BOOK REVIEWS

CONGRESSIONAL INVESTIGATING COMMITTEES. By Marshall Edward Dimock. The Johns Hopkins Press, Baltimore, 1929. Pp. vii, 182, xii.

This book touches upon wide areas of the National Government. "The writer's purpose has been to consider the problem of [Congressional] investigations in relation to the sum total of the processes of the National Government." One hundred and eighty-two pages are devoted to the task.

Investigations, the author finds, are in aid of one of the three following functions of the Congress: (a) law making; (b) controlling and supervising the administration of the government; and (c) protecting, disciplining and deciding upon the qualifications of its members. The author recognizes that investigations in aid of the second function have not yet been explicitly approved by the Supreme Court of the United States.

The book discusses the political as well as the legal problems arising in connection with congressional investigations; and sketches the history of not a few of the 330 investigations made since the Constitution was adopted. The author makes several good suggestions—notably the one that the Congress might well adopt the English practice of adding experts to investigating committees, not members of either house; and of making the new semi-expert bodies permanent where necessary.

At the same time the book seems to the reviewer to be somewhat lacking in realism. A very large proportion of all congressional investigations has taken place within the last forty years. This period is within the memory of many of the principal persons who actually took part in those investigations, and are still living. Apparently the author has left this field untouched. The reviewer recalls the gasoline investigation, of which the late Senator La Follette was chairman, and Senator Brookhart a member, and their prediction that unless something should be done about it gasoline would soon be selling at $1 a gallon. What is the basis for the widespread contempt for investigations as unfair, and often absurd and futile?

Perhaps the most important thing about the book is its attitude toward the eternal question of reconciling the claims of government to power, in order to fulfill its functions, with the claim of the citizen to freedom from interference. Dr. Dimock's feeling seems to be, that since government must be efficiently carried on, investigators must have enough power to investigate successfully. The reviewer, however, would stress the once respectable conviction that liberty is a good thing in itself; and that if we cannot have investigations without destroying liberty and privacy, we should do much better to forego investigations. Any increase in the powers of government—which is to say, in the power of those human beings (almost always politicians) who hold office—means less liberty for the rest of us. This fact should put a heavy burden of proof on any project looking toward any such increase.

The power to summon witnesses and to subject them to questioning is a power ordinarily exercised only by judges in judicial proceedings. Questions of pertinency, possible self-incrimination and the like, are ruled on by competent

authority. The power is subject to grave abuse, especially when exercised in non-judicial proceedings. Our forbears had settled views as to freedom from unreasonable searches and seizures, unjust impositions and the like. Nowhere has this been better put than by Mr. Justice Butler, in *Sinclair v. United States:*[1]

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions."

In *Barry v. United States ex rel. Cunningham,*[2] decided May 27, 1929, relator refused to answer the question as to where he obtained the $50,000 he contributed to the campaign of William S. Vare. The Senate issued a writ of attachment. The Circuit Court of Appeals for the Third Circuit held that the witness may not be arrested and brought before the Senate to answer questions he has already refused to answer and which are immaterial and irrelevant. The Supreme Court reversed this decision, holding that it would not go into the relevancy of the questions propounded. The Court held that it would allow the same presumption of regularity in the proceedings of the Senate, when acting within the scope of its authority, as it gives to proceedings before the courts of law.

In *Marshall v. Gordon,*[3] it was held that the power of punishment for contempt rests only upon the right of self-preservation, and that the writer of an alleged defamatory letter cannot be punished by the Senate for contempt. "Imprisonment only, and for a term not exceeding the session of the body in which the contempt occurred, is the limit of the authority to deal directly by way of contempt without criminal prosecution."

No person can be punished for contumacy as a witness before either House unless his testimony is required in a matter into which the House has jurisdiction to inquire. Neither of those bodies possesses the general power to make inquiry into the private affairs of the citizen.

