BOOK REVIEWS

Administrative Justice and the Supremacy of Law in the United States. By John Dickinson. Cambridge, Harvard University Press, 1927. pp. xiii, 403. Harvard Studies in Administrative Law, Vol. II.

This is an effort to analyze the problems of administrative justice—to examine from a central point of view "the boundary between the province of administrative adjudication and the courts." The author finds that the chief problem of judicial review of administrative proceedings is that as to how far the review shall extend, and that this rests to a great extent upon the distinctions which the courts draw between "questions of law" and "questions of fact." He largely disarms criticism by saying that the time is ripe "for a comprehensive treatise on judicial review of administrative determinations" and that his volume "makes no pretension to fill the place of such a treatise." The author's problem is essentially one as to the respective merits of judicial justice and administrative justice, and as to the extent to which it is necessary or desirable that judicial justice have a final check on the results of administrative justice.

That Professor Dickinson has not fully succeeded in analyzing the problems of administrative law is in part due, not so much to himself, as to the need for thorough and detailed investigation into the actual operation of present rules. The volume deserves praise as the first systematic effort to discuss general principles since the studies of Goodnow and Wyman, but in reading it, the reviewer had a somewhat confused impression and felt the need for a compass. The impression of absence of unity of construction is strengthened by a final chapter (XII) devoted to the problem of legal education. At the point where the reader expects and needs guidance to some final goal, he is shifted in chapter XII to a new and broader subject whose bearing upon the specific topics under discussion is no closer than to other fields of law.

The author's preface gives a clue to unity of subject-matter but only a clue, and chapter XI on "review of administrative determinations of fact," does not draw the reader's attention to any final conclusion, though in this chapter the author seeks to distinguish the judicial function from that of administration and to limit the court's review to the determination or application of some clearly formulated general rule of law, leaving to the administrative authorities finality in the detailed application of the rule so long as the court cannot rationally infer that their actions fall without the rule (pp. 314-15, 318). With respect to public utility regulation the distinction is more explicitly expressed on page 168:—

> "Where the only ground which a court can give for its difference from the administrative body is limited to mere difference of opinion as to some matter or matters peculiar to the case, or some difference in inference from those matters, then the court should not disturb the opinion or inference of the fact-finding body unless the latter is plainly beyond the bounds of reason; for the difference is one of discretion, or 'fact.' On the other hand, where the ground of difference between court and fact-finding body can be isolated and expressed as a general proposition applicable beyond the particular case to all similar cases, the court, if it holds the proposition one of sound law, must enforce it by overruling the administrative determination."

This would apparently deny judicial review in such cases as *McCardle v. Indianapolis Water Co.*,[1] unless the court could say (as it would if

[1] 272 U. S. 400, 47 Sup. Ct. 144 (1926).

it adopted the author's language) that the fact-finding body had acted beyond the bounds of reason. The author himself recognizes that an administrative determination "which could not *rationally* have been reached by *fair-minded* men from the evidence" may properly be set aside by the courts (p. 320). The author's rule apparently becomes a theory of judicial discretion as to specific cases, though this is what he is combatting, yet his views would apply the theory liberally, as has the United States Supreme Court in dealing with the Interstate Commerce Commission. In distinguishing "law" from "fact" the problem is practical rather than logical, and in its discussion the author would have found much of interest in the statutes and cases involving the extent of review by appellate courts. The thing to which the author particularly objects is the failure of the court to lay down general principles, and the use of its power "to revise at will the discretion of the administrative officials from case to case" (p. 227). In this connection it would have been of interest to discuss the extent to which in recognized fields of judicial authority courts decide on the basis of the facts of particular cases, without laying down general principles. In constitutional law, decisions on the validity of statutes as tested by "due process" are often of this character, as are state constitutional decisions as to what constitutes "one subject" of legislation. Fact-decisions, as distinguished from decisions on principle, are characteristic of the field of state regulation and state taxation of interstate commerce. It is impossible to draw a hard and fast line between law and fact. The courts must deal equally as much with questions of degree as with questions of principle, and questions of degree are largely questions of fact. Cases decided merely on issues of fact, without giving any guidance for the future, are irritating, but in administrative law and elsewhere they will to some extent persist as long as law is a human institution.

