BOOK REVIEWS

THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS. By Walter Wheeler Cook. Harvard University Press, Cambridge, 1942. Pp. xx, 473. Price: $5.00.

This is the last book of a great law teacher. Employing his inquiring and critical mind as he had done in many parts of the law, Mr. Cook devoted his last twenty-five years largely to conflict of laws. The volume, though made up principally of law review articles, has unusual unity, for its plan was carried out with adherence to the same fundamentals in the discussion of the bases selected for attention.

The task of conflict of laws is one of the most interesting in the law. It is to make our interstate and international systems work satisfactorily in their bearing on the everyday affairs of man.

Like all law, conflict of laws has various bases or sources. All of them are present in every situation, and the one to which attention will be given depends on the focus of the particular case or the stage of development of the subject or the writer's special bent or interest. Four of the bases or sources may here be mentioned:

1. The *formal,* which determines the part of the legal system, whether international or national or state, to give direction and rules for the subject.[1]

2. The *analytical,* which seeks to develop a set of legal ideas adequate to give place and expression to the various elements of the subject.

3. The *sociological,* which makes explicit the social setting and factors, whether political or economic or otherwise, of the problem.

4. The *policy,* which makes clear the various policies to be carried out or adjusted in the handling of these interstate and international matters.

Of the first of these bases, the formal, some aspects are treated, especially in Chapters IV and V of the book. The powers of Congress over this field have been exercised to only a limited degree, and the methods of interstate enforcement of judgment are even now more cumbrous than those provided by Parliament for the British Commonwealth of Nations. Chapter IV, The Powers of Congress under the Full Faith and Credit Clause, a notable and pioneering article, points out possibilities through congressional action of wider effectiveness of state judicial process, of swifter enforcement of judgments, and of extra-state protection to rights based on legislation. The federal common law, though not necessarily a part of the subject, has a special interest. *Swift v. Tyson,*[2] the foundation case, was based on conflict of laws facts, and Story's contribution through his opinion in the case was to transform a conflict of laws problem into a non-conflicts problem by the creation of the federal common law. *Erie Railroad Company v. Tompkins*[3] in striking down the federal common law faced the federal courts with the frequent necessity of choice of law. The extreme developments of the doctrine of the latter case is brought under fire in Chapter V, The Federal Courts and the Conflict of Laws.

1. See Cheatham, *Sources of Rules for Conflict of Laws* (1941) 89 U. OF PA. L. REV. 430.
2. 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842).
3. 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).

It is the second, however, of these bases, the analytical, as the title of the book suggests, which especially attracted and held the attention of Mr. Cook. In his words,

> "The purpose of this book is not to present a complete treatise on the Conflict of Laws. What has been attempted is a study in 'legal method' . . . an analysis of some of the more common problems which present themselves in this field, with special reference to the intellectual tools available for their solution." [4]

The analytical systems of sovereignty-comity which Story erected, and of territoriality-vested rights supported by Beale, Dicey, and Holmes, are the object of special attack. In its unrelenting analysis of a series of practical situations the book demonstrates that sovereignty and territoriality and vested rights as they have been used are inadequate guides to decision or in explanation of the cases, and are not consistent with their own premises.

It will be agreed by all that when Mr. Cook approached the subject, conflict of laws was in need of reexamination. The old theory of vested rights had served its time and purpose in helping to achieve or to explain a more extensive interstate recognition of foreign-based claims. But the specialized conception of sovereignty or territoriality, with its few simple principles pushed everywhere, could not continue to be the sole or principal guide in so vast and complex a field. It was Mr. Cook, more than anyone else, who aided in giving freedom from these too constricting ideas.

The last two bases mentioned above, the sociological and the policy, are indicated briefly in the analysis and discussion of some problems in the volume. They do not receive, however, the sustained and consistent attention given to the analytical. Frequently Mr. Cook points out that these are matters for further investigation and deliberation. At times he suggests new solutions, and often he helps to new methods even more inclusive than his own.

For me, the most satisfying part of the book is Chapter VI, 'Substance' and 'Procedure.' Through examination of the purposes served by the distinction at various places in the law, the particular reason for the distinction in conflict of laws appears and the guiding line is made manifest.

