

BOOK REVIEWS.

TRIAL BY JURY. A Brief Review of Its Origin, Development and Merits and Practical Discussions on Actual Conduct of Jury Trials. By Robert von Moschzisker, LL. D. Geo. T. Bisel Co., Philadelphia, 1922, pp. x, 452.

In his treatise on *Trial By Jury*, Chief Justice Moschzisker has made a real contribution to legal literature and has supplied a need long felt by the profession. His superior advantages of a long and varied experience as a trial lawyer and a trial judge, and his many opportunities of observing trial lawyers at their best and worst, seasoned by his later position as an appellate judge, have equipped him as no other author has been equipped for sane, sound and practical directions.

This work is an outgrowth of a series of lectures delivered by the author to the law students of the University of Pennsylvania. The first three chapters of the book are devoted to a brief summary of the early forms of trial, which preceded and led up to trial by jury, as well as the opinions and speculations of writers on the subject, concerning the origin and development of the jury system. This admirable historical introduction is followed by eleven chapters in which the author deals in detail with the practical as well as the theoretical problems involved in the actual conduct of a jury trial. Here the fullness and variety of the author's knowledge are self-evident. However much he gives of this abundance, the feeling is still there that an abundance remains, flowing from an unexhausted reservoir. Here, too, his analytical gifts are displayed at their best. The system, order, conciseness and clearness of his treatment are unrivaled; there is no fog, either of thought or of expression, dimming the pages. The paragraph divisions appeal to the mind and hold it while the proper emphasis is maintained by admirable variations in type. The appendices, particularly the first, containing indices for use in determining the number of peremptory challenges in criminal offences, are invaluable.

Aside from all this the text is so full of the atmosphere of the person—so colored with the narrative of personal incidents and anecdotes as to impart to a book of practice the charm of literature illustrated by the memories of Westminster Hall, or our own court rooms redolent of the fame and art of Choate and Johnson.

In one instance it might seem that the author has left a seed of mischief to work by giving prominence, in paragraph 329 of his book, to *Hilands v. Commonwealth*, 111 Pa. 1, 5, without the complete antidote of Justice Mitchell's exhaustive and complete concurring opinion in *Commonwealth v. McManus*, 143 Pa. 85. In the former case Chief Justice Mercur reiterated the rule laid down by Chief Justice Sharswood in *Kane v. Commonwealth*, 89 Pa. 522, that jurors in a criminal case "are not only judges of the facts . . . but also of the law." Chief Justice Moschzisker, however, since the publication of his book, has effectively dispelled whatever doubt or uncertainty might arise through his treatment of this subject, by his opinion in *Commonwealth v. Castellana* (not yet reported) where, speaking for the court over which he presides, he adopted the view of Justice Mitchell in

Commonwealth v. McManus and stamped out forever all vestige in Pennsylvania of the mischievous and unfortunate language of Chief Justice Sharswood.

Many of us have turned wearily over the pages of old Tidd, Archbold, Troubat and Haly, and Brewster in the vain hope of finding what the author has here given in the way of practical suggestions of a sterling stamp. Too often have we closed these works with a realization that their chapters smacked of the methods of the bureau and not of the field officer who had seen active service. Of this work there can be no such criticism.

I wish that I had had at the outset of a career now near its close such a *vade mecum*, and I envy the men of today who can have its daily aid. It is the best book on practice that I know and I predict an enormous success for the work.

Hampton L. Carson.

THE LABOR INJUNCTION. By John P. Frey. Equity Publishing Co., Cincinnati, 1922, pp. xiv, 197.

That there are evils in the modern use of the injunction, particularly with regard to labor cases, is hardly to be denied. In a recent book Mr. Frey, of the International Molders Union, has sought to point out and array these evils. The subject matter is so important and the problems discussed so timely that the book has attracted considerable attention.

To evaluate the book one must recognize at the very outset certain limitations on the part of the writer. Mr. Frey is not a lawyer, and in the course of his busy, hard-working life has never had the opportunity to acquire a legal education. One cannot be surprised, then, that in writing about a difficult and highly complex legal subject, Mr. Frey should, in the course of his examination, have fallen into errors which a well-trained lawyer would have avoided. The book was not written as a treatise for the guidance of those desirous of knowing the law. Its value and interest lie rather in its revelation of the ideas of a layman of unusual intelligence, struggling to understand the principles of judicial determination as he watches the law in action. It is significant in its portrayal of a conception shared by many hundreds of thousands of workers,—a conception of real injustice wrought against workingmen today largely through the instrumentality of the labor injunction.

It is easy for a lawyer to point out errors in the book. In his discussion of the development of the injunction remedy in English labor cases, in his contention that business is not an interest of substance to be given the protection of law, in his apparent intimation that the right of workers to combine may be enjoined apart from other illegal acts, in the conception which he works out of "government by judicial conscience," Mr. Frey will fail to carry with him many of his readers who are versed in the law. But after all, that is beside the point. Has Mr. Frey, in spite of evident misconceptions, put his finger upon any of the elements of the injunction

problem which do constitute real evils and which, therefore, hinder rather than further the advance of social progress?

