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Reviews

CIVIL CODE OF LOUISIANA. Revision of 1870 with Amendments to 1947, edited by Joseph Dainow. West Publishing Company, Saint Paul, 1947. Pp. li, 852. \$8.00.

I have been requested to prepare a short review of Professor Dainow's edition of the Louisiana Civil Code.

It is almost a work of supererogation for me to attempt to add anything to Mr. Dainow's masterly introduction; but presumptuous as the effort may be, I still am pledged to undertake it. When William Ewart Gladstone said that while the English Constitution was the subtlest work that had proceeded from progressive history, the Constitution of the United States was the greatest work ever struck off at a given time by the brain and purpose of man, he was of course aware, when he made the comparison, that the subtleties of the English Constitution evolving from progressive history were also the raw material with which the transplanted Englishman of the Eighteenth Century worked to frame the American Constitution.

How the civil law of Louisiana was evolved by a similar process from the materials furnished by the master builders of Rome, and of Spain, and of France, and of our own American jurists, suggests a parallel to Mr. Gladstone's dictum.

It is my recollection that even one who had been trained in the civil law tradition dismissed our civil code with the statement that "It was nothing but a statute." Similarly, a great teacher in a law school of a common law jurisdiction warned that the legislature might meet, if there were a code, and repeal all the law that a student had learned.

That disaster has been averted in Louisiana by the solemn pronouncement of its constitutions. Article III, Section 18, reads: "The legislature shall never adopt any system or code of laws by general reference to such system or code of law; but in all cases shall recite at length the several provisions of the laws it may enact." Article IV, Section 16, reads: "No law shall be passed abolishing forced heirship or authorizing the creation of substitutions, fidei commissis or trust estates;" (except that the legislature is permitted to authorize the creation of limited trust estates, but the prohibition against the abolition of forced heirship remains).

It is clear that the constitution is a bar to the adoption *in globo* of the common law or any other system or code of laws. It is equally clear that the institution of forced heirship remains under constitutional protection.

Let us consider what forced heirship means. A forced heir is one who must inherit unless one of the several causes of disinherison exists. The prodigal son was a penitent wastrel when he returned to his father's house; but no matter how deep parental displeasure might have been he was safe against being "cut off with a shilling" or with whatever was the equivalent of a shilling in biblical times.

The "testamentum inofficiosum" (undutiful testament) of the Roman law is branded in the Louisiana law of 1947.

The relationship of husband and wife as stated in the Louisiana Civil Code of today has been subjected to vital changes, some of which are not contained in codal articles, but are the subjects of legislative enactments which have changed the code.

The disabilities of the wife, reflecting a long outmoded conception of the status of women, have been largely removed by legislation.

The community property system, embedded in the law of Louisiana, is shared by this state with several other states in common law jurisdictions. The subject is too vast for more than a brief reference.

Article 119 of our civil code says that the husband and wife owe to each other mutually fidelity, support and assistance. Evidently that duty was fulfilled by a minister of the gospel to whom his wife had bequeathed her property; but he was not exempt from the pursuit of her heirs.

Professor Dainow's code is not an annotated code in the usual sense; but Article 1492 says concerning a will that was under attack: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion, or captation." Whence comes the word "captation"? What was a "captator"? He was a legacy hunter. Look in your Latin lexicon. Look in the Digest of Justinian.

This Article 1492 was examined in the case of *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894). The case was litigated with two of the most eminent and learned lawyers of the New Orleans bar on opposing sides. The attack on the will utterly failed. The

surviving husband was vindicated and cupidity was rebuked. Our supreme court silenced the plaintiffs, carrying out the plain mandate of the law that "proof was not admitted," etc.

In the field of sales, a contrast between the common law and the Civil Code of Louisiana is worthy of notice. In the matter of price, the requirement of our civil code is that the price must not be out of all proportion to the value of the thing sold. Thus the sale of a plantation for a dollar is regarded as a donation in disguise, under Article 2464, Paragraph 2.

Earnest money (Article 2463) does not bind the bargain, but on the contrary loosens it.