The first chapter, which gives its name to the book, is for me less compelling in its affirmative insistence that the author's theory "that a court never enforces foreign rights, but only rights created by its own law . . . is the only satisfactory way [of stating the matter]." [5] The local law theory here given is only one possible analytical explanation of how it happens that in deciding a case the court of one state may employ the law of another state. The theory is free from the particular rigidity of the vested rights doctrine. Yet it would substitute for the territoriality of the place of occurrence a conceptually necessary territoriality of the state of the forum. The system permits a greatly needed flexibility in choice of law, and in this it is a substantial advance over its predecessors. But any analytical system, even his own, as Mr. Cook would have insisted, is useful only in aiding us to see and express the real problem, and it cannot itself give the answers which must be sought from deeper and more fundamental bases of the subject.

The charge that the book is principally destructive rather than constructive is answered in the preface in terms of confession and avoidance.

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4. Page ix.
5. Page 29.

The first thing to be done, so it is stated, was to destroy the prestige of the earlier conceptions. The general method to be followed in the longer and more laborious task of working out affirmatively the answers to the various problems in the field was suggested:

> "But, I may be asked, if the answer to conflict of laws cases cannot be deduced from certain preexisting principles relating to 'jurisdiction,' how are they to be decided? The only answer that can be given is, by the same methods actually used in deciding cases involving purely domestic torts, contracts, property, etc. The problem involved is that of legal thinking in general."
>
> ". . . In making a choice between these rules, it is obvious that here as elsewhere the basis must be a pragmatic one—of the effect of a decision one way or the other in giving a practical working rule. In this connection it may be that in some cases it makes little difference which rule is adopted, so long as it is reasonably clear and definite and after its adoption is not departed from in cases clearly falling within it, but in others clearly vital problems of social and economic policy must be considered before a wise choice between conflicting rules can be made." [6]

It is significant for the future that the Restatement gives in similar terms its conception of the sociological and policy factors in conflict of laws:

> "*Sources of Conflict of Laws* . . . It [each court] derives this law from the same sources used for determining all its law: from precedent, from analogy, from legal reason, and from consideration of ethical and social need." [7]

The task ahead in conflict of laws, handed on by Mr. Cook to his successors, is the working out of these factors in this extraordinarily varied field. In preparation for it this book will be of lasting value. To an exceptional degree it combines insight, penetrating analysis, and clarity in organization and expression.

Mr. Cook's wide influence on the law came largely through his powers as a rare and gifted teacher. His students and his colleagues reveal his ability to stir others. It is a mark of his devotion to teaching as well as of the meticulous character of his writing that, casebooks aside, this is his first as well as his last book.

Elliott E. Cheatham.†

FUNDAMENTALS OF FEDERAL TAXATION. Edited by Professor Erwin N. Griswold. American Bar Association, 1943. Pp. 800. Price: $10.00.

Fundamentals of Federal Taxation is a printed tax course sponsored by the American Bar Association and the Practicing Law Institute. It is published in the form of pocket-size pamphlets and is designed to meet the need of lawyers for instruction in the fundamental principles of Federal taxation. The course consists of a series of articles, written by various practitioners and edited by Professor Erwin N. Griswold, and a copy of the Internal Revenue Code.

6. Pages 42, 44-45.
7. RESTATEMENT, CONFLICT OF LAWS (1934) § 5, comment *b*.
† Professor of Law, Columbia University.

The subject matter is presented in a clear and concise manner. The articles make easy reading and will afford the general practitioner an opportunity to grasp the elementary principles with a minimum of effort. As a result of the brevity of treatment and of the simplicity of presentation, a streamlining effect is attained which will undoubtedly induce many lawyers to read the pamphlets and learn something about Federal taxes.

The arrangement of the material is good. Each pamphlet covers one or two topics. One pamphlet is devoted to an index. The articles are liberally annotated with citations to the statutes and the leading cases. The bibliography, contained in the pamphlet entitled "Introduction to the Income Tax," should be helpful to the lawyer who is interested in pursuing the subject matter beyond the mere fundamentals. Some of the reference works listed, such as Mertens, *Law of Federal Income Taxation* and Paul, *Federal Estate and Gift Taxation*, should be in every law library.