Dr. Dimock urges that the courts should recognize the validity of the grand jury rôle of congressional investigation. It should be borne in mind, however, that the exercise by a legislative body, or a committee thereof, of the investigative power is fraught with serious danger to the rights and liberties of the individual, who before a court always receives protection as against fishing notices to produce and sweeping subpœnas,[4] as well as against self-incrimination.[5] The Supreme Court of the United States, by a majority vote in *Brown v. Walker,*[6] held that the constitutional provision against self-incrimination was satisfied where the witness was protected from indictment. This would have been regarded by early Pennsylvania lawyers as a serious departure from the

[1] 279 U. S. 263 at 292, 49 Sup. Ct. 268 at 271 (1929).
[2] 49 Sup. Ct. 253.
[3] 243 U. S. 521, 37 Sup. Ct. 448 (1917).
[4] Hale v. Henkle, 201 U. S. 43, 26 Sup. Ct. 370 (1906).
[5] Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524 (1886).
[6] 161 U. S. 591, 16 Sup. Ct. 644 (1895).

true view: *Respublica v. Gibbs.*[7] In view of the right to be heard in person or by counsel, the refusal to permit counsel to appear and be heard before investigating committees seems arbitrary and unjustifiable. The author deals in a telling manner with *"ex parte* inquisitions." "Is their purpose vindictive, *ex parte,* a consuming passion to establish evidence of guilt at all costs?" If not, "then witnesses should be permitted to confront the accuser and cross-examination should be frankly permitted."

The reviewer quotes with satisfaction and approval the following:

> "Charges like the above, of 'secret *ex parte* inquisition', are the most damaging charges concerning investigations which must be faced by the constructive student of their procedure. The inquisitorial attitude which is so prone to pervade the countenance of investigations is undoubtedly conducive to convictions, but it repulses competent and unbiased knowledge. The witness is utterly at the mercy of the austere panel of committeemen. There is no escape from the customary procedure rules. The witness has no inherent rights, but must rely upon the committee for privileges. The witness must tell all, or face the possibility of a jail sentence and a heavy fine. Subsequently he is not liable to prosecution as a natural person, but he must consider well his replies, or else be prosecuted for perjury. In view of these facts, it is suggested that the thing most needed in congressional investigations is a constant recognition on the part of committeemen of the enormity of the power exercised, and of the corresponding trust incurred in respect to the rights and sensibilities of the citizen."

An unsavory example quoted from Adams' Diary, XII, 162, was the treatment meted out to Reuben Whitney in 1837. "You shan't say one word while you are in this room. If you do I will put you to death." The chairman, Henry A. Wise, added: "Yes, this insolence is insufferable." Mr. Adams comments, "As both these gentlemen were armed with deadly weapons, the witness could hardly be blamed for not wanting to testify again." Today, subtler but equally effective compulsion is exercised.

How far and for what purposes may legislative bodies investigate? How far may they exercise inquisitorial powers over the private affairs of citizens? Are there limitations to these powers, and if so how may these limitations be ascertained and recognized? These are grave questions in the age-long issue of state power versus individual liberty. The grand jury or "grand inquest" into crime is for the purpose of protecting individuals against aggressions by officialdom.

Inquisitions by law-making bodies, primarily in aid of the law-making function, lend themselves to use as a cover for political or partisan ends. Activity may even result in high political preferment. It should be recognized that there is grave temptation to abuse inquisitorial power. If questions are asked and insisted upon beyond the power of the inquisitor, there is no redress. But the witness must answer at his peril. Advice of counsel is no shield. No matter how novel the point involved, the witness must correctly foreshadow the final decision of the court of last resort. The position of the witness is no more enviable under this non-itinerant General Eyre than six or seven centuries ago. The penalties may perhaps be less dire, but there are no Articles of Eyre to

[7] 3 Yeates 429 (Pa. 1802).

restrict the scope of the investigation, and hence no practical limit on the discretion of the inquisitor.

The author's point of view seems to be that investigations are useful and necessary; and should be carried on, as far as possible, without infringing the liberties of the citizen. This is a far cry from what, it is submitted, sounds almost the same but is very different: Investigations are useful and necessary, but must be carried on without infringing constitutional guaranties.

Society, its protection and its success, depend more upon the character and conscience of individuals than upon government. Those in power are prone to make the end justify the means. The hope of the future is in the individual, not in the mechanism of government exercising coercion, but in the individual in freedom making wise decisions and voluntarily pursuing right conduct. Coercion by government is essential to protect against gross wrongdoing; and unless human nature greatly improves, will continue to be necessary. Our government is based upon belief in the individual, upon the ideal of freedom for the individual and respect for his rights. But in the matter of legislative investigations, or inquisitions, there is no redress for the invasion of such rights of the individual; the inquisitor who violates these rights has complete immunity; and in real life it is an act not merely of courage but of hardihood to question the inquistor's power, no matter how palpable may appear to counsel to be the abuse. A master, or examiner, or magistrate may not commit for contempt; the master reports to the court and the court after argument directs the witness to answer or not to answer, but before an investigating committee a witness refuses at his peril. If one is being investigated should one not have the right to cross-examine the witnesses whose testimony may be broadcast? Should not one have the right to be heard by counsel? Should not one have the right to a judicial ruling before it is too late?

