in connection with the recent New York statutes.[13] Once again Mr. Washington shows his scholarly balance, his agony of indecision. He is not the only writer, of course, who has hesitated between a desire for full protection of honest fiduciaries and a belief in the value of prophylactic rules. I have a strong suspicion that I am in no position to cast even a sympathetic stone.

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American Legal Records, Vol. 4: The Superior Court Diary of William Samuel Johnson, 1772–1773. Edited by John T. Farrell.* Washington: American Historical Association, 1942. Pp. lxv, 293. $7.50.

As the fourth volume in its American Legal Records series, the American Historical Association has selected for publication the Diary of William Samuel Johnson, Judge of the Superior Court of Connecticut from 1772 to 1773. The volume includes the Diary, consisting of cases noted by Johnson for a few months in the winter of that year, together with pertinent illustrative material—writs, pleadings, depositions and other file papers—added by the editor. Mr. Farrell has prefaced it with a valuable introduction, in which he discusses the pre-Revolutionary court system in Connecticut, civil procedure and criminal process, and gives a short account of Johnson and his contemporaries. A brief foreword by Judge Charles E. Clark, and a few additional pages devoted to sketches of attorneys practicing before the Court, complete the volume.

The book is full of interest and is a valuable contribution to the legal and historical literature of the period; it should, as Mr. Farrell hopes, be welcomed by all scholars who can find useful information in legal records. Johnson's career touched many sides of life in the eighteenth and early nineteenth centuries. A man of wide literary interests, he was also thoroughly conversant with the English common law. Always prominent in public affairs, he was, in addition to his term on the Bench, important in the formation of the Federal Constitution and became a Senator from Connecticut in the first Congress. He finished his career as President of Columbia College.

The historian will find in the volume many points of interest. On the one hand, in the Introduction, there is an account of the development of the writ system in England and its adoption by Connecticut; there is also a provocative discussion of the origin of the Grand Jury in a form peculiar to Connecticut. On the other hand, in the Diary are cases shedding light on slavery in the North, restrictions against gaming, marital relations, and the local poor law. And in the parties' complaints and witnesses' depositions we frequently have the strong flavor of pithy Yankee language.

The lawyer will appreciate the value of the Diary when it is first said that the court on which Johnson sat and heard the cases here noted was, normally speaking, the highest court in the colony. Although an appeal might lie in certain cases to the General Assembly, most important questions of law were decided in the Superior Court. In the second place, although the Diary is not an official report, Johnson himself was well trained as a lawyer. He had systematically studied the English reports and abridgements, and had broadened his knowledge by readings in Hale, Fortescue, and Puffendorf, as well as by frequent attendance on the English courts when in that country

[13] Pp. 426–27.

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as agent for Connecticut. Styled "Father of the Connecticut Bar," he was one of the first to make the study of law a full-time job and to remove it from the domain of more or less proficient amateurs. Hence from the cases in his Diary it is possible to form a pretty accurate picture of certain sides of the law as it was in Connecticut in the third quarter of the eighteenth century.

For the most part the causes of action are not unusual: debt, account, appeals from probate, slander and libel, real actions and the like bulk large. Many of them are strikingly modern; others remind us that much of the law was still in its infancy. Thus, negligence comes up but once, which is not surprising in view of the fact that the development of the law of negligence is largely a product of the nineteenth century. On the other hand there are a large number of divorce cases in which the petitions were granted—and this a good hundred years before divorce was recognized by the English courts. An interesting case in conflict of laws is that of *Desire Rawson*, which seems well in advance of its time. Mrs. Rawson and her husband had lived in Massachusetts Bay; with his consent she had removed to Connecticut and there sued him for divorce on the ground of cruelty. Although the court had some doubts as to its jurisdiction, since the husband was domiciled in Massachusetts, they seemed to regard his consent as sufficient to establish a separate domicile for the wife in Connecticut, and the petition was granted.

