BOOK REVIEWS

A Panorama of the World's Legal Systems. By John Henry Wigmore. Saint Paul, West Publishing Co., 1928. Vol. 1. pp. xxxi, 453. Vol. II, pp. xv, 410. Vol. III, pp. xiv, 335. $25.

These three sumptuous volumes are difficult to criticize for it depends entirely on our conception of the author's purpose whether we can say that he has accomplished his task or not. If Dean Wigmore's primary aim is to give the general reader a series of interesting, but necessarily rapid and incomplete, pictures of the historical development of the sixteen legal systems of the world then he has undoubtedly been successful. Beautifully printed on excellent paper and enlivened by over five hundred illustrations the books are a pleasure to the eye. These "impressionistic" sketches, full of pleasant gossipy bits and occasional good stories, are particularly easy reading for they do not attempt to deal with any general ideas or principles. It is, therefore, a less serious work than either H. G. Wells' "Outline of History" or Durant's "The Story of Philosophy." In saying this we do not wish to be understood as criticizing Dean Wigmore. There is no reason why all books on legal subjects should be written to be of use either to the practitioner or to the scholar. Perhaps the novice may hesitate to write anything which cannot be described as "solid" for, safely entrenched behind a wall of citations, he can defy criticism. An outstanding legal scholar, such as Dean Wigmore, can, however, afford to be less serious and to write solely for the entertainment of the general reader.

If, however, this work is intended as an introduction to the subject of comparative law, then we are doubtful whether it will accomplish its purpose. "As a basis for broad and safe generalizations," in Dean Wigmore's words, it must prove inadequate. There is not enough material here on which any conclusions may even tentatively be grounded. These brief sketches of the functioning of the various systems—for their content is not dealt with—do not attempt to do more than stress a few of the more important and striking features. Take, for example, the chapter on the Anglican legal system. The keynote is the emphasis placed on the Inns of Court as the primary instrument by which the Anglican law was created and the Romanesque law was rejected. This is described in an interesting even if not in a novel manner. But any attempt to base a generalization on this alone, without an adequate consideration of the many other and perhaps more important factors which influenced the development of English law, would lead the student into disaster. Perhaps this emphasis is due to the fact that it supports a "generalization which has become a favorite hypothesis of the present writer's" that "the rise and perpetuation of a legal system is dependent on the development and survival of a highly trained professional class." There is some difficulty in reconciling this generalization with the author's statement that the Chinese system has survived continuously for a period of more than 4000 years, but "there were no lawyers (as we understand the term) in the Chinese system." On the other hand "all Chinese are fairly well acquainted with both the customary and the statute law, owing to the fidelity with which the laws reflect the common usage."

After having enjoyed the elaborately colored illustrations of the Great

Pyramid, the Hanging Gardens of Babylon, the Parthenon, and the Colossus at Rhodes, it may seem ungracious on the part of the reviewer to disagree with Dean Wigmore's view that the pictorial method is of practical value in expounding the science of the law. A student, whose zeal must be stimulated in this way, can hardly be worth teaching. It is, of course, always interesting to see the portraits of famous judges and lawyers, but we doubt whether a legal scholar will obtain any benefit from the knowledge that Coke and Bacon wore beards while Selden and Mansfield were clean-shaven. Of even less scholastic value must be the photograph of a statue of Gaius based entirely on imagination, for nothing whatsoever is known about him except his praenomen. (Dean Wigmore's remark that "we know less about Irnerius' personality than we do about Gaius" is interesting for it suggests that he may know something about "this most mysterious person," as Professor Buckland has called him.) This does not mean that we have not found the pictures entertaining; it is merely intended as a criticism of the view that the study of law as a legal science can be advanced by photographs of the Supreme Court of Siam and of 10 Downing Street incorrectly described as the Privy Council Office.

