

BOOK REVIEWS

NOTES ON PROOF. By Harold G. Aron. Georgic Press, New York, 1932. Pp. xxiv, 561. Price: \$5.50.

This book is singularly difficult to describe and criticize. For one thing, it still lacks a supplement or appendix intended to contain notes which may run into the thousands. And the text is inherently puzzling. The author's own characterizations of his work are disarming. Toward the end of a long first chapter, he speaks of "the foregoing effort" as "incomplete, inadequate and superficial".¹ Later he says: "The work itself is replete with opportunity for criticism and undoubtedly many of the statements therein contained will be challenged and disputed".² Certainly, though, he must have intended his effort to be measured by some fairly rigorous standard. The title gives a clue. When, in legal literature, one encounters "notes" upon a specified topic, the implications are against comprehensiveness or studied grace in presentation; but one may reasonably anticipate persistent attention to a clearly defined general objective and systematic marshalling of materials. More explicitly Mr. Aron puts his own standard thus: "The contents of the foregoing pages will have failed of their purpose, if therein is not found, in however imperfect form, a *vade mecum* for the trial lawyer, information and comment of practical value to the student of law and of general interest to the public, who are the beneficiaries or the gulls of a defective administration of justice and law".³

Trial lawyer and student, seeking system and tight coherence, will find instead the miscellaneous contents of a wide-ranging and apprehensive intellect set down with fine disregard of source and form—the stream of consciousness method applied for the first time to writing on the law. Now, to the present reviewer's mind, it is creditable and stimulating that references to standard authorities—J. B. Thayer,⁴ Wigmore,⁵ the Report for the Legal Research Committee of the Commonwealth Fund⁶—should be joined by passages from Nicholas Murray Butler,⁷ Palgrave,⁸ R. S. Sutcliffe,⁹ Sir Henry Maine,¹⁰ Dennis Tilden Lynch,¹¹ John M. Zane's quotation from and comment on Sir Walter Raleigh's trial,¹² and an account of Giles Corey's fate in the Salem witchcraft frenzy.¹³ Sections from one of Mr. Aron's briefs,¹⁴ excerpts from magazines,¹⁵ newspapers,¹⁶ and humorous journals,¹⁷ etc., may indeed be expertly knitted into the same fabric with prolonged statutory quotations,¹⁸ although thirty-five successive pages containing nothing but the catch-titles of New York criminal enactments make a poor yarn for knitting or other purposes.¹⁹ All this might tend intelligibly to relate problems of proof to law and life in general. But the handling of such a miscellany calls for unifying skill which Mr. Aron seems to lack. His text, to this reviewer at least, constantly suggests disorder rather than harmony. The book can scarcely be said to have a pattern.

¹ 122.² 553.³ *Ibid.*⁴ 53, 64, 125.⁵ 122-123.⁶ 4-6, 46.⁷ 20, 268-269.⁸ 125-126.⁹ 157-159.¹⁰ 309.¹¹ 380-385.¹² 450-455.¹³ 456-461.¹⁴ 134-140.¹⁵ 13.¹⁶ 147, 317-318, 435-437, 513-516.¹⁷ 13, 463-465.¹⁸ 163-167, 300-302, 388-390, 394-397.¹⁹ 475-510; partly repeated on 518.

In part the author's uncontrolled propensity to ramble is at fault. Of this he gives fair warning in the foreword: "At numerous points the text will be found to depart from the general subject, to permit of suggestions for changes in both the Substantive and Adjective Law . . ." ²⁰ The problem of differentiating various types of legal proceedings somehow leads into a comparison of American and English newspaper methods of reporting lawsuits; ²¹ an essay to show how abduction is proved lands the reader in a Bulgarian fable about a slanderer, a priest, and a bag of goose feathers; ²² a similar essay with respect to "accident" ends up with a dissertation on the difficulty of bringing proof within fixed boundaries which involves mention of the codes of Napoleon and Hammurabi, of a royal baker preparing a religious feast, and of expeditions to examine the flora and fauna of Tasmania; ²³ a third essay on proof of the attorney-client relationship runs along through the characteristics of this relationship, its obligations, etc., into the question of overcrowding, and proper supervision of candidates for, the bar; ²⁴ it takes nearly seven pages and an account of versification in the jury box to suggest that the absence of juries in equity leads to some procedural advantages; ²⁵ between "Classification and Attributes of Proof" and "Actions *ex Delicto* and Their Proof", is inserted an entire if short chapter with no fewer than twelve full page plates on "Judicial Proof as Revealed in the Declaration of Independence" ²⁶ Incidentally, the arrangement of material is often profoundly confusing. Why, even in a miscellaneous definitive chapter, should "alibi", "alteration", and "spoliation" follow fast on the heels of "admissions and confessions"? ²⁷ The alphabet, perhaps; but next we get "notice" and "estoppel"; ²⁸ then the Statute of Frauds and the Statute of Limitations. ²⁹ In the same chapter, "precedent" and "*stare decisis*" ³⁰ hang together well enough, but why is "maxims" the following topic? ³¹ And what in the world are "color in pleadings" and "cooling time" doing sitting cheek by jowl? ³² A belated return to alphabetical order?

