BOOK REVIEWS.

THE NATURE OF THE JUDICIAL PROCESS. By Benjamin N. Cardozo, LL. D.
Being lectures delivered by the author before the Law School of Yale University. Yale University Press, New Haven, Connecticut, 1921, pp. 180.

Judge Cardozo has published in book form four lectures which he delivered before the Law School of Yale University. The volume is dedicated to the memory of a young graduate of Yale University, who after a distinguished career in college, and the Law School, won an enviable position at the New York Bar which he held at the time of his death in the fortieth year of his age.

While these addresses were prepared for and delivered to classes of law students, they are worthy of a much wider audience, explaining as they do in clear and specific terms the basis of logic and philosophy underlying court decisions frequently criticized as judicial legislation.

The broad expansion of police power in recent years is a source of bewilderment to the unthinking who endeavor to reconcile the avowed protection secured by constitutions to those rights of life, liberty and the pursuit of happiness asserted in the Declaration of Independence to be the inalienable right of each human being with the endowment of life from the hand of God, and judicial decisions declaring in effect whatever a strong and preponderant public opinion regards as against the prevailing morality and inimical to the public welfare constitutional, guarantees are impotent to secure; upon which doctrine is predicated the right to abolish private ownership of property for the public welfare. It has been said with well founded reason, "before this apothesis of police power, the right of free speech, a free press, freedom of conscience and religious worship must yield."

The founders of our government never claimed that it was perfect in its foundation.

The author has presented with clarity the distinction between liberty as an abstract quality—the inspiration of the poet and the panegyric of the orator, and the liberty which living in a community governed by law, among men subordinate to law, and in a society restricted by law, we can know only in terms of law and indicates that it is public or political liberty of the citizen with which legislative bodies and courts have to deal, rather than the private or individual liberty of the man. That law to which the individual is subject ascends from the people and is the product of its impulses, its conscience, and its traditions.

All human history demonstrates there can be no real liberty without restraint, and no civilization that is not governed by law.

The lectures treat of the mental process of the judge in applying philosophy to judicial decisions where the facts are admitted or ascertained and the law applicable to the case is determined. "Any judge," it is observed, "one might suppose, would find it easy to describe the process which he had followed a thousand times and more"; but he adds "nothing could be farther from the truth."

In the plenitude of experience he declares: "I take Judge-made law as
one of the existing realities of life," but he asserts that "some principle, however unavowed and inarticulate and subconscious, has regulated the infusion," and presents a skillful analysis of the conscious and subconscious elements that enter as ingredients in the law thus declared.

Quoting from Geny that, "The power thus put in their hands is great and subject, like all power, to abuse," he avers, "in the long run there is no guaranty of justice," in the words of Ehrlich, "except the personality of the judge."

Where there are precedents, legislation, codes or constitutions plainly applicable to the question in hand no difficulty arises, but it is where there are gaps to be filled, "doubts and ambiguities to be cleared" hardships and wrongs to be mitigated, "the judge, as the interpreter for the community of its sense of law and order, must supply omissions, correct uncertainties and harmonize results with justice." This result should be accomplished through a method of free decision is the plea in a school of continental jurists.

The three directive forces invoked in rendering decisions, it is maintained by the author, are those of philosophy, history and customs.

By a wealth of supporting authorities he shows that logic, philosophy, history and sociology have their part in the making of law, and "when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other larger ends."

"From history and philosophy and custom," he says, "we pass therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology."

This is followed by the assertion that the final cause of law is the welfare of society; and that "new times and new manners call for new standards and new rules." Constitutions, he declares, are more likely to enunciate general principles, which must be worked out and applied thereafter to particular conditions; and from all this, it results that the content of constitutional immunities is not constant, but varies from age to age. The needs of successive generations may make restrictions imperative today, which were vain and capricious to the vision of times past.