To the reader, whether lawyer or layman, who is seeking for pleasant relaxation these volumes can be heartily recommended for he will find them written in a vivid and striking manner. Perhaps the three pages on the Bolshevist legal system, which the Dean must have written with his tongue in his cheek, will prove particularly entertaining. To ignore one of the most important developments of modern comparative law on the ground that the elaborate Soviet codes are the work of "ferocious political lunatics" is hardly serious scholarship. As Professor Edouard Lambert, director of the Institute of Comparative Law at Lyons, has pointed out in a masterly essay dealing with the Russian codes, it is just because "ce droit est en opposition avec les nôtres tant par l'intransigeance de ses formules que par les fins politiques qu'il poursuit" that the study of this new system is so valuable to the student of comparative law. Such an analysis would, however, be difficult matter for the general reader, so Dean Wigmore may have been wise in limiting his discussion to a full page illustration of the outside cover of the Soviet Constitution bound in flaming red.

A. L. GOODHART.

Trade Associations: The Legal Aspects. By Benjamin S. Kirsh. New York, Central Book Co., 1928. pp. 271. $5.

There are various economic ills in industry today. Many of them can be cured by economic means. The business world is recognizing the value of trade associations—federations of independent competitive business units—for this purpose. Mr. Kirsh aptly points out the great economic value of trade associations and emphasizes the ever increasing recognition by the courts of their economic bases. "Viewed compositely, the latest Supreme Court opinions evidence a judicial attitude founded upon sympathy and understanding rather than on suspicion, hostility and negativity." (p. 12)

Mr. Kirsh, in a commendable manner, traces the shifting of the emphasis on the part of the United States Supreme Court from a search for a technical violation of the words of the Anti-Trust Act to proof of the presence of substantial economic benefit. The dissenting view of Justice Holmes and Justice Brandeis in the *Hardwood* case[1] in 1921 becomes

[1] American Column & Lumber Co. v. United States, 257 U. S. 377, 42 Sup. Ct. 114 (1921).

the prevailing view of the court in the *Maple Flooring*[2] case in 1925.

The author presents a strong and able argument in support of the economic-judicial interpretation of the Anti-Trust Act; but it would seem that he stops too short in his application of the principles that he sets forth. A trade association, according to Mr. Kirsh, may legally gather statistics (c. 2); it may adopt uniform cost accounting (c. 3), uniform arbitration practices and a uniform code of ethics (c. 10); it may function as a credit bureau (c. 4); it may provide for patent interchange (c. 5) and standardization (c. 9); and it may adopt a uniform basing point system (c. 7); all within proper limits; but a trade association must not endeavor to enforce its regulations or contracts with its members.

"There must be no penal provisions to compel each member, under duress of fine, suspension, or expulsion to conform to group action rather than individual discretion." (p. 63) To permit ". . .penal provisions requiring the deposit of funds to insure obedience to agreements . . . would render ineffective, efforts, on the part of government officers, to enforce the provisions of the law." Such provisions are "generic evidentiary features" of illegality. (pp. 31-32)

The subject of liquidated damages is not mentioned in the book.[3] Instead we find references to "penal provisions," such as we have quoted.[4] Mr. Kirsh seems to have overlooked entirely the distinction between liquidated damages and penalties: a liquidated damage clause in an illegal agreement is unenforceable, not because the liquidated damage clause is unenforceable or illegal per se, but because the contract is illegal; likewise, a penalty clause in a legal contract would be unenforceable, not because of any provision of the Anti-Trust Act, but because a penalty cannot be enforced.

Mr. Kirsh declares that fines, suspension, expulsion and what he calls "penal provisions" are illegal. He says:

"In the enforcement of a code, the controlling factor is, therefore, the value which the members of an industry attach to membership in the association.[5] . . . If there is power to enforce the code it will be effective.[6] . . . In the last analysis, however, trade associations seek to arrive at the stage where the persuasive power of group disapproval or approbation will be sufficient to prevent trade abuses between buyer and sellers and to encourage the observation of the high standards set up in the rules." (p. 238)

There is no doubt that the ideal situation would be presented where a gentlemen's agreement would be enough. But we are dealing with real conditions, as they now exist, not with Utopia. Farmers' co-operative marketing never became successful until the "persuasive power of group disapproval or approbation" was re-enforced by an iron-clad contract containing provisions for liquidated damages and injunctive relief.[7]

After a trade association has become firmly established, it is possible, but not very probable, that a gentlemen's agreement may be sufficient; but to deny to a newly organized association the right to suspend or expel

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[2] Maple Flooring Mfg Ass'n v. United States, 268 U. S. 563, 45 Sup. Ct. 578 (1925).