Mr. Aron's definition of "proof" is also a factor impelling him to the part of a hound baying along every legal rabbit trail. He starts out normally enough: "Proof is the effect or result of evidence; evidence is a partial means or method of proof . . ." ³³ Then this: "Proof . . . is evidence plus what is naturally inferred, judicially noticed and legally presumed. . . ." ³⁴ Still nothing abnormal. But an expansion is coming: "As in science and theology, so in the law evidence proves little; it merely establishes a state of facts or conditions to which accepted implications judicially noticed, inferences and presumptions are attached. *In a murder trial, the evidence cannot do more than establish the homicide and premeditation; the proof of the crime lies in the presumption of the law, that the wilful killing of a human being renders the perpetrator unfit for human society; precisely the same evidence would establish a commendable act in the public safety, if the victim were a spy or traitor in time of war or a malefactor about to perpetrate a felony*" ³⁵ And, to clinch the idea: "In proving a cause of action, before we get to the evidence, there must be established: the jurisdictional facts as to parties and the cause of action; the status of the plaintiff and jurisdiction of the defendant; the existence of a right and a

²⁰ xiii-xiv.

²¹ 151-152.

²² 197-198.

²³ 200-202.

²⁴ 210-213.

²⁵ 434-440.

²⁶ 267-273.

²⁷ 47-51.

²⁸ 52.

²⁹ 56.

³⁰ 86 *et seq.*, 90 *et seq.*

³¹ 91-101.

³² 119.

³³ 3; *cf.* 12.

³⁴ 188.

³⁵ 188-189. Italics supplied.

remedy".³⁶ Anybody who discusses "proof" under this definition has given himself a roving commission covering the whole area of the law and thus of human affairs. Hence it is not surprising that in Mr. Aron's later chapters on "Actions *ex Delicto* and Their Proof", "Actions *ex Contractu* and Their Proof", "Actions Affecting Real Property and Their Proof", "Proof in Actions against Decedent's (*sic*) Estates", "Proof in Suits in Equity", "Crimes and Their Proof", and "Proof where [or when] the Police Power Is Involved", he who reads may find a bit of everything.

So far we have attempted to look upon the volume through the eyes of the trial lawyer and law student, and have criticized it principally for lack of concentration. How will this quality affect its utility to the general public from whom Mr. Aron expects to attract readers? Probably unfavorably: those who read seriously will lose their way; those who seek to skip from one bright passage to another will find the going impeded by solid, earnest, and difficult pages, for there is here much matter demanding hard thought, and worthy of it, as the concluding portion of this review will indicate.

With a return to the technician's attitude, some account should be given of the accuracy and value of Mr. Aron's informative material entirely aside from arrangement and manner of presentation. In the term "best evidence" the author asserts that he finds "the pole star of the whole subject of evidence".³⁷ And he states the principle: "The complainant must prove his cause of action by the best evidence which the nature of the case permits".³⁸ Passing by the question of confining such a fundamental rule to complainants, we may ask whether the statement even in its limited form is true. It errs in two directions at once—first by implying that evidence which is the best obtainable will always, or at least normally, be admissible and adequate; second by implying that evidence not attaining this standard will always be inadmissible or inadequate or both. With our elaborate evidentiary technicalism in mind, no lawyer will hesitate to reject the first implication. As to the second: suppose a litigant desires to prove an event witnessed by Ananias and George Washington; both famous individuals are available to testify; our litigant chooses to call and rely upon the former. Under our somewhat enlightened modern rules the witness would be generally competent; and if the jury saw fit to believe him, they might find accordingly. No doubt Mr. Aron could recast his statement of the pole star principle to take care of this, but he would have to do such a lot of recasting before sundry critics had exhausted their powers that the ultimate result would be worth little as a guide. Our author perhaps realized this when he threw the pole star out of the firmament by remarking that "we of the law might . . . eliminate confusing terminology, if we discarded expressions such as . . . *best evidence* . . . and simply referred to *eligible* and *ineligible* evidence."³⁹ That would be about equally useful.