By "supremacy of law" the author means supremacy of judicially-administered law. The distinction is not nearly so clear as he believes between judicially administered law and that administered through the administrative agencies of government. There are many instances in which an administrative tribunal is not both an adjudicating and enforcing agency, with the function of enforcement the dominant one (p. 204, 235). And in the modern development, the statement that "administrative tribunals decide controversies coming before them, not by fixed rules of law, but by the application of governmental discretion or policy" (p. 36), is clearly not applicable to a broad field of administrative determination. The movement away from arbitrary discretion has been one of the most important of recent years. This movement, while largely forced by judicial decisions, has been to a great extent promoted by statutes to which the author gives little attention. Nor does the author give sufficient attention to the grant by statute of judicial review over administrative action in many cases where judicial review would otherwise not be available.

On the whole the book seeks to make too sharp a logical distinction between judicial and administrative processes. In this connection it would be of value to discover the extent to which judicial processes have tended to become more summary, and administrative processes more regardful of private interests. Development in administrative law for the safeguarding of private rights seems now most likely to come through the establishment of safeguards by statutes, and through an expansion of governmental responsibility for wrongful acts. In good part because of the logical antithesis which the author has set up between "administrative justice" on the one hand and "supremacy of law" on the other, these developments have been ignored, although chapter v of the volume appears to recognize that no such antithesis exists.

The present volume is best in its specific discussions of the actual extent of court review (c. VI-X), although even here theoretical digressions somewhat confuse the issues. The specific topics are treated briefly, and the treatment is for this reason often inadequate. Pages 265-268 do not present a sufficient discussion of removals from public office. The subject of public utility regulation is the most fully treated, and the discussion is valuable. Yet here the reader must be guarded against being misled by the intimation that writ of error is the only means of going from the highest state court to the Supreme Court of the United States (p. 177). And in discussing the scope of review by federal courts over the determinations of state utility commissions, it must be remembered that proceedings in the inferior federal courts under section 266 of the Federal Judicial Code tend to be substituted in important cases for the procedure in state courts provided by state statute.

The author as a rule writes clearly, though the organization of chapters and the tendency to recur to the same topic cause the reader some difficulty. Occasionally this difficulty is increased by resort to figures of speech, which sometimes themselves become mixed, as on page 77, where the author refers to the "dead hand" of an "obscure nerve of slumbering tradition." The volume as a whole is a daring effort at generalization in a field where fully successful generalization is not now attainable. Yet the effort was worth while, and the volume contains much of value.

WALTER F. DODD.

A Selection of Cases on the Conflict of Laws. By Joseph Henry Beale, Jr. Second Edition. Cambridge, Harvard University Press, 1927, Vol. 1, pp. xvii, 799. Vol. 2, pp. 891.

Professor Beale's casebook on the Conflict of Laws, which appeared in three volumes from 1900 to 1902, was a remarkable piece of work. Although the cases involving the conflict of laws were not to be readily found in the Anglo-American reports, there were brought together in this collection all the leading English and American cases on this subject. According to Professor Beale, the "common law" has accepted, as the basis of the conflict of laws, the theory of vested rights. A state is deemed to possess exclusive power, in consequence of the principle of territoriality, to attach legal consequences to certain operative facts either because they took place within its territory, or because they are deemed connected with such territory. Thus, the state where a contract is made or a tort is committed has the sole power to say whether an obligation has been created. If it has created such obligation, all other states must recognize it as a fact, although they need not give it effect. Property rights can be created only by the state in which the physical res is located, and "status" rights, by the state in which the party whose status is in question is domiciled. In accordance with this fundamental point of view, the first volume of Professor Beale's first edition dealt principally with the subject of "Jurisdiction," the second dealt with the "Creation of Rights" and the third, with the "Recognition and Enforcement of Rights." Professor Beale was aware, of course, that the decisions of the Anglo-American courts did not present a very homogeneous picture in the matter of the conflict of laws, but he felt that he could promote the scientific development of law best by throwing the weight of his great authority in support of the theory which he believed would produce greater simplicity and uniformity. In his preface to the present edition of his casebook, Professor Beale states that he had postponed the preparation of a new edition until the subject became more stabilized, but that he had lived to despair of this consummation. Professor Beale's

strong convictions concerning the fundamental principles which should govern the conflict of laws and his conception of law in general have caused him to find in the decided cases general rules, instead of decisions of particular controversies. In his opinion, the "common law" furnished, with few exceptions, ready answers to practically all questions arising in the conflict of laws. From his statement in the preface, it would appear that he has been somewhat disillusioned in this regard.

