BOOK REVIEWS

Judicial Review of Legislation. By Robert von Moschzisker, LL.D., Chief Justice of Pennsylvania. Washington, The National Association for Constitutional Government, 1923. pp. 183.

This book contains two lectures, delivered before the law school of the University of Pennsylvania, devoted to consideration of the warrants for and merits of our American system of review of legislation to ascertain its constitutional validity. The lectures were prepared with the view of correcting popular misconception of the doctrine of judicial review, by demonstrating that it does not involve abuse of judicial power, that it was intended by the founders of our government, that it has justified itself by successful operation, and that the system utilizing the doctrine is better than any proposed substitute. The style, which is sometimes intimate and personal, places the information and the argument within the comprehension of the ordinary citizen. The text and the footnotes contain references to the literature upon the subject of the book, for those who desire to inquire further.

One addendum contains a list of the decisions of the Supreme Court of the United States holding federal legislation to be unconstitutional. This list includes nine cases not embraced in the collation found in the useful volume, "The Constitution of the United States of America, Annotated," 1923, prepared by George Gordon Payne, under direction of Honorable Charles Curtis, chairman of the committee on rules of the United States Senate (Senate Document No. 96, 67th Congress, second session). The author properly omits two cases included in the latter compilation: *Baldwin v. Franks* (1887) 120 U. S. 678, 7 Sup. Ct. 656, which merely extended application of the decision in *United States v. Harris* (1883) 106 U. S. 629, 1 Sup. Ct 601, holding unconstitutional the act penalizing conspiracy to deprive any person of equal protection of the law; and *Weeds v. United States* (1920) 255 U. S. 109, 41 Sup. Ct. 306, which merely extended application of the decision in *United States v. Cohen Grocery Co.* (1921) 255 U. S. 81, 41 Sup. Ct. 298, holding the food control act unconstitutional for uncertainty. A second addendum contains a list of decisions embraced in volumes 221-256, and part of volume 257, of the reports of the Supreme Court of the United States, holding unconstitutional state legislation, municipal ordinances, and acts of commissions and boards. The lists of cases would have been made interesting to the general reader by indicating concisely the nature of each statute, ordinance, or regulation held to be void. A serviceable index concludes the book.

The author's undertaking was so large, compared with the fixed limits for accomplishment, that the presentation of facts is necessarily characterized by condensation which sometimes becomes bare enumeration, and by succinctness of statement. Necessarily, too, there had to be selection of matter for inclusion and exclusion, and choice of features upon which stress would be laid. The author's judgment has been carefully exercised, and he has succeeded so well that the book is an excellent one for those for whom its publication was intended.

It is easy for one who has not borne responsibility for performance to suggest what might have been done. In this instance the reviewer would have made more extended references to the July 17 debate in the Constitutional Convention, concerning congressional negative of state legislation, because of the clear revelation that the minds of the framers were well saturated with the idea of court review by an independent judiciary. Sherman said the power was unnecessary, "as the Courts of the states would not consider as valid any law contravening the Authority of the Union." Madison replied:

"They [the states] can pass laws which will accomplish their injurious objects before they can be repealed by the Genl. Legislre. or be set aside by the National Tribunals. Confidence can not be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures. In Georgia they are appointed annually by the Legislature. In R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature . . . ." (2 Farrand, *The Records of the Federal Convention* [1911] 27.)

In distinguishing between the American and English systems, the reviewer would not have included reference to Mr. Herbert Pope's view that in England the promulgation of a legislative act was *ipso facto* a declaration of the highest court that the act did not transgress the fundamental law. (27 HARV. L. REV. 59.) Mr. Pope called attention to the fact that Professor McIlwain, in his book, "The High Court of Parliament," did not bring out clearly, and probably did not recognize, that whenever Parliament legislated it adjudicated constitutionality of the act. None of the masters of English constitutional history have had such perception. The period of confused legislative and judicial power was the one in which the common law courts treated acts of Parliament most cavalierly, even made formidable their assertion of power to declare acts of Parliament void. As specialization became more complete, parliamentary ascendency in legislation, ending at last in political supremacy of the House of Commons, was accompanied by segregation of judicial function, a survival of which finally lodged in a special organ, the House of Lords; and there is no evidence that in modern times an act of Parliament, as a piece of legislation, was considered by the courts as possessing an increment of authority because it embodied a judgment by the highest court of judicature that it was supreme. Professor McIlwain quotes Sir Frederick Pollock as saying the courts of England have regarded acts of Parliament as proceeding from a "wholly external and unjudicial authority."

The space gained by the suggested omission might have been devoted to expanding, with compendious brevity, the pertinent subject of judicial interpretation, an acknowledged and familiar judicial function in England and America when our Constitution was framed. Blackstone stated ten rules for the construction of statutes.