On the whole, however, one is struck by how closely the law of Connecticut was in line with the English law of the day. It would be interesting to know whether Johnson's influence was at all important in bringing this about. In trespass and case, the classic forms of action were closely followed. Elsewhere, the English reports and abridgements are frequently cited; so too the law merchant. In a suit brought on an insurance contract to recover the value of a vessel, the court refused to presume she had been lost in the "late terrible Hurricane," but followed the rule of the law merchant that twelve months must elapse before loss could be presumed. But what the lawyer misses is some general account in the Introduction of the "state of the law" in Connecticut at the time, similar to what Professor Chafee did for Massachusetts Bay.[1] Admittedly the case material in the Diary is scant for this purpose, but it could have been supplemented from the Superior Court files to which Mr. Farrell had access. Not even the index contains references to more than a few of the conventional legal classifications: for example, bailment is not distinguished from simple contract. Again, it would have been interesting to know whether by comparison with others of the time these cases are characteristic of the period or whether Johnson's common law training makes them exceptional.

One or two points in the introductory material cannot pass unchallenged. The reader should be cautioned as to what Mr. Farrell says about the action of book-debt.[2] The action was not peculiar to Connecticut but is found also in Massachusetts and the Carolinas.[3] Closely related to the colonial practice of allowing parties' account books to be put in evidence at the trial, the Connecticut action is recognized by a statute of 1769.[4] As to its source, it might have been judicious to consult Wigmore before pinning

[1] 29 Publications of the Colonial Society of Massachusetts, xviii–xciv (1930).

[2] Pp. xxv–xxvi.

[3] Thayer, Cases on Evidence 506–8, note (1892); Wigmore, Evidence (3d ed.) § 518, n. 10 (1940).

[4] Conn. L. (1769) 35, 296. Cf. Thayer, op. cit. supra note 3, at 515 note.

it chiefly to English local customs; the shop-book rule at least was well known at common law in England in the 1600's.[5] A reminder, too, should perhaps be given that the Connecticut intestacy law[6] was declared null and void by the Privy Council in 1728 in the case of *Winthrop v. Lechmere.*[7]

In general, however, the editing has been competently done,[8] and the volume is one for which historians and lawyers alike should be grateful. It will be a long time before the history of American law can be written; the publication of diaries and unofficial papers, as well as of court records, must come first, if the stage of accurate generalization is to be reached. In editing Johnson's Diary, Mr. Farrell has made a significant contribution to this effort.

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Constitutional and Legal History of England. By Marshall M. Knappen.* New York: Harcourt, Brace & Co., 1942. Pp. x, 607. $3.25.

This book is apparently the outcome of a feeling, caused in great part by the recent lawlessness of Nazism and Fascism, that past historians of our common heritage of constitutional liberty in England and America may have failed to give due weight in their accounts of the growth of the constitution to the influence of the private law upon the public, and to the historic role of the former as probably the chief obstacle to the development of a royal absolutism. That impression is undoubtedly sound, and it is one that no previous generation could possibly feel as vividly as we do, face to face as we are with the suppression of all private right and the emphasis on "reason of state" which constitute so large a part of contemporary totalitarianism.

It is strictly true that our constitutional history must be rewritten with the common law more in mind than has been usual in the past. Before the sixteenth century there was little clear recognition of our modern distinction between public and private law, and even the prerogative of the king was discussed in the same terms as the right of the subject: both were but parts of the ancient customary common law the bulk of which was treated as the law of property. It is obvious, therefore, that a true grasp of the growth even of "the law of the constitution" is absolutely dependent upon an understanding of the history of what we now call the private law, and upon some mastery even of the technicalities of the English land law. This is true primarily of the medieval development, but it remains true in great though diminishing measure down to a very late period of our constitutional history, and is not negligible even now. The notion of legislative sovereignty had little practical application in England before the Reformation Parliament, and later conservative upholders of the law against the will of the king, such as Sir Edward Coke, were merely harking back to an earlier period and an ancient

[5] Wigmore, op. cit. supra note 3, at § 1518.

[6] P. xxxii.

[7] 5 Mass. Hist. Soc. Coll. (6th series) 496 (1892). See also 5 Conn. Hist. Soc. Coll. 418 et seq. (1896).

[8] It may be noted, however, that the Assize of Clarendon is not spelled "Clarenden" (pp. xl, 279), and that Maitland and Ames do not spell "seisin" with a *z* (p. xxxiii).

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