The preparation of tax returns is explained in two pamphlets by Christian Oehler. In one pamphlet he states in detail each of the steps to be followed in the preparation of the Individual Income Tax Return, the Partnership Income Tax Return, the Corporation Income and Declared Value Excess-Profits Tax Return, and the Corporation Excess Profits Tax Return. In the other pamphlet are shown the actual returns, the preparation of which is explained in the first pamphlet. This would seem to be an excellent method of teaching the proper preparation of income tax returns. No instruction is given in the preparation of the less complicated returns such as the Estate Tax Return and the Gift Tax Return.

The article on excess profits tax by Alger B. Chapman is particularly to be commended as a simple explanation of one of the most complex of the taxes. His clarification of that phase of the law contrasts favorably with the phraseology of the Code.

There are about 800 pages of text. The pamphlet in which the Code is printed consists of a copy of the Code, as amended to the end of the year 1943, and requires about 300 pages. The Revenue Act of 1943, which was enacted on February 25, 1944, and which further amended the Code, is printed on 50 additional pages, with 90 pages of explanation prepared by Prentice-Hall, Inc. The mere fact of the bulk of the statutes as compared with the text of the articles demonstrates the condensation required in order to make the course as short as it is. The Code, in comparison with the articles, is much more complicated, involved, and in many instances obscurely phrased. It makes tedious and arduous reading and is far more difficult to understand.

The course is commendable as an easy method of obtaining a familiarity with the elementary concepts of Federal income, excess profits, gift and estate taxation. It seems to have been prepared and edited with great care and studiously avoids many of the controversial interpretations of the provisions of the Code and some of the more obscure subjects and details. This is inevitable in a work of this nature.

A weakness of any printed course of instruction on Federal taxation arises from the constant change of the law. Every year since 1938 the Congress has amended the Code. Most of the amendments have made substantial changes in the law. Further, the impact of higher tax rates has brought into the courts a great mass of litigation, resulting in a constant flow of decisions and opinions from the Tax Court, the Court of Claims, the United States District Courts, the United States Circuit Courts of Appeals, and the Supreme Court. As might be expected where decisions are rendered by different tribunals, many are conflicting and some have the effect of altering fixed conceptions of the law. Thus it is that a

text on this subject matter quickly becomes obsolete unless revised annually or kept up to date in some other manner. The articles were written before enactment of the Revenue Act of 1943 and the Individual Income Tax Act of 1944, both of which made important changes in the Code. Some of the amendments are retroactive as far back as the year 1931. Hence caution must be exercised in relying on the text.

The course should suffice to give the general practitioner a working knowledge of the tax laws sufficient to meet his casual requirements. It will not make him an expert in the field but may broaden his vision so that he will recognize the tax problems of his clients as they arise in the course of his practice. The recognition of the problem is even more important than the solution.

Herman H. Krekstein.†

THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835. By Charles Grove Haines. University of California Press, Berkeley and Los Angeles, 1944. Pp. xiii, 679. Price: $6.00.

The tremendous importance of the Supreme Court of the United States as the arbiter of the relations between the individual and government and between the states and the nation was never greater than today, when the opinions of the Court reveal a constantly growing absorption of its time with problems arising out of attempted governmental restrictions on economic enterprise, industrial organization, civil rights and personal freedom. And what was once considered heterodox and impious is now recognized as a commonplace truism: that under the guise of legal form the Court exercises far-reaching political, social, and economic control. Since constitutionalism has played, and even under the new dispensation continues to play, such a dominant rôle in our history, it is fitting that an eminent constitutional historian should have employed his talents and ripe scholarship in producing another survey of constitutional development during the formative period of our national life.

Professor Haines' labors have been prompted by his belief that the story of the Supreme Court has generally been told in such a way as to defend and praise "the Federalist and nationalist policies and principles and correspondingly to depreciate and condemn the local, particularist and democratic principles and traditions in the American way of life." With the conviction that the rôle of the Court during the period from the adoption of the Constitution to the death of Chief Justice Marshall is deserving of more careful and systematic evaluation, Professor Haines has devoted much attention to the activities of the justices, the decisions of the Court, and the relations of the tribunal to the other departments of government. He explains further that "the fact that the work of the Supreme Court viewed from the conservative and nationalist viewpoints has been so frequently and so effectively treated by well-known historians, and that its work considered from the liberal and democratic approach has been so seldom and so inadequately handled has necessitated at times . . . more thorough and extended consideration of the critics rather than the defenders of the Court."