A constitution should state not rules for the passing hour, but principles for an expanding future; embody only relatively fundamental rules of right as generally understood by all English-speaking communities, and not become the partisan of particular ethical or economical opinions; and the function of the courts to fix the limits of possible encroachment by statute upon the liberty of the individual should be reserved for exercise with insight into social values, and with suppleness of adaption to changing social needs. In the performance of this function the judge is to exercise a discretion formed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order for the social life. This restriction of individual liberty he defines as the "method of sociology." The judge, he declares, should be thinking of the end which the law serves, and fitting its rules to the task of service.
The analysis of the judicial process is described as consisting of logic, and history, and custom, and utility, and the accepted standards of right conduct and these are the forces which singly or in combination shape the progress of the law; but, one of the most fundamental social interests it is admitted, is that the law shall be uniform and impartial; and therefore in the main there must be adherence to precedent.

We are assured that the method of sociology, even though applied with greater freedom than in the past, is heading us toward no cataclysm; for insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side.

Their conclusions must, indeed, be subject to constant testing and re-testing, revision and readjustment; but if they act with conscience and intelligence, he claims, they ought to attain in their conclusions a fair average of truth and wisdom.

The recognition of this power and duty to shape the law in conformity with the customary morality, he asserts, is something far removed from the destruction of all rules and the substitution in every instance of the individual sense of justice; and assures us that modern juristic thought, turning in upon itself, subjecting the judicial process to introspective scrutiny, may have given us a new terminology and a new emphasis; but in truth its method is not new: it is the method of the great chancellors, who without sacrificing uniformity and certainty, built up the system of equity with constant appeal to the teachings of right reason and conscience. It is the method by which the common law has renewed its life at the hands of its great masters—the method of Mansfield and Marshall and Kent and Holmes.

The convincing truths thus presented by Judge Cardozo call for thoughtful reflection upon the prophecy of Samuel Butler that the next tyrant of the world would be organization. We have been taught that the acceptance of the decision of a majority of the people is the very foundation of a Republic; but to secure the acceptance the decision must be that of a majority, and not of a minority read into the law of this land by manipulation of the machinery. The prevailing idea is that the people's will is absolute; and that, therefore, whatever a majority or in case of a divided vote, even a minority determines to do or demand, irrespective of its character, it is free to ordain. Was it not precisely this domination of arbitrary power that the Constitution was designed to prevent? Should not legislation be limited by the provisions of this fundamental law containing a guaranty of personal rights and liberty that should never be taken away?

We are today confronted by problems that reach to every phase of our social, industrial, economic and international relations.

In many instances, States and Municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the dominion of private enterprise. If there is no constitutional barrier against the program of the ultra-radical, the barrier if it exists must be found in the sober sense of the American public voiced in public opinion.

It was said by the late Lord Bryce: "The greatest peril to self-govern-
ment is at all times to be found in the want of zeal and energy among the citizens; and that this is a peril which exists in democracies as well as in despotisms." Submission, he said, is less frequently due to overwhelming force than to the apathy of those who find acquiescence easier than resistance.

While the police power doctrine is the outstanding feature of the decisions of the last decade, concurrently with this has come development of intensive and scientific lobbying by compact and zealous minorities, a form of influence which legislatures both state and national have shown themselves unable to resist. With the relaxation of the constitutional limit once enforced by the courts we are warned that the day of despotic rule by minorities in the United States is not far off. It is apparent if the majority was at all times awake to its own interests the situation would soon correct itself, and the lobbying which is rapidly making a farce of representative government would be checked by law; but the history of the American people shows a tendency to submit overlong to an abuse and then correct it with undue violence. In affording the recognition to the state of public opinion it is of grave moment that the courts be informed that in recent years a new form of special control has arisen, that of strongly organized and heavily financed minorities; and that this control is even more dangerous to political liberty than that of the party machines, for it is not only free from the check which internal rivalries exert upon machine politics, but also enjoys the insidious advantage of being able to masquerade as the agent of a popular demand.

Long prior to the decision of Bourquin J., in A. M. Holter Hardware Co. v. Boyle, 263 Fed. 134, experience had taught us that "public opinion, prevailing morality, emergencies, may warrant denouncement as crime today what was lawful yesterday; may do in behalf of public welfare today what could not be yesterday."

"Public policy," said Baron Parke, "is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expediency,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person. Who is to decide whether an act is against public policy or not? To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislatures to determine, what is best for the public good. It is the province of the judge to expound the law only; not to speculate upon what is the best in his opinion, for advantage of the community."