In Great Britain Parliament is supreme; but in case of inconvenience, absurdity or injustice apparent in a statute, the courts may modify the meaning of the words, alter their collocation, reject them altogether, or interpolate others. ("Maxwell on Interpretation of Statutes," ch. IX—a standard English work quoted by all the courts of Great Britain.) In the case of *Earl of Waterford's Claim* (1831, H. L.) 6 C. & F. 133, 172, Lord Chancellor Cottenham said it could not be denied the plain meaning of an act of Parliament had been changed by a course of judicial decisions, so that the act must be construed with reference to such decisions. However, when an act of Parliament is passed contravening a series of judicial decisions, the decisions fall before the higher law. No act of Parliament becomes obsolete by disuse, and the courts are obliged to deduce and declare the law from conflicting statutes. Having discovered the meaning of each, the courts compare them, and give effect to the one of superior authority. Usually it is declared the former act has been "repealed," although Parliament has not said so. The later act takes the place of the Constitution in our system, and the former act, which is in contravention of the Constitution, is "nullified," because of the conflict which the court finds and adjudges to exist between the two. If, however, the later act be couched in general terms, applicable to all cases, and a former special act be found governing a particular case, the special act prevails. This doctrine applies to rules established by particular customs. In such cases the court simply compares law with law, the same as an American court would com-

pare law in the form of Constitution with law in the form of statute, and, in the event of conflict between them, decides according to the one which is paramount. In England this function has been performed in reference to acts concerning the jurisdiction of courts, and consequently properly falls within the domain of English constitutional law.

Historically and analytically, this function is of the essence of judicial power—

> "the power to take cognizance of controversies of a judicial nature, to determine what the law is that governs them, and to apply and enforce that law as between the litigants." (Thomas M. Cooley, "The Federal Supreme Court," *Constitutional History as Seen in American Law* [1873] 29, 37.)

The English usage was followed by the colonial judiciary and by the privy council in the capacity of "Supreme Court" for the colonies, and was continued by the state courts under the constitutions which supplemented charters. When the federal Constitution was framed, the restriction characterizing the grant of legislative power was omitted, no limitation was placed upon the grant of judicial power, and that grant was extended to include the entire field of federal jurisdiction, and every possible federal question. The revolt of the colonies was a legal revolt, directed especially against claimed Parliamentary omnipotence; and when the federal legislature was reduced to an agency with none but powers limited in their delegation, by a Constitution which declared itself to be the supreme law of the land, the law of paramount authority for the adjudication of "cases," and "controversies," was dictated to the courts by the sovereign, "the people of the United States."

The result is, there is nothing essentially unique about our system of judicial review. It was the concrete product of human experience; and when the new forms of law, the written Constitution of the United States and acts of Congress, made their appearance, the authority of the courts was merely amplified in scope, but not in the slighest degree in kind.

It is to be hoped that thinking people will make use of the book. Most discussions of its subject are conducted without regard to facts. The constitutional fundamentalist is impervious to them. We have heard a distinguished chief justice of a state court declare power to hold an act of Congress unconstitutional was four times voted down in the Philadelphia convention. As the author shows, it was a council of revision, a very different thing, that was voted down. We heard Roosevelt declare, in 1912, no judge in Australia had the right to make, or would be permitted to make, a decision holding a law unconstitutional, notwithstanding the fact that in the year of grace 1901 we saw the Queen, Lords and Commons of Great Britain put into effect for the government of the people of the Australian continent a written Constitution, moulded upon that of the United States, under which not only the high court, but every court of competent jurisdiction, possessed power to declare statutes void by reason of trangressing the Constitution. In December, 1922, this LAW JOURNAL contained an article, *Developing Ethics and Resistant Law,* written to warn against reverence for law, which Lincoln exhorted as the political religion of the nation. While some of the criticism of the article was sound enough, the premises of the argument were that human nature is one of the most mutable things in the world, and that in the last one hundred years it has been completely made over by industrial change. One conclusion was that our law is out of date and out of joint. This is an exemplification of the exploded theory of effect of environmental influence. The theory was that the human mind is a page on which society may place what stamp it will, as a child may be taught any language; the new type of character will be transmitted by heredity; and through the powerful influences of the church, of education, and of the state, the millennium may be speedily brought about. The millennium, however, still gives no sign of early arrival. While man possesses remarkable adaptability to new

conditions, there is no proof that ordinary environment can alter any single salient mental or moral trait in any measurable degree from what they were predetermined to be through inherited capacities and powers.

The only way to protect the people from being deluded is to keep giving them information and instruction regarding facts.

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Cases and Other Authorities on Equity. Volume I. By Walter Wheeler Cook. St. Paul, West Publishing Company, 1923. pp. xvi, 805.

This volume has been eagerly awaited by teachers of equity, with the confident expectation that it would provide them not only with a novel and interesting arrangement of material for an introductory course, but with more adequate means of emphasizing the important modern developments and the adaptation of old doctrines and rules to the social conditions of to-day. This expectation is not disappointed.