The common law rule of caveat emptor (let the buyer beware) has no place in the civil law. The redhibitory action affords the buyer a remedy. (See Article 2520).

The doctrine of quasi-contract, recognized by our law, Article 2293 et seq. of the civil code, was recognized by Lord Mansfield in the case of *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Reprint 676 (K.B. 1760), wherein Lord Mansfield traced it to its origin in the Roman law.

Article 2500 defines eviction thus: "Eviction is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claims of a third person."

In this definition attention should be paid to the expressions *the right or claims of a third person*. It is not necessary that the buyer should be actually ousted from possession of the property. According to the language of the French commentators, of whom one is here quoted there is eviction when the right of a third person is shown to exist. In the case of *Bonvillain v. Bodenheimer*, 117 La. 193, 42 So. 273 (1906), one of the justices referred in discussing the meaning of eviction to three dictionaries: Abbott's Law Dictionary, the Century Dictionary, and Webster's International Dictionary. He also referred to the civil code; but his opinion on the first hearing was not the opinion of the court on the rehearing, and the court refused a second rehearing.

The organ of the court on the rehearing was Justice Alfred D. Land, who cited Laurent, Marcadé, and Durantou. I give what Laurent says: "*La vente de la chose d'autrui étant nulle, l'acheteur a le droit d'en demander la nullité, quand même il ne serait pas*

troublé." "The sale of the property of another being null, the buyer has the right to demand its nullity, even when he has not been troubled (or disturbed)." I beg indulgence for what may be deemed a poor translation.

Happily, it is not yet heresy to quote the French commentators.

I wish to make acknowledgment to Alexander E. Ralston, Jr., whose article on this subject appears in the *Tulane Law Review*, Vol. 15, page 115 et seq.

I have briefly sketched some of the leading principles of the civil law of Louisiana. It seems to me that there is a thread of the ethical running through those principles and when that thread is followed it leads to just conclusions.

Professor Dainow, as I have said, has not prepared a fully annotated code. When the legislature has in an amendatory act incorporated bodily the codal article as amended he reproduces in the code that amendatory act (see Article 142, as amended in 1946).

But if as in the case of the abolition of the disabilities of married women, the legislature has acted by legislation accomplishing that result, but not specifically amending a particular article or particular articles of the code, then he does not reproduce the amendatory legislation in full. This is so manifest as not to require demonstration.

Thus Mr. Dainow has dealt with the code not only as an enacted body of legislation, but also as an institution. In closing, this reviewer wishes to commend to the practicing lawyer, the law student, the judge upon the bench, and to all other molders of the law, Professor Dainow's masterly sketch of the Louisiana civil law, pages xi to xxx of his volume and also his bibliography on pages xxi to xxxviii.

I quote his last paragraph on page xxx:

"Louisiana's civil law has changed considerably since 1803. One and a half centuries of the world's most rapid and most startling progress in all fields of human interest and relations called for corresponding adjustments in every civilized legal system. In making its adjustments to all the operative forces, the Louisiana civil law has retained its essential nature. It is now and will continue to be a legal system with the individualized character of Louisiana."

In closing, I have to say that we live in a scientific age. The

electric light has superseded the tallow candle as a means of illumination. That feebler source was in constant danger from the gusts of prejudice.

But Mr. Dainow and his co-workers have served as electricians for us who look upon our pursuit as the science of jurisprudence. By the steadier light which they have furnished, we may discern the path to a surer and a better law.

ROBERT LEE TULLIS*

CONGRESS AT THE CROSSROADS, by George B. Galloway. Thomas Y. Crowell Company, New York, 1946. Pp. ix, 374. \$3.50.

The paper jacket covering George Galloway's *Congress at the Crossroads* pictures a signpost in front of the capitol in Washington. But the arms on the signpost carry no words to show which way they point. After reading Mr. Galloway's book, I am still uncertain as to what alternatives are open to Congress. It is clear that Congress ought not stay right where it is. But I do not think Mr. Galloway gives us a very good vision as to the different places Congress might hope to arrive at, or points out very clearly the route by which it may get to any of those destinations.