Perhaps the most interesting charges in Mr. Frey's indictment of the labor injunction as used by American courts, are (1) class distinction on the part of the courts in the issue of injunctions, (2) the vagueness and indefiniteness of much of the language used in injunction orders, and (3) the delay in appeal procedure. Concerning the first of these charges there will be a wide difference of opinion. Whether or not there is justification for such a widespread criticism, it must be confessed that lawyers have found it difficult to reconcile such cases as *Wilson v. Hey*, 232 Ill. 389 (enjoining employes from participating in a secondary boycott) with such cases as *Macaulay Brothers v. Tierney*, 19 R. I. 255, *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, or *Montgomery Ward v. So. Dakota Ass'n*, 150 Fed. 413 (refusing to enjoin business men from participating in similar secondary boycotts). Mr. Frey cites numerous instances to prove his contention; but there still remains the question whether a necessarily limited number of isolated instances will prove convincing to those who do not share Mr. Frey's viewpoint.

One might wish that Mr. Frey had developed further his criticism based upon the indefiniteness of the language often used in restraining orders. Courts have laid it down that "as the defendant is bound to obey the process of the court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning."¹ In their issue of labor injunctions too many courts have signed against this principle. Many modern restraining orders bristle with such controversial and ambiguous terms as "malicious," "threatening," "intimidating," "coercing," "picketing," "hindering," "obstructing," etc. Frequently they are couched in language which, if accepted at its face value, would include many perfectly legitimate and lawful activities. Theoretical justice may be saved by appeal courts paring down the literal meaning of the language through careful judicial interpretation; but workingmen are far more vitally concerned with the law in action than with theoretical justice. If the terms of an injunction issued against them are so ambiguous that neither they nor a legal expert can possibly tell with certainty what conduct will be permitted and what forbidden by the restraining terms,—if they are told by the best legal advice that conduct presumably lawful may be legally punishable by contempt proceedings depending upon how some individual judge may choose to interpret the questionable language of the restraining order, they will begin to think that they are governed by men rather than by law and their respect for our courts is not likely to be increased.

In pointing out the frequent cases of injustice to workingmen through sweeping injunctions unjustly granted by lower courts and not vacated on appeal until many months have passed, Mr. Frey touches upon another matter which is worthy of serious consideration. During the pendency of the appeal, the injunction continues in force; and due to the overcrowded

¹ *Laurie v. Laurie*, 9 Paige 234.

dockets of many of our courts, often a sweeping injunction, containing terms evidently not justified by the law of the state, will as a practical matter restrain workmen from the exercise of perfectly lawful activities until the crisis which called them forth has long since passed. A temporary injunction was issued against the striking railway shopmen last September in terms so sweeping that its validity has been questioned on many sides by distinguished members of the bar. The defendants immediately moved for a dissolution of the injunction. The court denied the motion and set the cause down for trial on May 3, 1923. By next May the issue will probably be cold; in the meantime, the injunction remains in force, and the employers have succeeded in getting the courts to restrain activities during the time of crisis which, on appeal, may be declared perfectly legitimate. Here is an abuse which by law providing for quicker appeal procedure in labor injunction cases and possibly by one requiring the payment of damages if the injunction is later vacated might well be remedied.³

As one concludes the reading of Mr. Frey's book, he is impressed by the thought which must be present in the minds of nine or ten millions of workmen. Is there a law governing the issue of injunctions in industrial controversies; and if so, what is it? No matter how earnestly and sincerely the workman may seek to discover the law upon which his industrial existence and happiness largely depend, he can find it written in no single book, nor in any language intelligible to him. No one, not even trained experts in the law, can with certainty or precision draw its outlines for him. He sees the courts themselves often in hopeless conflict; different judges of the same court fail to agree. Mr. Frey courageously set forth to find the law. He did not find it; but he has recorded his impressions along the way. The fair-minded critic will not agree with many of the conclusions reached by Mr. Frey, but he will find in the book considerable food for thought.

Francis B. Sayre.

RAILROADS:—RATES, SERVICE, MANAGEMENT. By Homer Bews Vanderblue, Ph. D., Professor of Business Economics, Harvard University, and Kenneth Farwell Burgess, LL. B., of the Chicago Bar. The Macmillan Company, New York, 1923, pp. xv, 488, including table of cases and index.

To include in one volume even a general treatment of the great phases of our railroad problem comprised in the sub-titles "Rates," "Service," "Management," is not a small undertaking. The experience and achievements of the authors of this book leave no doubt that they recognize the vastness of the field they have sought, in some measure, to cover, and the success of their work is due in large part to a wise selection of broad and controlling principles and tendencies from the mass of detail and cross currents of thought and purpose which often confuse the common conception

³ See Walter W. Cook, *The Injunction in the Railway Strike*, 32 *YALE LAW JOUR.* 170.

of our transportation problem. As the preface indicates, the book is not offered as an exhaustive treatise but is rather directed "to students *approaching* an intensive study of railroad practice."