"Declarations," says Mr. Aron, "are admitted . . . (1) When they concern a matter of general or public interest . . . (3) When they are made against the interest of the party making them, these being so-called declarations against interest. . . ." ⁴⁰ Let us hope no law student ever attacks an examination or an opponent relying on these as definitions! Nor would the following be on the safe side: "An admission is in civil trials what the confession is in criminal prosecutions, namely, an acknowledgment, made of his own free will by an interested party, of the existence of some fact or factual circumstance or condition. The eligibility of an admission as evidence depends on three elements: it must have been voluntary, the interest of the party making it must have

³⁶ 191.³⁷ 26.³⁸ 18.³⁹ 44.⁴⁰ 45.

existed at the time of the admission, and it must have been made other than in the course of negotiations or discussions of a settlement or adjustment of the controversy".⁴¹ A true evidence shark would slash to ribbons nearly every clause of those two sentences. The author's terminology sometimes shifts unfortunately. At an early point he defines "relevancy" perfectly correctly.⁴² But at least twice later on he sags away from this definition: in proving abandonment "neither opinion or hearsay testimony is *relevant*"⁴³ and an abstract of title "may be *relevant* as a declaration or admission against interest".⁴⁴

The comment just made carries into that portion of the book with the greatest appearance of system and the most obvious utility—a collection of some 250 "commoner facts recurring in the average lawsuits with the briefest possible suggestions as to the manner of rendering them eligible as proof"; the whole in alphabetical arrangement extending from "abandonment" to "X-ray" and covering approximately 69 pages.⁴⁵ The promise of brevity is not always fulfilled, and much of the material seems rather futile. "*Immunity*—granted a witness by official act is, unfortunately, a matter of increasing public interest."⁴⁶ This is quite in the pungent style of old Dr. Johnson's dictionary, but gives not the slightest clue as to the demonstration of immunity in judicial proceedings. Nor does it seem particularly helpful to be told: "*Abandonment*—applies to contracts, domicile, easements, spouse, insurance, patents, trade-marks, and any other right or legal status, such as citizenship. It is proved by acts and omissions testified to by those who observed them. . . ." ⁴⁷ So much practical value might be worked into a topical list of this kind that Mr. Aron deserves honest praise for attempting it. He may be interested to compare a list intended for similar purposes included in the English law book called Cockle's *Cases on Evidence*.⁴⁸

This review has been written from the viewpoint of a teacher of the "law of evidence"—the existence of which, by the way, Mr. Aron "emphatically" denies in a passage which remains mysterious after several readings.⁴⁹ From that angle of scrutiny, there is a great deal to be said for this remark: "It is a broad statement but sincerely believed to be true by the author, that our present law of evidence is totally out of joint with our present system of jury trials, and that sooner or later we may have to discard one or the other".⁵⁰ Evidential rules, often perverted deliberately or from stupid ignorance,⁵¹ are applied to keep the triers of fact from seeing and hearing "for themselves those things a reasonable man would want to know about."⁵² For proof of this, one need not even go to court; scores of dreary pages in every year's digest of American case law drive the point home with shocking emphasis.⁵³ The pathetic struggle of reasonably minded law students to attune their concepts with those gravely propounded by evidential decisions constantly distresses the writer. If anything,

⁴¹ 47-48.⁴² 15.⁴³ 197. The author adds: "Intent is the ultimate fact to be proved in abandonment". Now intent is commonly proved by hearsay.⁴⁴ 200. Italics supplied.⁴⁵ 197-266.⁴⁶ 236. The alphabetical order breaks down here, as well; thus: *inducement, impression, infancy, immunity*, etc.⁴⁷ 197.⁴⁸ x; cf. 127.⁴⁹ See 4th ed. (1925) 530-533; cf. 522-529.⁵⁰ 196.⁵¹ 16; cf. 19.⁵² 36; cf. Coleridge, J., in *Wright v. Doe d. Tatham*, 5 Cl. & Fin. 670 at 690 (1838): "The question seems to me based on the fallacy, that, whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury".⁵³ In the two volumes of the American Digest System's CURRENT DIGEST for 1931, "Evidence" runs about 93 pp.; the subhead "Evidence" also runs to an aggregate of 45 pp. in "Criminal Law" alone. The same volumes devote 39 pp. to "Witnesses".

the failure of many to succeed in this process is less regrettable than the surrender of others to the conventions, even though the former does cause more examination failures and trial work less effective superficially.