The reviewer's motto would be "Liberty first—always liberty first." Government at the price of liberty is not good government.

Ira Jewell Williams.

Philadelphia.

THE STORY OF LAW. By John M. Zane. Ives, Washburn Co., New York, 1928. Pp. xiii, 486.

Even one who, having worked for several years with a view to the publication of a somewhat similar volume, many features of which have been anticipated by Mr. Zane, might possibly be expected in his disappointment in finding the field already occupied, to give only a meagre and grudging mead of approval to this book, feels that all must agree that it is decidedly worthwhile and decidedly interesting. Moreover, the volume holds, for one who is concerned with law and with the civilizations which have been influenced and shaped by law, an interest comparable to that of a good novel. For Mr. Zane brings out in splendid fashion the drama of human existence and of human struggle for law, as history reveals it through the many centuries about which we have certain information, and as to the centuries preceding the era of definite information, his suppositions and surmises are also replete with interest.

Although one of the professed objects of the author was to write a book for popular consumption, it seems doubtful that the book will be easy for the

ordinary layman to follow, although the author has carefully avoided technical legal terminology, for, in spite of such avoidance, it is inevitable that many legal concepts should be involved in a story of legal development. More attention given to introducing and developing these ideas would probably have given the book a much wider popular appeal. At least, the opinion is hazarded that most readers, unfamiliar with the law, except those with a thorough knowledge of history and social institutions, will have considerable difficulty in really comprehending and appreciating the material presented in this work.

The lawyer, however, should find it a source of delight from cover to cover. Even the well-grounded lawyer should find the book entirely worthwhile for presenting to him, in a new and refreshing form, much with which he may already be familiar; and besides, if he likes an argument, he should enjoy reading the book, if only because of the opportunity it gives for disagreeing, violently if so inclined, with some of the author's sweeping, vigorous generalizations and condemnations. The law student or prospective law student can also read the book with considerable profit with the object of orienting himself and his future field of endeavor in the human scheme of things past and present, provided he is given an occasional caution that there is room for honest difference of opinion on some of the views expressed, in spite of the fact that Mr. Zane seems to blast to annihilation all those who disagree with him. (On the matter of Mr. Zane's generalizations, although perhaps in the nature of scandal mongering, it may not be out of place to refer to one learned contemporary's ironically critical comment on one of Mr. Zane's efforts along this line, the occasion being a criticism by him of a well known definition of law. The comment follows: "In an article distinguished for the scholarly modesty with which matters of opinion are expressed, Mr. Zane *with charming disregard for realities and equal devotion to abstractions,* demonstrates to his entire satisfaction the hopeless absurdity of . . ." the definition. Incidentally it might be said that the same definition is again attacked by Mr. Zane in his *Story of Law.*) One may take exception, for example, to his thesis that all legislation is simply recognition of accepted custom. Again, giving the jury system all due credit, one may be inclined to wonder whether the author's veneration for this institution is not somewhat disproportionate—especially after reading Mr. Zane's own illustration of the weakness of jury trial in the trial of Raleigh, which occurred at the time, of all times, when the jury was supposed to be the bulwark of our liberties.

But these defects are perhaps too insignificant to hurt, to any important extent, an excellent piece of work. For out of the general history of an ages-long legal development, the author, unable in the space available in one small volume to go into a detailed treatment of many matters, has the happy faculty of seizing upon some typical illustration that will do as much as chapters, or possibly even volumes, to present in part, and suggest as to the balance, a situation which should be of consuming interest to all interested in law. And information about many such situations should be part of every well-grounded lawyer's equipment.

As to major legal developments that have contributed to make our law what it is, Mr. Zane's brief and pithy summations are especially striking. His summaries of the important contributions of various civilations are one of the most valuable features of the book. That Babylon furnished regular

tribunals for the settlement of disputes, even though there was no compulsion to resort to them, was properly indicated as being a great improvement over earlier conditions where regular tribunals were not available. That Hebrew law contributed the idea of individual moral, social and legal responsibility in place of the earlier notions of tribal or family solidarity, is another great step noted by Mr. Zane. That Greece contributed the idea of man-made, instead of God-made, law and that it gave to the world a highly developed legal theory (which however did not work in practice), is another pertinent characterization. That the Romans made the Greek theory work in practice is a point so significant that all lawyers should know about it, and a point which the reader cannot possibly miss. Nor can he overlook the point that feudalism was undoubtedly a retrogression and an institution that stifled legal development. The main point of the chapter on supremacy of law in the United States is especially excellent. And so it is with many other parts which make it impossible, even for the casual reader, to avoid getting great benefits from a perusal of this work.