Instead of consisting of a body of fixed rules and principles, the subject of the conflict of laws is more generally regarded as being still in its infancy and as still groping for stability. And how can it be otherwise, if we take into consideration the nature of the subject! The rules governing contracts are today pretty well established, but it has taken many decisions on the same factual situations to bring about this result. It will not be until we obtain a similar experience in the field of the conflict of laws we can hope for a better crystallization of the rules governing particular situations. Any attempt to state the rules of the conflict of laws in catagorical form, as is being attempted at present by the American Law Institute, must in the very nature of things therefore prove to be abortive. If the rules so laid down should be accepted by the courts as an expression of sound doctrine, the result, so far as the development of this subject is concerned, is bound to be mischievous, instead of being helpful.

A comparison between the first and second editions of Professor Beale's casebook shows that the number of cases is about the same. Approximately one hundred new cases have been added and a corresponding number of old cases has been omitted. The total number of pages in the new edition exceeds that of the first edition by about one hundred pages. With one or two exceptions the new cases are not annotated. The notes to the old cases have been retained without change and contain no references therefore to the more recent cases and articles dealing with the subject. No changes have been made either in the selection of foreign cases, so that they also represent the law as it was at the time of the first edition.

In the arrangement of the material, there has been a radical change. Professor Beale states the following in this regard in his preface:

"The old arrangement has had no merit except a pedagogical one. Experience seemed to show that it had that merit; and it may be feared that teachibility has been sacrificed to logic. The new arrangement has not been adopted because it is more logical, but because it is more in accordance with that of the restatement of The American Law Institute."

The threefold division into Jurisdiction, the Creation of Rights, and the Recognition and Enforcement of Rights, which was the characteristic feature of the first edition, has completely disappeared. Instead we find the following chapter headings: Law, Jurisdiction over Persons and Things, Jurisdiction of Courts, Right of Access to Courts, Status, Rights of Property, Contracts, Wrongs, Judgments, The Administration of Estates, and The Determination of Foreign Law.

The first three chapters have the same titles as the corresponding chapters in the first edition. The one on "Law" omits most of the material formerly included, being reduced from 139 to 27 pages. It contains two English cases on "renvoi" (*In re Annesley*[1] and *Armitage v. Attorney General*[2]), but no American cases.

The second chapter contains a section on "General Principles of Jurisdiction," which replaces the section entitled "Personal Presence" in the former edition. In this section the author seeks to develop his general

[1] [1926] 1 Ch. 692.
[2] [1906] Prob. 135.

theory concerning the jurisdiction of a state over persons and things. The jurisdiction of state to tax is dealt with in a special section, as before.

Chapter IV, entitled "Right of Access to Courts," is an innovation, apart from the section on "Procedure," and the matter of local and transitory actions, which is dealt with in the first section of this chapter. Sections 2, 3, and 4 of this chapter deal with the non-enforcement of obligations, on the ground that they are public or penal, or violate some public policy of the forum. Heretofore these questions were dealt with in the third volume after the rules governing the creation of rights had been studied. These cases constitute exceptions to general rules and it seems therefore anomalous to study them before the rules themselves have been studied. How can a case like *Armstrong v. Best*[3] (p. 539) be understood, unless it is known that the law of the state where the contract is entered into is ordinarily looked to by the American courts to determine whether a married woman had capacity to contract! The capacity of married women to contract is taken up, however, only on page 278 of the second volume.

The new title of "Status," given to Chapter V, embraces the topics of marriage, legitimacy, adoption, guardianship of the person, absolute status, and incorporation. It is difficult to see how this great variety of subjects can be conveniently or successfully treated together. This "status" of natural persons is one thing and the "status" of corporations another. The common element alleged to unite these different topics is their control by the law of domicil. But we find that marriage is controlled in this country by the law of the place of celebration rather that that of the domicil of the parties. In view of this fact, of what value is it to place this topic under such a general heading as that of "Status?" "Incorporation" is part of the subject of corporations and is as remote from the other topics of the general title of "Status," which belong mainly to the law of family, as could be. The mere fact that the law of the state in which the corporation was organized is deemed to control in certain respects does not justify throwing the subject of incorporation into hodge-podge with matters affecting family relations.

The section on "Absolute Status," by which is meant the legal condition of a person in relation to the community, considers the subjects of slavery, conviction of crime, attainder, civil death and prodigality, the conclusion being that all of these, excepting that of slavery, are non-static, that is, that they have no effect in other states.