Of course, thanks to the Herculean efforts of such men as Bentham, Thayer, and Wigmore, we are much better off in this respect than our ancestors. But prevailing heavy emphasis on the technicalism of admissibility still consumes in the schools and at the bar alike time which might much better be devoted to the persuasive power of various kinds of evidence in typical situations. These topics Mr. Aron's book suggests again and again.⁵⁴ They may perhaps be considered as its main thread. The volume would be much more profitable if it had clung tenaciously to them.

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FONTES JURIS GENTIUM. (Series A, Sectio I, Tomus 2. Digest of the Decisions of the Permanent Court of Arbitration, 1902-1928). Edited by Viktor Bruns. Carl Heymanns Verlag, Berlin, 1931. Pp. xxiii, 306. Price: 21 marks, paper; 24 marks, cloth bound.

One of the most encouraging signs that international law is approaching more and more to the status of a strictly scientific study has been the publication in recent years of numerous volumes of source material. A generation ago the familiar textbook was in large part a more or less dogmatic statement of what the author believed to be the principles of international conduct recognized by his particular government and the customs of international relations to which his government had given its approval. Little source material was available apart from the texts of a few important treaties and the decisions of national courts. The American student was particularly favored by the then recent publication of Moore's digest of correspondence of the State Department and Moore's compilation of arbitrations to which the United States had been a party; but even these documents could give but a one-sided picture in terms of the interpretation of international law by the United States.

The present collection of volumes, bearing the general title, *Fontes Juris Gentium*, represents an effort on the part of the Institute for Foreign Public Law and International Law of Berlin to bring together all those various documents, national and international, which, taken collectively, should enable the student and the jurist to form an accurate picture of the law upon a given subject. It is an ambitious undertaking and promises to make available material drawn from widely scattered sources, much of which would be otherwise practically inaccessible. The four series (A-D) will include the decisions of international and national courts, diplomatic notes issued by the most important countries, the opinions and decisions of international organs other than arbitral tribunals, such as those of the Council and Assembly of the League of Nations and their several commissions, and lastly, a compilation of treaties concluded by the principal states. The significant feature of the undertaking is the systematic classification of the material collected. Instead of presenting documents in full, which would duplicate existing material and reach an impossible bulk, the editors propose to analyze and digest the material and to classify it according to standard sub-headings, so that reference may be made to the material which bears upon the particular point under investigation.

The present volume, the second of the series, deals with the decisions of the Hague Permanent Court of Arbitration, and it has been prepared by Ernst Schmitz, A. H. Feller, and B. Schenk Graf von Stauffenberg. While the activi-

⁵⁴ He hammers away, indeed, at the idea of a triple aspect of law: substantive, adjective, and probative; 38 *et circa*.

ties of the Hague Court have naturally tended to diminish with the establishment of the Permanent Court of International Justice, nevertheless the decisions of the court are believed by the editors to be of lasting value for the study of the law, since the jurisprudence of the Permanent Court has to a considerable extent been built upon them. The systematic arrangement of the material follows that of the first volume of the series dealing with the decisions of the Permanent Court. Two main divisions of the law are adopted: the first part being the substantive law and the second part arbitral jurisdiction. Under Substantive Law the chapter headings follow in a general way those of the ordinary textbook—the foundations of international law, the relations between international law and municipal law, the subjects of the law, nationality, territory, jurisdiction, foreign relations, unilateral acts, treaties, responsibility of states, and war and neutrality. Each chapter heading has its own sub-headings which are intended to aid the reader in finding that particular aspect of the subject in which he is immediately interested. Under Arbitral Jurisdiction are chapter headings covering the bases of arbitral jurisdiction, the jurisdiction itself, procedure, and the arbitral award. In view of the fact that the decisions themselves are not reproduced as integral documents, but are digested under the various captions adopted, it was believed desirable to reprint the special agreements, or *compromis*, in accordance with which the several arbitrations were carried out. These appear in an annex and are brought down to the decision in the Palmas Island case. In addition to an elaborate general index, the volume contains an index of passages reproduced from the decisions, which is designed to enable the student to trace the different principles of international law which the particular decision is believed to illustrate. The materials of the volume appear in three languages: German, French and English.

