as well. However, such a result is almost impossible to attain because it is necessary to present facts which in themselves are essentially valuable but nevertheless unattractive to the reader's eye.

This is a collection of some three hundred and thirty cases covering seven hundred and fifty-six pages, with an introductory essay on "History, Systems

and Functions of Pleading," by Professor Charles E. Clark of Yale. In the footnotes references are made to some forty articles and notes upon important topics from a dozen legal periodicals.

Briefly stated, the book treats of the subjects of, Parties, Joinder and Splitting of Causes of Action, Complaint, Demurrer, Answer, Reply and Supplemental pleadings.

Is the work teachable? Only one who has tried it can answer with any degree of assurance. The material seems sufficient and satisfactory for a successful subject. The cases chosen concern the most interesting and important questions in the course. The footnotes are abstracted from works by such learned men as Hinton, McCaskill, Cook, Sunderland and Clark. The puzzling problems of code pleading are either clearly explained in the book or reference is made where further knowledge can be acquired.

The book contains a number of recent cases including for example, those landmarks in the development and interpretation of the New York and Illinois Civil Practice Acts. In general, the cases have not appeared in other collections, although many of them naturally have introduced some of these cases.

The excellent features of Professor Throckmorton's books are many. The great variety of cases, new and old, present a wealth of teaching material. The arrangement is good and there is enough material on each topic.

The material facts of a case, the decisive question in it, how this question was reached, and with what final result, can be ascertained only from a careful reading of the whole case as given in the casebook. It is my personal opinion that this is a factor, not only of this casebook alone, but all others as well, which is subject to severe criticism. If an author insists on many long cases to bring out a single point, the student's search for possible distinctions between the case and other cases should be aided by short order ancillary cases.

Two features are notable in the cases in Professor Throckmorton's book, their wide field of selection and the number of them which have appeared since 1900. The larger number of cases come from New York, but the trans-Mississippi states are represented with a sufficient number of cases as well.

Two other features of the book are deserving of notice. It gives at the opening of the more important chapters, the text of the enactments in a representative number of the codes, east and west. These enactments are selected from some of the older codes and from the recent New York and Illinois Civil Practice Acts.

The book has an Appendix containing the Rules of Civil Procedure for the district courts of the United States and for the courts of the District of Columbia. This is of practical value. Although the author has been sparing in the use of forms, and not having an actual color of reality, nevertheless, the student should pursue this knowledge through the books in order to familiarize himself with the forms as used in his own jurisdiction.

The extracts from the various code provisions which appear at the beginning of every chapter, in my humble estimation, constitute the outstanding feature of the book. In this manner the student has a general idea of the topic which the subsequent cases will cover.

On the whole, this is a good standard casebook, worthy of a place in the American Casebook Series; it is as good as most of the books, and much better than others.

James E. Bales.

CONFLICT OF CRIMINAL LAWS. By Edward S. Stimson. Chicago: The Foundation Press, Inc. 1936.

This book, a fourth of a series on Confiict of Laws, was published by Professor Stimson with a duality of purpose. Not only did he desire to state the law as accurately as possible and cite all the authorities substantiating his statements, but also the preface states his purpose to be "to make a thorough analysis of the problem of jurisdiction over crime with a view to ascertaining and recommending general principles to be applied in solving the problem." It is in this latter goal that we find a unique study in the criminal law. To the practitioner and student alike the book is of great value, but if not closely scrutinized some of the ideas of the author, which are not the law but what Professor Stimson thinks the law ought to be, will be accepted as dogma.

A long line of precedent has established the rule that a criminal will be tried only by the state in which he committed the crime or the state in which the effect of the crime took place. However, it is advocated in this book that the criminal be tried in any state where he is apprehended, or where it is convenient and economical, and that that state apply the criminal law of the state where the criminal act occurred. In this way the Conflict of Law theory as promulgated in *in personam* actions would be used. It is pointed out this would defeat the obtrusive decision of *Commonwealth of Kentucky v. Dennison,* 65 U. S. 66, 16 L. Ed. 717 (1860). The arguments given in support of such a proposition would be several; double jeopardy would be eliminated, extradition would be made less important, the defendant would know what law governed his acts and there would be less complication in the law. However the criticism of the system would far outweigh the merits. What state would seek the honor of punishing at its own expense a crime committed in another jurisdiction when the howl for a reduction of taxes is ever-increasing? If one state refused to pass a statute permitting such an action, it would be the haven of all criminals, it would not be unlike the distasteful condition of the divorce laws of the nation—where several states granting easy divorces have been the sanctuary of those evading the more stringent laws. Therefore the theory presented here by this metaphysical jurist, Professor Stimson, would have multiple bad results.

