BOOK REVIEWS

JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION: An Analysis of Cases Decided in the Supreme Court of the United States. By James Brown Scott, A.M., J.U.D., LL.D. Publication of the Carnegie Endowment for International Peace. Oxford, Clarendon Press, 1919, pp. xiii, 548.

This volume has been prepared with the definite purpose of demonstrating that the experience of the States of the American Union under their judicial system justifies confidence in the practicability of the judicial settlement of international disputes.

Mr. Scott discusses the cases in which States of the American Union have been summoned before the Supreme Court of the United States, embodying in the text copious quotations from the decisions, but adding a running comment elucidating his own ideas of the significance of the opinions of the Court.

The discussion is not technical, but, on the contrary, the editor—for the work is that of an editor rather than that of an author—has addressed himself to the larger audience composed of those having an educated interest in the settlement of international controversies.

It need hardly be said that the experience of the United States, as illustrated in the decisions quoted and discussed, presents an impressive argument in support of the practicability of the judicial settlement of many classes of international controversies, and Mr. Scott has been happy in the plan of his volume, which clearly outlines the development of the jurisdiction of the Supreme Court of the United States, both in the matter of the body of such jurisdiction and in the matter of its procedure.

To those who fear the possibility of undue assertion of jurisdiction by an international tribunal, he points out the care with which the Supreme Court has, from the beginning, questioned and circumscribed its own jurisdiction. The argument is persuasive, but doubtless the Supreme Court has been admonished to exercise discreetly this extraordinary jurisdiction, because of the practical difficulty of enforcing its decrees if they should be resisted.

Moreover, there has at times been a tendency toward a literal application of the language of the Constitution, as, for example, in Chisholm v. Georgia, 2 Dal. 419, and South Dakota v. North Carolina, 192 U. S. 286. When regard is had to the purposes to be subserved by the jurisdiction of controversies between States, it seems clear that the intention of the framers of the constitution would be defeated by the establishment of a jurisdiction such as that sustained in South Dakota v. North Carolina, which would permit the *intentional creation* of controversies between States, a result which is not calculated to promote harmony between the States involved. It is much more reasonable to suppose that the jurisdiction was intended to be restricted to cases where the controversies developed naturally with the efflux of time, and were not artificially brought into being. It is possible, however, that these exceptional cases tend to prove that the Supreme Court in most cases has been careful not to exceed the jurisdiction intended to be conferred upon it; but it is not nearly so certain that

this same tendency would have been manifest had the Court been sure of the execution of its decrees, since tribunals frequently disclose a tendency to extend rather than to restrict the scope of their activity.

While the author's review of the decisions of the Supreme Court of the United States constitutes a potent argument in favor of the judicial settlement of international controversies, and while there are abundant reasons in favor of any plan having this object in view, the discussion would have been more complete had Mr. Scott included therein some consideration of the fundamental reasons which underlie the ordinary rule that a State is not suable without its consent. And the inquiry naturally arises how an international court is to function successfully unless supported by what, for the sake of a better term, we may term an international legislature; and if this is necessary to the successful operation of such a court, is there a possibility that the countries of the world may find themselves unexpectedly subordinated to a super-state, in much the same fashion as some of the States of the American Union found themselves unexpectedly subordinated to the National Government? It may be that such a consummation is in the interest of humanity, but it is desirable that there be a clear comprehension of the results which are likely to attend the establishment of an international tribunal.

Nor should it be overlooked that there are limits to the effectiveness of judicial action when controversies arise involving issues of the graver sort; the Dred Scott case naturally comes to mind when an effort is made to prevent war by judicial action.

Henry Wolf Bikle.

A MONOGRAPH ON PLEBISCITES (with a collection of official documents). By Sarah Wambaugh. Carnegie Endowment for International Peace, Division of International Law, Oxford University Press, New York, 1920, pp. xxxv, 1088.