What may the editors reasonably hope will be the result of their patient and exhaustive efforts to digest so large a body of material? To say that the work will facilitate the investigations of students and the research of the occasional practitioner who is presented with an international case, is to describe its value most inadequately. Of far greater importance is the effect which it must have upon the foreign offices of governments in impressing upon them the fact that international law already has developed to the point where it has principles and rules which may be made the basis of a universally accepted legal system. Too often governments have refused to arbitrate disputes from the conviction that there was no clear rule of law to be applied to the controversy. At times governments have taken positions based upon their own traditional interpretation of international law without being aware of the extent to which their attitude was or was not in conformity with the general practice of nations. Textbooks have been unable to pursue their subject into such detail as to show all the variations of national practice and to distinguish adequately the practice of a few nations from the universally accepted rule. It is the belief of the reviewer that the systematic classification which the editors plan to extend to all volumes of the series will show perhaps a wider diversity upon details but a greater agreement upon general principles than is at present appreciated by governments. If that should be the case, *Fontes Juris Gentium* will have rendered a service to the progress of law between nations which will be of inestimable value. The great task of the codification of international law, taking that term in its broad sense, is to proceed from accepted general principles to more definite rules for the conduct of the practical affairs of international life. The editors of this important series, when their work is completed, will have laid the basis for more effective codification than has been found possible thus far.

C. G. Fenwick.

CASES AND MATERIALS ON THE LAW OF CREDITORS' RIGHTS. By John Hanna. Commerce Clearing House, Inc., Chicago, 1932. Pp. xvii, 1076. Price: \$7.00.

Case books on procedure and the practical administration of the law are very difficult to edit. The innumerable petty points of difference in the dry details of practice in the courts of the several states and the federal courts make anything like exact general treatment impossible; and yet there runs through most systems a very deceptive resemblance due to their common source of derivation. Anything more than a general survey of the common law system with indications of modern innovations means entanglement in a veritable network of local statutes, rules and forms. Perhaps in the present state of American law, court and office practice can be taught realistically only as the practice of a particular jurisdiction; but to give both general and specific courses on procedure would in the opinion of most faculties tend to overload the course with remedial law. The field is not inviting to most scholars, and yet no branch of the law needs more urgently the attention of disciplined minds. A case book, then, such as Professor Hanna's work is entitled to careful and sympathetic study by all teachers in charge of procedural courses, representing as it does so much patient research in the field of remedial law.

The general subject treated is the realization of unsecured claims. The client comes in and says: "I was a fool to get caught in this way, but see what you can do for me." The courses open to counsel are examined in turn. Included are comparatively brief sections on executions, debtors' exemptions, attachment, garnishment, creditors' bills and supplementary proceedings; a more extensive treatment of fraudulent conveyances, general assignment, creditors' agreements and receiverships, and a very full treatment of bankruptcy. In fact, the last mentioned subject takes up about one-half of the case book, and, taken alone, offers sufficient material for a complete course on that subject. In this chapter, which is preceded by an historical summary, the cases, with few exceptions, are recent decisions of the federal courts and are accompanied by extracts from the bankruptcy act with many additional citations. In the other chapters, the cases are drawn from all sections of the country, and, in addition to the leading cases, there are many digested cases and copious notes on New York, New Jersey and Connecticut practice. For use in a school located in New York City, this selection of jurisdictions for special emphasis is justifiable, but the editor disclaims an intention to meet a local demand, and indeed these states may be taken as typical representatives of American tendencies, since each has to a certain extent interested itself in attempts to modernize its procedure. Professor Hanna tells us that the book is meant to be covered in its entirety in a three-hour course throughout one semester but it is difficult to see how this enormous amount of material could be intelligently digested in that time by the average law student, with cases in other major courses to prepare, and how it could be adequately presented and discussed in class in that time where the orthodox case method of teaching prevails. Over one thousand closely printed pages packed with detailed information on the diversities and perversities of remedial law is an ambitious program. By treating the book as a combination of textbook and case book and by omitting details not essential to the undergraduate, time could be found for discussion. The course contains just the sort of information most eagerly sought by the student bred in a metropolitan area; it accords with the American taste for technical training. Bankruptcy is one of the major preoccupations of the federal courts. There is here, then, the material for a useful elective course for those whose temperament calls for work in this field or whose office prospects urge them toward these studies, always understanding that for the details of procedure, which can readily be picked up after graduation, or in

the office of one's preceptor, hours ought not to be sacrificed that are needed for more fundamental problems. It may be that some day there may be set up in city law schools, continuation classes for recent graduates, not post-graduate work in the academic sense, but supplementary to the original studies. Under such an arrangement, a highly technical course on creditor's remedies, objectively approached with the social implications in mind, would offer much to graduate students whose contacts with actual practice would enable them to appreciate more fully its method and purpose.

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THE GROWTH OF POLITICAL THOUGHT IN THE WEST. By Charles Howard McIlwain. The Macmillan Company, New York, 1932, Pp. vii, 417. Price: \$3.50.

