

## BOOK REVIEWS

POWER OF FEDERAL JUDICIARY OVER LEGISLATION. By J. Hampden Dougherty. New York: G. P. Putnam's Sons, 1912.

A discussion very nearly as old as the Republic itself, a controversy that has been waged with acrimony and great show of bitterness at times, a difference that has called forth some of the most astute legal reasoning of the past century, is still as far from adjustment as at the time of its inception. The old arguments *pro* and *con* on the question of whether or not our judiciary has the power to set aside acts of the legislative branch of the government as unconstitutional, have taken the modern form of agitation over judicial recall and recall of judicial decisions, but the latter is merely an outgrowth, or offspring, so to speak, of the former. The foundations of the two are the same; their basic essentials are identical. And the questions raised are not confined to the philosophical fulminations of legal theorists. We meet them in the learned publications of political science societies, we listen to them as expounded by the practical politician from the stump, we participate in them over the family dinner table. Therefore, Mr. Dougherty's new book ought to find a hearty welcome in numerous and diverse circles. It is not so technical or so specialized that the ordinary layman cannot read it without an immediate comprehensive grasp of its thesis. Nor yet is it so elementary that the precise and exacting student of this phase of our legal development will not find much in it of interest and value.

The title of Mr. Dougherty's essay is rather vague and perhaps misleading, for it is undoubtedly too wide for the scope of the work. The subject treated is the origin of the power of the judiciary to declare legislation unconstitutional and the historical justification for the exercise of such a power. Mr. Dougherty's argument is that the Constitutional Convention of 1787 expressly intended to confer this power upon the Supreme Court and the federal judiciary. He points out that such power was not unknown to the laws of foreign nations, is to be found in the Roman and canon laws, and had several times been used in England prior to the English Revolution of 1688. Then coming to America, he shows that there were a few instances of judicial annulment of legislation in the colonies, and a number of highly important and widely discussed cases in the states just before the calling of the Convention. All this being in the minds of the framers of the Constitution, liberal extracts from the records of the Convention's debates show how the framers thought they were conferring just this power upon the judiciary when they put in the form we now have them the "Supreme Law" clause of the Constitution (Art. VI) and the cognate clause which established the Federal judiciary upon a firm basis (Art. III, Sect. 2). Arguments and debates in the ratifying conventions of the several states strengthen this position.

Mr. Dougherty briefly sketches the history and career of his theory through the nineteenth century down to the present time. He then takes up the origin of the opposite view in the Virginia and Kentucky Resolutions of 1798-99, that since the Constitution does not in so many words confer power on the judiciary to set aside unconstitutional legislation, that power does not exist. This doctrine, too, is traced right down to to-day and then its fallacy pointed out. In closing, the author devotes a few pages to what he believes are remedies preferable to any system of judicial recall.

This book, written in a most excellent, interesting style, is easy reading. And, a feature that will commend itself to many, it is not too large to slip into one's pocket.

J. F. N.

A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS AND MOVEMENTS IN CONTINENTAL LEGAL HISTORY. By Various European Authors. Boston: Little, Brown & Co., 1912.

This is the first volume of the continental legal history series, published under the auspices of the Association of American Law Schools in pursuance of a resolution adopted at the annual meeting of the Association in 1909, in the belief that American lawyers and scholars should have at their disposal translations into English of some of the more recent works on European legal history, embodying the researches of distinguished modern scholars. The scope of the project includes, besides volumes of essays on the legal history of those countries whose legal institutions are derived from Roman Law, translations of complete works on the history of private and public law in France, of private law in Germany and Italy, of continental commercial law, criminal law and procedure, civil procedure and the evolution of law. It will readily be seen that the series is of high importance to all who wish to obtain a broader legal horizon and should have a marked influence in stimulating interest in the study of comparative law.