Very few people have had better preparation for writing a definitive book about Congress and its work than Mr. Galloway. He went to the Ph. D. degree in academic training with government and politics as his major interest. He has spent virtually all of his adult life in Washington. He served during several years as chairman of a group of political scientists and Congressmen engaged in active study of Congress and its problems. He was subsequently employed by the House and Senate Joint Committee on the Organization of Congress to direct its research staff. He is now a member of the staff of the Legislative Reference Service of the Library of Congress. The book appears to have been written during and after his service with the Joint Committee.

This should make it clear that if any reader is disappointed in this book, it is because Mr. Galloway chose to write a different book than the one the reader hoped for. This is an author's privilege; it is for him to decide whom he is writing for and what he wants to tell that audience.

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As best I can judge, Mr. Galloway chose to write for a general audience of thoughtful American people who are concerned about the security and effectiveness of their basic institutions, but who are not sufficiently informed about them to be ready for critical analysis of issues of policy. He describes at some length the things that Congress is expected to do (enact our basic policies, appropriate money for government functions, maintain some supervision over government departments, etc.); gives some attention to the kind or quality of men we elect to Congress; explains how it is organized to do business; discusses its practices and procedures; and points out and offers suggestions concerning the issues, problems, obstacles and so on that are involved in making Congress into a legislative body that would suit most of us better.

It seems to me that Mr. Galloway is best in describing Congress as it is—the character and quality of Congressmen, the way Congress is organized, how it does its work, the volume of its business, and similar matters. Even in this part of the book, however, the reader's confidence is occasionally jarred by looseness of language. The implication of pages 36-37 is that the American people have forgotten Fighting Bob LaFollette, George W. Norris and Cordell Hull. The statement that "measures not advocated or supported by the administration are usually pigeonholed"¹ is untrue when applied to kinds of legislation in which neither President nor political party have an interest, and untrue of legislation generally at a time when Congress and White House are under the control of different parties. Mr. Galloway tells us² that members of the appropriations sub-committees tend to put questions "of a random, impromptu character, picking on this or that item in a spot-check quest for information . . . seldom prepared to make a penetrating analysis of the estimates and tend to appropriate blindly." My own observation, and I find it confirmed by others, is that a substantial number of committee members come to the hearing on a department's request for money quite familiar with what the department does, ask searching questions on important points, and can give good reasons in support of the action they finally take.

Flaws of this sort are definitely few in number, however, and probably passed from manuscript into book only because the author felt that the state of public interest in the subject made it important to get his message into the hands of readers as quickly as possible.

1. P. 54.
2. P. 247.

In my opinion such a decision was fully justified; the gain in greater accuracy that would have resulted from further revision of the manuscript was outweighed by the greater impact on public understanding that could be expected to result from the appearance of the book at a time when the country was most conscious that Congress needed to undergo reorganization. And the American citizen who has not had an unusual opportunity to observe or study Congress in action will find in this book a very substantial addition to his present knowledge about Congress, what it does, and how it does it.

But the book has a further purpose. As the description of Congress, its powers, its practices, and its problems goes forward, the author calls attention to what he considers to be inadequacies or shortcomings, usually discusses alternative remedies which have been proposed, and sometimes endorses a specific solution. In a number of instances his analysis and his reasoning are, for me at least, far from convincing. I think he sometimes mistakes symptoms for causes, as when he says³ that the practice of electing only local residents to Congress "has set local above national interests." The point is reiterated at page 287. Surely it is the other way around; an ingrained localism induced by a wide range of factors established and supports the practice of sending only local people to represent a district in Congress.

It takes a good deal more argument than this book supplies to convince me that it might be a good idea to forbid the two houses to "increase an appropriation item beyond the figure recommended in the committee report."⁴ Fixing the amount of money to be spent for specific purposes is one of the most important ways of saying what the government shall do, and it is just as important for the legislative assembly to be able to fix the minimum expenditure as to fix the maximum. If Congress cannot by majority vote overrule the committee on the exact amount to be appropriated when it disagrees, then it will be essential for Congress to dissolve the committee and get itself a new one. I do not understand that Mr. Galloway proposes this limitation as a device for forcing a more careful selection of committee members; it seems pretty clear that his purpose is rather to restrict Congress from deciding by majority vote how it wants the taxpayers' money to be spent. If one does not want such matters decided by a majority of the whole membership, it seems to me he has to carry the burden of showing how he would

3. P. 119.

4. P. 258.

identify or constitute the minority group (in this case a committee) that the nation can better afford to trust.