Under "Rights of Property," which form the sixth chapter of the new edition, Professor Beale included in the first edition sections dealing respectively with the nature of property, immovables, movables, trusts and marital property. The subject of inheritance was treated in an independent chapter, and the subject of insolvent estates in the chapter on the Administration of Estates. All of this material is now to be found in one chapter. As marital rights, rights of inheritance, and assignments for creditors are controlled by quite different considerations of policy, the question naturally arises whether anything is to be gained by dealing with them together.

The chapter on "Contracts" is essentially as it was in the former edition, except that the sections relating to the "effect" of contracts and to special contracts, such as bills and notes, have been omitted.

The chapter on "Wrongs" includes in the new edition cases on workmen's compensation, and maritime torts.

ERNEST G. LORENZEN.

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[3] 112 N. C. 59, 17 S. E. 14 (1893).

Cases on Trial Practice in Civil Actions. By James Patterson McBaine. St. Paul, West Publishing Co., 1927. pp. xvi, 1045.

This is an excellent orthodox casebook. The cases selected cover every step and proceeding in an action, from the choice of place of trial and issuance of summons to final termination in the trial court. They exhibit the procedure covering defaults, judgment by consent and confession, change of venue and bills of exception—subjects usually omitted from casebooks. They present the procedural puzzles which may arise at the various stages of a law suit, and furnish good examples of the solutions reached by the courts. They reveal what to do next, how to do it, and how not to do it. The text and annotations give a very fair picture of the existing law with a brief indication of its historical development. In short, the book contains full material for teaching the art of practice. But more—its decisions raise the fundamental problems of procedure and enable the teacher to discuss not only the art but also the science of practice, or at any rate to debate whether there be any such thing as a science of practice or procedure. And a goodly number of helpful references to legal periodical literature is furnished.

The book is not designed for use by first-year men. It treats practice in much too great detail for them. Its 368 cases are too many to be discussed in class in the time usually allotted for such a course. The compiler hesitates to indicate for omission any particular case but thinks that a hurried teacher might well pass over certain chapters, which will reduce the content to 315 cases. What seems a more rational though more laborious process is suggested, namely, that each instructor choose what he regards as the key cases in each section, assign them for study and careful discussion, and use the balance of the text as a basis for problems which test the application of the doctrines involved. Could not many casebooks be reduced to usable proportions by the adoption of this suggestion either by the editor originally or by the instructor using the work?

Dean McBaine has provided abundant material. What use a teacher will make of it will depend upon the teacher. One can scarcely censure an editor if the good tool which he furnishes is clumsily handled by an unskilled workman or perversely used by a skilled technician. One can imagine the former using this tool as a means of imparting mere information. Many procedural rules are only mechanical devices for getting work done. Any one of half a dozen will serve the purpose quite as well as any other. The important thing for the practitioner to know is what rule his jurisdiction has adopted. The reasons for it he may safely leave to academic speculation. And it is easy to acquire this attitude toward all procedural questions. Or one can readily envisage the technician employing this material to expound the efficacy of procedural skill as a savior of bad cases. Many law teachers will recall the exposition which Professor Sunderland's paper of a few years ago produced at Chicago. An able and distinguished practitioner of the Illinois bar demonstrated how a combination of skill in pleading, with a knowledge of and willingness to use the rules of trial and appellate practice enabled him to collect for his client the tidy sum of $10,000 to which he was not entitled on the merits. On the other hand, the teacher who conceives that no procedural rule has any excuse for existence, save in so far as it aids in the speedy and inexpensive conduct of litigation, will find abundant material for use as horrible examples. He may complain that he finds too little that points the way to intelligent and intelligible reform. And one might well wish that Dean McBaine had envisioned such a system, and by problem cases, if not by actual decisions had made it difficult for the teacher of procedure to use his book without at least glimpsing the heavenly vision.

EDMUND M. MORGAN.

Private Law Sources and Analogies of International Law. By H. Lauterpacht. London, Longmans, Green, & Co., Ltd., 1927. pp. xxiv, 326.

Since the very beginning of modern international law, writers and publicists have concerned themselves with the problem of to what extent private law has been a source of international law, and with the question of the propriety of resorting to analogous legal relations in private law for the purpose of filling gaps in existing international law. Despite the obvious importance of the subject, most writers have in the past been content with large generalizations based upon individual philosophical and political preconceptions, and until the appearance of Dr. Lauterpacht's monograph no writer has directed his efforts toward a conscientious examination not only of legal theory on the subject, but also of the actual practice of states. Such a study necessarily involved an analysis of much original material in the form of decisions of international tribunals, and this Dr. Lauterpacht has done by specific consideration of the more important decisions, such as the *North Atlantic Coast Fisheries Case*, the *Alabama Case*, etc., and generalizing on the minor cases.