The arrangement of the work proceeds upon a classification into four "Parts": "The Scope and Machinery of Regulation," "Rates," "Service," "Management." The first of these grand divisions presents in the scope of but fifty pages a very clear and enlightening history of regulation and its agencies, touching upon the parallel and often conflicting growth of State and Federal Commissions leading to the essential supremacy of the latter, whose organization, functions and practice are set forth in a degree of detail which will appeal to railroad officers and practicing attorneys even if less useful to readers generally. A similar inclusion of detail occurs later, in Part II, in the description of railroad tariffs, their construction and publication. Occasional passages of this detail character are, however, exceptions, quite in contrast with the general philosophical tone of the book.

The ever present problem of the "reasonable" rate and the difficulty of its adjudication is made admirably clear in the early chapters of Part II: "The requirement that rates shall be reasonable is then rather a statement of a problem than the statement of a solution of that problem." This, coupled with the assertion that "cost is simply not ascertainable," leads to a discussion of the economic and business principles which so largely affect and often control any rate structure. The negation of cost needs qualification, and is later somewhat qualified. Cost ascertainment with mathematical accuracy is doubtless impossible, but the science of railroad cost accounting has made notable progress in the past decade and in cases concerning a general structure of rates on such commodities as ore; coke and coal, "cost studies" are likely to form a major item of the evidence, pertinent in an increasing degree and undoubtedly having material effect upon the conclusion. Nevertheless, the public misconception that exact cost is easily ascertained, and the belief that it should furnish the measure of rate, calls for enlightenment which is admirably given in the discussion of "Equalization," "Distance," "Group Rates" and the familiar but misunderstood principle of "What the traffic will bear."

The most notable portion of the discussion of rates deals with "General Rate Levels." Here the work passes from an exposition of existing experience to contemplation of the new era of regulation inaugurated by the Transportation Act of 1920. Here is traced the progress from the repudiation in 1910 of the strengthening of railroad credit as a justification for higher rate levels, to the complete acceptance by the Commission in 1922 of "the responsibility of adjusting rate levels to the revenue needs of the carriers."

Part III, dealing with service, touches a field heretofore less written of than rates. Here again is traced the development of Federal and state control, the former marked by sound caution and conservatism, the latter, not seldom, extreme, unwise and unjust. The impression given that the worst phase of conflicting and capricious state requirements is past, is, it is to be hoped, correct. There is made clear the vast responsibility and intricacy of

actual railroad management and operation and the fact that control of these matters "has not now been assumed by the regulating power." The Transportation Act of 1920 again opens a new era of service regulation particularly in the matters of compulsory construction, car service and train movement, raising many questions to be settled only by experience, and the courts. The impressive list of achievements of private management for improved service, including such matters as standard gauge and time, interchange, Master Car Builders Rules, and the important work of the American Railway Association serves to remind the reader that all progress in America is not the child of legislation.

Under the general head of "Management" are included a somewhat heterogeneous group of subjects not dealt with directly in discussing rates and service. Chapters are devoted to Valuation, Labor Disputes, Accounts and Consolidation as well as to a phase, sometimes overlooked, "The Protection of Inventors." Each subject is well treated, if, from the nature of the case, conclusions are lacking.

The book as a whole gives a competent conception of America's contribution to the science of government in regulating railroads. In addition to what has been achieved, the reader is ever reminded of the vast problems yet unsolved and the new era born with the Transportation Act of 1920.

The book contains and imparts information and inspires thought in the thoughtful reader. The authors well term it a record of "thoughtful observations." It is well worth the careful reading of all who are touched by our railroad problem.

Frederic L. Ballard.

THE LAW OF CITY PLANNING AND ZONING. By Frank Backus Williams. The Macmillan Company, New York, 1922, pp. xvii, 738.

Cities in this country and Europe have until recent times been permitted to develop without any particular regulation, each individual owner of property erecting such improvements as fancy or the desire for profit might prompt. It is now recognized that some restriction must be imposed and some active effort developed in order that cities may be made in any reasonable degree, livable, healthful and beautiful. Left to themselves, the members of a community of men in thickly populated areas will inevitably produce conditions objectionable from every point of view. We accordingly have city planning and city zoning, and laws enacted for such planning and city zoning.

Mr. Williams has collected the various laws which have been enacted on the subject in this country and Europe, and has arranged them under several headings in a fashion which lays every student of the subject under deep obligation to him; comprehensive tables of statutes, index of cases, index of statutes, and general index making the contents easily accessible. The important decisions of the courts are referred to and discussed, but the book is not in any sense a technical law treatise. The development of city planning and zoning in some of the more important cities of the world

is referred to in much detail, and many topics of great interest are developed. Among the latter is the difference between the exercise of eminent domain in this country and in Europe. No thinker can fail to come to the conclusion that the constitutional provisions in the United States are too restrictive and unduly protect individual property interests against the interests of the community at large.