In reviewing the book one cannot help acknowledging the exhaustive research and marvelous study that the author has brought to bear on the subject. Some 1200 cases have been studied and been made authoritative, statutes instituting modern trends have been commented upon, and the fifteen separate crimes which have been examined lend a great deal to this book. One of the most novel and interesting phases of the book is the analysis of the crimes committed through agents and its relation to all fields of law.

The three-fold division of the book into a study of decisions in regard to specific crimes, in regard to crimes on water, and in regard to forfeiture of property ordinates the book in a scholarly fashion. In each case the law is pointed out as being what it ought to be and in relation to property, it is the place where the owner of the property is at the time of the seizure. Since the book is specialized in the field of criminal law, it is highly imformative on particular points. For that reason it is of unusual value to the student. Both the members of the profession and the law students are, therefore, deeply indebted for this contribution in the field of Conflict of Laws, and should express a desire that this series by Professor Stimson be continued into other fields of conflicts.

John De Mots.

THE LAW OF NATIONS. By Marcellus Donald A. R. von Redlich. Second Edition. World League For Permanent Peace. 1937.

The Law of Nations is made up of those principles and rules which civilized nations have agreed to be applicable to them in their mutual relationship, and only if nations abide by these rules which they have accepted will universal peace be attained. Disputes in the past between nations have many times been settled only by resorting to violence and bloodshed instead of by the principles of justice found in the Law of Nations. It is the author's purpose in this book to set forth the means and the machinery the world has created by treaties and custom for the amicable settlement of international differences, which consist of diplomacy and settlement by arbitration or by an international court.

In considering diplomacy the history of diplomacy is shown from the Pater Patratus of Rome who sought peace for the Romans by diplomatic negotiations and declared war by hurling a spear across the frontier of the enemy, through the early American diplomatic history, to the history of the establishment of the modern permanent diplomatic missions. Then in further consideration of diplomacy the modern status of diplomatic officers is interestingly set forth which includes the circumstances under which a nation may receive or reject a diplomatic representative, and the rights, duties, privileges and immunities of diplomatic officers. The author rightly observes that the settlement of international disputes by diplomacy has not been entirely satisfactory since diplomatic representatives in the past have fomented as many disputes as they have settled, and that the determination of the respective rights of nations would be better accomplished by the submission of differences to a court as the disputes between individuals within nations are settled.

In view of the world's need for the judicial settlement of international disputes the world's facilities for the settling of such disputes in a judicial manner is considered. Arbitration, where it has been used, has had marked success in the maintenance of peace. At present the League of Nations has established the Permanent Court of International Justice for use by the League members in the settlement of disputes before the greatest jurists of the nations of the world. Proper space is given to an exposition of the nature of the Court, the history of the League, and its present organization, and the author recognizes the inability of the Court to enforce its decrees. He shows, however, that all early law courts were deficient in this regard and expresses the hope that mankind will realize that the settlement of international disputes by law and pustice is the only method of settlement in keeping with man's dignity. He feels that the United States would be a great factor in the maintenance of universal peace if it were to enter the League of Nations, not to become an international policeman, but to vitalize the League and the Court by her prestige. The United States necessarily must be interested in world peace, and that can be most easily expressed by cooperation in that behalf with the other Great Powers through the League which the United States so manifestly aided in molding.

Of considerable interest to students of Constitutional Law in particular is the author's discussion of the treaty-making powers of the United States wherein he sets forth the extent of that power, the relation of treaties to federal statutes, and the binding force of treaties upon the states. Consideration is also given to the circumstances under which a treaty may be terminated and to the question of whether all treaties between belligerent nations are automatically terminated by the outbreak of war.

The mechanics of the book make study of the subject-matter most easy. Division of the book is by chapters with further division of the chapters by numbered and titled sections. Further aids are a complete index, an extensive bibliography affording means for exhaustive research on the subject, and an appendix contain-

ing the Covenant of the League of Nations, the Statute and the revision in the Statute of the Permanent Court of International Justice and other Treaties referred to in the text and cited as appearing in the appendix. Throughout the text are excerpts from the leading writers in the field of International Law and citations to United States Supreme Court cases. A notable feature of the book itself is its extreme light weight although more than six hundred pages long.