One might be tempted to quarrel with certain features, but these faults, if they are such, are only those of omission. It seems that the author might well have spent more time on the details of the prætorian development of the Roman *jus gentium,* for it is this developed law of the later republic and empire, and not the early law of Rome as a city state, the world thinks of when the term "Roman Law" is used, and it is this system which has had such widespread influence on western civilization and western law—not excepting our own. A somewhat detailed treatment of this matter might also have furnished a valuable example of how law grows, and would have served as a basis for comparison in the later discussion of the Anglo-American judicial function. More attention might also have been given profitably to some of the more important details of the development of our own Anglo-American system of law. To cite only a few examples, it should be stated that as to our own system, one gets only the haziest notion of pre-Norman law, of Norman law, or of the political institutions that contributed to the development of the royal post-Norman, or Common Law, of the King's Courts. One gets little or no idea of how or why the Equity, the terrestrial and maritime Commercial, and the Ecclesiastical jurisdictions developed in England, and only the vaguest of suggestions as to the titanic competition between these jurisdictions and their courts and judges for supremacy. Nor is one given any adequate idea of the important steps in the amalgamation of these various systems of law, so that now it might be said with considerable truth that there is *an English system* of law rather than *four English systems.* The absorption into this system of the secular parts of the canon law, which had such a widespread influence on the development of our lego-moral concepts and upon our petty criminal law, our law of wills and our law of domestic relations, is hardly touched upon. The absorption of the law merchant by the common law, though touched upon, is not adequately treated. Nor is one sufficiently informed as to the possibility and the tendency in this country to amalgamate the surviving separate equity and law jurisdictions and, of the prospect that the time may shortly arrive when, in the United States, we may come to have *a system* of law instead of the present *two systems* of law and equity—as yet quite distinct in spite of the wide adoption of the codes of procedure. It would seem that a book which purports to tell *The Story of Law* can hardly afford to omit these

matters, and it is believed that more attention to these matters would have constituted a valuable addition to the book, so far as professional readers are concerned, and could probably have been treated in Mr. Zane's interesting manner so as to be acceptable even to the lay reader.

Perhaps the author thought these matters smacked too much of the technical. At any rate, what is presented is decidedly worthwhile, and is decidedly interesting. Some of the matters omitted can well be left for another volume. After all, one cannot put everything in the world between two covers.

Charles H. Kinnane.

Dean, Law School, University of Wyoming.

CASES ON DOMESTIC RELATIONS. By Joseph Warren Madden. American Casebook Series. West Publishing Co., St. Paul, 1928. Pp. xix, 742.

This collection is composed of decisions of both American and English courts and therefore represents the authority of Anglo-American common law on the topics it treats. The scope of the subjects included is comprehensive enough to merit a larger title such as Cases on the Law of Persons. The cases selected are arranged in four main divisions called Parts. Part I deals with parent and child and covers 130 pages. Part II deals with infants and covers 195 pages. Part III deals with husband and wife (excepting the rules as to marriage, divorce and separation) and covers 183 pages. Part IV deals with marriage, divorce and separation and covers 225 pages.

While it is not desirable in a case book to present too many clues to the student by means of chapter headings, the headings in this collection are misleading in some instances. They are repeated at the top of each page and in some chapters two or three topics are treated, but only the first one is printed each time. For students or practitioners using the collection as a starting point for brief work these headings will prove only confusing for example: "Parent's Right to Earnings and Services of Child-Emancipation" (Part I, c. 3). "Right of Husband to Earnings, Services and Society of Wife," "Rights of Wife in Husband" (Part 3, c. 2) repeat only the first subject on each page. In the matter of selection for inclusion in the collection it is particularly hard to understand why the editor has such a short selection of cases (four pages only) dealing with the liability of parents for the torts of their children. The following footnote on page 114 of the book dismisses in a summary manner, a very important part of the law on this topic:

> "The parent may, of course, be liable on the ground that the child is his agent. Some courts have held that a child or other member of the family driving the family automobile is the agent of the head of the family. The propriety of this conclusion is, of course, essentially a question of the law of agency. For the authorities see notes, 32 A. L. R. 1506, 50 A. L. R. 1512, and references therein."