I have the feeling that Mr. Galloway has not quite made up his mind whether he trusts Congress to make decisions for the American people. It seems very clear that he has not made up his mind what the relationship between Congress and the President should be in making public policy. Uncertainty on the latter point is quite understandable and quite forgivable; it is a tough problem and very few of us have found a solution that satisfies us. Mr. Galloway encounters that problem at several points in his book and it seems to me that what he says at one point about Presidential leadership in legislation is not entirely compatible with what he says at other points about organization and procedure in Congress.

These shortcomings may have been caused by pressure to get the book in the hands of the public at an opportune moment; it may be that the author was writing for an audience that he thought would not be concerned about critical analysis. Whatever be the explanation of the qualities of this book, there should be no dissent from the statement that the country needs a different one which Mr. Galloway (and very few other people) can write—a book that joins a capacity for sharp analysis, an intimate acquaintance with Congress and President and their respective ways of behaving, and a student's appreciation of what time and varied experience have shown to be the crucial problems in giving a nation government that responds to the will of the people.

CHARLES S. HYNEMAN*

THE BASIC EQUITIES OF THE PALESTINE PROBLEM, a memorandum by Simon H. Rifkind, Jerome N. Frank, and others;* New York, 1947. Pp. 107.

The Palestine problem has been a matter of special concern since the First World War. Even though this came about as an outgrowth

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* The names of the authors are significant in forming an evaluation of the Memorandum: Simon H. Rifkind, Chairman, Judge of the United States District Court, New York; Jerome N. Frank, Judge of the United States Circuit Court of Appeals, Second Circuit; Stanley H. Fuld, Judge of the Court of Appeals of the State of New York; Abraham Tulin, member of the New York Bar; Milton Handler, Professor of Law, Columbia University; Murray I. Gurfein, member of the New York Bar; Abe Fortas, former Undersecretary of the Interior of the United States; Lawrence R. Eno, member of the New York Bar.

of a great international conflict, it was generally considered as a local affair rather than an international issue. For that matter, in the United States, before 1941 there was very little outside of its own scope of active interest which penetrated the thinking of the American people. It took the Second World War and its devastating effects on humanity at large, together with the rival interests of great powers, to bring the Palestine problem into general focus as a matter of international concern, and perhaps one of the most serious from several points of view.

The absence of general interest in the Palestine problem has been accompanied by a lack of basic information as to correct facts and legal data. In its stead, emotion and rationalization were supporting predetermined points of view for reasons which were related not to the merits of the issue but to the results of its outcome. The memorandum under review is in the form of a legal brief, prepared by lawyers; the facts and legal data collected from documents and records which are not readily accessible, constitute a very useful addition to the materials which are being brought to light and coming before the United Nations Organization at the present time.

The two basic points of reference for the Palestine problem are the Balfour Declaration of 1917, and the League of Nations Mandate for Palestine of 1922. The key phrase in the former "a national home for the Jewish people" has been defined by different parties in accordance with their respective objectives, and the significance of the mandate has been interpreted divergently in the same manner. In setting forth the circumstances and discussions before and after the Balfour Declaration, as well as the pertinent provisions of the mandate and their interpretation by those who drafted them and first applied them, this memorandum not only supplies a great deal of basic information and legal data but at the same time dissipates misrepresentations and unmask deliberate distortion.

In this manner, the memorandum shows from the documents and the discussions that all the parties involved clearly understood the unequivocal intention of establishing a Jewish State in Palestine: the British, the League of Nations, the United States, and the Arabs, as well as the Jews. Even as late as 1939 and 1944, officials of the British Government (usually while in the opposition benches) confirmed this understanding. Likewise, pointing out the same objective, are shown the pertinent provisions of the San Remo Decision and Accord of Principal Allied Powers in 1920, as well as the Treaty of Peace with Turkey later in the same year. Then in

1924, the Anglo-American Palestine Mandate Convention incorporated the same understanding.