[3] The phrase "liquidated damages" is mentioned on page 131 in the discussion of National Harrow Co. v. E. Bement & Sons, 163 N. Y. 505, 57 N. E. 764 (1900). Mr. Kirsh seems to overlook the fact that this decision holds in effect that a liquidated damages clause is not, as a *matter of law*, illegal.

[4] The expression "penal provision" is also found on page 48; but neither it nor the expression "liquidated damages" is in the index.

[5] But he says that suspension or expulsion is illegal!

[6] But he says that enforcement is illegal!

[7] NOURSE, THE LEGAL STATUS OF AGRICULTURAL CO-OPERATION (1928) c. 9.

a member for deliberate breach of a material regulation, and to prohibit the use of liquidated damages and injunctive relief will probably render many associations helpless. Furthermore, a mere "gentlemen's agreement" has often been and may often be the cloak for a secret illegal understanding.

The only legal authority upon which the author relies in declaring fines, suspensions, expulsions, etc. illegal is the *Linseed* case.[8] But it is this case and the *Hardwood* case that the book criticises. It is these two cases that "seemed to threaten the very existence of the entire trade association movement." (p. 34) The thesis of the book is to show that these two cases do not represent the law of today but have been practically overruled by the economic-juristic opinions in the later decisions. (pp. 49-50)

Furthermore, there is nothing in the *Linseed* case that declares liquidated damages or "penal provisions," as such, illegal. The decision holds that *illegal* practices of a trade association cannot be enforced by any means. It does not hold that *legal* practices of a legal association cannot be enforced by fines, suspensions, expulsions or liquidated damages.

United States v. Fur Dressers' & Fur Dyers' Association[9] held that fines, suspensions and expulsions for violations of the by-laws, rules and regulations were legal, and that a provision of the by-law that each member should deposit $500 to secure his faithful performance of the by-laws, rules and regulations was reasonable and lawful. This case is referred to with approval on numerous occasions in the book[10] and is discussed at length therein.[11] It is, therefore, surprising that the author overlooked the portions of that opinion referring to this subject.

Liquidated damages, expulsions and suspensions have often been upheld as legal in other trade association cases.[12] If the provision violated by the member is itself illegal, it cannot be enforced by damages or expulsion or suspension; but if the provision is itself legal, then the remedy, if reasonable, will be granted by the courts.

In his discussion of co-operative buying, Mr. Kirsh states:

"It is advisable that no agreement be entered into among the members of a group buying organization binding each to purchase . . . on the basis of a price negotiated by the agent or committee and which would preclude the individual member from making his own purchases at his own price." (p. 206)

Group purchasing is becoming more and more an economic necessity. The growth of chain stores and of large vertical and horizontal combinations and mergers tends to force group purchasing upon smaller individual units. Group purchasing cannot usually be established and maintained by a mere "gentlemen's agreement." The agent would be unable to make contracts for a definite quantity of merchandise. He could not call for bids. He would be greatly handicapped. The enemies of the plan could take a

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[8] United States v. American Linseed Oil Co., 262 U. S. 371, 43 Sup. Ct. 607 (1923). This case is the only authority cited for the statements quoted herein from pages 30, 31 and 63.

[9] 5 F. (2d) 869 (S. D. N. Y. 1925).

[10] Pp. 24, 98, 99, 100, 101, 213.

[11] Pp. 98-102, 213.