After a brief historical introduction, which consists chiefly of excerpts from the best recent studies, the editor devotes nearly half of the volume to "The Powers of Courts of Equity," including the methods of enforcing equitable decrees, the legal effect of decrees, the relation of equity to the common law—the "conflict" of equity with common law and the "fusion" of the two systems under modern codes, powers over a *res* within and a *res* without the territorial jurisdiction, and the extraterritorial recognition of decrees. Naturally, this part of the collection is designed to develop and support the views so ably presented by the editor in his series of articles originally printed in the Columbia Law Review nine years ago.

The latter half of the volume, under the caption "Principles Governing the Exercise of Equitable Powers," deals with the meaning of "jurisdiction" as used in equity cases, the requirement that the legal remedy be inadequate, the kinds of interests protected by equity—private interests and public and social interests, the doctrine of the balance of convenience, and, briefly, the denial of relief to complainants who are themselves guilty of wrongful or inequitable conduct. A striking feature of this part of the book is that while the larger part of the material is drawn from the field of torts—as is true indeed of the first part—the several torts are not, as in Ames' Cases, separately considered. Within each section, however, there is a sufficient variety of cases to bring out the important distinctions as to the conditions of equitable relief in different torts, so that the editor is probably justified in expressing the belief that "a student who has mastered the material in this volume will have no difficulty in handling cases involving particular torts." The arrangement certainly avoids a good deal of unnecessary repetition.

The writer of this review has been using the volume in a first year class—the course beginning at the opening of the second quarter of the year so that the student already had some familiarity with the law of contracts and torts—and has found it a most illuminating and stimulating collection. The vigorous, analytical mind of Professor Cook has been exercised to great advantage, and teachers as well as students will profit by his work. Inevitably there will be differences of opinion as to particular features. To many the volume will seem far too large for an introductory course; but this objection may be overcome in large measure, though not entirely, by judicious omissions. To some the first part of the volume will seem to contain a good deal of material that is pretty difficult of assimilation by a beginner in the field of equity; but few of the difficulties, probably, are so great that by the right sort of teaching they

cannot be made to provide a stimulus rather than a soporific. What seems to the writer a real defect is the paucity of historical material. There are only twenty-nine English cases in the volume, of which eleven were decided since 1850. And of the American cases nearly one-half were decided within the last twenty-five years. The explanation is, to quote the editor, that "The animating purpose has been to present a picture of the fundamentals of the equity law as it exists to-day." This purpose is accomplished. But of course it is a moving picture and not a "still," and one sometimes feels that the student is not merely left with insufficient knowledge of the historical development of doctrines and rules, but that as a result he fails to appreciate how deeply rooted they are and how difficult it is to modify or discard them. One is led to question, therefore, whether the editor, as a consequence of his keen interest both in analysis and in the adjustment of the law to present day needs, has not underestimated the importance of the historical approach.

The indisputably good features of the collection are many. The inclusion of excerpts from the works of well-known scholars, followed by cases which enable the student to check up their statements, is an excellent incentive to the exercise of the critical faculty. There is a most interesting group of cases on civil and criminal contempt—a subject of considerable importance in this day of injunctions in labor cases. Another group clarifies the meanings of the loosely used term "jurisdiction." Ample material is provided for the study of the extent to which interests of personality will be protected. Such topics as unfair competition and the use of injunctions in labor disputes are touched upon for the purpose of showing the nature of the interests protected, though wisely left for fuller treatment in other courses. The editor's notes, in the main, are of the sort which do not collect the authorities but which direct the student to significant cases or valuable contributions to periodical literature.

The publication of two additional volumes promised by the editor—one dealing with the specific performance of contracts, the other with reformation, rescission and restitution, is awaited with unabated interest.

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Outlines of Historical Jurisprudence. By Sir Paul Vinogradoff. Volume II. The Jurisprudence of the Greek City. New York, Oxford University Press, American Branch, 1922. pp. x, 316.

Historical Jurisprudence is a term of such tantalizing vagueness that it is impossible to tell exactly what it means to the Corpus Professor of Jurisprudence in the University of Oxford, even for one who has studied two volumes of his *magnum opus.* The expression has been used to mean, among other things:

1. Legal History,
2. The history of Jurisprudence,
3. A study of the sequence of legal ideas and institutions in world-history,
4. A theory that the key to the understanding of laws is furnished by a study of the beginnings, which are supposed, somehow, to present "simpler" or purer versions,
5. A theory of the force exerted by events in the shaping of laws.

Although combinations of these meanings are possible, it is submitted that the definitions are distinct and in a measure inconsistent with each other. Moreover any one of them, particularly the fifth, is capable of diverse interpretations as Dean Pound has recently shown.