Against this background, there was a unilateral reversal of policy by the British Government in its promulgation of the White Paper of 1939, the two main prongs of which were the choking restrictions on Jewish immigration and on land acquisitions. Despite a disregard for the mandate provision that "the consent of the Council of the League of Nations is required for any modification of the terms of this mandate," and despite the provision in the Anglo-American Convention that the mandate was not to be modified without the assent of the United States, and despite the discussions and conclusions of the Permanent Mandates Commission of the League of Nations that the action was violative of the mandate, the British Government proceeded to enforce and is still enforcing that illegal White Paper of 1939. It is by a cruel transference of epithet that the despair-driven displaced Jews of Europe, who attempt to come to the home which was supposed to have been provided for them, are called "illegal" immigrants.

As part of its presentation, the memorandum contains many facts and figures about Palestine and its economic absorptive possibilities. It shows that the potential for Jewish mass immigration into Palestine is large, and is related to many factors which are not always fully understood in this connection, such as capital investments not dependent on any profit return, the social outlook of land development, the confirmed possibility of a Jordan Valley Authority for ample electrical power, an understanding and sympathetic government, and so forth, as well as the better known factors of modern scientific methods and equipment.

An argument sometimes urged against a Jewish Palestine is the principle of self-determination for the Arabs. In the light of the broader perspective of facts presented in the memorandum, this argument weighs against that contention. It is pointed out that the principle of self-determination emanated from the same people who drew up the Palestine Mandate, and that it was in the carrying out of this principle that the Arabs of the former Turkish Empire have already been assisted in establishing the six independent States of Syria, Lebanon, Saudi Arabia, Iraq, Egypt, Yemen. Of these, all but the last are already members of the United Nations Organization. Palestine does not have the character of another Arab country. On the contrary, Palestine is always described as being quite different from the neighboring Arab countries. The character of modern

Palestine, as well as its historical associations, is definitely Jewish. It is hardly out of proportion to have there one small Jewish state, with one membership in due course in the United Nations Organization.

Another item on which there is enlightening information is the Arab claim that Palestine had been promised to them by Sir Henry McMahon during the First World War. The memorandum shows that both the British Government and Sir Henry McMahon rejected this contention as unfounded.

The fact that the Palestine problem is not merely a Jewish problem but is a world problem has been acknowledged by its place on the present agenda of the United Nations. The solution must be through international action. Here again, the memorandum provides useful information about the different solutions which have been proposed, including the two impossible ideas of Cantonization and a Bi-National State. Likewise, the minority report of the United Nations Special Committee on Palestine is described and shown to be unacceptable. It is pointed out that an indispensable part of any feasible solution is a Jewish State, the nature of which is outlined in quotations from a memorandum submitted to the United Nations Special Committee on Palestine by the Jewish Agency for Palestine, which includes the following (p. 91):

“What will be the character of this (Jewish) State? It will be an independent self-governing Palestinian State with a Jewish majority in which all citizens regardless of race or creed will enjoy equal rights and all communities will control their internal affairs. The State will not be Jewish in the sense that its Jewish citizens will have more rights than their non-Jewish fellows, or that the Jewish community will be superior in status to other communities, or that other religions will have an inferior rank to the Jewish religion. It will be Jewish because the Jews will have a right of entry not limited by any political considerations; because in it Jews will be free to create a society according to their own way of life; because in addition to ensuring the welfare of all its inhabitants, this State will have the special function of serving as a National Home for the Jewish people and providing a refuge for oppressed Jews.”

The territory of Palestine as it was contemplated in the Balfour Declaration and as it was defined in the mandate included Trans-Jordan which the British Government separated out and, by its

unilateral action, established as an independent Arab state in 1946. Now, it is proposed to divide again even what is left of Palestine. Yet, the point of greatest importance is the establishment of a Jewish State even in a part of Palestine, as long as this part is sufficient for the necessary purposes of its existence.