In these admirable lectures Judge Cardozo has handled his subject with skill and learning, and presents his case forcefully, lucidly and in a style well calculated to charm and interest the lawyer, the layman and the student.

J. Willis Martin, LL.D.

President Judge, Court of Common Pleas No. 5, Of the First Judicial District of Pennsylvania.

In this book the author undertakes to examine the workings of the present Constitution of the United States and to suggest a revision thereof through the holding of a Constitutional Convention which would make the text of the Constitution more nearly conform to what he conceives to be the established practice, or which will bring about changes in the Government of the United States which he thinks would be desirable.

The book is interesting as setting forth the point of view of one who evidently has very advanced ideas as to methods of government. Some of the proposals in it will commend themselves to students of constitutional government; others are of doubtful wisdom, even if a general revision of the Constitution should be attempted.

The author's opinions are obviously affected, as they naturally would be, by his conception of existing facts and conditions, but it is impossible to escape the conclusion that his judgment as to what is the present condition in at least some particulars is at fault. For example, in his chapter on "The Federal System," he states that: "It is well within the truth to say that, the authority and prestige of the States as governments is approaching the vanishing point." A little later he says that the obvious tendency is for the States to become mere subdivisions or departments of the Federal Government, and for all the larger affairs of life to be regulated by Federal laws.

One might reach this conclusion from contemplating only the power of the Federal government which has been greatly extended in recent years, but in point of fact the State government touches the individual in a hundred places where the Federal authority touches it in one, and it is certainly too much to say that the authority of the States is approaching the vanishing point, or that they are likely to be reduced to mere administrative departments of the Federal government. On the contrary, there is at the present time a distinct reaction against the constant extension of Federal power. This fixed impression, which the author evidently has, however, has colored the book and has led him to propose more drastic changes in the Federal Constitution than he himself probably would have proposed had he a more accurate conception of the relative powers of Federal and State governments.

The principal proposal discussed in this book is that the executive power of the United States Government should be vested not in a President elected for a fixed term, but in a Premier and Cabinet. The argument of the author in favor of the change is based on what is called the irresponsibility of the present system, by which he means that the President during his fixed term of four years cannot be called to account for his actions, except by impeachment, hence there is no effective method of controlling a President who follows his own judgment rather than that of the people or of a congress or parliament.

The author apparently feels that to have a premier appointed by the President, in the same manner that the Premier of England is appointed by
the King, and a cabinet selected by the premier, who would be required to resign whenever they were not supported by Congress, would substitute responsible for what he calls irresponsible government. His theory is that responsibility should be to the people and that changing opinions of the people would require the premier and cabinet to follow or else to surrender their powers.

It is not quite clear that this is true, even if the proposed change were made; it is conceded that the members of Congress must be elected for fixed terms, and the members of Congress so elected would not necessarily yield to public opinion during the period of their terms of office any more than the President would during his term. In other words, even under the method proposed by the author of this book, there is no way whereby the people can, except in an indirect manner, make their influence controlling over the party in power.

There have been many discussions in America among students of constitutional law as to which of these methods of government is best. No doubt there are many arguments which can be advanced in favor of the English system, and some of these are very ably put forward by Mr. MacDonald. On the other hand, it should not be overlooked that there is much to be said in favor of the American system—the election of a President who is charged with responsibility for four years, and who during the same period is substantially safe from interference.

While a corrupt or reactionary president might do injury to the country by the conduct of his office, it might equally well happen that a strong president, able to withstand a wave of public sentiment, could do the country a great service which he would be unable to do if by a change in public opinion he could be removed from office. It is only necessary to go back to the administration of President Cleveland to find an illustration. Undoubtedly, under the English system, President Cleveland, as Premier, would have been swept from office and would have been unable to preserve a money standard which now is universally admitted to have been the sound one. Mr. Cleveland was far-sighted enough and strong enough to withstand pressure from his own party; when he left office he was in great disfavor with his party, but he lived this down, and was greatly honored and respected during the last years of his life, not only by members of the Democratic Party, but by the whole nation.