The book is well worth careful study, and will prove an invaluable handbook to those interested in this department of civic improvement.

Roland R. Foulke.

PHILOSOPHY IN THE DEVELOPMENT OF LAW. Modern Legal Philosophy. Series, Vol. XIII. By Pierre de Tourtoulon, translated by Martha McC. Read, New York. The Macmillan Company, 1922, pp. lxi, 653.

"A little scepticism will render him [the judge] more scrupulous, more indulgent to every one and consequently more just" (487). "One may ask oneself whether a little scepticism would not have spared humanity many sorrows" (530). "It [the philosophy of chance] inspires a salutary scepticism; not that of negation, but that of prudence,—the kindly, scrupulous and searching scepticism, which might well be the best instrument of progress for humanity" (634).

These quotations from Tourtoulon's book give us a measure of the author's point of view. He is a very wise man and a sceptic. He is a keen analyst and not carried away by words or sentiment. He knows the difference between what is scientific and what is not, and his standard is very high. But he is not sure that scientific truth always is the thing to follow in law or politics. "We construct," he says, "upon the most absurd axioms, reasonable, practical, and sometimes even ingenious institutions" (290). "It is certain that a mistake or a blunder does not inevitably occasion unhappiness and the truth happiness. There are instances where lies may bring happy results." (*ib.*)

The book under review is intended by the author as an introduction to a legal history, "to a juristic history of modern Europe." Accordingly Tourtoulon discusses one after another all the possible questions of a general nature that may be asked about the history and development of law. Each discussion may be regarded as almost a monograph in itself. For the author analyzes the given concept in its broadest aspect before he applies it to the law. Thus to take an example, every philosophic lawyer would like to know, if he could, whether we can explain the origin, history and development of the law as the result of a deliberate attempt of human individuals and groups to realize certain ends. To state the same things in technical terms, Is the history of law a teleological discipline? To answer the question, Tourtoulon analyzes the concept of teleology in general, and in various specific applications. Then he discusses teleology in the law. The author's benevolent scepticism leads him to state the arguments for and against any theory with the completest impartiality, though he may sometimes seem paradoxical. The

paradox seems forced from him by an unusual insight into the facts. The book is extremely refreshing and exhilarating. There is an openness of mind that is wholly commendable. The book is long and treats of a great many topics. It is out of the question to touch upon all of them in this brief review. My purpose will be, by a few selected references, to give the reader an idea what a wealth of wisdom and clear and dispassionate thought the book contains.

The author does not believe in teleology in the development of law because we do not know the purposes of institutions. The best that we can do is to study the functions of laws, though here, too, "the greatest jurist has only very vague ideas concerning the services that the laws which he expounds render to society. . . . The first step toward wisdom is the knowledge that we are ignorant of nearly all of the functions of our laws, or of the evil or the good which they may bring us" (24). He admits that man intervenes in the creation of the law, and that his will has considerable influence, but whether that influence is all-powerful, whether it is in accordance with his foresight and desires is another question. Man rarely foresees the actual result of a proposed law; hence we cannot speak of an end or purpose, but of a limit, a point of arrival. By experience, however, we may at least improve the method of realizing our purpose in a new law. But when all is said and done, "the law is not the human will realized."

Does the law act as a selective agency in favoring persons endowed with certain meritorious qualities? The author's answer is that juridical selection and elimination can work in all directions. "The law intervenes in the struggle for existence to eliminate sometimes those who possess a certain quality, sometimes those who possess the opposite quality" (114). And the different departments of the law must be examined in relation to this question, for they need not all necessarily have the same effect. One seems to hear Thrasymachus speaking in the following sentence: "Historically, the idea of justice is primarily a ruse which clever and cynical peoples employ to deceive more idealistic, and, for that reason, weaker peoples" (115). "The idea of justice is consequently an instrument of selection which may favor indifferently practical men or idealists." (*ib.*)

There is a very interesting chapter entitled "Diseases of Thought and Legal Development." By diseases of thought the author means certain kinds of error in our thinking which, to judge from their universality, seem to be of the essence of real human thought. They are necessary, he says, and it would be impossible to abolish them. They play the part of a social and intellectual function. He names as the principal types, credulity, language myths, historical myths, fashion. It is in this connection that he points out that truth in itself is neither good nor evil. "The true and the good are two ways of imagining things and between them there is no necessary relationship." "The development of the law has been directed in great part by forces which are logically defective" (289). The myth gives people enthusiasm. It permits a great deal of talking, writing and acting with a minimum of thinking, and brings sometimes, though not always, good results. Examples of such myths are "the sovereignty of divine law" myth,

the "social function" myth, the "solidarity" myth, and so on. "Irrational intellectuality is one of the most fruitful sources of the law. In my opinion it is certain that the legal philosophy of the future will find there its most substantial bases" (300).