In which sense is it Historical Jurisprudence to undertake as our author does the study of a series of types of society which he enumerates as follows? 1,

Origins in totemic society; 2, Tribal law; 3, Civic law; 4, Mediaeval law; 5, Individualistic jurisprudence; and 6, The beginnings of socialistic jurisprudence. This outline points to one of the first three definitions. Vast stretches of the book read like a legal history. Yet the author makes a point of distinguishing between legal history and Historical Jurisprudence, which "deals with the relation between legal rules and the institutions of an epoch in their doctrinal connexion." But if, after reading this distinction we turn back to the proposed outline we are confronted at the outset with the difficulty of that German historian of philosophy (Brucker) who is said to have devoted a whole chapter to the question whether there were any philosophers among our antediluvian ancestors. One wonders what would have been said of "doctrinal connexions" in the part dealing with totemic society if it had not been unceremoniously omitted under the pretense that it was to be treated along with tribal law. One has to look pretty sharply even in the case of tribal law to discern its "doctrinal connexion" between its institutions and its rules. In the third part, which makes up the book before us, there are signs that the author is beginning to think of his task as the ascertainment of the state of Jurisprudence at a particular place and time and in a particular type of society, namely in Greece of the Fifth Century, B. C., in the City-State, though by far the greater portion of the book is consistent with the notion that he is merely trying to find analogues of modern legal institutions in an ancient epoch. Certainly from the close of the fourth chapter this is implicit in the outline followed: The Structure of the City; The City and the Citizen; The Law of the Constitution; Relations between Cities; Crime and Tort; Property and Possession; Conventions and Transactions. There can be little doubt, however, that the author has in mind at times the defense or the salvaging of Historical Jurisprudence in the Nineteenth Century sense of a particular theory or set of theories. He still talks of ideas unfolding themselves, albeit he is not satisfied as the Hegelians of the last century were with the selection of a single idea as the dominating force in history. He still thinks in the Hegelian formula of thesis, antithesis and synthesis. Legal History is made up of a synthesis of "effort" and "conditions." The mention of conditions that play a part in the result in spite of effort gives ample opportunity for the recognition of the importance of history as a synonym for conditions. The mention of effort suggests for a moment that he is abreast the leaders of juristic thought in this country. who are rebelling against the belief in the futility of effort once fostered by the historical school. The formula is broad enough to give ample sway to effort. The chapters he has presented so far, however, have been concerned almost exclusively with conditions rather than effort. The cross section of Greek life in a particular stage of development gives no clue to his theory of law. And so the puzzle remains: What does the author mean by Historical Jurisprudence? Has he a definite meaning consistently in mind? Perhaps later volumes will show—but meanwhile it is distressing to wade through a chapter, say on The Sources of Law, in which the stream meanders back and forth between the author's idea and the old Greeks' idea of what these sources were.

Our doubts need not interfere with our admiration for the learning displayed. The show of learning, however, is of a type that most writers in the English language avoid—whether for better or worse it is not always easy to say. Even pedantry has its advantages, and with Vinogradoff before us, one is tempted to write in praise of pedantry. We might just as well recognize that it is pedantry to throw away the keys that others have made and pretend that everything in Greek legal experience must be learned anew and directly from the texts of the poets, orators and philosophers, as if they had not been explored dozens of times for this very purpose. It is pedantry to dress up Greek names with a system of transliteration which simply disguises them to an English reader. Why Kyklopes, and Sokrates, and Kleon, Kleisthenes, Lykurgos and Thukydides and even Kretan and Korinthian, at this stage in the history of the English language? It looks

learned—but isn't it really based on ignorance of the simple fact that the tradition of the English language has been to pass these words through the Latin form before transliterating them? But why not at least be consistent and say Homeros and Aristoteles and even Pavel Gavriilovich Vinogradov, as the author spelled his name when he began to write in England, if Anglicization is distasteful? It certainly seems pedantic to drag in so much of the workshop as he does every time he is confronted with an important Greek word, to assure us that there is no exact equivalent in English, as if the intelligent reader did not know that all translation was at best approximation, and as if other translators did not spend sleepless nights trying to get the closest approximation possible without either being thoroughly satisfied or—writing a commentary. It does smack of pedantry to cover between ten and twenty per cent. of the printed space with long excerpts from Greek writers in the original, besides quoting translations from standard English editions, generally without indicating whose editions. It does look like pedantry to enter into interminable debates on matters that have never been seriously disputed, such as that to some extent there is a unity running through Greek law (the theme of the first eleven pages). All of this pedantry may be pardoned, even if it does no good, provided it does no greater harm than to irritate the reader and make whole chapters unreadable and others superfluous.