Political theory comprises remarkably few ideas which recur in infinite combinations. The emphasis in the study of the subject must therefore be placed upon the growth or development of ideas to discover the successive answers which generations of men have given to the problems which perplexed them. This has not always been the course which studies in political theory have taken; twenty years ago political theory was too often contented to isolate the concept of sovereignty and subject it to a rigid legalistic analysis. The utility of this sort of intellectual activity was seriously doubted, and the study of political theory earned the amused scorn of many political scientists. The low esteem in which the subject came to be held is sometimes reflected today in the attitude of many of the more practical-minded members of the profession. Professor McIlwain's book will go a long way towards reassuring the doubtful and the scornful that political theory is engaged in a service that is at once useful and important.

"It was among the Greeks apparently that we find the first faint trickle of that particular stream of speculative thought upon the nature of political relations which has been flowing ever since over the European world and over all the lands whose culture is in origin European." But to Greek speculative thought was added the law of Rome. "Whatever our modern laws may be, Rome is the source of our jurisprudence, and whatever our form of government, Greece has furnished us the main outlines of our political science." With the great central principles supplied by the thought of Greece and Rome, Professor McIlwain traces the subsequent development of ideas to the close of the Middle Ages. His method is that of the scientific historian, his research is painstaking and thorough, and his interpretation is characterized by imagination and breadth of vision. The results are highly instructive and are entirely free from the pessimism which led the late Professor Dunning to see little advance in political thought since Socrates debated with Glaucon in the Athenian market-place.

The lawyer is reminded that "the whole prevailing legalistic cast of most modern political thought has Rome for its origin, and by Roman law modern thought must therefore in part be interpreted." But the careful distinction which the Romans made in considering the relation of *imperium* to *potestas* does not extend into the feudal age. As Professor McIlwain points out, "but for such a mingling in the Middle Ages of the ideas of proprietary right and governmental authority, which the Romans had so carefully distinguished, and the corresponding fusion of public and private law which they had kept separate, feudal institutions and feudal conceptions of government could never have become what they were in the later Middle Ages. Without some understanding of the factors which led to these changes, the political ideas of the feudal period

are inexplicable." It is out of the confusion of law and politics during the early Middle Ages that the lawyer must seek the answer to many present-day problems.

The recovery of the Roman law and the revival of Aristotelian learning in the later Middle Ages enabled political thought to pursue a more orderly development. At the same time, the struggle between Popes and Emperors raised questions of profound significance. The far-reaching arguments by which the rival contentions were supported are interpreted by Professor McIlwain through the careful analysis of many texts. Brevity in the treatment of a large number of writers results in a far more revealing picture of the political thought of the Middle Ages than complete digests of the philosophy of a few men. Professor McIlwain is to be congratulated on the skill with which he has depicted the growth of political thought through the later centuries of the Middle Ages.

The concluding chapter adds little to our knowledge of the subject and might have been omitted without injury to the book. By the time it is reached, the development of political thought in Western Europe has been made so clear that the reader requires no chapter of conclusions. But this is to say that Professor McIlwain is truly a master of his subject.

William Seal Carpenter.

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CASES ON AIR LAW. (Second Edition). By Carl Zollmann. West Publishing Co., St. Paul, 1932. Pp. xvi, 612. Price: \$6.00.

The first edition of this case book, the first devoted to aeronautical and radio law, included practically every decision of merit handed down in these two fields. The second edition clearly shows the great increase of aviation and radio litigation, for about one-half of the aeronautical material consists of recent decisions and some two-thirds of the radio material is new. The author's problem has now been the careful selection and arrangement of cases. In this Professor Zollmann has been very successful in presenting within the confines of a 600-page volume the leading air law cases.

Eleven chapters are devoted to aeronautical law and deal with Admiralty Law, Statutory Construction, Interstate Commerce, Air Space Rights, Airports, Torts, Contract, Crime, Insurance, Carriers and Workmen's Compensation. The order of presentation has been changed somewhat, one chapter has been omitted, and two have been added.

Thirteen chapters concern radio law, including: Radio Act, Interstate Commerce, Statutory Construction, Licenses, Municipal Corporations, Torts, Contract, Insurance, Crime, Copyright, Unfair Practices, Interference and Public Utilities. In these chapters, some of the material appearing in the earlier edition has been condensed and rearranged to allow publication of the newer cases. The radio license material comprises, perhaps, the most valuable portion of the recent decisions.

Three appendices present the Air Commerce Act of 1926, the Uniform State Law for Aeronautics, and the Radio Act of 1927.