This excellent study of the theory and practice of plebiscites is very timely, for the plebiscite is obviously the best available method by which subject people may exercise the right of self-determination, which the Paris Congress (partly from a sincere faith in its justice, partly in fulfillment of the promise made by the Allies during the stress of the War), made a basic principle of the Versailles settlement. Some of the peoples to whom this privilege was extended have already exercised it, while others are still in the throes of factional and racial controversy attendant upon plebiscites. On the other hand, neither the principle nor the practical application of this much-acclaimed right originated at the Peace Congress or in President Wilson's Fourteen Points. The thousand odd pages of the volume before us afford ample proof of this. Altogether the author gives us the history of eighteen cases of the exercise of the plebiscite in determining a change of sovereignty prior to the world war. Of these four belong to the period of the French Revolution, eleven to the years marking the triumph of the spirit of nationality from 1848 to 1870, and three to the years from 1870 to 1905 when Norway voted for separation from Sweden.

It is significant that during the periods dominated by Napoleon, Metternich and Bismarck, plebiscites for changes in sovereignty were not the fashion. Metternich stood for the *status quo*, while Bonaparte and Bismarck made no

pretense of obtaining popular consent to their aggressive annexations. In the case of the extensive annexations by Prussia in 1866, Bismarck had promised to give the people of the conquered territory an opportunity to express their wishes, but he conveniently forgot his promise later.

The author's historical survey of the subject is all too brief (178 pages), and might very well have been expanded into a fuller treatment. On the other hand it should be viewed in the light of the 900 pages of documents, official source material relating to each case, given *in extenso* both in the original and in the English translation. An examination of this reveals two methods of ascertaining the popular will, namely by direct vote on the question at issue, and by vote of an assembly elected by the people for this purpose. As an illustration of the former the first three paragraphs of the order providing for the plebiscite in Venetia in 1866 is of interest. Both methods are illustrated in the case of Nice. In 1792 an assembly was chosen to carry out the will of the people for annexation with France, while in 1866 the people voted "yes" or "no" on the same issue. In each case the choice was for annexation.

The volume has a detailed table of contents, a good index, and several excellent maps, though these might be more numerous. Altogether it is a distinct contribution to a phase of international history, that is of a special interest at this time. It is to be hoped that the author will in the not distant future complete the study of the subject by a volume on the plebiscites resulting from the Treaty of Versailles.

William E. Lingelbach.

FRANCISCI DE VICTORIA DE INDIS ET DE IURE BELLI RELECTIONES. Edited by Ernest Nys. Published by the Carnegie Institution of Washington, Washington, 1917.

The first impulse of the reader is to congratulate the collaborators of the present volume and the Carnegie Institution for having brought out so splendid a volume. It leaves nothing to be desired as a work of scholarship. The work before us is one of a larger series devoted to the "Classics of International Law" under the general editorship of James Brown Scott, President of the American Institute of International Law. The text here published is entitled "De Indis et De Iure Belli" (Concerning the Indians and the Law of War), being two chapters or lectures or "disputations" of a larger work by the author, Franciscus de Victoria, entitled "Relectiones Theologicae XII" (Twelve Theological Discussions). The author was a Spanish Theologian of the first half of the sixteenth century and held the position of Primary Professor of Sacred Theology in the University of Salamanca. The two chapters edited in the present volume in the original Latin were composed in 1532, as is clear from the author's reference (p. 218) to the "barbarians of the New World" commonly called Indians, who came under the power of Spain forty years ago ("qui ante quadraginta annos venerunt in potestate Hispanorum").

The Latin text is very carefully edited on the basis of three principal editions of the sixteenth and seventeenth centuries by Herbert Francis Wright, of the Latin department of the Catholic University of America. The revised text of Dr. Wright is provided with critical textual notes and, what is extremely valuable to the serious student and must have involved a good deal of labor

and research, citations of the actual words of Victoria's authorities from whom he quotes.