Thus, the United Nations Special Committee on Palestine (majority report) has recommended partition into two separate states, one Jewish and the other Arab, as the only workable basis of solution.¹ (Jerusalem would be an international area.) Even though the territory proposed is less than one-eighth of what was originally contemplated for the Jewish National Home at the time of the Balfour Declaration and in the League of Nations Mandate, the conclusion of the memorandum accepts this as a compromise solution. The present impossible situation would be brought to an end, and a fresh start could be made towards a peaceful and progressive development of Palestine and the Near East.

The memorandum is strictly legal, and as a brief it is of course advocacy, yet it is "based upon fair argument and unchallengeable facts." There is no mention of the great power rivalries and political manoeuvres which Bartley C. Crum discloses in his book "Behind the Silken Curtain," nor of the vital oil interests to which Richard Crossman attaches great importance in "Palestine Mission."²

Palestine has always been the crossroads between the old continents of the world, and the world is now at a crossroad itself in facing the Palestine problem. It is encouraging that the matter has been acknowledged as one of international concern, and it is hoped that the world will find the way through the higher levels of government to the higher levels of morality and justice.

JOSEPH DAINOW**

ANNUAL SURVEY OF AMERICAN LAW, published by the New York University School of Law, New York (4 volumes). \$5.00 a volume.†

A common complaint of the average lawyer is that he has

1. At the time of this writing, the United States and Russia have already expressed official approval.

2. Crum was an American member and Crossman an English member of the Anglo-American Committee of Inquiry on Palestine. Their two books are reviewed together by Fowler V. Harper in 56 Yale L. J. 1233 (August, 1947).

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† 1942 Survey (1945) pp. lxiil, 995; 1943 Survey (1945) pp. lvil, 962; 1944

neither the time nor opportunity to keep abreast of current developments in his field. The annual product of the courts has reached fantastic proportions. The National Reporter system alone prints more than seventy-five thousand pages each year. When to this is added the enormous output of the Congress, the various state legislatures and the plethora of administrative tribunals, it is obvious how difficult is the task of the average lawyer who wishes to be even moderately well posted.

Nearly twenty years ago our English brethren of the bar were given material assistance in their effort to keep abreast of things by the launching of an ambitious venture known as the Annual Survey of English Law. These volumes were published each year by the London School of Economics and Political Science, and they were favorably received by the bench and bar of that country. More recently the faculty of New York University School of Law, acting under the able and inspired direction of Dean Arthur T. Vanderbilt, has made a similar undertaking for the American lawyer in the publication of the Annual Survey of American Law. These volumes begin with the year 1942, and the survey for 1945 (the fourth of the series) has recently been released.

The series is primarily for those who would read and run, and in this, I believe, lies its chief point of appeal. There is little attempt to present either detailed commentary or learned discussion. For him who would pause either because of necessity of practice or intellectual curiosity there are abundant references to current literature that probes deeper. But the series itself attempts to pack a maximum of authoritative material into a minimum of space, and this is precisely what sets it off from anything heretofore attempted.

A great attraction of the series relates to the comprehensive area that is covered. The treatment is not confined merely to bread and butter matters handled by the courts. Legislative and administrative action is covered as well, and there is a generous section dealing with legal philosophy, history and reform. A spare reference to some of the topics included will suggest the breadth of coverage: International Law and Relations; Administrative Law; Social Security and Welfare; Public Housing, Planning and Conservation; Cooperatives; Security Issues and Exchanges; Wages and Hours; Copyright Law; Patent Law; and Crime and Delinquency.

Perhaps your reviewer may be pardoned for what seems to be more of a sales prospectus than a critical review. I believe that this series should be in the office of every attorney who regards himself as a member of a learned profession rather than a drudge, who feels that the lawyer must shoulder a part of the responsibility for putting to right this confused and morally impoverished world in which we live. Such an undertaking as this series furnishes a fair answer to the too-often heard complaint, "I haven't got the time to keep up."

WEX S. MALONE*

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