[12] Dyer Brothers v. Central Iron Works, 182 Cal. 588, 189 Pac. 445 (1920) (deposit by members of promissory notes to be enforced in case of violation); Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50 (1898) (fines imposed for violation of rules and regulations); Industrial Ass'n of San Francisco v. United States, 268 U. S. 64, 45 Sup. Ct. 403 (1925) (members fined and expelled for violations); People v. New York Produce Exchange, 149 N. Y. 401, 44 N. E. 84 (1896); Associated Hat Mfrs. v. Baird-Unteidt Co., 88 Conn. 332, 91 Atl. 373 (1914); see also, in general, cases cited in 14 C. J. 374; 5 C. J. 1354-5.

small temporary loss by selling below cost to one or two of the members of the association in order to disrupt it at the very start. These are not idle fears but the results of experience.

The Federal Trade Commission announced some time ago that it was ready to enforce, whenever practicable, trade practices entered into by the members of an industry with the approval of the Commission. This is a most important development of Trade Association activity but Mr. Kirsh merely mentions it in a note [13] and omits any discussion of its importance.

Mr. Kirsh has presented a strong and able argument in support of the economic-judicial interpretation of the Anti-Trust Act; he has excellently developed the economic place of trade associations in American business life. We differ with his views on legal technique and enforcement. Perhaps this reflects the difference in the experience and viewpoint of Mr. Kirsh as a former Government prosecutor [14] on one side and the experience and judgment of the reviewer, a trade association advocate, on the other.

New York City AARON SAPIRO.

The Practical Work of a Bank. By William H. Kniffen. Seventh Edition. New York, The Bankers Publishing Co., 1928. pp. xi, 618. $7.50.

This work has gone through six editions since its initial appearance in 1915. The present edition, the seventh, has been considerably revised, a large part of the subject matter being new. It is interesting to note the hope of the author, expressed in the preface, that by entirely omitting statistics from this edition, it should not soon become obsolete—except for changes in the law. But the text deals largely with bank practice, as the title implies, rather than with the fundamental unchanging principles of banking, which may or may not exist, and it may be safely hazarded that continued revision will be necessary. Certainly, if the past is any guide, continued changes in practice, whether occasioned by changes in law or not, may be expected.

There is some difficulty in accurately placing this work for purposes of comparison inasmuch as it does not deal exclusively with bank practice. The first two chapters deal with money and bank credit. The treatment is distinctly not that of an economist. These chapters, however, serve as a very elementary introduction to the subject. The last three chapters are entitled, Banking as a Career, Knowing Your Bank, and If I Were a Bank Director. Obviously these are not concerned solely with details of bank operation.

Although the work may be of considerable value to lawyers for the indication it gives of bank practice, it is not always accurate when reference is made to legal points. For example, on page 20, the statement is made without qualification that a bank which has certified a raised check is responsible to the holder for the raised amount but can only charge the drawer for the original amount. This result was reached in Illinois by decision but, it is believed, obtains nowhere else. At the same time the writer has not shown the considerable effect the decision has had in causing banks generally to adopt a practice of not certifying checks unless at the instance of the drawer. Also, no effort has been made to evaluate the social or business consequences of such a change in practice.

Pages 179 to 188 are devoted to a quotation, fourteen years old, concerning the law relating to the practice of sending items directly to the drawee for collection. It is but a recital of the general rule that the

[13] P. 238, n. 20.

[14] Mr. Kirsh was formerly special assistant to the United States Attorney in New York in the prosecution of Sherman Anti-Trust cases.

sending bank is responsible for damages in such case. No mention is made of the widespread use of collection clauses stipulating for the privilege of handling collections in this way, although this would seem to be a matter intimately connected with bank practice. Nor is any mention made of the fact that many states, by statute, now sanction the practice.

Again on page 234 considerable doubt is thrown on the position of a bank discounting bill of lading drafts. No mention is made of the adoption within recent years by the Federal Government and most of the states of legislation removing most of the dangers referred to. Indeed very little recognition is given to the widespread use of the seller's order bill of lading. Commercial letters of credit are discussed rather generally under a chapter entitled Foreign Exchange. Very little of the highly specialized work of the bank handling bills of lading and other documents presented under such credits is described.

Perhaps this brief statement of some of the limitations of the work will, by a process of elimination, give an idea of its scope. Written by a practical bank executive, in a more popular than technical manner, it is a mixture of bank practice, elementary economics and law, interspersed with various comments and quotations. Insofar as it discusses methods of handling matters of bank routine, such as filing credit information, recording cash collections and such matters, which comprise the larger portion of the book, the work is no doubt accurate and of value to bankers.