After demonstrating the great influence which Roman law had upon the early writers, the writer passes to a criticism of the modern so-called "positivist" doctrines. Especially enlightening is his discussion of the influence of political theory in the formulation of the theories of the "positivists." He points out the fallacy of supposing that any logical or coherent system of international law can be built upon any rigid conception of the "sovereignty" of states, or upon any exalted idea of the legal or moral value of the state which puts the self-interest of the state above law. The fallacy becomes the more apparent after an examination of the writings of some of these "positivist" writers, when it is found that they are forced, as a practical matter, to stop far short of applying their doctrine to its logical extreme.

No unbiased reader could read through Ralston, *The Law and Procedure of International Tribunals* (1926) or Borchard, *Diplomatic Protection of Citizens Abroad* (1915) without being convinced of the fact that international tribunals have drawn heavily on private law as a source of guiding principles, and that without such recourse, often legal decisions would, as a practical matter, be impossible.

We find international tribunals recognizing as applicable in international law such private law principles as *res judicata*, prescription, estoppel, etc., while private law analogies have been freely resorted to in determining questions of territorial sovereignty, acquisition and loss of territory, servitudes, bankruptcy, interest, mandates, leases, measure of damages, burden of proof, tort responsibility, etc. Private law rules of evidence and procedure, as well as substantive law are thus included.

Space forbids a discussion of the various decisions analyzed by Dr. Lauterpacht, but it is perhaps sufficient to say that while many of the conclusions he draws from individual cases are questionable, he has set forth sufficient facts of such nature as to amply support his general thesis.

There are, of course, limitations upon the resort to private law analogies, but decisions of international tribunals in the past demonstrate the fact that such tribunals have been able to properly determine which private law analogies are applicable in international cases and which are not, and how far they are to be followed when applicable. Indeed, one cannot but be impressed with the thought that the influence of private law upon international law has been an invigorating and strengthening one—it has offered material for the filling of space where there was no law, and when

so used it has helped to emphasize the essentially *legal* nature of relations between states. The rule of force, which has for so long a time governed the relations of nations, is restricted each time a private law analogy is applied, and in its place is substituted a known and accepted principle of *law*. One of the functions of international law is conceived to be the gradual substitution of the rule of law for the rule of force in international relations, and to deny one of the most practicable methods at hand for realizing that function is to hamper and restrict the expansion of law in governing the intercourse of nations.

The author fails, in his "conclusions," to note how far this work must go toward demolishing the rather widespread notion that the so-called "codification" of international law is a necessary condition precedent to the proper functioning of an international court. It is not here necessary to discuss the desirability of codification, or to discuss whether or not codification is a probable or even possible realization.

Dr. Lauterpacht has demonstrated beyond cavil that international tribunals can and do function without a code of international law, and that if states were willing to substitute a strictly legal order in international relations for the present order, existing international tribunals could effectively determine their legal rights and duties. One is thus led to suspect that something other than the "codification" of international law is lacking. One suspects also that the enormous energy expended in the attempt at complete codification might better be spent in determining and attempting to remove the really basic causes of the rejection by states of the complete substitution of law for force.

Occasionally Dr. Lauterpacht gives an unsatisfactory treatment of a subject, as for example his discussion on Mandates and State Succession, but these matters do not detract from the scholarly character of the work, nor from the general force with which he supports his thesis. Dr. Lauterpacht possesses and uses what is only too rare among international law writers—a legal mind. His feet are on the ground, and it is to be hoped that this monograph will not be his last nor his least contribution to the subject.

JOHN P. BULLINGTON.

The Origin of State. By Robert H. Lowie. New York, Harcourt, Brace & Co., 1927. pp. v, 117.

Political scientists and legal historians have to thank Professor Lowie for bringing together within the scope of this small but significant volume a mass of ethnological material bearing on the origin and development of the inclusive political organization which we call the state. It will be a particularly welcome addition to the library of the man who approaches the field of government from a sociological point of view.

Inevitably the answer which Professor Lowie finds to the problem regarding the origin of the state, is shaped as much by the formulation of his question as by the results of his investigations. The distinguished anthropologist frankly takes the evolutionary standpoint, not, of course, that he is a believer in the long-abandoned doctrine of unilinear development, but in the sense that his interest is to vindicate the principle of continuity. From this point of view, the question regarding the origin of the state becomes the question whether primitive people are organized in a way which justifies speaking of their governmental units as "states," or at least as the rudiments of such.