In discussing what he calls "general positive law," by which he seems to mean the same thing as is called "jurisprudence" by Holland, he makes a valuable distinction between the general elements of law and the necessary elements. All necessary elements are, of course, general, but not *vice versa*. In this connection he remarks: "Up to the present time no one has concerned himself with anything except what was common to every juridical system of the past or present" (411). This is scarcely true. Stammler, in his several works, and especially in his "*Theorie der Rechtswissenschaft*", undertakes to define law and to derive from the definitions the categories of law, not by the inductive method of observing what is common to the various systems of law, but by an *a priori* method of discovering a certain mode of human consciousness, getting therefrom the elements of the legal concept (I mean the concept of what law is), and then by a purely logical process deriving from the definition or concept of law the necessary legal categories. Tourtoulon is quite correct when he says that "the necessity of a juridical idea, the impossibility of its contrary, cannot result from experience." Hence the experimental and inductive method, as well as that of observation, abstraction and generalization, cannot be employed. "Sanction" is an example of such categorical necessities in law.

In studying the history of law and comparative law we use the inductive method of observation, for the purpose of discovering certain general truths. The author asks the interesting question, Can inductive juridical propositions become experimental truths? (431). His answer is qualified. What determines an experimental, scientific truth is the possibility and facility of testing and verifying the statement. The social sciences are very imperfectly experimental, because of the difficulty of verification of theses by others than the author. The one who would undertake the verification must go through the same amount of work as the author, and more besides, in order to see if the author has neglected any observations. Nevertheless, verification is not impossible, and a great many points in the history of law may be considered as verified by experiment, as, for example, the existence of matriarchy.

Is the knowledge of the past that we thus acquire of practical value? Tourtoulon analyzes the situation and gives a negative answer. Experience, he says, is good advice; but it is not correct to say, Experience gives us scientific directions which we ought to follow. For in the first place, the specific conditions into which the institution or law is to be introduced is a new factor. In the second place, we can not tell the secondary, tertiary and so on, effects of a given reform. And in the third place, even if we could know all this, no state of knowledge can scientifically impose a state of will. And in the sequel the author calls attention to the way in which inductive generalizations of social facts which may be sound enough are changed by insensible transitions into principles of morality. Thus one starts with the

proposition, "Men live in society," which is perfectly true, and ends up with the statement, "The aim of the life of the individual is to contribute to the development of the social body," which is far from being a scientific statement, and may easily be denied. Moreover if the last proposition is intended as imposing an obligation, it can never be logically derived from the statement of a fact. Most if not all of the books dealing with natural law by advocates of that doctrine, such as Thomas Aquinas, Grotius, Lorimer, are guilty of this fallacy.

Sound is also the author's view that an experimental definition of the law is impossible because it leads to a vicious circle. What is found in juridical facts and not in non-juridical is law. But in order to separate juridical facts from non-juridical, we must know what law is. A conventional definition he rejects because everything that is built upon a conventional basis is bound to be conventional and hence devoid of interest.

Here it is not clear that one need agree with the author's statement. His objection that the agreement among dialecticians or dialectical jurists on any conventional definition of law is more apparent than real is not serious. For as long as one jurist is in agreement with himself on a definition of the law, he can establish a useful system upon it, which should not be devoid of interest. This does not mean that one is free to give any definition to law that he pleases. The conception of law, though vague and indefinite, is one that has grown up semi-consciously in the course of social existence. There is a vague general agreement as to its meaning and all that the jurist has to do is to make the notion precise. Thus the definition is both experimental and conventional. It is experimental because the jurist picks out for study those facts which, by general consensus are termed juridical and by a study of these facts he establishes a definition. It is conventional, because the jurist must assume a vague and unprecise definition as already existing in the general consciousness, which is the result of convention, though forced upon the human mind by the situation, natural and social. Conventional need not mean arbitrary. Are not all definitions partly conventional and partly experimental? And therein is the solution of the objection of arguing in a circle. However, Tourtoulon is in agreement with Stammler on this point that the specificity of the law is not experimental or conventional, but categorical, in the same way that quality and quantity are categorical in their nature. Law "plays the same part in society that the verb or the adjective does in language. It is a form necessary to the understanding of all society" (461). This is all true, but what was said before of the definition of law may be said here of verb and adjective.

The first categorical truth, then, according to our author, is the law-idea (specificity of the law). "The distinction between juridical functions, between private law, public law, criminal law, etc., between real rights and personal rights—all of these form so many branches of the categorical syntax of the law" (462).