But the service which he performed for the country could not have been performed if he had not been in office for a fixed period without an opportunity of interference.

This is only another way of saying that it is not always safe to assume that popular opinion is correct; the minority have often been right. It cannot be assumed without argument that those charged with responsibility for the conduct of government should at all times be subject to removal, if there should be a change of popular opinion or if they do not meet such changes by trimming their own sails accordingly.

It may be well to notice at this point that the author does not inform his readers how public opinion is to be ascertained. This is difficult enough even through elections at stated periods. There is, however, no other way at the
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present time which can be relied upon. Opinions which are expressed in the newspapers sometimes represent but a small portion of the electorate and often distinctly a minority. Congress, as well as the President, may often be right in refusing to follow what seems at the moment to be the majority opinion but, which ultimately may be found to be but the expression of views of the more noisy members of the community.

The other proposed changes in the Constitution are less important, and, perhaps, beyond the scope of this brief review. Some of them, however, may be mentioned. It is, of course, recognized that the presidency under the new plan would be greatly changed; while the President would probably have more power than the British King, he would be the head of the government only in an ornamental or technical sense. Most of his great powers would be taken from him and given to the premier and the cabinet. He would be shorn of the veto also, which would be abandoned altogether.

It is proposed that Congress should still consist of two houses, but that they should be elected for equal terms not exceeding four years, subject to be terminated if the government should fall. It is proposed that Congress should be given greatly added powers, partly on the theory that the government would now be responsible to the people, and partly on the theory that the Congress exercises such powers anyway. For example, it is proposed that Congress should be given power to pass laws relating to marriage and divorce, child labor, the regulation of prices, wages, conditions of service, etc.; also that Congress should be given power to nationalize any industry if, after debate in Congress, it was deemed desirable to do so. Realizing that giving such great additional powers to Congress might be very dangerous, the author proposes that Congressmen should be subject to recall by the people at any time.

He also proposes that the control of elections should be given to the Federal Government, and is especially savage against the Southern States, which, he says, have violated the Constitution for many years in the matter of the disfranchisement of the negroes. He is of opinion that the States which have so offended should be debarred altogether from representation in the House of Representatives and from participation in presidential elections until they have granted full suffrage to the negroes.

Another quite novel and rather interesting suggestion made by the author is that there should be a new basis for representation in the House of Representatives; that some shall be elected to represent units of population and others to represent professions or occupations. It is not altogether clear how the author proposes to work out this plan in practice, and indeed it would be difficult, if not impossible, to do it. Moreover, it seems quite clear that such a proposal is most unwise. One who is elected to a legislative body by a profession or group is certain by his vote to represent that profession or group rather than the interests of the people as a whole. Of course, this cannot be prevented to some extent in any event; a representative is likely to favor the interests of the class to which he belongs, and to some extent the profession to which he belongs, but not nearly to the same extent that he would if he were elected by the class or profession expressly
for that purpose. For example, the position of a lawyer in Congress would be quite different if he represented his own profession, instead of a constituency, as at present, consisting of the entire population of a certain district. The same would be true to an even greater degree of one who represented some other profession or occupation, whose peculiar interest in legislation would be greater than that of lawyers, who have little direct interest in the result of legislation different from that of other citizens.

In the chapter devoted to "The States," the author submits some interesting observation on a number of rather unrelated subjects. He is opposed to the Eighteenth Amendment, which gives the States concurrent power to enforce the prohibition law, and he again returns to the charge against the Southern States, who have restricted the rights of negroes to vote, holding that these States have not a republican form of government. He also devotes a paragraph to Rhode Island, concluding that it too is without a republican form of government, owing to "the extraordinary inequality in the distribution of population, in consequence of which the City of Providence" which contains nearly one-half the total population of the State, has only the same influence in the State Senate as towns of only a few hundred inhabitants. This is indeed an unusual and peculiar situation if correctly described, and one which is not so generally known as the condition existing in the Southern States.

The author also thinks amendments should be adopted so as to forbid any person or corporation engaged in interstate commerce from employing "bodies of armed guards for the protection of their property"; also that lynching should be suppressed by a constitutional amendment, and that States should in the same manner be prohibited from appropriating money to institutions of a sectarian character.