ROSCOE B. TURNER.

The Making of the Constitution. By Charles Warren. Boston, Little, Brown & Co., 1928. pp. ix, 832. $6.

The value and the importance of this volume rest in part upon the method in which the contents are arranged and presented. Naturally the method had to be used with good judgment, and with a scholarly sense of what is pertinent and useful. We have here not a new treatise, in the ordinary meaning of that word, covering the work of the Federal Convention; nor is it a narrative account of the debates, but a day by day journal of the convention's proceedings, a journal made up of quotations from speeches which tell their own story, and including skillful condensation of the arguments of the delegates. To the day's proceedings in the convention are added letters or excerpts from letters and occasionally articles or portions of articles gleaned from the newspapers. The letters, if written by members of the convention, necessarily give little information about the actual work of that body, for the resolution enjoining secrecy was on the whole conscientiously observed. But the net result of presenting these letters and "outside" comments, the guesses of the press concerning what was going on behind the closed doors, the unimportant entries in Washington's diary, and the like, all tend to give a strange and unexpected reality to what was done in those four fateful summer months of 1787.

How successful the author has been in carrying out an intention to trace a connected story of the source of each important clause it is hard to say. The reviewer must at least drop by the way a word of gratitude for an honest, helpful and scholarly attempt. Perhaps the method of tracing the history of express provisions has made it impossible to present adequately the movements and decisions which were not clearly crystallized into paragraphs and explicit sentences. Take, for example, the early proposals to coerce a delinquent state; coercion of some kind appeared in the plans presented to the Convention, but it did not find its place in the Constitution. Its omission, however, is of supreme importance. It

was omitted because of the establishment of a national government over individuals and operative immediately on them. In later years, discussion concerning the right of the government to coerce a state stands out conspicuously in American history. But there is no entry under the title "coercion" in the index, though there does appear under "Congress" the sub-title "power to enforce;" the pages one is referred to in the text give insufficient information. If the volume contains such information, a diligent search has not disclosed it. On the whole, a much fuller index would be very serviceable, and, considering the nature and organization of the material, an analytical table of contents would greatly help the reader or the investigator.

Of course, to use Madison's Notes and other material of that sort effectively required scholarly care and also knowledge of what was significant. Such care and knowledge Mr. Warren appears to have used. His comments are helpful; the footnotes are almost as valuable as the text; and his handling of the sources throws new light on old material. No one examining such documents can choose what is chiefly important in them unless he knows the years that followed: he must know the controversies of later days, when men disputed about constitutional interpretations; he must know the serious and difficult problems that came before the courts for solution. The author's knowledge of later constitutional history and of the history of constitutional law was invaluable to him. His task required technical knowledge of the law as well as the historian's skill and the historical method of approach. It must be said that on the whole he has used the two techniques well and effectively.

Of considerable significance, too, in estimating the value of the book is the evidence of the author's painstaking use, not alone of the formal documents and contemporary materials—sometimes almost trivial—but of more recent studies of various kinds. I doubt if there is anywhere else so good or so extensive a collection of titles of articles and books dealing with the convention's work and with the problems which that work presented. The footnotes, furthermore, indicate that the author was not content with titles; he profited by the work of his predecessors.

It is difficult to say just how and where this book will be used. It will probably not be eagerly devoured by the general reader, although one cannot be sure, for it is interesting and contains enough gossipy matter to hold the unwary and unlearned reader's attention. It will be of use to the student, any serious student, of the convention's work. It will be a convenient guide to lawyers working in the field of constitutional law. Possibly some persons, a bit tired of mere wordy laudations of the Constitution and the Fathers, will find a relief from their weariness in this very real and graphic presentation of what was actually done, and such a reader will lay down the book with greater admiration than before for the intelligence and wisdom with which the framers did their job.

University of Chicago A. C. McLAUGHLIN.

