

BOOK REVIEWS.

THE LEGAL BASIS OF CAPITALISM. By John R. Commons, Professor of Economics in the University of Wisconsin. Macmillan Company, New York, 1924, pp. x, 394.

This book, in the words of its author, has as its aim "to work out an evolutionary and behavioristic, or rather volitional, theory of value." As the statement indicates, it is essentially theoretical and it is impossible to give it an adequate review in a brief space. In fact, the virtue of the book lies in the fact that it does not over-simplify the complex, a fault all too common in those who write for common approval or who possess limited powers of analysis.

The various headings: Mechanism, Scarcity, and Working Rules; Property, Liberty, and Value; Physical, Economic, and Moral Force; Transactions; Going Concern; The Rent Bargain, Feudalism and Use-Value; The Price Bargain-Capitalism and Exchange-Value; The Wage Bargain-Industrialism; and Public Purpose suggest the fact that the book is less legalistic and more economic and philosophical than the title, "The Legal Basis of Capitalism," suggests. Yet, true to title and purpose, Mr. Commons, who is primarily a student of labor problems, builds his theory from a study of numerous court decisions which serve as points of departure for substantial excursions into the fields of economic theory, logic, philosophy, psychology and ethics.

The discussion throughout reflects the language and motif of pragmatism and behaviorism. Unfortunately the exact sense in which he is using his terms is not always instantly comprehensible, and, although the reader is extricated from time to time with explanations on subsequent pages, the impression remains that the author has felt it *his* duty to put things down and the reader's duty to figure out what they mean.

Such criticism should not detract, however, from the quality of scholarship which displays itself on every page. The book is a discriminating piece of work. Mr. Commons demonstrates his thesis so adequately that the reader assents as he hits at "ancient" conceptions of the individual will as an entity, the social unit as one individual seeking his own pleasure, and a host of other errors which the economist has less of an excuse for assuming than the courts, and of which he is guilty only to a lesser degree.

Indeed, courts must follow and not lead. The economist can and should agitate for change, seeking to discover a means for a more perfect accommodation of the subtle, plastic aspects of human life, even though the task involves running the gauntlet of error. In turn, as conceptions are worked out and adopted by society, the courts will reflect the findings. How far social conceptions will change and how far they will sweep the courts along constitutes a good guessing match. A specific case: How many decades preceding January 7, 1924 would it have been possible for the Supreme Court to hold that the paragraph of the Transportation Act providing for the payment by the railroads to the government of one-half

of their earnings in excess of six per cent. on the value of their property was not a plain appropriation of property without compensation?

In his discussion of property Mr. Commons shows how the common law conception of property as a physical thing, which was the substance of the holdings in the *Slaughter House* case and the *Munn* case, was "overturned" by the *Allgeyer* case in 1897 when property was viewed in the sense of exchange-value. Now before his book has reached the reader we find a conception of trusteeship recognized. What more need be said for the necessity of building theory, as Mr. Commons does, in terms of change?

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THE AMERICAN JUDGE. By Andrew Alexander Bruce, Professor of Law in Northwestern University, formerly Chief Justice of the Supreme Court of North Dakota. Macmillan Company, New York, 1924, pp. 212.

In "The American Judge," Professor Bruce has presented to the general public an interesting discussion of many questions now being widely debated in reference to the workings of our judicial system.

The picture which the author portrays is a gloomy one. He points out the need of a restatement of the law due to the masses of conflicting decisions even within the same jurisdiction. He depicts the unsatisfactory conditions attending the trial of criminal cases due to the incompetency of the average district attorney, the ease with which continuances are obtained until witnesses have disappeared, and the baneful influence of politics in the administration of criminal justice. He stresses the growing disrespect for law in America, due to an increasing lack of religion and of reverence among the people in general and to the breaking down of home life, especially in the larger cities. He complains of the excessive costs of litigation and of the abuses of the contingent fee system. He deplores the destructive and frequently wanton attacks made by sensational newspapers upon courts and upon their decisions. He points out the prevalence of low standards for admission to the bar, and the resulting large numbers of lawyers who abuse the practice of the legal profession. He laments the fact that the current tendency is to shorten rather than lengthen the tenure of judicial office, making judges the prey of political influences and the victims of excited and misguided public opinion. And finally he draws a vivid but discouraging picture of the plight of the American judge, condemned to unjust attacks without the opportunity to reply to them, forced into political campaigns without the right to adopt or countenance the methods of the politician, compelled to keep aloof from too much contact with men and affairs but subject to the criticism, if he do so, of being an aristocrat, pilloried in the press if he makes one false or even seemingly false move but passed by unnoticed so far as the great general mass of his work is meritorious and the result of constant and laborious toil.

Are these defects in our judicial system over-stressed? That there is justification for the author's recital of them is unquestionable, for they cer-

tainly exist. No doubt, however, they vary in their intensity in different sections of the country, some prevailing here, some there, with the result that the reality in any one place is not as dismal as might be the impression derived from the cumulative effect of the author's statements. Take, for example, conditions in Philadelphia or in the State of Pennsylvania at large. The costs of litigation are very small, even in cases of appeal. The evils complained of in regard to the trial of criminal cases are not marked. The term of judges in the Common Pleas Court is ten years with re-elections the rule rather than the exception, while in the Supreme Court of the State the term is twenty-one years. The judges are generally respected, and receive kindly and even generous approval from the newspapers. On the other hand we no doubt suffer in this jurisdiction from defects which in other cities and states have been corrected. On the whole, reforms are going on rapidly, and conditions are improving.

Professor Bruce discusses the now much-mooted question in regard to the proposed limitation on the right of the majority of the court to declare acts of the legislature unconstitutional. Aply demonstrating the justification of the exercise of this power by the judiciary, the author nevertheless feels that it is subject to abuse, and that there is much to be said for the contention that the power should be exercised only in cases of comparative certainty, and where that certainty exists in the minds of at least two-thirds of the sitting judges. It is pointed out that the close decisions, those by a court divided five to four, have usually been in cases where economic rather than purely legal questions were involved, and that in such litigation there is a temptation, not always overcome, for the judges to use the power here referred to in order to enforce abstract theories of their own. There is no doubt that the power to declare statutes unconstitutional has vested enormous authority in the American courts, that this power extends, in practical effect, to the determination of many problems of a social or economic rather than a technically legal nature, that in some cases such decisions have tended to check popular impulses and thereby to irritate the masses of the people, and that, where such decisions have been decided by a mere majority vote of the judges, this irritation has naturally been augmented. But without attempting to weigh all the arguments that have been advanced on both sides of this question, it is not believed that the American people, on sober second thought, really desire a limitation placed upon the judicial power in this respect, or a change in the principle of majority rule in the judiciary. Only an exceedingly unfortunate and unpopular ruling upon some important statute of economic import will, if a mere majority ruling, be likely to sweep the public into insistence upon a constitutional change requiring, as the author suggests, a two-thirds vote in such cases.

There are two propositions which Professor Bruce forcibly presents, with which all will agree. One is that real reform in the practice and administration of the law can come only with and by the reform of lawyers themselves—in their better education and ethical standards, and in the realization on their part that they are officers of a court of justice, and not mere gladiators and hirelings. The other principle insisted upon by the author is