The reviewer, who belongs to a guild which has probably sinned, more than any other, against the prescription of sharp definition and consistent

terminology, should not criticize Professor Lowie too severely for his omission in this respect. Nevertheless, it is to be regretted that the author has nowhere given us a clear-cut definition or description of the type of social organization called the state. What he means by a state is implied rather than defined. We infer from the treatment of the material, from the chapter headings, and from his quotations that a state is a social organization in which order is maintained within fixed territorial limits by a controlling authority assuming a monopoly of political coördination and possessing the power of coercion.

Professor Lowie is frank to admit that such a state has never existed among primitive peoples. They do not know a sovereign body with a controlling authority towering above the individual. Authority is distributed among different organizations such as churches, local bodies, and groups of kindred. But is it fair to picture the modern state as territorial collectivity towering above the individual? Has this concept ever existed outside the mind of the lawyer? What is characteristic of the modern state is not that it is the sole authority above the individual, but that it is the organization possessing special coercive powers because of its legal monopoly of physical force. Even in periods of the greatest absolutism, the individual has been less aware of his state than of the other collective groupings in which he has participated. He has undergone its influence, insofar as he was not a criminal, indirectly, that is through its coördinating and limiting effect on the associations in which he lives his direct social life.

Due to his interest in continuity, the author emphasizes the similarities between primitive and modern social organizations, rather than the differences. His object is not to account for the differences, but to find in primitive social life the elements of state in embryonic form. In the search for these he is successful.

Among the most primitive peoples such as the Pygmies and the Tasmanians, the necessary elements of government, leadership and social control are provided by personal leadership and social disapproval. Among the slightly more advanced peoples, whose organizations seem at first glance to be based primarily on blood relationship, and whose subdivisions are moities and clans, or sibs, the territorial factor is never entirely absent. Even among the Yurok, the Ifugao, and the Angami people, who at first sight seem to lack coördination between the kinship groups, the local bond is recognized and expressed in the law.

Next to the kinship groups and those based on territorial propinquity, there are other groupings in primitive life weaving additional threads in the social pattern and contributing to the process of political integration. These are the associations, the men's clubs and the secret societies. In many cases these organizations are the centers of political life, and usually tend to counterbalance the predominance of the kinship groups. But associational activity is not always a means of integration. Competition and conflict between these associations can be a dissociating and disrupting factor, a point to which Professor Lowie draws particular attention, as he feels that in his previous publications he has overstressed the integrating function of primitive associations.

What we in modern terminology have called "sovereignty," the superiority of the territorial association over the other groupings within the social fabric, can also be found in embryonic form in many primitive societies. The author suggests as a standard of measurement the degree in which the blood-feud is limited in the interest of the maintenance of order within the territorial group. In many instances there is definite recognition of some deeds as crimes, as distinguished from torts or private wrongs. These acts against the territorial community are sometimes punished by a rudi-

mentary form of police force such as is found in Africa and among the Plains Indians.

Having discovered the links he looked for when searching for continuity, Professor Lowie comes to the conclusion that the germs of political development are latent but demonstrable in rudimentary form in primitive society and, therefore, that some sort of state is a universal feature of human culture.

To the author, then, the basic problem in considering the origin of the state is not that of explaining the somersault by which people achieved the step from government by personal relations to one of territorial contiguity. The problem is rather to show what factors strengthened the local tie which must be recognized as a basis for organization, not less ancient than the kinship tie. Professor Lowie suggests that the answer may lie in the contact between weaker and stronger groups and the resulting conquest.

If one accepts this formulation of the problem, one can hardly quarrel with the conclusion. The latter is an inevitable result of the former. But it appears to the reviewer that Professor Lowie's formulation is not the only one and his answer, therefore, is not the only answer. The question regarding origins, that is, regarding the emergence of new forms, cannot be answered in terms of continuity. Such a formulation of the problem either leads to inconsistency in terminology or to an answer which is a contradiction in terms. Consistency of terms is not maintained in the actual treatment of the problem. The words "origin," "state" and "continuity" change their meaning. In the formulation of the question the word "state" is used for a specific type of social organization. In the answer, "state" denotes social organization in the generic sense, that is, any kind of social organization. The answer to the question of the origin of the state, therefore, turns out to be that the state has no origin—it has always existed. This is nonsense unless the meaning of the word origin has changed from a concept of occurrence, the factors which brought the state into existence, to a concept of form, the nature of the primitive state. A comparable shift in meaning could be illustrated in the field of biology if, in regard to the origin of a mammalian individual, we used "origin" first for the act of propagation and later for the embryo.