Present-Day Law Schools in the United States and Canada. By Alfred Zantzinger Reed. New York, The Carnegie Foundation for the Advancement of Teaching, 1928. pp. xv, 598.

In 1921 the Carnegie Foundation published a volume on legal education (Bulletin Number 15) by Alfred Zantzinger Reed, the preface to which stated as its purpose "to point out certain broad lines along which legal education . . . must develop if the profession of the law is to fulfill its true function." The present volume by the same author is in effect volume number 2 on the same subject; it develops more thoroughly some of the

topics discussed in the earlier Bulletin but also contains a notable amount of new material. It should be read by everyone interested in legal education, whether as administrator, teacher, student or friend.

It is a comprehensive study of the development of the present-day law schools. Chief among the elements of this development are placed bar admission requirements. As these passed from a period (1810-1830) when admission to full privileges of a "counsellor" in Massachusetts required seven to nine years of apprenticeship and practice, through a time when good moral character alone entitled any applicant to admission to the bar, and down to the present when admission is generally by examination, law schools advanced to where, of the 176 schools listed as having the power to confer a degree, all but ten require study for three years or more to secure a degree. These ten are termed "anacronisms" by Mr. Reed who says, with much show of reason, "The question of present interest is whether even three years is a sufficiently long period." Of the three-year law schools, 60 per cent are shown to require two years or more of college work prior to admission to the law course.

For these and other notable advances in standards, Mr. Reed gives credit to the American Bar Association and the Association of American Law Schools, which he describes as the "Machinery for Professional Supervision." These two bodies are shown to have co-operated on the same program since 1921.

But the Bulletin is not given entirely to statistics. It takes up again the discussion of "Uniformity or Diversity," which Mr. Reed initiated with the previous Bulletin. Shall the law schools continue to offer students a uniform preparation for entrance into a "diversified" practice, or shall they each "concentrate upon a portion of the field" and offer different kinds of training to produce different kinds of lawyers? This suggestion in the earlier Bulletin was received inhospitably. It led Professor Vance to say, "It is to be feared that the author's 'broad lines' of development are quite too broad to be serviceable," [1] and brought down a maelstrom of disagreement elsewhere. But the author repeats his confidence in the plan in the following words:

"In the judgment of the writer, not only will law schools be eventually compelled to adopt this method of extricating themselves from their difficulties, but already forces are at work that are destined to split, first the schools, and then the legal profession into which they feed their graduates. The suggested frank division of American lawyers into two or more supplementary and mutually supporting groups, each resting upon its own basis of preparation, is no more inherently impossible than the already existing division of English lawyers into barristers and solicitors, or of French lawyers into *avocats, avoués,* and *notaires,* or of our own practitioners of the healing arts into physicians, dentists and trained nurses. There is really only one obstacle that stands in the way. That is, that for many years our legal profession has been, as a matter of legal form, undivided."

It is difficult to understand just what kind of division Mr. Reed suggests, or would suggest. It seems that he confuses the idea of a graded bar, nourished by selective bar associations that choose as their members the sheep and close the door to the goats, with the idea of a bar divided as to the different legal relations with which practitioners are compelled to cope, such as corporation law, administration of estates, criminal law, etc. It is not apparent, however, that either of these divisions could be aided by different schools concentrating upon a portion of the field. Rather, it would seem, after the author's suggested analogy to the field of the healing

[1] Book Review (1921) 31 YALE L. J. 225.

arts, the student in all schools should be permitted to concentrate upon a portion of the field by *majoring* along the line of division he proposes to take in practice, or by taking post-graduate work *specializing* along that line. For, as the American Bar Association has said, "the same fundamental intellectual processes are back of all legal relations."

However much one may differ with Mr. Reed's analysis of the facts he presents and the conclusion he reaches, no one can deny the value of the present volume as an historical source book, if a source book has any value. And no one can fail to feel indebted to him for his stirring discussion of the admitted problem of better preparing lawyers to give "the efficient service of broadly and thoroughly trained experts, to whom clients can resort in full confidence that without undue delay or expense they will be honorably and competently served."

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REVIEWERS IN THIS ISSUE

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