Professor Haines' volume, comprising almost 700 closely printed pages, is divided into five parts. Part I deals with the background for the prevalence of political ideas and principles in the judicial interpretation of the

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Constitution. Part II surveys the Court under Federalist regime. Part III considers the fortunes of a Federalist Supreme Court under continuing Republican administrations. Part IV is concerned with the Court's foremost nationalistic decisions and with the continuance of partisan attacks upon its work. Part V analyzes the circumstances under which the Court declined in authority and prestige during the period from 1828 to 1835.

Professor Haines writes with authority and insight. Constitutional problems presented in leading cases are viewed, not in narrow, legalistic terms, but in relation to the shifting sands of political and economic environment. While disclaiming any attempt to present a strictly nonpartisan account of the period treated, he has nevertheless handled his materials in workmanlike and scholarly fashion, free from dogmatism and intolerance. Many historical events and incidents have been reconsidered in the light of the author's reexamination and reinterpretation of source materials, including original documents, letters and diaries, Congressional debates, executive papers and orders, as well as the opinions of the justices.

Perhaps the most interesting chapter—at least to the general reader—deals with the political phases and implications of the Marshall era of constitutional interpretation. The author concedes that if the Federalist doctrines of judicial protection to vested rights and of implied limitations on state legislatures in favor of private rights of person and property had been repudiated, the economic development of the nation would have been less rapid. He ventures to believe, however, that if the democratic principles of Jefferson and his followers had prevailed the spirit of bitterness which resulted from the undermining of state power would have been allayed. "With a more natural and direct outlet for political feelings and prejudices and with greater freedom for the expression of particularist tendencies," he writes, "may it not have been that the issues of expansion and of slavery could have been settled without such long and bitter controversies?" (In this connection, it is of interest to contrast the recently expressed view of Charles A. Beard in *The Republic* that the "Federalist new deal" was of great advantage to the youthful nation in that its program "helped to cement the Union, to transform the country from a raw-material province of Europe into an independent industrial nation, to enrich our civilization by the diversification of economic activities.")

But one does not need to agree with all of Professor Haines' conclusions to appreciate the magnitude of his labors and to welcome his significant contribution to American constitutional history.

Pendleton Howard.†

PENNSYLVANIA PUBLIC UTILITY LAW AND PROCEDURE. By Charles L. Casper. George T. Bisel Co., Philadelphia, Pa., 1943. Pp. xl, 302. Price: $6.00.

Most lawyers keep a notebook, or a series of them, in which they enter citations of cases dealing with certain phases of the law in which they are particularly interested. Over a period of years such notebooks become more and more valuable. Their weakness, however, generally lies in improper and inadequate indexing, not to speak of their lack of completeness resulting from the failure of the compiler to make an immediate entry of a case when it comes to his attention. Of course, he always promises himself that he will make a note of the case at the first available moment, but if that

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moment ever comes it is more than likely that the case is completely forgotten and the entry is never made. Those who habitually practice before the Pennsylvania Public Utility Commission will find themselves rescued from these human frailties by Mr. Casper's book. Those who appear there only occasionally will find it a guide to lead them through the intricacies of a highly specialized but nevertheless important branch of the law. Both will find it a valuable tool and guide book.

The book consists of 173 pages of text, a table of cases of 28 pages, and 39 forms comprising 98 pages. The text, cases and forms are well indexed. The reader is taken through the entire gamut of present day public utility regulation by the Commonwealth of Pennsylvania. He is made acquainted with the organization of the Pennsylvania Public Utility Commission, its powers and duties and the procedure before that Commission. Not only that, but he is told the facts to be proved in particular proceedings, the points being laid out in logical sequence and tabular form. Separate chapters with numerous subtitles are devoted to the utilities regulated, certificates of public convenience, valuation, rates, services and facilities, crossings, accounting and financial matters, contract carriers by motor vehicles and brokers. The book also takes the reader beyond the confines of the Commission itself and deals with the question of reviews of, and appeals from, the decisions of the Commission.