To answer a question regarding change in terms of continuity takes all meaning from the word continuity. This can be made clear in considering a more recent example of social change, that of the government in Russia. It may be pointed out that the functional, vocational associations in which the predominant authority now rests were existent in embryonic form in the pre-revolutionary days and that territorial forms still persist. To that extent, there is continuity. Yet it is hard to deny that the revolutionary process, which gave these embryonic vocational organizations an absolute predominance, can scarcely be subsumed under the heading of continuous processes.

The above methodological considerations suggest that the problem of the origin of the state has another aspect. It is fundamentally an historical question and must therefore be defined as such in order to give scope to an answer not merely in terms of continuity, but also in terms of discontinuity; not only in terms of processes, but also in terms of events. The problem of the somersault still remains.

Professor Lowie is not unaware of this other aspect and his book contains the data for an answer to this side of the question. The chapters referred to are the one dealing with the relation between the size of the group and the type of organization, and the one dealing with the formation of classes. In these two chapters the significance of war and conquest for the transformation of social organization is clearly brought out and ad-

ditional data are provided, which, according to the reviewer, strengthen rather than weaken the theories of Gumplowicz and Oppenheimer regarding the origin of the state. The author and the reviewer, therefore, do not differ on fundamentals, but on emphasis. Owing to his preoccupation with the problem of continuity, Professor Lowie, while mentioning war and conquest, seems to attribute no great significance to these factors. At least he does not state that they contain the other half of the complete answer to the question of the origin of the state. It is this over-emphasis on continuity which detracts slightly from what is otherwise a very valuable contribution to the borderland between sociology and political science.

NICHOLAS J. SPYKMAN.

Cases on Partnership and Other Unincorporated Associations. By Scott Rowley. New York, Prentice-Hall, Inc., 1927. pp. xv, 784.

This book from a publishing house which is a newcomer in the field of law school casebooks is a great improvement mechanically on many now in use. The type is large and well spaced, the paper strong and opaque, the binding durable and the volume of a convenient size and attractive appearance.

Superficially the most evident variation from the conventional is the almost complete absence of foot-notes. Only law review articles and the editor's text, *The Modern Law of Partnership,* are cited. In his preface the editor expresses the opinion that extensive citations are wasted on poor students and a source of discouragement to good students because of the impossibility of reading them all. What footnotes mean to the law student might well be made a subject of pedagogical research in some graduate school of education. In the reviewer's experience they mean much to the instructor. He would like to know whether the case represents the weight of authority, and how he is to answer the ubiquitous student who wants to know if this case is law here and now. After exhausting such cases as the students have had time to prepare the instructor must somehow fill in the hour with real or apparent variations from the fact situations involved therein. Citations of recent interesting cases, editorial notes in law reviews and annotated series of reports are a great help to the instructor in preparing for his class. Nowadays it is not necessary to go so far as Ames in collection of comprehensive digests.

In his selection of cases the editor has ignored current decisions citing and applying the Uniform Partnership Act. Such cases as *Giles v. Vette*[1] and *Wharf v. Wharf,*[2] showing how the Act has changed the law, are not even noted. It is submitted that an instructor using the book in a jurisdiction which has adopted the Act should be given some aid in finding to what extent it has settled conflicting lines of authorities or changed the law. The Act is printed in the appendix, together with the English Partnership Act, and the Uniform Limited Partnership Act, with references to law review articles.

The book is made the more readable by omissions of facts in many instances, and large portions of opinions. The editor has succeeded in presenting the more important of the judicial comments on certain problems of the law of partnership. The omissions of facts in many cases, such as those involving the existence of partnership as distinguished from some other relationship, relieve the student of the task, one of the supposed

[1] 263 U. S. 553, 44 Sup. Ct. 157 (1924). See notes (1924) 22 MICH. L. REV. 588 and (1923) 36 HARV. L. REV. 1016.

[2] 306 Ill. 79, 137 N. E. 446 (1922).

merits of the casebook system, of analysing the fact situation and discovering just what legal issue the court had to decide.