The author's discussion of justice, its relation to law and to morality, is very illuminating and suggestive, though there is ample room for difference of opinion. Justice, he maintains, is absolutely necessary to law, though it is

not a logical or scientific, but a metaphysical concept. Metaphysical he denominates those "forms of intellectual labor which can legitimately lead only to hypothetical solutions" (477). It is, however, "the highest order of thought and one without which human civilization would be a trifling matter" (*ib.*). Justice, to be of any value, must be immutable and hence transcendent, not, however, necessarily implying theism. Metaphysical law is justice, morality is goodness. The good and the just are not identical. They may be opposed. Slavery may some time have been good, it was never just. For justice is correctly defined by the expression "*sum cuique*," to every one his own. "Let us leave," he says in his characteristic manner, "to humanity the illusion that the legislator can always be just and good at the same time." Logically it is not true (486). Positive law is different from metaphysical law. The former has order as its aim, not justice. It "draws its inspiration from the just, but it follows quite as readily, and according to circumstances, the directions of the useful, of the moral, and even that of prejudice" (489). "Metaphysical law is not an ideal positive or Utopian law, but a science of simple logic. It does not propose to seek what 'ought to be,' a formula void of any logical meaning, but what conforms to, or does not conform to, the '*sum cuique*'" (491-2). From justice as thus defined we can derive logically other ideas, such as liberty and others besides of a concrete character. Legal philosophers, he says, confuse the metaphysical basis of law (justice) with its justification. An unjust law may be justified. Laws of prohibition are unjust as a restraint on personal liberty, but they may be justified if the dangers of alcohol are a great menace to the community.

There are many other important discussions of philosophical and psychological problems having a bearing on the law, which render the book valuable as a distinct contribution of a fresh nature to the theory of law. To get an adequate idea of the importance of the book, the reader is advised to scan its pages carefully.

The translator has done her task on the whole rather creditably, if one may judge of a translation without having consulted the original. But there is room for improvement in a number of respects. The proofreading was done poorly. We find "casuality" for "causality" twice at least (204), "*raison d'être*" (623), "*de la giuris prudenza*" (640), "Picard" for "Picavet" (520), and many other disfiguring misprints. We notice "observation" used in the sense of "observance" (p. lix). There are quite a number of instances of badly constructed, or unintelligible sentences. Thus, "What periodicals, parliamentary treatises and lawyers' speeches, what collections of decisions and judgments, might never have sprung from this colossal, semi-intellectual activity if it had to be submitted to the strict rules of logic!" (291). "Before entering upon a discussion on a point of logic propound this question to one's (*sic*) antagonist" (454). "But this estate . . . ought to be granted to every '*cuique*' being" (495). "Now on the Sabbath day, the Hebrews are forbidden to carry their bundles the same as upon other days of the week" (523). This sentence is not clear. But what the author meant to say is no doubt that on the Sabbath a bundle had to be

carried in a different manner than on the other days of the week. "But if it may not be necessary to insist on this, it is quickly apparent that the mathematics are especially rich in concepts of this sort since its elements, the most simple to the most complex—point, line, surface, infinity, space of n dimensions, $\sqrt{1}$ and that the bases of all reasoning, the categories—cause, quantity, quality, relation—have no actual existence whatever" (646). "But the old deterministic metaphor in which man plays the part of a balance, where his thoughts, desires and beliefs are forces foreign to him, externally produced and weighed in some scales or other, cause his decision, is also abandoned" (30). Here and there is noticeable what is, no doubt, a mis-translation of the French text, or a literal translation which gives poor sense or no sense in English. Thus, on p. 421, end, we read, "Thus observation cannot (*sic*) end in an induction, but is satisfied to note the facts just as they have successively occurred." Here "cannot" must be a mistake for "may not." "The ideal of Greek thinkers is to bring the law under the rule of the harmony, the equilibrium and the moderation, which though distinct from logical justice seem to resemble it somewhat" (513). Here the three definite articles which I italicized, are clearly literal translations of the French which make no sense in English. There are also peculiar translations of Latin expressions. Thus "*recedi posse a voluntate parentis*" is translated "you can well yield to the will of a parent" (316). The meaning can only be "to be able to depart from the will of the parent." "*Eo quod super causa statu proferebantur*" is rendered "because they were brought upon the suit standing for hearing" (342). The correct translation is "because they were brought forward concerning the status or condition of the cause."

Isaac Husik.

THE CONTROL OF AMERICAN FOREIGN RELATIONS. By Quincy Wright, Ph. D., Professor of International Law in the University of Minnesota. The MacMillan Co., 1922, pp. xxvi, 412.

This work is a revision and expansion of an essay of similar title with which the author won the Henry M. Phillips prize of \$2000, offered by the American Philosophical Society, in 1921. It is essentially a treatise on foreign affairs in American constitutional law, and on the resulting conflict of constitutional and international law.

It presents in systematic detail the problems of a government which is controlled by a written constitution, under whose terms the responsibility and power to conduct foreign relations is divided among several agencies, and yet is held responsible as a whole, diplomatically and legally, by the other sovereign states with which it associates in the Society of Nations. "Constitutional law defines the powers of the organs which conduct American foreign relations; international law defines their responsibilities."

