

*Collected Legal Papers.* By OLIVER WENDELL HOLMES. New York, Harcourt, Brace and Company, 1921.—vii, 316 pp.

The author tells us that this book has been gathered from bits of his fleece which have stuck to the brambles through which his path has led. And so in a sense it is; the Jason is perhaps not yet breeched who shall fetch the whole glittering pelt from the Euxine of the Law Reports. Besides, the ram is still lively, and grows wool of equal weight and fineness as before. Nevertheless, *Collected Legal Papers* is a good vertical section of the mind of that judge who beyond any other of his generation has impressed his ideas on the structure and course of the law. While, therefore, we must wait for an adequate estimate of his work, probably till the momentum of those ideas has been more fully felt in another generation, we should be grateful now for this glimpse of how he thinks, and—what is the same thing—what he is.

The collection is miscellaneous enough, passing from impromptu after-dinner toasts, set speeches and responses, through excursions into Early English law, discussions of present legal problems, up to speculations about the nature of law and the basis of ethics. These are strung together only on the thread of chronology and give the continuous reader a strange sense of traveling now on the earth, now on the sea, and again in the air. Upon the historical papers I have no right to an opinion; the Frankish "salman" and the Roman "hæres" must fight it out without the help of those of us who grind a daily grist, and when the scholars are agreed, we shall all acclaim the victor as veritable executor without pride or rancor. But such papers as those on "Agency" and "Privilege, Malice and Intent" come close to daily affairs. There is no practising lawyer but has floundered helplessly in the bogs of such phrases as "scope of authority", "undisclosed principal", or "rights of action", "malice" and "intent".

The uses of scholarship—legal scholarship at any rate—lie chiefly in this, that it prevents, or at least impedes, false rationalizing. Much of the law has developed as a succession of misunderstandings of the past, laying the patterns of the present upon inherited mosaics which they cannot fit and to whose makers they would seem meaningless. Scholarship is a Chronos which devours its children, and more monstrous still, a Hegelian Chronos which can only in this way realize any synthesis out of its own self-contradictions. Its disclosures must always shock the reverent, even though after a decade they accept them as foreordained and immemorial.

A good deal of the book goes in this vein to show that much of our legal thought has no relation to present notions of social convenience; it is inherited from other times when personal responsibility had not yet emerged, and when, so far as it had, it was determined only by grosser tests than we now employ. Still our progress has in no sense resulted in confusing morals and law — on that point we must especially insist. Law is merely that order on which the sheriff will act, its *sine qua non* is the writ; the Austinian tradition carries through all historical researches. There are no laws *in nubi-bus*; *jus gentium* is so much as the prætor actually enforces. Moreover, law remains as before, a matter of external tests; a contract does not require mutual assent or a common intent; it is a consequence imposed by fiat upon conduct, usually verbal, and, if ordinarily a common understanding also exists, that is irrelevant. It is a consideration which may have fixed the law as it is, but it has nothing to do with its content.

But in none of this is the chief significance of the book; English-speaking lawyers are little given to Platonism, though they are seldom such conscious positivists. The nub of the thing is rather the vein which crops out here and there, and elsewhere runs continuously beneath the surface. Our highest judges are not kings, to be sure, but they are of necessity philosophers, little though they may know it, and their philosophy is of much consequence to the State. Until half a century ago it made less difference, because politically we were all of one catholic church; or at least all dissenters were of Ishmael and we might ignore them. There was but one Jeremy and John Stuart was his prophet. But later the people have wandered in the wilderness following false leaders, and the winds now carry to us obscene voices deriding the faith. How shall philosopher-judges behave? The answer here is not edifying to the orthodox, seeking comfort. "My children, seek no deducible irrefragibilities. Man is a poor passional thing; his laws, his maxims, his verities are compromises between what he likes, and what he likes better. Temporary they are, because today he likes better this than that, which he liked better yesterday, and may like again tomorrow. Law is but a working formula of the moment, in which the constants are all variables to be successively determined anew by each generation."

A disquieting faith surely to a people seeking eternal truth, not too conscious of its own self-determination, desiring some solid *point d'appui* from which to step. Yet even so, it might be manageable. The profession of the law, as Inspired Church, is a familiar doc-

trine, drawn perhaps from more august analogies. Revelation by continuous inspiration might at least fill the void. Alas, this too is denied us. While a community is in essential harmony, the unformed broodings of its bosom may indeed be delivered by a bench of judges, interpreters of a common *Zeitgeist*. But what if it be riven by contentions going to the very heart, and if the bench by birth and training be interested parties? How can such then be spokesmen of a harmony not realized, and perhaps not realizable? Let them beware of playing Procrustes. The decisive conflicts are not for their solution; they must be content to accept commands which may violate their dearest prepossessions.

Yet this is no counsel of irresponsibility. Life must be viewed *sub specie Puritanica*. Man is born to strive, perhaps to lose, but the wages of the great-hearted are secure, and they know it. Let them be at peace, if they will only fight manfully. These speeches do indeed teach the strenuous life. Am I only a weakling, or will others too miss in this the note of something more precious than "the cold passion of the Puritan"? They say the soul of Rabelais roams the earth gathering spirits for the Abbey of Theleme, those who are gay, nimble, courteous, feat, witty, amorous, simple, courtly, kind, pleasing, happy, genial, wise, humble, tolerant, joyous. Now the initiated tell us that among these there is none he has more certainly chosen than the captain of Antietam, young then and young now. Rabelais was indeed not a presentable person at a bar association or commencement exercises, but suppose he had rudely shouldered himself in once or twice. They would have been scandalized, and properly too, and yet, and yet—

LEARNED HAND.

NEW YORK.

*The Case for Capitalism.* By HARTLEY WITHERS. New York, E. P. Dutton and Company, 1920.—ix, 255 pp.

Hartley Withers is a great popularizer. He has an astonishing capacity for taking involved and difficult economic subjects and presenting them in a most entertaining way for the edification of the "general reader". His books on *Money Changing* and *The Meaning of Money* will be recalled in this connection. Of necessity the popularizer, striving for interest and lightness of style, makes serious sacrifices of depth and of thoroughness. Nobody could write more engagingly than does Withers, but his books have the faults of their