Unfortunately it is not always so harmless, as the following four illustrations will show. 1.—Having labored furiously to prove what no one disputes, that there were marked resemblances in the laws of the various Greek cities, he feels that he has put forth a dogma of the first importance: the Unity of Greek Law. Thereafter his entire book is marred by the assumption that every illustration is presumably applicable to the entire Greek world. The danger of such an assumption is apparent to everyone who has ever heard of the diversity of the constitutions that led Aristotle to collect them, to every school boy who has read of the differences between Sparta and Athens. In fact quite as good a chapter could be written on the diversity of Greek law as on its unity. Ordinary scholarship simply says that we do not know enough to construct an essential Greek jurisprudence because the evidence is too fragmentary and proceeds humbly to determine which ideas of those that have come down to us seem to have been more or less widely held in ancient Greece. That is not the tone of the volume before us. 2.—The habit of quarreling about the true meaning of particular Greek words also has its pitfalls. If it is true today that a word is not a crystal but the skin of a living thought, why assume that whenever an ancient Greek—whether poet, philosopher, orator or lawgiver—said *nomos* he meant one and the same thing? As a matter of fact *nomos* means anything from "opinion" to "law" or "custom," according to its context. A kind of Platonic insistence on a "right meaning" for the word has led to the nonsense on page twenty-six. A philosopher is quoted to the effect that things only seem to be sweet or bitter, hot or cold, and colored in various ways, but that in reality they are inscrutable and void of these qualities. (Vinogradoff's translation of the Greek *atoma* in this sentence as "atoms" is annoying to say the least.) One version of the saying has come down to us in which the "seeming" is spoken of as *nomos* ("opinion"—not "law") and "reality" as *phusis* ("nature"). From this passage the author jumps to the point he wishes to prove, that positive law (*nomos*) is conceived of in Greek philosophy in the Fifth Century, B. C., as something to be contrasted with natural law (*phusis*). He practically concedes the non-legal interpretation given above and everywhere else where the passage has been discussed and adds: "But it implies at the same time that our formal rules also exist as phenomena, in contrast with *phusis*." Far-fetched, I call it. The denial of our ability to know the *Ding-an-sich* has been very comfortably put forward by skeptics who had no idea of mystically predicating an ideal system of law as one of the *Dinge*. If the point that our author is making about Greek thought cannot be proved in any other way, let us not imagine

we have proved it by conjuring with the word *nomos* in two distinct senses. 3.—Pedantry, while using steam-hammers to crack eggs, has a strange way of trying to crush rocks with a tooth-pick. The great difficulty that the author might have foreseen in making this summary of the law of the City-State acceptable was to overcome the religious interpretation that Fustel de Coulanges had made classic. To read the present volume one must forget completely that the gods were still realities in Greece in the Fifth Century. But what is said of the reason for the omission? There is one passage in the first volume that casually tells us that Fustel de Coulanges oversimplifies the facts of the Ancient City by overemphasizing the religious element. And here we are told (at page 207) in connection with one point, the origin of private property, that "it requires a more vivid imagination than is generally possessed by scholars nowadays to accept the view that man appropriated fields not for the sake of the harvest, but because they had buried their parents in some part of the compound." All that the imagination of modern scholars seems to permit is the admission of the religious factor as an afterthought. Perhaps this estimate of the scholar's imagination is correct. So much the worse for his historiography.

4.—The most serious penalty of pedantry is that it sacrifices the benefit of the contribution of others whom one doesn't wish to quote. The author's apparent ignorance of American writers, in particular, is amazing, and redounds to his own disadvantage. Take for example his perfectly helpless treatment of a passage in Demosthenes made famous by incorporation in the Digest (I. 3. 2). In telling the tribunal why laws should be obeyed the orator crowds together all the reasons that had ever been thought of. Laws, he tells them, are of divine origin; they are the teachings of the wise; they correct and redress mistakes and injuries; and finally they are made by a compact of the citizens. In one place (page 18) our author sees in this passage an indication of "the direction which the Greek mind took in considering the social functions of law." How? He fails to tell us. In another part of the book (at page 230) he makes this passage the basis for the assertion that the Greeks recognized a close connection between private agreements and public rules. Yes, it shows a connection but hardly of the kind from which his two corollaries can be drawn: namely that private conventions can be enforced only if they do not contravene the laws of the city and that all transactions are recognized as conventions which are enforceable at law. Now let us look once more at the fourfold justification of law uttered by Demosthenes, divine origin, traditions of the wise, utility, and agreement of citizens. An American jurist has discerned here the catch-phrases of several periods of legal development.[1] Had our author seen the point of this he could have rewritten to advantage not only the passage alluding to this quotation but his entire treatment of The Justification of Law and the Sources of Law. Moreover he might have supplied an historical perspective for Greek juristic thought that we seek in vain. Modern scholarship is a coöperative undertaking in which no man can afford to overlook the contributions of his fellow workers. A one-man science is doomed to pedantry.

Of course we are thankful for the vast industry and learning that have brought together the Greek passages bearing more or less directly on the legal experience

[1] *Cf.* Pound, *Introduction to the Philosophy of Law,* page 23: "It was not long since that men had thought of legal precepts as divinely revealed, nor was it long since that law had been a tradition of old customs of decision. Philosophers were seeking a better basis for them in eternal principles of right. In the meantime in political theory, at least, many of them were agreements of Athenian citizens as to how they should conduct themselves in the inevitable clashes of interests in everyday life." The same idea had previously been elaborated by Dean Pound in other connections.

of the Greeks. It has produced a corpus of propositions from Greek literature that may be used to supplement Telfy's *Corpus Juris Attici* and the *Inscriptions Jurisdiques Grecques*. But if we want to know just what it all has to do with Historical Jurisprudence we must wait for the key and hope that it will come with the next volume, that on The Mediaeval Jurisprudence of Western Christendom.