Half of the main portion of the book which deals with ordinary partnerships is devoted to the question of nature and tests of the existence of the relation. At the outset is a collection of extracts from opinions affirming or denying the legal personality of a partnership. This is an interesting matter, but one of secondary importance to the student. The primary question is the rule of law applicable to some particular situation. Legal personality is a device of legal technique used to justify or support the rule of law found to be applicable. It does not seem useful in the present state of the law of partnership to discuss legal personality except in connection with particular rules of law on which it has some bearing. The student should not be led to conclude that in any particular jurisdiction a partnership is or is not for all purposes a legal person, or is or is not treated as such.

What is partnership property, including good will, is treated adequately. There seems to be little if any material on the rights of partners in specific partnership property, the subject matter of Sec. 25 of the Act, as relates to rights of assignees and separate creditors of partners, and disposition of realty after dissolution. Fraudulent conveyances and distribution of insolvent estates as between firm and separate creditors is left for a course in bankruptcy,—such topics seem to the reviewer more appropriately treated in a course in partnership.

The later chapters contain several cases on limited partnerships, joint stock companies and Massachusetts or business trusts. It is difficult to understand why some Texas cases were printed while the recent drastic decisions [3] mentioned in the editor's recent law review article were omitted.[4]

The publishers assert that the book "can be readily adapted to courses in Partnership Law or used as collateral reading." How readily it can be adapted depends upon the method of instruction and the content of the course instructors desire to offer.

JUDSON A. CRANE.

Delinquents and Criminals. By William Healy and Augusta Bronner. The Macmillan Co., 1926. pp. viii, 317.

The chief trouble with most criminologists is that they start their treatises with the assumption that there is a chief trouble which leads to delinquency. Within the last fifty years we have been told that the one great cause of crime is anything from cauliflower ear to an inability to memorize six numbers backwards after one repetition. The one generalization a student of the literature can make is that any generalization can be established as sound by a research worker who starts with that generalization as his hypothesis. It is otherwise with a student of facts, and, unfortunately for simplicity and catchword propaganda, Dr. Healy and Dr. Bronner are students of facts.

The material they present is gathered from their individual studies and follow up of juvenile delinquents in Chicago and Boston. Social and individual diagnoses are correlated with outcome over about a decade in order to bring to light causative factors that may be used to predict and control these outcomes. Past hypothesis to the contrary notwith-

[3] Hollister v. McCamey, 115 Tex. 49, 274 S. W. 562 (1925); Thompson v. Schmitt, 115 Tex. 53, 274 S. W. 554 (1925); Victor Refining Co. v. City Nat. Bank of Commerce, 115 Tex. 71, 274 S. W. 261 (1925); Howe v. Keystone Pipe & Supply Co., 115 Tex. 158, 274 S. W. 563 (1925).

[4] Rowley, *The Influence of Control in the Determination of Partnership Liability* (1928) 26 MICH. L. REV. 290.

standing, these investigators find that heredity, nationality, poverty (except in extreme, and therefore rare cases), physical type, bad habit (such as excessive smoking, masturbation, etc.) are of no appreciable assistance when taken alone as a basis for prognosis. The mentally abnormal have a smaller percentage of successful outcomes than the mentally normal, but the difference is not great, while the number of abnormal delinquents in the whole group is almost as abnormally small as the normal curve of distribution would lead one to expect in the general population.

There are some positive causative factors which may, in individual cases, lead to crime. They are such things as mental conflicts, bad companions, social suggestibility, early sex experiences. They are not postulated as general causes of crime, because the experiences are almost universal; but in any given case one or more of these factors (including, of course, those mentioned in the previous paragraph) may appear as the outstanding cause of a delinquent career. Whether or not any factor does so appear depends not upon a general theory, but upon a careful, individual study.

The effect of a community upon delinquency is well brought out by a comparison of the Chicago and Boston cases. In the former city over half of those studied continued their careers of crime, while in the latter only a little more than a quarter of the outcomes were unsuccessful. There are many possible explanations, on one of which the authors of the present volume lay some stress; that is the tendency, in Chicago, to send the boy or girl in trouble to a juvenile institution against the much wider use, in Boston, of probation and placing out. In both cities the institution handled cases were less successful than those handled outside.

All this smashing of precedent is as important as any work a criminologist can undertake at the present moment. A complete dissociation of ideas must precede any constructive study that is to transcend the narrow conceptual limits set by tradition. Since one must approach any research with some psychological limitation imposed by his past experience, it is desirable that that experince include some such general denial of everyone else's past experience as the present volume.

DONALD SLESINGER.

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