The author explains in the preface that the purpose of the book is "to explain the substance of the laws affecting public utilities in Pennsylvania and the procedure thereunder, from a study of the statutes, the decisions of the courts and the orders of the Commission." Thus the book is a statement of principles with supporting authorities. No attempt is made to justify those principles or to criticize them. Such an attempt is expressly disaffirmed by the author's statement that "no attempt has been made to predict how the courts or the Commission will interpret those provisions of the law which have not yet been discussed by them." The book should prove invaluable to one whose duty it is, in his work-a-day world, to handle routine matters and problems before the Pennsylvania Public Utility Commission. It is a guide book both to the law and to the procedure—all made readily available to the busy practitioner by an author who was at one time the Chief Hearing Examiner of the Commission and is singularly qualified for the task which he has undertaken.

William F. Zearfaus.†

THE ITALIAN CONCEPTION OF INTERNATIONAL LAW. By Angelo Piero Sereni. Columbia University Press, New York, 1943. Pp. viii, 402. Price: $5.50.

The author rightly states that the Italian writings on international law are very little known abroad.[1] To fill this gap and to familiarize the English speaking world with the Italian approach to international law is the purpose of this thorough and highly informative study. Italian theories of international law, Italian state practice, and Italy's international legal status are the three main fields of the author's investigation.

Bartolus of Sassoferrato (1313-1357) is considered one of the founders of modern international law by describing realistically the international

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1. Page 352.

community in which he lived.[2] More than two centuries later, Alberico Gentili (1552-1608), an Italian protestant who spent the greater part of his life in England, thought in terms of a *societas gentium* which comprised on a footing of absolute equality Christians, heretics, and infidels.[3] By going back to the 13th century, Sereni tends to dispel the myth that the inception of international law coincides with the Peace of Westphalia. He assumes a gradual transformation of the European state system rather than a sudden switch from the unitarian idea of the Empire to the coexistence of the several independent states.

No major works on international law were written in Italy in the 18th century. In the period of the *Risorgimento,* Mazzini and Mancini advanced their partly original but highly nationalistic doctrines of international law. Whereas Mazzini advocated the "doctrine of nationalities" more as a political ideology, Mancini proposed to give it a legal form, above all in his famous lecture on "Nationality as the Foundation of the Law of Nations" (1851). Not only was this lecture significant in that it furnished a legal basis for the national aspirations of 19th century Italy, but it contributed also to the blind acceptance of the principle of "national self-determination" as one of the major war aims of World War I. Sereni's treatment of the "doctrine of nationalities" is scholarly and objective. He presents the main tenets of Mancini's theory in concise legal parlance,[4] but he is by no means blind to the limitations of the doctrine. "Even the adherents of the doctrine in Italy recognized . . . that it was quite void of value from the point of view of positive law. It expressed only an aspiration and a political program: that humanity ought to be organized in national states. The doctrine was therefore only political, not juridical, and even from the political point of view the doctrine was of questionable accuracy." [5]

The main schools of the 20th century are classified as the "positivist doctrine" and the "reaction to the positivist doctrine." The outstanding representative of the positivist school is Anzilotti whose textbook on International Law has been translated into French and German. Moreover, Anzilotti's activity as a judge of the Permanent Court of International Justice has given particular weight to his views. Sereni points out the most important features as well as the shortcomings of Anzilotti's approach to international law. Sereni himself obviously sympathizes more with the second school whose main representatives are Santi Romano and Giorgio Balladore Pallieri. Chapter XIII is particularly valuable since the writings of Romano and Balladore Pallieri are only available in Italian. A separate chapter is devoted to the Fascist conception of international law, which, according to the author, is non-existent. He thinks that a "Soviet as well as a Nazi and Japanese conception of international law exists today . . ." but that "fascism was unable to express any conception of its own international law." [6] He even raises the question whether the conspicuous lack of express references to fascism in the recent Italian textbooks on international law "was not a form of mute protest against fascism, the only one possible in a totalitarian regime." [7] Certainly, Italian international lawyers did never debase themselves to the level of many so-called German scholars of international law who at times went so far as to reduce international law to the *Aussenstaatsrecht* of the German master nation. One may even admit that fascist "ideologies have not exerted the slightest

2. Page 57 *et seq.*
3. Page 64.
4. Page 163.
5. Page 174.
6. Page 273.
7. Page 278.

influence on the Italian *conception* of international law." [8] Nevertheless, fascist ideology has undoubtedly affected the *attitude* of many Italian lawyers to specific issues of international politics.