Apart from the inclusion of recent decisions and rearrangement of case material, this second edition has several other merits. Foreign cases of importance have been included, many of which have been carefully translated by Professor Zollmann, and a most useful bibliography has been appended to nearly all chapters. This feature is a distinct improvement over the first edition as it makes available to the student an abundance of periodical material published by the three air law journals subsequent to the first edition of Professor Zollmann's case book.

By the time a third edition appears, the reviewer believes it will then be desirable to divide the material into two separate case books, one devoted to aeronautical and one to radio law. For the present, it seems desirable to treat both, for classroom purposes, under the head of air law.

Now that so much more material is available on these subjects, it is believed that an increasing number of courses on air law will be found in the various law school curricula.

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MR. JUSTICE BRANDEIS. Edited by Felix Frankfurter. Yale University Press, New Haven, 1932. Pp. vi, 232. Price: \$3.00.

The volume under review does not attempt a life-size portrait, being but a series of six essays written for the seventy-fifth birthday of Mr. Justice Brandeis. These studies of Mr. Justice Brandeis, I think, might well fall under three main heads: (1) Earlier activities, especially "public work" prior to appointment to the Supreme Court; (2) Social and economic philosophy; (3) Constitutional jurisprudence.

The first is given inadequate treatment in these pages. Such reference as is made to his practice as a "people's lawyer" is casual and incidental. This seems unfortunate since Mr. Brandeis' social-economic philosophy and constitutional jurisprudence were shaped in large measure by the forces of his time and by the significant *rôle* he played in dealing with these. Brandeis must be studied, in other words, in terms of the entire social movement in which he has figured so prominently. His special interest, it appears, lies not in the field of private practice but in matters of large public interest—in manifold and complicated social and economic problems. So he decided quite early in his career to enter affairs of state on the side of the public. By 1905 he was much impressed by the fact that the great majority of talented lawyers had already become adjuncts of huge corporations. His decision to become the "people's lawyer" rather than the more usual "corporation lawyer", brought him face to face with such major economic and social problems as trust regulation, railway rates, public utilities, supervision of insurance companies, "the money trust", relations of capital and labor, old age pensions, unemployment insurance, and so forth. In the course of dealing with these problems, he formulated, despite his strong distaste for theorizing, a definite and well-rounded social philosophy. The tenor of this theory is ably and comprehensively discussed by Max Lerner in his article entitled "The Social Thought of Mr. Justice Brandeis". Indeed, Mr. Lerner's article is so well done that one wonders why the editor included Mr. Richberg's article at all, since it covers ground already admirably treated by Mr. Lerner.

Space permits mention only of the main tenets of Mr. Brandeis' philosophy. Brandeis' chief concern is for the freedom and liberty of the individual—not political liberty, but industrial liberty; not freedom from physical restraint, but rather freedom from economic oppression. Modern industrial society, as he sees it, is essentially a contest between those who have and those who have not. His special concern is for the "have-nots". To secure the individual workman against modern forms of oppression, such as penniless old age, protracted unemployment, long hours and inadequate wages, Brandeis foresaw the need of, and advocated more and more, governmental control. He has long urged legislation in behalf of labor unions, hours-of-labor legislation, minimum wage laws, old age pensions and unemployment insurance.

Another aspect of our industrial system early attracted the attention of Mr. Brandeis. He observed the increasing tendency of business concerns to grow

bigger and bigger, and to fall under the control of a smaller and smaller number of persons. But it is doubtful whether even Mr. Brandeis foresaw the length to which this concentration of corporate control has been carried in recent years.¹ Trusts and monopolies have always been for him objects of grave suspicion: first, because he had demonstrated that a point is reached in the growth of industry where "bigness" no longer makes for efficiency; second, because "big business" runs counter to his cherished principle of industrial democracy. He well appreciates that political democracy is not enough. He believes that industrial liberty must attend political liberty; industrial democracy should ultimately attend political democracy. We must avoid, he urges, industrial despotism, even though it be benevolent despotism.

Mr. Justice Brandeis would not, like the radical socialist, destroy capital. Rather he would soften the asperities of the capitalist system, "humanize its rough competitive struggle, endow it with responsibility as well as vigor". "He has so much respect", as Mr. Lerner puts it, "for private property that he wishes it to flow freely instead of being concentrated in a money trust, . . . so much respect for profits as an incentive that he wishes it to operate unobstructed by the monstrous weight and artificial power of corporations, so much respect for business enterprise that he wishes to make of it a responsible creative force. . . . He has thrown all his powers and all his passion into the problem of attaining freedom and justice and a fair chance for every individual to make a life within the framework of a capitalist society. To this end he uses law instrumentally, as a living organism of adjustment to a changing society, as a method for distributing power and control within that society" (p. 35).