Lastly, Marcellus Donald A. R. von Redlich must be highly commended for the clear, interesting and readable fashion in which he has fulfilled his purpose of presenting the Law of Nations as it actually is, and not as it ought to be, for the peaceful settlement of international disputes. The reader is forcibly made to realize the agencies at hand in the world for the easy and sane dissolving of such international differences, and how unreasonable is the resort to war with these agencies existing.

William R. Bowes, Jr.

VALIDITY OF FOREIGN DIVORCES. By Hamilton Vreeland, Jr.[1] Chicago: Callaghan & Company. 1938.

"Concerning the extraterritorial recognition of divorce decrees there has existed and still exists unfortunate discord, with resulting lamentable social confusion and hardship." [2] To bring order out of the chaos of decisions Dr. Vreeland has examined all the decisions and other authorities on the problems which have been found in Anglo-American and Continental jurisprudence.[3] Decisions of courts, statutes, treaties, and the thoughts of jurists have been examined, compiled, evalued, and criticized in an illuminating style which has been coupled with many technical advantages of law book construction to make the fruits of the author's research most usable to the practicing attorney.

English authorities are examined in Part One for the avowed reason that the law of England on this problem is simpler than that of other jurisdictions.[4] It is seen that the English courts have adopted the view that a divorce need not have been obtained after personal service upon the defendant to entitle such decree to recognition as valid in England, because the case of *Le Mesurier v. Le Mesurier* [5] held that all that was required was that the divorce have been granted at the true domicil of the parties. As to the recognition accorded a separation decree, however, the English court in *Armytage v. Armytage* [6] refused to grant extraterritorial recognition where there had been no personal service upon the defendant in the jurisdiction handing down the decree. The apparent social anomaly whereby the decree of less magnitude in the eyes of society requires greater notice to the defendant is satisfactorily explained by Dr. Vreeland by an exposition of the nature of the two decrees with a finding that the divorce decree attacks the status of the parties created by the marriage, and therefore a court

1 Associate Professor of Law, Catholic University of America.

2 P. liii.

3 Included are: Law of every jurisdiction of the United States including that of the federal courts; the law of England and of certain British possessions; and the law of every country on the Continent of Europe, except that of Soviet Russia.

4 Which if true, is true only by comparison, as no existent theory in this field may be termed simple.

5 [1895] A. C. 517.

6 [1898] P. 178.

to successfully dissolve such status, or *res*, must have jurisdiction over that status, which jurisdiction is determined by the location of the true domicil of the parties. In the instance of the separation decree the *res* is neither attacked nor affected, and consequently for such personal adjustment between the parties personal jurisdiction is all that is required.

The difficulty which ordinarily arises upon permitting the wife to adopt a separate domicil from her husband is circumvented by the refusal of the English courts to recognize such a right in the wife. The injustice of the arbitrary presumption that the domicil of the wife always follows that of the husband is recognized by the author who suggests as a remedy the adoption of a theory that the presumption becomes inoperative when the husband deserts the wife, but that it remains operative when she deserts him.[7] A solution of this vexing problem seems necessary, and the substitute theory advanced by the author appears sound and not in violation of any legal theory.

From a discussion of the *in rem* theory of the *Le Mesurier* case and the *in personam* theory of the *Armytage* case, the author in Part Two enters into an examination of the extraterritorial recognition of a foreign divorce under the constitution of the United States. It is seen that the United States Supreme Court in its application of the *full faith and credit* clause of the Federal Constitution has been deaf to pleas of divers writers who seek to compel the Supreme Court to declare whether a suit for a divorce is *in rem* or *in personam*.

Taking four of the leading decisions it is discovered that "the *Haddock*[8] case may be . . . considered to have been decided on the ground that there was no jurisdiction either *in personam* or *in rem*; the *Atherton*[9] case on the ground that there was jurisdiction *in rem*; the *Andrews*[10] case on the ground that domicil, as conclusive evidence of the absence of fraud against the state of citizenship, was not present; and the *Cheever*[11] case on the ground that there was jurisdiction *in personam*, with domicil established as the conclusive evidence of the absence of such fraud."[12] From these cases and others the author logically concludes that there is no necessity for a declaration by the Supreme Court that a divorce action is either *in rem* or *in personam*, since all that is required to entitle a decree to extraterritorial recognition under the Constitution is that there exist in the court of the original decree some jurisdiction of either type and no fraud.