Sereni furnishes many examples of Italian state practice covering the period from the 12th century to 1943. Early Italian state practice is particularly interesting as regards commercial intercourse, consuls, legations, neutral rights (*Consolato del Mare*), etc. The author's interpretation of the primary sources and of the pertinent literature helps to clarify many traditionally hazy views on this stage of diplomatic history.

Chapter XV on the "International Status of Italy" includes extremely noteworthy material which will be useful also in connection with plans for the reconstruction of Italy.

Ample references to the European literature on the history and the fundamental problems of international law are particularly valuable and the general bibliography [9] is a convenient guide to the Italian publications in the field.

The author is certainly right when he states that the leading Italian writers on international law are adherents of the dualistic theory propounded by Triepel in *Völkerrecht und Landesrecht* (1899). The positivists Donati and Anzilotti subscribe to this theory; and even the opponents of the positivist school: Romano and Balladore Pallieri disapproved of the monistic conception of international law.[10] The non-recognition of the superiority of international law seems, however, a weak spot in the body of doctrines evolved by Italian international lawyers.

On the whole, Sereni takes great pains to show how in the early stages Roman law rules were accepted or adapted as rules of conduct between or among independent states. This development proves that the monistic school—occasionally called the Austrian school of international law—is right in its insisting that the rules of international law are not basically different from the rules of domestic law. Sereni praises Gentili as one of the founders of international law because Gentili attempted to bring out the necessity of international relations "governed by actual rules of law," by "fixed juridical principles derived from a law of nature superior to the nations." [11] In addition, Sereni, after having severely criticized Anzilotti's theory on the sources of international law, recognizes that the binding force of international law is, at times, independent of the express consent of independent states. If these three criteria: structural identity of the rules of international law and the rules of domestic law, superiority of international law over domestic law, and acceptance of the binding force of the rules of international law even without express consent of states are considered the main tenets of the monistic school, the history of Italian international law reveals that many Italian international lawyers were adherents of the monistic school whether they profess it or not.

On the other hand, it is likely that even the Italian positivist school has not always been free from political considerations. For, as Kelsen has shown time and again, the primary purpose of the dualistic school is to have escape clauses ready the moment a conflict between international and domestic law arises. Although fascism may not have produced a genuine doctrine of international law it was not so difficult for the politicians as it may seem to reconcile the Italian theory of international law with fascist practices. By combining Mancini's claim to the place in the sun for the

8. Page 348.
9. Page 955.
10. Page 258.
11. Page 106.

Italian nation with the dualistic doctrine which denies that international law is superior to domestic law, a perfect legal basis was at hand for the Corfu-incident as well as for the self-defeating invasions of Ethiopia, Spain, Albania and Greece.

To be sure, the basic conflict between national independence and international interdependence, inherent in the structure of the community of nations as we know it in the 19th and 20th century, is not confined to Italy or the Italians. And even in the current discussion on post-war reconstruction is the principle of the superiority of international over domestic law very rarely mentioned.

However that may be, Sereni lives up to the high standards of his Italian predecessors and his book on the Italian conception of international law is to be considered a major contribution to the Italian and the American literature on international law.

Hans Aufricht.†

THE BURLINGTON COURT BOOK: A RECORD OF QUAKER JURISPRUDENCE IN WEST NEW JERSEY 1680-1709. Edited by H. Clay Reed and George J. Miller. American Historical Association, Washington, D. C., 1944. Pp. lv, 372. Price: $7.50.

In this volume, the fifth in the American Legal Records series, the Littleton-Griswold Fund carries forward its pioneer work of publishing the raw materials of American legal history. *The Burlington Court Book* is the record of the principal county court of West New Jersey, the great bulk of material covering the years before the fall of the Quaker oligarchy in 1703. Despite the fact that the Quakers were a minority of the population, they maintained a virtual monopoly of the bench. The judges, moreover, were laymen. Few if any of them had legal training; not until 1701 do the records mention a "lawyer"; and the first formal commissioning of an attorney was in 1709.

Like most reports of the period, these cases contain no judicial opinions, and hence tempt the legal technician to reconstruct symmetrical dogma from the bare facts and conclusions of cases. But this is a dangerous temptation, and one which the cautious reader will avoid. For the cases were not recorded by or for the black-letter lawyer.