In addition to the revised text of Dr. Wright there is published for the instruction of the interested reader a photographic reproduction of the edition of 1696, one of the three editions of Victoria's work used by Dr. Wright in the preparation of his own.

The volume being intended not for Latinists but for students of the history of International Law, there is a translation of the Latin text by John Pawley Bate, LL.D., Reader of Roman and International Law in the Inns of Court, London. Without having compared the text and translation throughout, I have read enough to see that the translator has done his work well, having produced a rendering that is smooth and accurate. Reading casually, I noticed two passages where the translation, it seems to me, can be improved. In one of these, Mr. Bate's rendering, while sufficiently accurate for the legal reader, misses (perhaps dispensably) the scholastic flavor of the original. In the other, it appeared to me that the logical sequence is weakened by the translation as it stands. The first is found on p. 231, marginal no. 334, "Praecipuum autem in homine est ratio *et frustra est potentia, quae non reducitur ad actum.*" Mr. Bate translates the italicized words (p. 127), "and power is useless which is not reducible to action." I would render: "and potentiality is useless which is not reduced to actuality." The student of Scholasticism will at once recall the Aristotelian and scholastic categories. The other passage is found on page 278, no. 11. It reads as follows: "Non est iusta causa belli amplificatio imperii. Haec notior est quam ut probatione indigeat, alias esset aeque iusta causa ex utraque parte belligerantium et sic essent omnes innocentes. Ex quo iterum sequeretur quod non liceret occidere illos; *et implicat contradictionem, quod esset iustum bellum.*" The italicized words are rendered by Bate (p. 170): "and so imply a contradiction, because it would be a just war." I think the translation should read: "but this would contradict the hypothesis that it was a just war."

Text and translation are preceded by a general introduction in French from the pen of Ernest Nys, member of the Institute of International Law, Member of the International Court of Arbitration at The Hague. This is an informing and illuminating essay on the author of the Latin text and his times so far as the topic of international law is concerned. Oddly enough this introduction too is translated into English by Mr. Bate and published together with the French original.

Franciscus de Victoria was not a lawyer (jurisconsultus, jurista) but a theologian. Whether or not he intended these lectures to be published, it is clear that they were not intended as a treatise on law. They were university exercises, primarily for the benefit of the students, like the "disputationes quodlibeticae" of Thomas Aquinas and the other scholastics of the thirteenth and fourteenth centuries. And Victoria apologizes for dealing with so live and practical a question as the political and legal relations of the Spanish and the Indians, by calling attention to the fact that the discussion is academic and not intended to have any practical consequence, and if this were not sufficient justification, he adds that it is not a legal question he is concerned with but a theological question. For the barbarians, as he says, are not subject to human law, and therefore their affairs must be examined not by laws of human imposi-

tion but by the divine law. And as no worthy theologians had to his knowledge been called upon in the past to give their opinion on the matter, it is wholly within his province to consider the question.

This is perhaps merely to say that there was no such thing as international law in those days, and questions of this sort had to be treated from other points of view. Nay, if an essential requisite of law is the sanction of a supreme political force transcending both parties to an international dispute, there is no such thing as international law today, but, if not international theology, at least international ethics.

In any case the text before us is extremely interesting from many points of view. To the student of international law, it presents the beginning of discussion as to the rights and wrongs in the relations of a civilized Christian people to pagan barbarians. Additional importance is given to the work in question by the fact that Victoria is one of the sources of Grotius. The student of *Kulturgeschichte* will find this work entertaining and instructive by its quaintness, naiveté, and the manner in which the author conducts his investigation and marshals his arguments and authorities.

The specific questions he undertakes to investigate are: (1) By what right did the Indians come under the sway of the Spanish? (2) What is the extent of the temporal and civil power of Spain over the Indians? (3) What power has the Church over the Indians in matter spiritual? (4) Are Christians allowed to wage war? (5) With whom rests the authority of declaring war? (6) When is a war just? (7) What may one do to an enemy in a just war?