In McCurdy's collection of cases on the law of persons he includes this particular section which Professor Madden assigns to a course on agency, and one feels that of the two McCurdy's is the wiser choice.

In the section of the book dealing with Divorce the early history of divorce is given and purports to be largely derived from a "report of the Commissioners

appointed by the Queen to inquire into the mode of obtaining divorces *a vinculo matrimonii* in England." There is also a reference to a summary of this report in an obscure Canadian book published in 1889, *"The Practice of the Parliament of Canada upon Bills of Divorce,"* by John Alexander Gemmill. A perusal of the references in Gemmill leads one to infer that the material in the case book is largely a summary of a summary. Some passages from the original report would surely be more interesting and probably also more valuable for the purposes of instruction. The indebtedness of Professor Madden to Gemmill is fully acknowledged. The report of the English Commissioners on Divorce is not to be found in 64 Lord's Journal, at page 59, as cited by both Gemmill and Madden. It is referred to only in 85 Lord's Journal, which is some twenty years later, at page 131. The actual text of the report is to be found in volume 40 of the parliamentary papers for the session 1852-53, which is one of the seventeen volumes of reports from commissions. The report is the fourth in volume 40 and is cited in the index for the year as beginning at page 249, but no volume paging could be found in the volume consulted in the Boston Public Library. Gemmill lifts without acknowledgment whole paragraphs from the first twelve pages of the report of the Commission.

The cases selected under the various topics by Professor Madden are brief and to the point and their order appears to be well worked out for the purpose of class-room instruction. The reviewer is not acquainted in detail with the legal topics treated in this book and cannot express any opinions as to the errors or wisdom of the processes of exclusion and inclusion beyond those already mentioned.

This collection the editor acknowledges owes much to the earlier collections of Kales on the *Law of Persons,* and Vernier on *Marriage and Divorce.* The arrangement of topics follows closely the arrangement in the joint 1911 edition of Kales and Vernier. The present classification is, however, simpler and the headings are more concise than those of the earlier books. Many new cases also are introduced. The material provided by Professor Madden is to be compared with Professor McCurdy's larger collection published in 1927. Professor McCurdy's has 1250 pages, whereas Professor Madden's has only about 750 pages. Professor McCurdy believes in intensive treatment of a few topics and very properly devotes the first 506 pages to Marriage, Separation and Divorce. Professor Madden gives about 225 pages to these subjects. While Professor McCurdy's work may be over-generous of material, Professor Madden offers a collection of cases sufficient for a good length course. The lasting value of any case book can only be estimated by years of practical experience in teaching students from it, but Professor Madden's book appears to be a useful and informative collection for obtaining that experience.

J. F. Davison.

Harvard Law School.

JUSTICE AND ADMINISTRATIVE LAW. By William A. Robson. The Macmillan Company, London, 1928. Pp. xviii, 346.

English commentators on constitutional law, writing in the latter part of the nineteenth century, were wont to emphasize the exclusive authority of the ordinary, or common law, courts over the rights and property of Englishmen and

to contrast this rule of law with the French system where, side by side with the ordinary law of the land, there existed a *droit administratif* having peculiar principles of its own administered by government officials in special tribunals independent of the ordinary courts. Such a complete contrast between English and French systems can no longer be made, for the developments of the past fifty years have brought into existence a large body of administrative law in England and have led to the creation of a system of special courts largely independent of the courts of common law. It is a study of these new administrative tribunals—the reason for their development, their methods of procedure and their relation to the older judicial system—that forms the subject of Mr. Robson's book. The author deals with the topic not primarily as a lawyer, but as a student of political science. For that reason the book is of special value to the technically trained lawyer since it invites him to consider his own subject in its relation to other social institutions and to evaluate its peculiar contributions to the social good.