Part Three covers the law of conflict of laws in the United States. In this extensive section the theory adopted by the courts of each state in the United States is evaluated and set forth in a convenient alphabetical arrangement by states. In addition the theory adopted by the American Law Institute in the *Restatement of the Law of Conflict of Laws* is presented and criticized along with the *Uniform Divorce Jurisdiction Act*, prepared by the National Conference of Commissioners of Uniform State Laws, which is included although it is not law at present in a single state. The material summarized and considered for each state does not purport to be exhaustive of the law of that jurisdiction,[13] but the author has discerningly selected only the leading cases and only a sufficient number of those to present the complete theory of each jurisdiction.

Apparently the book was written before the decision of *Jardine v. Jardine*[14] was handed down. However, it is suggested that in the event of a reprinting of

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[7] P. 18.

[8] Haddock v. Haddock, 201 U. S. 562 (1905).

[9] Atherton v. Atherton, 181 U. S. 155 (1900).

[10] Andrews v. Andrews, 188 U. S. 14 (1902).

[11] Cheever v. Wilson, 9 Wall. 108 (1869).

[12] P. 35.

[13] Although in many instances it is exhaustive.

[14] 291 Ill. App. 152, 9 N. E. (2d) 645 (1937).

this book this recent case should be included, not because it alters the Illinois rule as set forth by the author, but because it sustains that view with greater clarity and in a more exhaustive opinion than many of the cases considered.

Part Four sets forth the European law under the Hague Treaty of June 12, 1902. In it the provisions of the treaty are presented along with the names of countries which are signatories thereof, the comments of the publicists upon it, and the cases construing the treaty.

Part Five presents the European law aside from the treaty considered in Part Four. In it is organized, in an alphabetical arrangement by countries, the divers legal theories adopted in the jurisdictions considered.

In Part Six the author presents his conclusions formulated after his exhaustive consideration of the authorities. These conclusions are splendidly arranged, the fundamental problems are restated, and there is a list of jurisdictions grouped according to the legal theories adopted by them in the recognition of foreign divorces.

As the author's constructive solution of the problem he suggests a treaty, a draft of which he includes in Part Six, adopting standards for the extraterritorial recognition of divorce decrees, which if ratified by the United States would automatically become binding upon the courts of each state, thus achieving uniformity within the United States in one fell swoop. The authority for this proposition of "legislation by treaty" is, in the main, based upon the decision of Mr. Justice Holmes in *Missouri v. Holland*,[15] and although Dr. Vreeland, in his argument and suggested draft of the treaty, satisfies all the requirements of that case, it seems that it is one of Mr. Justice Holmes' poorest opinions. So indefinite and tenuous is it that it is believed that upon this case alone the "jurisprudes" of the realistic school of jurisprudence could accord Justice Holmes membership in their school, which school has for its one universal attribute the fear of all its members of being tied down to anything said by them. Admittedly, "legislation by treaty" is a solution which possibly could be used in the manner suggested, but too great hopes should not be held out for it.

Unintentionally, perhaps, this book presents by implication a definite condemnation of the practice of divorce as it exists in this country today. One cannot peruse it for long without a realization of the catastrophic results that are attendant upon the so-called "society" or "conventional" divorces which in so few instances are upheld when attacked in a court of law. The results of ineffective decrees are universally disastrous, children often are rendered illegitimate, and divorced parties contracting a subsequent marriage are subject to prosecution for bigamy and adultery. It is urged that any lawyer, forced to procure the dissolution of a marriage, should be compelled to read this book before any steps are taken, and since this book has made the necessary information available, any lawyer who assists a client in procuring a divorce which is not later entitled to universal extraterritorial recognition should be held liable to his client in a negligence action for being remiss in his knowledge of the law.

As might be inferred from what has been said in review of this book, it is structurally quite well written, the numerous summaries, the alphabetical arrangement of the law in jurisdictions, and a reserved, incisive style all grace the book. The legal profession needs more of such books that are scholarly in thought and expression, but which have been kept off the market by publishers seeking works shallower in thought but covering a wider scope and subject to a speedier turnover.

The method of citation employed differs from that found in books of recent years, in that the citations are included in the text rather than in footnotes. The

15 252 U. S. 416 (1919).

form of citation of cases could stand definite improvement, for, throughout the work cases are cited often without the unofficial citation, sometimes without the official citation, and when both are given there is no consistency as to which comes first. The cases are all properly cited in the table of cases in the front of the book, and the author explains in his introduction [16] that the reason for the incomplete citations throughout the text itself was his lack of access to all the compilations of cases. Such statement explains but does not excuse the laxity in this matter and does not justify the failure to make the simple mechanical corrections necessary.

James Joseph Kearney.

Chicago, Illinois.

[16] P. liv.