Indeed, here is "case" law in the primitive atomistic sense. Precedents are not cited, and a lawbook is referred to only once. What one finds are half-remembered institutions crudely applied to work rough justice in a particular case. This is layman's law and breathes the life of a community speaking a half-understood language. But if the accents of professional finesse are lacking, it is apparent that the vocabulary of English common law is serving tolerably well the needs of a lawyerless society. In a case [1] where the defendant put in a special plea, and the defendant offered a demurrer, "The Bench give their opinion, That in regard of the infancy of the Province, advantage may not be taken against the formality of a Plea." One looks in vain for a case where a party might complain of the technicality of the law. And one begins to wonder whether the secret of the vitality of the common law in America is not that it was transferred and "received" here by laymen, men less concerned with professional doc-

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1. Page 172.

trine than with the effective use of the tools at hand to make common-sense solutions of daily problems.

Anyone who insists that law be defined from the point of view of Justice Holmes' "bad man" surely will not understand the Quaker jurisprudence, and might even conclude that this community had no law at all. The historian must therefore seek a category broader than the pragmatist's "predictable behavior of judges" and narrower than the whole of social and moral custom in which to classify the institutions described in the Burlington Court Book. The vagueness of the forms of action and the informal flexibility of remedies reveal the determination of lay judges that morality and good manners be supported by legal decision. Consider the case,[2] of which the complete report follows:

> "Roger Pinnick and Thomas Fowler to Answer the Complaynt of Henry Patrick. An Indictment Fyled against them, To which Pinnick and Fowler plead not guilty, and referre themselves to God and Country. The Court require of the Prisoners, whether they are sorry for their fault: To which they reply they are sorry. The Court alsoe require of the Prisoners, whether they will ask the Master forgivenesse, or not, before the Jury goe togeather: and wayt a while for their answer, they appeare a while unwilling to ask forgivenesse, but at last, they both desire the Master may forgive them, and that the Jury may be withdrawne, And the master forgiveing them, and assenting thereunto the Jury is withdrawne And the Prisoners cleared by Proclamation paying their Fees."

Or, the case of Thomas Peachee and his wife,[3] who were presented by the Grand Jury for not living together, "Whereupon the Court ask them both if they are not willing to come to a Reconciliation and live togeather as husband and wife ought to doe, And admonish them soe to doe . . . after some good admonitions from the Bench, they both promise they will forgett and never mention what unkind speeches or actions have formerly past betweene them or Concerning each other. . . ." In an action of trover for a horse,[4] where the jury brought in a special verdict recommending that the Bench propose a reference, the judges showed ingenuity, and disregard for legal formality:

> "Whereupon the Bench make this proposall to the Plaintiff and Defendant (vizt) That the Defendant Evans take the Horse or Gelding into his possession and pay Fifty shillings to Cole the Plaintiff and if hereafter the said Horse appeare by his Mouth, or other playne demonstration that the horse is not the Defendants by his age, Then the Defendant to return the Horse to the Plaintiff and the said Plaintiff then to pay back to the Defendant the 50s. And Plaintiff and Defendant, to pay equall share of Costs and Charges of Suite. To which proposall, Plaintiff and Defendant agree."

Perhaps the strikingly high proportion of causes withdrawn before trial is another evidence of the common-sense resourcefulness of judges in bringing litigants together.

Did the legal system function despite, or because of, this wholesale confusion of law and morality? The judges seem to be making a kind of

2. Page 42.
3. Page 163.
4. Page 33.

natural law of common-law materials. Such practical success as they achieved may be explained by the fact that the community did accept a fairly articulate set of common values. Or was it simply that this was not yet a commercial society? Although actions of debt are not uncommon, there are only three mentions of Bills of Exchange, and only one mention of assumpsit.[5] Economically, the most important cases seem to be those involving land, and some certainty had been introduced into this department by the connection of land ownership with the power to govern, which early had led to the recording of deeds. The vagueness of legal doctrine may be another explanation of the large number of withdrawals of cases before trial. It would seem futile to analyze these cases by a careful distinction between common law and equity, or even between judicial and legislative functions, since the county court was in many ways a legislative body. On the whole, flexibility and substantial justice seem preferred to the more commercial virtue of predictability.