The organization of material in the book is at first sight confusing but the reasons for the order in which topics are treated becomes more apparent as one proceeds. The author first discusses the administrative and the judicial branches of government, their theoretical separation and, in practice, the frequent union of their functions in the same hands. This confusion of function may be observed in earlier days in the judicial powers of the Privy Council and other ministerial agencies and in the administrative duties of the justices of the peace. Next follows an analysis of the procedure of the regular courts, the main characteristics of their methods, the authority of the judge, his immunity from political control and the qualities required of him, the object of the analysis being to establish a standard of comparison for administrative tribunals and thus bring out the essential nature of the latter. Having done this, the author proceeds to enumerate and describe the principal administrative tribunals in England, their composition and powers and the nature of the law that is developing as the result of their jurisdiction. This is followed by a discussion of domestic tribunals by which is meant the officials of voluntary societies, such as labor unions, professional associations, social clubs and the like, who have power to discipline or expel their members and thus exercise a quasi-judicial function. We then return to a more general topic in a chapter entitled "The Judicial Mind," which is the most suggestive portion of the book. It is a brief but clear analysis of the logical and psychological factors involved in the judicial process and indicates the debt society owes to the standards and methods evolved in the common law courts as well as the necessary limitations of these methods. The last chapter discusses the advantages and disadvantages of administrative law as it has grown up in England and the extent of the control by the regular courts over these tribunals and closes with a number of practical suggestions for the improvement of the system.

It is pleasant to find in a work of this character so cordial an appreciation of American scholars as is expressed by Mr. Robson in his Introduction. "I cannot conclude this acknowledgment of those who have helped me," he says, "without paying tribute to the work of some of the distinguished jurists and judges whose brilliant writings the United States of America is giving to the world. I have in mind particularly Dean Roscoe Pound's *Spirit of the Common*

Law, Mr. Justice Cardozo's *Nature of the Judicial Process,* Mr. Gerrard Henderson's *Federal Trade Commission,* and the works of President Frank J. Goodnow of Johns Hopkins University, and Professor Freund of the University of Chicago. I believe that no more brilliant literature concerning the problems of the law in relation to modern life is to be found than that which is emerging from the constellation of theoretical jurists and practicing lawyers who dwell across the Atlantic and whose work enriches not merely their own country but the whole civilized world."

Arthur Charles Howland.

University of Pennsylvania.

LOSING LIBERTY JUDICIALLY. By Thomas James Norton. The Macmillan Company, New York, 1928. Pp. xiv, 252.

Mr. Norton has sought to cure the "constitutional illiteracy" of the country by showing how a great deal of the "Liberty of the Man" has been lost through the judicial process. His complaint is that cases have been wrongly decided because "constitutional principles" were not applied, or not correctly applied, by the judges. The author apparently thinks that liberty was rather generally approved of by the Supreme Court of the United States until the *Mugler* case was decided; but that since that time the courts have permitted the legislatures to encroach upon the liberty of the individual. Of course, one always expects the legislature to be thinking up new ways of depriving man of his liberty, whether to help the farmers sell more butter by throttling the production of oleomargarine or whether to prevent an honest man from getting a drink and ruining the whisky ring. But the Constitution controls the power of legislating and it ought to and does, although the Court doesn't always seem to know it, prevent the loss of liberty except, of course, only in so far as is necessary for the general good. Mr. Norton concedes that the strong must yield convenience (but not right) when reasonably necessary for the help of the weak. But he thinks that all evils should be overcome by regulation, not prohibition.

Prohibition brings us back to the *Mugler* case. The author concludes that it was wrongly decided because the cases cited therein as authority did not rule the case; and besides, it offended "constitutional principles." That being so, any case which cites the *Mugler* case as authority for its decision is also wrong. There the judiciary yielded to the legislature, and has done so many times since. Had there been laid down in the *Mugler* case, as the author contends should have been done, once for all, the doctrines of Revolutionary times so clearly stated by Thomas Paine, this losing of liberty judicially would never have started. The Supreme Court should have defined liberty in such a way that thereafter, and hereafter, "this constitutional Liberty of the Man" would be respected in all legislation. So Mr. Norton would have us believe. Surely there is no history, before or since the *Mugler* case, which could reasonably cause one to believe that such a result could be so easily achieved.

The book gives definitions of liberty. The author quotes John Stuart Mill, the Declaration of Independence, Blackstone, Thomas Paine, John Dickinson, and Lord Acton, none of which authorities has ever had much to do with the interpretation of our federal constitution, which is "always sufficient" and can take care of all questions of liberty if given the chance. "It is never necessary

to read anything into the Constitution: it is quite sufficient." Yet the fifth and fourteenth amendments, greatly relied on, were not in the Constitution when it was first adopted, although the author seems to be of the opinion that sufficient, if not all, of the wisdom and knowledge of the world, then, now, or in futuro, was in the Constitutional Convention. The Fathers themselves do not seem to have thought as well of their own omnipotence as Mr. Norton does because they at least contemplated the possibility, however remote, of the amending of the Constitution and even went so far as to provide that it could be done. Their own contemporaries, even at the risk of giving the appearance of not being completely satisfied with the great document, adopted ten amendments in very short order and a few more long before all of the Fathers were dead. Of course it is not to be supposed that the liberty of every man, at least the black man, was so piously respected even by the venerable sages themselves: the Constitution itself provided for the return of escaped slaves.