The book states in clear and detailed fashion the respective shares of the President, the President and Senate, and the House of Representatives, in our making of treaties and conducting foreign affairs, and outlines with

equal care and detail our responsibilities as a nation to other powers, the ways in which they may properly expect to deal with our government, and the limited extent to which they must know and make allowances for our governmental machinery.

In exhaustively discussing the subject first from the international and then from the constitutional side, a certain amount of repetition was inevitable, but such a method is certainly defensible because of the gain in clearness and precision,—qualities most desirable when presenting involved questions in a treatise designed for college and law school textbook use.

The constructive part of Professor Wright's work is the development of the topic of what he calls "constitutional understandings." Evidently, in a government whose powers with reference to foreign relations are divided, and which must still present a united front to foreign nations a policy of "give and take" between the varied agencies having unquestioned rights is essential. Some of these "constitutional understandings" are already in being; others are suggested.

When the powers of two departments overlap, making possible contrary action on the same occasion, the way to harmony lies in the development of an understanding that each department should so exercise its concurrent powers as not to impair the validity of action already taken by the other department, without that department's consent. Here the legal principle that the most recent exercise of concurrent power prevails can be helped by such an understanding.

Where action contemplated by any independent department requires the co-operation of another independent department for its carrying out, the advice of that department ought to be sought before the action is taken. Where such action has already been constitutionally taken, the department whose co-operation is required ought to perform the necessary acts, even though its advice has not been asked, or if asked has not been followed. (Is not this a "counsel of perfection"? Though, to be sure, in practice the House of Representatives, despite grumbling, may be counted on to pass enabling legislation.)

It is the duty of all organs of the government to aid in meeting international responsibilities, the author argues. Congress has power under the "necessary and proper" clause to provide for meeting international responsibilities, and it is under a clear obligation to provide the instrumentalities for doing so. The President is under a duty "to take care that the laws (including the law of nations) be faithfully executed," which helps to a certain extent.

Recent history gives point to the suggestion that the power to confirm treaties be taken by constitutional amendment from two-thirds of the Senate, and given to a simple majority in both houses of Congress. Such a plan would facilitate treaties running the gauntlet of Senatorial scrutiny, and soothes the injured feelings of the House, now often asked to pass enabling legislation as a matter of duty, for treaties in whose making it had no voice.

A very novel and stimulating idea presented is that the conduct of foreign affairs would be better harmonized and unified, and the ratification

of treaties facilitated, if we had a special cabinet for foreign affairs, consisting of the Secretaries of State, War, Navy, Treasury and Commerce, the Attorney-General, the Vice-President, the Speaker of the House, the President *pro tem* of the Senate, and the chairmen of the Foreign Relations and Foreign Affairs Committees.

Donald L. Stone.

THE NEW CONSTITUTIONS OF EUROPE. By Howard Lee McBain and Lindsay Rogers, New York, Doubleday, Page and Co., 1922, pp. ix, 612.

Never in the history of the world has there been so much constitution-making as in these post-war years. The entire political systems of the countries of Europe from the Rhine eastward have been overturned and rebuilt, and the main outlines of the new structures, the skeletons or framework formulated in written constitutions. To Americans this latter process was the logical step after the destruction of the old governments. The United States set the example for written constitutions in the eighteenth century. France promptly followed and in the course of the next century, from 1789 to 1870, developed a new constitution with each successive change in her government. Other peoples adopted the fashion, and written constitutions marked the founding of all the new European States in the last hundred years. It was, therefore, to be expected that the "Founding Fathers" of the new States should lay great stress on constitutional conventions and the definite formulation of the fundamental law. The value and significance of this to the historian is evident and it would have been a real contribution to our subject to have had the results brought together in one convenient volume. But the authors of this work have done much more. They have not only furnished excellent translations of the text of the constitutions of ten of the new States—Germany, Prussia, Austria, Czecho-slovakia, Jugoslavia, Russia, Poland, Danzig, Esthonia and Finland and three of the older ones—Belgium, Italy and France—but they have supplied the critical and the historical apparatus for the study and appreciation of them.

Prefaced to the separate constitutions are excellent historical introductions that will be most welcome to the average reader and student. They set out clearly the successive steps in the political development that led to the adoption of the constitution. The distinctly original contribution, however, is in the illuminating and interesting discussion (pp. 1-164) of the theory and principles of political structure of the present day. It contributes the most suggestive and up-to-the-minute treatment of the subject extant; succinct, scholarly and readable. No student of political history can afford to overlook it.

The very chapter headings challenge one's interest, as for example, "Princes and Parliaments," "Legislatures and Bureaucrats," "Proportional Representation," "Secondary Chambers" and "Democrats and Diplomats." In the chapter entitled "Individualism and Socialism" the authors review the different aspects of this basic problem of democracy in the light of the most recent experiments in socialization. The treatment is both sound and original.