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The Law of the Press. By William G. Hale. St. Paul, West Publishing Company, 1923. pp. x, 503.

This book was compiled for use in schools of journalism. It employs a modified case method. Since the decisions are to be read by laymen, they are accompanied by much more comment than would be desirable for students of law. Indeed, it is somewhat doubtful whether future journalists will gain much from grappling with the technical phraseology of judicial opinions even as they are presented here. It may be that the same amount of time and space could be more fruitfully given to discussion of a greater variety of problems after the manner of Odgers' excellent lectures on the English Law of Libel, or Birrell's lectures on Copyright. The student of law ought to go to the cases rather than to a text book because judicial decisions are the material with which he will have to deal all his life. The journalist is under no such necessity. Of course it is advantageous to present him with a few decisions so that he may become familiar with the actual nature of a legal case, but after he has learned this, the legal information which he needs could perhaps be presented as advantageously in more compact form than if the questions are raised by judicial opinions reprinted at considerable length. The alternative to a case book need not necessarily be limited to the author's statements of the law and nothing more. Mr. Hale has made considerable use of hypothetical situations and many more of these could be inserted in the space now occupied by opinions. Even law students, as Professor Llewellyn has suggested, might profit if our case books supplemented judicial decisions on a given topic by a series of problems, especially if these problems involved points which have not yet come before the courts, but are likely to be presented by the events of ordinary life.

However, the proof of the pudding is in the eating, and it is interesting to find that Mr. Hale, in his teaching, has found that laymen can gain much from the study of decisions bearing on their vocation.

An opening chapter sketches the organization of courts and ought to be very helpful to the reporter whose duties include reports of the daily doings of courts. Several years ago, Charles E. Hughes suggested that better newspaper accounts of litigation would do much to create public realization of the value of law. It is to be hoped that such a book as Mr. Hale's may lead the way to American press reporting of litigation comparable to that in the London TIMES. A large amount of space is properly devoted to Libel, with a section on the responsibility of the owner, the editor-in-chief and the managing-editor. The topic of Retraction, which has been much neglected in our law,[1] receives several pages. The Right of Privacy is a developing legal field of much importance to newspapers. Mr. Hale reprints *Pavesich v. New England Life Insurance Co.*,[2] states *Roberson v. Rochester Folding Box Co.*,[3] and quotes the recent New York statute. Some attention might well have been given to the numerous decisions interpreting this statute, particu-

[1] On the action for honorable amends in the Civil Law, see Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 364.

[2] (1905) 122 Ga. 190, 50 S. E. 68; reprinted at page 244.

[3] (1902) 171 N. Y. 538, 64 N. E. 442. Mr. Hale's reference, page 244, note 2, should have been to the Court of Appeals citation and not to the Appellate Division.

larly *Humiston v. Universal Mfg. Co.*,[4] which shows that a public personage is entitled to less privacy than ordinary citizens.

The chapter on Publications in Contempt of Court includes a case on the question of liability for bitter criticism of a decision after the litigation has ended. A long chapter on Constitutional Guaranties of Freedom of the Press reprints several important opinions with helpful comment and contains valuable collections of references to statutes on a large number of topics. Additional chapters deal with Copyrights, Rights and Duties of Newsgathering Agencies, Contracts, and Official and Legal Advertising. The author wisely realizes that an index is just as useful in a case book as in any other serious publication.

An occasional statement in the text is open to question. The law of libel is said (p. iii) to live after the journalist to plague his estate although an action for libel does not survive the death of the defendant in most jurisdictions. The discussion of common law and equity (p. 5) leaves the impression that the two are still administered by separate courts. Pleas of guilty or not guilty are explained (p. 18) but nothing is said of the plea of *nolo contendere*. The discussion of interstate rendition (p. 22) neglects to point out that the Governor of the State where the accused is found is free to disregard the request for his arrest. It is stated (p. 23): "In states where common-law procedure prevails, the suit is instituted by the filing of a *praecipe*." In Massachusetts and Rhode Island, at least, this practice does not exist since any lawyer may obtain blank writs from the clerk of the court. Rules of evidence are briefly mentioned (p. 20); it would have been worth while to explain the leading rules, since they are frequently referred to in press reports of criminal trials. In the account of a suit in equity (p. 25) a restraining order is described without mention of the fact that it can only remain in force for a few days until there is opportunity for the defense to be heard. The statement of the requirements of a validly executed will (p. 27) says that the witnesses must subscribe in the presence of each other. While this is a sensible precaution, it is not usually required by law. It is said (p. 28) that in the administration of a decedent's estate, "the money to pay debts is taken, first, out of cash in hand; second, out of funds realized from the sale of personal estate," and third, out of real estate. There is no such legal distinction between cash and other personal property generally recognized, and even if the cash exceeded the debts, the executor could sell securities and use the proceeds for the debts, unless such securities were specifically bequeathed. Mr. Hale's language represents a good business method, but not a legal requirement. *Hulton v. Jones*[5] is cited (p. 73, note) without the House of Lords reference, and the District Court's opinion in *United States v. Pierce*[6] is reprinted (p. 321) without mention of the affirmance of the conviction by the United States Supreme Court. Although the United States statute on second class mailing privileges is given in full, there is no mention of the important case, *United States, ex rel. Milwaukee Social Democratic Publishing Company, v. Burleson.*[7]