But all authorities prior to the *Mugler* case are respectable and should be followed; all since are wrong except those which hold laws unconstitutional, and they are all right because they uphold liberty. Prohibition, at least that of liquor, is a bad thing, and because the Supreme Court, as someone else has said, "seems to want to bat 1000 *per cent.* on prohibition," all prohibition cases are wrong. Indeed, some of them seem to be so to many other lawyers as well as to Mr. Norton. I do not recall ever having read an answer to Mr. Root's argument in the first prohibition cases and the decisions in the physicians' prescriptions and the wire-tapping cases seem to me to be indefensible, but perhaps the Supreme Court is in favor of "the noble experiment." Mr. Norton isn't. If the Supreme Court is, it is probably because it thinks that the conditions of the present time are such that prohibition won't do us any hurt which can't be reasonably borne. Mr. Norton would have us believe that he isn't, because it is not consistent with Magna Charta, the Common Law, Sir William Blackstone, Thomas Paine, the Declaration of Independence, John Marshall and the Ideas of the Fathers. Certainly, if many lawyers believe with Mr. Norton that our decisions in cases involving questions of constitutional law are, or should be, decided by the application of a written formula which is to be found in the sacred document itself, they are in a minority and a dwindling one. If the general lay public (surely this book was not written for the profession) should get that impression from this book, then it will do more harm than good.

The thesis is not complicated, but its presentation is so involved and so loosely constructed that sustained thought is impossible. The recurring repetition of ideas is so confusing that it should be exceedingly difficult for the lay mind to grasp the fundamental legal ideas in the book. Parts of it would be understandable only to the trained lawyer and it is such parts of the book which are best done. Some of the purely legal criticisms of the decided cases are well presented, but that should be of little or no interest to anyone but the bar, and the bar can already find the same material elsewhere without the necessity of reading through much matter of negligible interest.

I recommend as a good antidote the article of Thomas Reed Powell, entitled "The Constitution at Philadelphia and the Constitution at Large."[1] That gives

[1] (1928) Pa. Bar Ass'n Rep. 362.

the lay mind a picture of the contrasting approaches to questions of constitutional law which will be clear and accurate where this book is confusing and not representative of actual conditions; and to the profession it will appear a brilliant and searching analysis of the judicial process which it is fundamentlly essential to keep in mind.

Allen Hunter White.

Philadelphia.

THE LAW OF BANKS AND BANKING. By John Delatre Falconbridge. Fourth Edition. Canada Law Book Company, Toronto, 1929. Pp. lxi, 980.

The fourth edition of this valuable work, usually referred to as *Falconbridge on Banking and Bills of Exchange,* is, largely through the omission of certain introductory matter, some thirty pages shorter than its predecessor of 1924, and on account of a better paper and type, is not only less bulky but also much easier to read. Dean Falconbridge deals, in his usual thorough manner, with all changes in the law and the jurisprudence in both branches of his subject-matter, which are by the Canadian Constitution handed over to the central, rather than to the provincial, legislative authority.

Of new matter discussed, one notes the following. At pages 97 and following, in discussing Section 51 of the *Bank Act,* which provides in part that:

> "The Bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any share of its stock is subject."

Dean Falconbridge deals with one of the interesting situations arising out of the differences between the laws of the various Canadian provinces. He says (page 99):

> "In the Province of Quebec a power of disposition is not a necessary incident to the execution of a trust. It has been suggested that notice to a bank that shares are held by a trustee in Quebec is in itself notice that the trustee is merely an administrator for the beneficiary without power of sale unless such a power is expressly given by the instrument creating the trust, and that the bank is therefore bound to examine the whole of the document in order to ascertain whether or not the trustee has the power to sell. If, however, the statute is to receive the same interpretation in all the provinces, it would seem to follow that, for the purpose of this section, a trust must mean the same thing in all the provinces. An essential of a trust is that the legal title or control should be in one person and the equitable or beneficial interest in another. The legal title involves a power of sale. The trustee may pass the title, although in transferring the property, he commits a breach of trust."