The volume before us is, as its title indicates, a general survey of the external history of the law of the principal countries of Western Europe. Part I, from the history of Italian law by Professor Calisse, reviews the later Roman law, the codes of the Germanic invaders of the Empire and the feudal legislation; Part II, by the same author continues the story for Italy; Part III, takes up the story for France where Part I breaks off and consists of extracts from the history by the late Professor Brissaud; Part IV, for Germany is a mosaic from the works of Brunner, Stintzing, Stobbe, Schroeder, Siegel and Zaepfl; the remaining parts include the Netherlands by Professor Van Hamel, Switzerland by Professor Huber, Scandinavia, by Professor Hertzberg; Spain, by Professor Altamira and church law from Brissaud. The translations have been made by a scholarly group of experts including Professor Wigmore, the editor of the volume.

The shortcomings of the work are such as must reasonably be expected in so extensive an undertaking. Some chapters are decidedly patchy, particularly those relating to Germany. In other places, the story moves with such monotonous rapidity over the continent and through the centuries that the reader is left with but a blurred vision of Goth, Lombard, Saxon, Frank and Burgundian, of codes and capitularies, of glossators, commentators and jurists. On the other hand such a wealth of sources is uncovered that the student must close the volume with a feeling of de-pair at the hopelessness of attempting to master even a tithe of legal knowledge in the brief space of a lifetime.

It is to be regretted that the editors have found it expedient to exclude all reference to the legal institutions of the Slavonic peoples. It is true that, through Mongolian subjection, these races remained outside the influence of the Renaissance until comparatively recent times, but their great and increasing importance in Europe, and as immigrants to America, might have warranted, at least, a general chapter, which might well have replaced the brief account of canon law which adds little to already available information.

It may sound paradoxical to refer to the fact that in an extraordinarily learned volume of more than seven hundred pages about customs and codes, jurists and jurisprudence there is hardly a word of substantive law. And yet as is well said by the editor, there is more in this book than a narrative of events, sources and movements external to the law, to be more particularly described in succeeding volumes. It is possible to recognize recurring cycles of particularism and unification, of codification and precedent building, of petty technicalities and shallow generalizations, of dogmatism and philosophy. "The thoughtful lawyer begins to discover (without waiting for the authoritative interpretations of some profound seer) that the legal life of mankind, variant as it is, deals with materials so simple and limited in type that the same situations '*mutatis mutandis*' keep recurring with startling persistence." And looking at history and observing how in the past order and system have evolved from seemingly hopeless confusion, the American, often bewildered and always oppressed by forty-eight varieties of private law, may presume to hope for a saner future.

W. H. L.

THE LAW OF CONTRACT. By William T. Brantly. Second Edition; Baltimore: M. Curlander, 1912.

The high merit of the works upon contracts that appeared in the past century, and the completeness with which these have, since their first publication, been kept abreast of the more recent decisions and development of contractual principles in successive editions, has resulted in later years in a decline in the number of treatises issued upon the subject. The present second edition of a short work upon contracts, the original having been published in 1893, has not greatly modified the outlines of contractual law adopted by Sir Frederick Pollock and Sir William Anson, but it has, within the scope thereof, made use of the more precise and clear cut divisions of the subject found in the civil law. The author has in the treatment of the nature of contractual obligation followed the example of Sir William Anson, by giving a short and simplified explanation of the learning of Savigny. Not content with this, however, the writings of many other scholars of the civil law have been made use of to clarify a subject which seems particularly obscure in the common law.

This resort to a collateral system is evident in the treatment of many other points. Thus in the question of conditional contracts, the author states his use of the civil law classification, which is then adapted to common law principles. The result of this free use of all the sources of learning upon a legal conception common to all nations, is not, as might be expected, a confusion of ideas and principles. On the contrary, the writer has not for a moment lapsed into forgetfulness of his real purpose, the exposition of common law doctrines. The other system of law is used for illustration, not to force conclusions, and from the comparison our own law stands out with great clearness.

Apart from the value of this complete text for practical work, the parallel view is instructive and full of interest. The many points of unison between the two systems are surprising, considering the essential dependence upon form by one and upon substance by the other.

R. J. B.