In the mind of the present reviewer the answers to these questions given by the author are less important than his method of arriving at them. Formally speaking, the method of discussion is that known as the scholastic method, fixed by Thomas Aquinas. The argument advances by syllogisms, which are used not merely to prove the opinion of the author, but in a preliminary dissertation to prove tentatively the point opposed to the author's own. It becomes necessary therefore after establishing his point of view to answer the syllogisms of the opponent.

The syllogisms themselves are constructed on the basis of authority, and here we see the working of Victoria's mind, at least so far as concerns the ostensible reasons given for his convictions and beliefs. For it is indeed possible that a belief is better than the reasons on which it is consciously based. Victoria's visible reasons are his authorities, and they are precisely what they were to Thomas Aquinas in the thirteenth century and to St. Anselm and Abelard in the eleventh and twelfth. The Bible, St. Augustine, Aristotle, Thomas Aquinas, the civil and canon law—these are cited for every premise. A single sentence from any one of these authorities without reference to context will be cited to prove a thesis which strictly speaking the text is far from intending. The value in this manner of procedure is that one has enough texts to prove anything one likes, and one suspects that the real reasons for taking attitudes on vital matters had no relation to the texts adduced to support them.

In conclusion we wish once more to express our pleasure and gratification in being privileged to read a delightful work in such scholarly form. May the like of such works multiply in our land to the delight of all students.

Isaac Husik.

OCCASIONAL PAPERS AND ADDRESSES OF AN AMERICAN LAWYER. By Henry W. Taft, Esq. The Macmillan Co., New York, 1920, pp. xxiii, 331.

It is gratifying to consider that a member of the bar with the broad viewpoint exhibited in this collection of essays and addresses should have reached the high position among the profession which was attained by the author of this volume, who last year filled the office of President of the New York State Bar Association. Law students about to embark upon their career, as well as lawyers who may have been washed along too hurriedly to carve out for themselves a definite standard of action, would do well to read and consider the first two addresses in this volume on the position and responsibilities of the American lawyer, one delivered before the students of the Harvard Law School in 1908 and the other before the New York State Bar Association in January, 1920.

Probably the best essay of the collection is a commentary on the development and ideals of Soviet Russia, which are treated in a clear manner, free from the passion and appeal to the emotions which usually befog the issue in such articles written by those not in sympathy with the Bolshevists. The question as to why America should interfere with the settlement of the internal affairs of Russia, another sovereign nation, which has bothered many people of this country, is answered by Mr. Taft by consideration of the international ambitions of the Lenin and Trotsky group. The reader must feel the weight of the author's conclusions, even though he may differ with some of these, as, for instance, if he thinks that deportation of the ultra-radicals, which Mr. Taft approves, is a solution by merely dodging the responsibility and is unworthy of this country.

If the later articles have a familiar ring, or if the same quotation appears more than once in the volume, (as occurs in several cases), the reader may remember that most of the chapters were addresses delivered over a space of twelve years before different audiences.

Robert Dechert.

COMMENTARIES ON EQUITY JURISPRUDENCE. By Mr. Justice Story, Third English edition by A. E. Randall, 1920. Sweet and Maxwell, London, England, 1 volume.

It is eighty-five years since Mr. Justice Story first offered to the public his "Commentaries on Equity Jurisprudence in England and America" based on his lectures as Dane Professor of Law in Harvard University. The work has gone through many editions and has become one of the classic text-books of the law. This third exclusively English edition is an indication of its continued popularity and usefulness. The present editor has gone over the text carefully, making necessary corrections and occasionally adding a section explanatory of changes in the law in order that the modern student may not be misled. The book is well printed and is published in one volume, an example to many publishers in this country whose useless and expensive padding of new editions of the older law books has reached the limits of human endurance. Only English cases are cited, but the authorities are brought down to date.

Mr. Justice Story wrote in one sense at an opportune time; the work of Equity Jurisprudence as a reforming element in the law was about completed and his book is an admirable summary of the result of the labors of the great