It so happens that the Quebec law on trusts is derived from the common law, but that differences in expression arising from codification have caused Quebec practitioners considerable trouble in interpretation. Article 981 (b) of the *Civil Code,* for instance, states that trustees are seized as depositaries and administrators for the benefit of the donees or legatees, while Article 981 (j) states that:

> "The trustees, without the intervention of the parties benefited, administer the property vested in them and dispose of it, invest moneys which are not payable to the parties benefited, and alter, vary and transpose, from time to time, the investments in accordance with the provisions and terms of the document creating the trust."

Conservative opinion in the Province of Quebec has been very doubtful as to whether this language does not modify for the province the common law powers of trustees. It is quite possible that Quebec lawyers have been too timid in their interpretation. But if a trust should actually not mean the same thing in all the provinces, must it be made to mean the same thing by the mere fact that the *Bank Act* has used the word "trust"? Is it not sounder to argue on the basis of origin?

At page 163 Dean Falconbridge discusses the very interesting subject of the responsibility of a bank entrusted with valuables for safe custody, and raises the question as to whether there is a distinction between the civil law of the Province of Quebec and the common law of the other provinces as regards the degree of care demanded of the bank. He quotes the case of *Giblin v. McMullin*[1] as holding that the bailee is not liable for loss, provided it took such care as a man would take of his own property. As he says, what the common law calls bailment for reward, is not in Quebec a contract of deposit, as this contract is declared by the *Civil Code* (Article 1795) to be essentially gratuitous. It is more akin to lease and hire; but the question is whether anything really turns on the difference. As pointed out by *Hart on Banking*,[2] it could well be argued that none of the bank's services are in reality gratuitous. The bank is either taking custody of its customer's valuables as part of the implied contract which it makes with him when it becomes his banker, or, if the so-called depositor is not a customer, the bank only deals with him for a special consideration. In the first case, the advantage which accrues to the bank through having the customer, will affect the whole of its relations with the customer. "It is accordingly difficult," says Mr. Hart, "to see why the banker should be supposed to act gratuitously in discharging one of his functions rather than another." Even, however, if the civil law would not recognize the contract as deposit, but insisted upon treating it as lease and hire, the consequences do not seem to be materially different. The depositary under Article 1802, C. C., is bound to apply in the keeping of the thing deposited the care of a prudent administrator, but this is precisely the extent of care required in the case of lease and hire. Probably the distinction would turn upon the fact that the bank holds itself out as an expert in taking care, and as such it offers a higher degree of prudence in its administration than would be required of a person making no such pretensions.

Turning to the *Bills of Exchange Act*, Dean Falconbridge, at pages 616 and following, discusses the very disturbing decision of the House of Lords in *Jones v. Waring*,[3] where it was held that the original payee of a bill could not be a holder in due course, as it could not be said that the bill was "negotiated" to him. As a result the former practice of the banks in discounting for their customers bills drawn by the latter in favor of the bank upon other parties, and later accepted by them, will have to be changed, and the expedient adopted of having the customer draw the bill in his own favor and endorsing it to the bank before delivery, in order that it may be considered as having been negotiated. As shown by Dean Falconbridge, the decision of the House of Lords is based on

[1] 1869 L. R., 2 P. C. 318.
[2] (3d ed. 1914) 351.
[3] [1926] A. C. 670.

technical, and not wholly convincing, reasoning, and has the unfortunate result of compelling technical expedients to meet it.

One of the chief features of the present edition is the valuable chapter on "Conflict of Laws" in connection with Bills of Exchange, beginning at page 803. Article 161 of the Canadian *Bills of Exchange Act* reads as follows:

> "Subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance or acceptance *supra* protest of a bill, drawn in one country and negotiated, accepted or payable in another, is determined by the law of the place where such contract is made: Provided that where an inland bill is endorsed in a foreign country, the endorsement shall, as regards the payer, be interpreted according to the law of Canada."

Dean Falconbridge finds that this article ignores the prevailing doctrine as to the proper law of a contract, and does so on a misinterpretation of Story, who is quoted to explain a statute which says something quite different from what Story says. The whole chapter is an eminent example of the clear-cut reasoning which can always be expected from Dean Falconbridge and which makes his book as satisfying as it is useful.

He has again put his academic and his professional brethren very much in his debt.

Warwick Chipman.

Montreal.

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