On one point only does the reviewer question the accuracy of Mr. Lerner's analysis. He tells us that Mr. Brandeis "believes in competition as being good for the competitors, good for consumers, and good for the industrial process" (p. 29).

In an opinion² written after this article was published, Mr. Justice Brandeis uses language that would seem to call for qualification of Mr. Lerner's conclusion. An Oklahoma statute had declared the manufacture of ice for sale and distribution "a public business", and conferred upon the State Corporation Commission power to withhold a license to one desiring to manufacture, distribute or sell ice unless it be shown that such additional service was necessary in the community in which the petitioner desired to operate. Arguing in favor of the constitutionality of the statute, Mr. Justice Brandeis wrote in dissent:

"Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business. . . . Where there was competition, it often resulted to the disadvantage rather than the advantage of the public, both in respect to prices and to service."

Here Mr. Justice Brandeis obviously feels that in this case at any rate there was a distinct public advantage flowing from the regulation of destructive competition such as was furnished by the Oklahoma statute.

Mr. Lerner's altogether admirable essay is followed by that of Mr. Frankfurter: "Mr. Justice Brandeis and the Constitution." This article consists for the most part of long quotations from Justice Brandeis' opinions, broken now and

¹ See, in this connection, W. Z. Ripley, *New York Times*, July 24, 1932, at sec. VIII, p. 1.

² *New State Ice Company v. Liebmann*, 285 U. S. 262 (1932).

then by perfunctory analysis and comment. The reviewer is frank to say that the article is entirely unworthy of the subject it treats and will be a great disappointment to readers who are accustomed to expect high quality in Mr. Frankfurter's writings. Certainly Mr. Frankfurter does not bring to this study the careful thought and penetrating insight which characterized his well-known article dealing with the constitutional decisions of Mr. Justice Holmes.³ Indebtedness for services rendered by a Harvard Research student in the preparation of the Brandeis article, is duly recorded in a footnote.

This volume, in addition to brief tributes by Chief Justice Hughes and Mr. Justice Holmes, embodies two other papers of a more specialized nature. Henry Wolf Biklé discusses "Mr. Justice Brandeis and the Regulation of Railroads." That Mr. Justice Brandeis' opinions should, as some one has said, furnish our best text-book on railroad economics is no accident. He has almost made a hobby of scientific management and has handled several important cases before the Interstate Commerce Commission. He was selected by the Commission to represent it in the famous *Five Per Cent Case*⁴ and to "undertake the task of seeing that all sides and angles of the case are presented of record". This he did most ably. Of his Supreme Court opinions Mr. Biklé writes:

"He understands the different classes of rates and their economic functions and significance. He has a clear conception of that seemingly simple, but in reality highly complex, matter of railroad demurrage. To him undue preference is not a legal concept only, but a matter of vital business significance in its bearing on the relation of industries and communities. And the interest of the community as related to the interest of the railroad is fully appreciated whether the question be as to divisions of rates, or the mistaken policy of unduly low rates, the extension of new lines, or any other of the multitudinous issues that come before the Commission" (p. 166).

One aspect of Mr. Brandeis' legal equipment is sometimes overlooked. It is not, I believe, generally known that "he is probably the best technical lawyer on the bench. There is hardly a device or usage of intellectual method or judicial procedure which he does not employ" (p. 176). His use of the tricks of the legal trade is brilliantly illustrated in Prof. Walton H. Hamilton's paper, "The Jurist's Art."

An important phase of Brandeis' work does not seem to be given sufficient emphasis in these essays: he has been above everything else, I think, an advocate of social and economic planning. Writing when economic, social and political affairs were far less complex and baffling than today, he emphasized the urgent need for social intelligence among government officials, lawyers and judges. But he did more: he made careful diagnosis of the outstanding social and economic ills from which society is still suffering; he suggested remedies which at the time seemed far-fetched and visionary. He went further, even, and strongly implied that unless society radically alters its point of view and habit of life, that which appears a lingering disease may terminate fatally. He argued, in other words, for managed economy as a safeguard against the disastrous jars and dislocations of boom and panic, of inflated prices and soaring unemployment, long before we were hit by the present social and economic distresses. Only of late, however, has it become evident to students of social and economic science "that a fault", as one of our captains of industry naively observed, "has developed in our system of distribution" (!).

³ Frankfurter, *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121.

⁴ 110 U. S. 471, 4 Sup. Ct. 210 (1883).

The reviewer seriously questions whether the editor was justified in giving all these papers more permanent form and wider circulation than they had already enjoyed in the columns of Law Reviews. I feel sure that this is true of his own contribution which constitutes a large part of the book.

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