While the material in this book has been selected for use by journalists, it is extremely interesting to a lawyer, especially if he is likely to appear for or against newspapers. Many of the points covered are not included in ordinary case books, for instance, the effect of sending a newspaper to a person without an express order, or the test of a newspaper's politics. When Mr. Hale brings out a new

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[4] (1919, 1st Dept.) 189 App. Div. 467, 178 N. Y. Supp. 752. For discussion of the judicial interpretation of the N. Y. statute, see Z. Chafee, Jr., *Your Right of Privacy*, N. Y. Evening Post, June 11, 1921.

[5] [1910, H. L.] A. C. 20. Mr. Hale gives the Court of Appeal reference.

[6] (1917, N. D. N. Y.) 245 Fed. 878, on demurrer; (1920) 252 U. S. 239, 40 Sup. Ct. 205, conviction affirmed.

[7] (1921) 255 U. S. 407, 41 Sup. Ct. 352.

edition it would be interesting if he could include some discussion of the Continental law of the press on points where it differs from ours, which would furnish a good basis for classroom argument as to which rule is better. Also he might here and there draw the attention of future journalists to movements for law reform, such as the abolition of the grand jury (p. 17), rationalization of rules of evidence (page 20), and reorganization of the courts (p. 6). Lawyers are probably most to blame for the slowness of legal development, but there is little encouragement to laborious and unpaid efforts for reform so long as the public maintains its present lack of interest in any improvements which do not happen to benefit organized labor or some other large group in the community. The press could do a great deal to awaken general interest in the intelligent removal of archaic features from the law.

Harvard Law School ZECHARIAH CHAFEE, JR.

Materials and Methods of Legal Research, With Bibliographical Manual. By Frederick C. Hicks. Rochester, Lawyers' Coöperative Publishing Company. 1923. pp. 626.

Books about books are usually interesting. When they combine with literary criticism the practical functions of a pedagogic manual and a reference book of bibliographical information, they are especially to be prized. The book under review combines these functions admirably. Mr. Hicks has brought together in systematic form a vast fund of bibliographic information, a service which places the profession in his debt.

It is only in recent years that there has been any serious appreciation in law schools of the need of teaching the student the technique of finding his way through the printed repositories of the law. So vast is this output of the legislative, judicial and publishing enterprise that were it not for the mechanical skill of indexing and digesting which has accompanied this flood of printed books, it would soon escape all intellectual control. Acquaintance therefore with the various types of legal literature reflects not only the intelligent man's interest in the tools of his profession, but constitutes an indispensable practical need. Hence the introduction of courses dealing with legal bibliography, including the history, nature, scope, merit and function of the various types of legal literature.

The present volume, written by a teacher of the subject, is divided into three parts. In the first, "Law Books and Their Use" are discussed. Numerous volumes have already been written examining historically and analytically such departments of the law as statutes, law reports, treatises, periodicals, dictionaries, digests and search books. Yet in the critical discussion of their comparative merits and the scientific method of approach the author is believed to have made a distinct contribution. Every law student should be acquainted with this descriptive and analytical exposition. It occupies nearly half the book. This part may be said to cover the material usually embraced under the term "Where to find the law," though with much more discrimination and literary skill. The methods and technique of using this material in the actual solution of problems of legal research, necessary in brief-making, are not treated in the work because the author believes, correctly I think, that this cannot be learned from reading but only from doing Hence the need of supplementing the information in this part by practical exercises under guidance, in the running down of authority and the technical use of the various classes of literature. This can only be taught in the library.

Part II deals with Law Libraries, their organization, arrangement and administration. This information should be useful not only to law librarians and library executives and trustees, but should be helpful to the student in orienting him in the use of his laboratory and its bibliographic apparatus. The bibliography of law libraries appended to this Part is valuable.

Part III consists of an Appendix of bibliographies and books about law books, divided into their several classes. Probably no such collection of titles could be complete, yet it is hardly doubtful that such an exhaustive list has never before been brought together. The librarian will value this part perhaps more highly than the others, but the student and lawyer also may often have occasion to use it. The lists of abbreviations, of British and American law reports, and of legal periodicals in the English language should be helpful. The Appendix will be indispensable to libraries seeking to fill out their collections or desiring to complete their files in the classification, "legal bibliography." Incidentally, it may be said that the information imparted in this Part, as in the other Parts, is supplied with that bibliographic and cataloging detail which perhaps the trained librarian and research worker will best appreciate.