Without going further into the details of the book, which it is impossible to do in this short review, it is sufficient to say that it is well worth reading as an interesting and stimulating discussion of many points upon which the Constitution is supposed to be defective or obsolete. Many of the conclusions of the author must be disagreed with, and most students of constitutional history would conclude that the Constitution, with the changes proposed, would not be an improvement over the present one.

As is indicated by the foregoing remarks, the second great change which the author proposes in the government of the United States is in the legislative system, whereby the power of the Federal government would be greatly enlarged and the powers of the States greatly lessened. Here, too, the author strikes at a vital principle. It cannot be doubted that the success which has attended the American experiment in government has been due in large part to the fact that there is no attempt from a distant Capital to govern the entire country in those matters most narrowly affecting the individual.

It was, perhaps, the wisest provision of our Constitution, although made necessary by historical facts, that powers of local administration remained in the State governments. If the Federal government had undertaken to carry on the great powers which the author of this book now proposes shall be
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vested in it, its success would have been very doubtful, partly because of the
difficulty of providing by a central government for the needs of a population
so widely scattered, and with such varied requirements, and partly because
of the impossibility of meeting those needs justly.

Local responsibility and local self-government have been the safeguard
of our country's welfare. Men will submit to what they deem inconvenience,
or even interference with their rights, from a government close to them, and
which they have themselves established, but they will not submit willingly to
what they deem unnecessary invasion of right by laws passed by legislatures
situated thousands of miles away.

If the powers of government now exercised by the States in various por-
tions of this country, should in large part be taken from them and vested in
the Government at Washington, discontent with the growing interference with
private affairs by public laws would surely increase and ultimately the Gov-
ernment itself would be in danger.

Thomas Raeburn White.


Conscription System in Japan. By Y. Takata. With a preface by Go-
taro Ogawa, D. C. L., Professor of Finance in the University of Kyoto. Being
one of the Publications of the Carnegie Endowment for International Peace.
Oxford University Press, New York City, 1921, pp. xiii, 245.

Conscription System in Japan is a volume recently received whose title
challenges our attention. Interest is further aroused by the high character of
the introductions which accompany it. It is published by the Carnegie En-
dowment for International Peace. It is further listed as the first of a
series of Japanese Monographs edited by Baron Y. Sakatan, who ranks
among the most scholarly and thoughtful of the liberal leaders in modern
Japan. It opens with an introductory note by Dr. John Bates Clark, of Co-
lumbia University, the director of the Division of Economics and History of
the Carnegie Foundation. The note, written in September 1920, is interesting
as an expression of views generally held two years ago and which centered
on two outstanding convictions—the birth of a new world which, as Dr. Clark
states it, “evolved suddenly out of a world which we knew,” and secondly,
the menace of Bolshevism which in 1920 seemed to be a “portentous fact.” Since
then we have grown rather sceptical about the new world, and for the “grave
determination of Russian communists to extend their system by crude force
from State to State” we find substituted the amiability of the mild-mannered
men in high hats and frock coats who are now attending the Genoa Confer-
ence. But the singular thing about the prefatory note is the absence of any
reference whatever to the work which it introduces or the character of the
investigation.

Following the introductory note is the preface written by Dr. Gotaro
Ogawa, of the University of Kyoto, who (to quote the quaint English of
"Who's Who in Japan") “at present is taking in charge of Chief of the
Kyoto Branch of the Economical Investigation Society which belongs to the Japanese Branch of the Carnegie Peace Foundational Economical Department." On the title page, Dr. Ogawa is named as the author of the work but this honor he expressly repudiates in the preface. "I was glad to give some suggestions," he says, "about the collection of material and the construction of arguments, but have done little toward the completion of this laborious work. It is the result of the author's untiring efforts"—the author, being Mr. Y. Takata. Having thus completed the introductions, we turn with heightened interest to the essay itself. Mr. Takata has limited himself to a purely statistical study of the effects of conscription in Japan. He has therefore of necessity excluded many aspects of his subject—moral and political—and has concentrated on certain economic aspects of the problem.