The Burlington court, like other frontier tribunals, had its troubles in securing proper respect. Ample evidence of such difficulties appears in the numerous cases where constables refuse to serve, jurors refuse to appear, and citizens virtually thumb their noses at the sheriff asking for assistance. As in other reports of the period, one finds the earmarks of an unstable new community in the many cases of slander and assault.

The Introduction by Mr. Read deals with the political background; it is careful, scholarly and thorough, if somewhat lacking in liveliness. The purpose of the editors has been to make the text "*read* like the original manuscript, but not necessarily *look* like it." To do this with a seventeenth-century manuscript is admittedly difficult, and the work of the editors leaves nothing to be desired in the way of scrupulous care. As they themselves explain, a job of this kind requires the active interposition of editorial skill. The present reviewer regrets that the editors did not use their skill more boldly in making the printed page readable for the modern lawyer. The pages of this volume, reproducing the visual monotony of the original manuscript, would have been more inviting if the principal cases had been separated by headings, if the documents for each particular case had been clearly grouped, and if generally more typographical imagination had been shown. These devices need not have interfered with the essential accuracy of the reproduction. The index, excellent from the point of view of a genealogist, and adequate for the social historian, leaves something to be desired by the lawyer, who might have liked to see a more complete listing of technical legal terms. Still, these defects are minute. The lawyer and the legal historian will be grateful to Messrs. Read and Miller for this volume and will await impatiently the next volumes in the series.

Daniel J. Boorstin.†

JAMES MOORE WAYNE: SOUTHERN UNIONIST. By Alexander A. Lawrence. University of North Carolina Press, Chapel Hill, 1943. Pp. 250. Price: $3.00.

To write of a man is to write of his times. Especially is this true when the man is a statesman or jurist or one whose whole life is closely allied with the government of a people. In the present volume, although using as his central theme the story of James Moore Wayne, Mr. Lawrence

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has done more than record the life events of one man; he has produced a valuable account of the Supreme Court during the years of and preceding the Civil War, and in so doing has made a worthwhile contribution to the field of historical literature.

"James Moore Wayne does not belong in the foremost ranks of the men of his time. Among contemporaries he did not pass current as either a great man or a great lawyer, and history cannot raise that evaluation." This the author himself admits in commenting upon his subject. Yet, as is so often the case, a survey of the life of a comparatively minor character affords a more accurate conception of the thought of his day than does the history of a more outstanding figure, the glamour of whose personal life overshadows his background. Beginning his political career as an attorney and later Mayor of Savannah, Georgia, Wayne attained prominence in Southern politics more because he aligned himself with the popular political party and thus represented the majority view on political issues than because of personal brilliance. Upon his subsequent elevation to the Supreme Court of the United States, in which capacity he made periodic visits south to preside over the Circuit Court, he still reflected, if not the majority, at least a strongly supported view of political and social concepts in the South. With the advent of the Civil War, however, and the ever-growing clamor of southern states for an increasing recognition of the States Rights doctrine, Wayne remained steadfast to his belief in the Federal Government, and transmitted these beliefs into the current decisions of the Court, despite the fact that in so doing he was opposing the cause of his own state—a cause for which his son was to fight as an officer of the Confederate Army.

Because the war was brought about by disagreement among the states on the fundamental issues of government, the part played by the Supreme Court, especially in rendering decisions immediately affecting the controverted issues, was one of the most important in its history. The author devotes several chapters to a discussion of the Court's decisions during this period and their effect upon national politics, including not only the famous *Dred Scott* case[1] and later decision *Ex Parte Milligan*,[2] but also many lesser known decisions. For the student of constitutional law, these chapters alone would make the book worthwhile reading.

It is unfortunate that most of the papers and personal effects of Wayne were destroyed following his death. Because of this many of the intimate anecdotes that customarily color biographical literature are missing and several periods of the jurist's personal life are merely touched upon, with greater emphasis, as has been pointed out, upon current political events. Despite this shortcoming, however, the book is excellently written and can well take its place on the shelf beside the growing list of biographies of jurists and statesmen that have appeared within the past few years.

Phyllis Kravitch.†

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1. Dred Scott v. Sandford, 19 How. 393, 15 L. Ed. 691 (U. S. 1856).

2. 4 Wall. 2, 18 L. Ed. 281 (U. S. 1866).

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