Mr. Hicks has performed a highly commendable service, for which he is uniquely qualified.

EDWIN M. BORCHARD

Yale Law School

A Treatise on the American Law of Administration (Including Wills). By J. G. Woerner and William F. Woerner. Third Edition. 3 vols. Boston, Little, Brown & Company, 1923. pp. cclvii, 2121.

Kipling in the poem called "When Earth's Last Picture is Painted" describes the Heaven of Artists as a place where

> "Each for the joy of the working and each in his separate star
> Shall draw the Thing as he sees it for the God of Things as they are."

Probably all real artists and craftsmen get their real compensation from the work itself. The rule should and undoubtedly does apply to the making of law books but their subject matter is so practical and the authors are so tied to actualities, or what seem to them actualities, that we seldom get a glimpse of the artist's joy. He is too overwhelmed by the flood of material with which he is struggling to spend much time in rejoicing. When he does indulge in so unwonted an occupation he is apt to be shamefaced or perfunctory in any expression of his feelings.

These things make the more enjoyable the refreshing sentiment found in the prefaces to each of the three editions of Judge Woerner's masterpiece on the Law of Administration. He rejoiced in doing his work and in contemplating it when it was done. To him came a meed of appreciation from bench and bar which must have been a real and an abiding satisfaction. Now his son who was concerned in the undertaking from its beginning, with becoming pride in what his father had done, offers a new edition, the fruit of filial piety, as a memorial to a good man whose works live after him.

We have no American system of administration. We have forty-nine independent systems with many similarities and many divergencies. Statutes and decisions in one jurisdiction may be of greatest service in solving a problem arising in another or because of differences in statutes or polity may be a most unreliable guide. In many states the law of administration (as defined by Woerner) has been put in book form. But such treatises vary in scope and quality and soon become difficult to find. Many states have no such books. Hence these local publications would be most unsatisfactory as a source of assistance in studying the comparative law on a given branch of the subject. Not only this, each student making a comparison must blaze a trail for himself. The excellence of his result will depend to a considerable extent on the exhaustiveness of his study, and few will be the cases where real exhaustiveness will be, as the doctors say, "indicated."

These considerations should make clear the immense service done the profession by Mr. Woerner and his father. They have examined the statutes and authorities of every jurisdiction and have collated and systematized the results making them available to all. The work has been done with enthusiasm by lawyers who have studied the subject as practitioners as well as authors. The father also used his learning as a judge; the son his as a teacher of law. Such a combination of the practical with the theoretical explains much of the excellence of the book.

When attention is called to some of the limitations of the work, this should not detract at all from its merit because its real limitations inhere in the nature of the task imposed. Lawyers who devote a lifetime to the study of the probate law of the jurisdiction in which they practise realize how much of it they do not know. They realize how low their fielding average may be when they try to state the law, to prophesy "what the Courts will do in fact." (*Cf.* Holmes, *Collected Legal Papers* [1920] 173.) It necessarily follows that the study of men who attempt to do this work for forty-nine jurisdictions cannot result in a statement of the law as to all or any one of them which will be at all times a safe guide as to what the Courts will do or as to what a lawyer should prophesy they will do. In most instances the statement of Judge Woerner and his son must be taken as a starting point and a guide post indicating lines of research. Their opinion will in every instance be valuable. It cannot be final. It cannot have even the finality of a treatise of equal rank but on another subject, which is not so intensely characterized by particularism.

Nor can the statement of authorities be entirely exhaustive. The labor would be too great.

An example of these limitations is found in the treatment of the law of Connecticut on the effect of a finding by a Probate Court in Connecticut of jurisdictional or quasi jurisdictional facts. The law on this topic was so uncertain that when it became necessary to prove it as a fact in litigation in New York a group of leaders of the Connecticut bar testifying on the subject differed most radically among themselves. This litigation resulted in a statement of the law by a New York Judge (Leventritt, J. in *Plant v. Harrison* [1902] 36 Misc. 649, 74 N. Y. Supp. 411) which is of the greatest importance to any one who now seeks to form an opinion as to what the Courts of Connecticut will do. The opinion in *Plant v. Harrison* is that of a nisi prius judge in New York; but the importance of the matter, the character of counsel who argued the question, the aid given the court by the lawyers who testified and the skill of the Judge make the decision most significant.

Plant v. Harrison is not cited by Woerner, and the whole question is left so that an attempt to state the Connecticut law of the subject with Woerner as the only authority might readily result in error.

Two additions to the book would be most serviceable. First, a table of statutes arranged by states; and second, the giving of the dates of decisions. Such dates are important, especially in indicating the state of the law when particular Statutes were adopted.

The finding of slight imperfections in so great a work is not over difficult, but it only brings into relief what has been accomplished.

The profession owes a debt of gratitude to Mr. Woerner for revising—really revising—this text which has been its faithful friend so long. Many will be sorry to put away the old well worn volumes, but the new keep all that is good in the old and add the later learning.

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