The discussion of the "Second Chamber," humorously and with greater accuracy called the "Secondary Chamber" by the authors, is greatly strengthened by the publication in the Appendix (pp. 573ff) of the Report of the Conference on the Reform of the Second Chamber to the Prime Minister by Viscount Bryce in 1918. In both, the Second Chamber comes in for severe handling. The fiction that it represents the sober and mature second thought of the nation is scouted. Even our Senate seems to arouse suspicions on that score. At any rate the founders of the new European States were not greatly impressed with the idea. In general they retained the Second Chamber, but as in England and France it is depressed into a secondary position. Various devices are resorted to to secure a reasonable basis for representation.

The Introduction of the social and economic matter into the fundamental law constitutes a novel departure from the classical constitutions of the past hundred years. Not only are the Bill of Rights considerably extended to make room for the new ideas on the rights of society, but in cases, entire sections on this subject occur. Thus the German document devotes the entire Fifth Section to "Economic Life."

The authors also point out the manifest failure to provide effective control over the conduct of foreign affairs. The problem of "Secret Diplomacy" still awaits solution despite the much heralded "Open covenants openly arrived at," and the reviewer heartily recommends the chapter on "Democrats and Diplomats."

Some of the constitutions were available in English before, others, like the Prussian and the Finnish are here given for the first time. In a subsequent edition of the work the Irish and Turkish constitutions would make valuable additions, possibly those of Latvia and Esthonia also. Somewhat more stress on economic and social factors in the introductory sketch to the treatment of the German and the Russian constitutions would be advisable.

In conclusion attention should again be called to the fact that the authors' aim was chiefly to "furnish material for study rather than a fabricated product." In this they have succeeded much better than is usually the case in the publication of source materials. They furnish not only the translations of the constitutions, their historic setting and a helpful bibliography in the footnotes, but a discussion of political theory and practice on moot questions of national organization, which is of an unusually high order of excellence. Teachers and students of European History and Government are greatly indebted for so admirable an aid in their work.

William E. Lingelbach.

INTERPRETATIONS OF LEGAL HISTORY. By Roscoe Pound. The Macmillan Co., New York, 1923, pp. xiv, 171.

This volume comprises a series of lectures delivered by Dean Pound at Trinity College, Cambridge in 1922 describing and criticising the principal tendencies of historical jurisprudence in the nineteenth century. The legal

thought of that century was to a great extent in revolt against the natural law theories of the preceding period and the superficiality and cocksureness that characterized the era of codification. Under the impetus given by Savigny, coupled with the general interest in scientific research, historical studies became the fashion, investigation of the sources of law the chief outlet for juristic energy. But the unification of the results of such researches called for interpretations and deductions, and the result of these deductions have had no slight influence upon nineteenth century law. An analysis of the rise, growth and decline of these theories is the task of the learned author, and he has dealt with the subject with characteristic originality and penetration. Among the interpretations of legal history discussed, four are particularly important, the ethical, the political, the positivist, and the economic. Finally the author gives his own interpretation which he describes as an engineering interpretation. Jurisprudence is a science of social engineering; its task "an elimination of friction and precluding of waste, so far as possible, in the satisfaction of infinite human desires out of a relatively finite store of material goods of existence." This is a method rather than an interpretation, but concededly, the author's view corresponds closely to the civilization theory of Kohler, although Dean Pound is too much of a pragmatist to accept the Hegelian cast of Kohler's interpretation. "Pragmatism," he says, "sees validity in actions, not in that they realize the idea, but to the extent that they are effective for their purpose and in purposes to the extent that they satisfy a maximum of human demands."

Packed in very small space this short book contains much food for thought. It will surprise many to discover upon what slender foundations some doctrines rest that impressed themselves strongly on the last generation; such, for example, as Sir Henry S. Maine's generalization of progress as a movement from status to contract. In this connection may we not trace the doctrine of self-determination of small nations, that agitates present-day Europe, to that theory of historical jurisprudence which found the end of law in the securing of the maximum of individual self-assertion. It is characteristic of the legal profession, especially of those members in active practice, to affect a dislike for theory and a regard for what has the appearance of being practical; Anglo-American law in particular has prided itself upon its empirical development. No doubt this method has given it the toughness that delighted Maitland. But "what are abstract ideas in the hands of philosophers get a concrete content when they come into the hands of lawyers," and muddled thinking on fundamental problems has led to many unfortunate decisions, especially in the field of constitutional law. For this reason, if for no other, a work of this kind is stimulating and serviceable to teacher and judge and to those members of the bar who may be interested in the progress of jurisprudence at home and abroad, and this, although one may differ from the author on various matters of detail in a field so large and controversial.

Possibly some readers, born in the last century, may wonder at what seems, at least by implication, a slightly contemptuous attitude towards the author's distinguished predecessors of the historical school, attributing to them a juristic pessimism, a disbelief in the utility of effort for the improvement of