Before noting the method by which Mr. Takata marshalls his statistics and reaches his conclusions reference should be made to the first six chapters dealing with the historical development of Japan's system of conscription. In this survey Mr. Takata has rigidly adhered to those modern conventions of scholarship which we associate with German universities and has studiously avoided any comments or observations which might add life or color to his narrative. It is difficult for one to realize as one reads those chapters, that buried in the laws he cites and the statistical tables he submits is the romantic story of Japan's transformation from a highly organized feudal State into a modern military power. The hero of that story is Yamagata Aritomo, better known to our generation as Prince Yamagata, whose restless life closed only a few weeks ago. Born in 1838, the son of a feudal soldier of the Choshu Clan, he lived to see the Island Empire, which he so devotedly loved and so patriotically served, humble the pride of China, beat back the advance of Russia and emerge with added prestige from the World War. Few Japanese would hesitate to credit these achievements to the efficient military machine, which Prince Yamagata created and jealously guarded. Such success brought him not only honor, but vast power. As senior Field Marshal, as Supreme Military Counsellor, as President of the Privy Council, as Elder Statesman and holder of the coveted Grand Order of the Chrysanthemum, he dominated absolutely the policies of his country for a generation. Two short references in Mr. Takata's survey are deemed sufficient mention of this outstanding figure in modern oriental life. On page 7 he says, "It was Omura, who laid the foundation of the conscription law, upon which Aritomo Yamagata constructed the system in detail." Again, on page 17, "In August (1870) Aritomo Yamagata, (now Prince Yamagata) returned from his inspection tour through Europe.

. . . He prevailed upon them (i. e., the Government) to adopt the French system." Such economy and reserve may be scientific scholarship. It is not history.

We turn now to Mr. Takata's study, which includes separate chapters summarizing the effects of conscription on population, on the development of towns, on employment, on labor, on productivity, and on consumption. It is impracticable within the limits of this review even to touch upon the extensive data submitted by Mr. Takata or to test the conclusions which
he has reached. We confess, however, to a peculiar interest in the chapter, which deals with the effect of conscription on population and perhaps a brief reference to this chapter will serve to illustrate Mr. Takata's methods and the limited value of his conclusions.

The recent extraordinary increase in the population of Japan, presents one of the most interesting developments of our generation. Perhaps we can state the nature of this increase by means of a few figures. Careful investigations indicate quite accurately that in 1721, the population of Japan was a little over 26,000,000. In 1846, just prior to the opening of the ports and resultant contact with western civilization, the population was estimated as barely 27,000,000. Hence, it appears that for at least one hundred and twenty-five years the population of Japan remained practically stationary. Now note the change: In 1871 the population had risen to 33,000,000; in 1881 to 36,000,000; in 1891 to 40,000,000 and in 1921 to 57,000,000. What were the factors—social and economic—which retarded the growth of population during the centuries of seclusion and have so greatly accelerated it during the past fifty years of contact with the West? Over a quarter of a century ago this problem challenged the attention of Garrett Droppers, then a brilliant young teacher in Tokyo, and recently American Minister to Greece. In a paper read before the Asiatic Society of Japan he sought to explain the causes of this remarkable contrast. Among the social factors noted by Mr. Droppers conscription plays no part. Has it done so in these intervening years as the system of conscription in Japan has been enlarged and elaborated? Answering this question Mr. Takata offers a number of carefully prepared statistical tables. While obviously the results of painstaking labor, to the casual reader the statistics are inadequate and inconclusive. Evidently they produced this effect on Mr. Takata, for in summarizing the results he says: “We have seen that the system of conscription gives rise to the two contrary effects. It causes a decrease of birth rate on one hand, while it causes an increase of birth rate and decrease of death rate on the other. We cannot say definitely which of these two effects has the tendency to predominate over the other because we cannot determine the definite quantity of the latter. At any rate we can say that the effects of the system upon these several rates are not very great.” This impotent conclusion we interpret to mean that statistics, however conscientiously gathered, standing alone, tell us nothing. They are at best merely a small portion of the raw material of the thinker. In this aspect Mr. Takata's volume has some value. But the story of the effects of conscription on Japan in its larger significance is still to be written.

Formerly Ambassador to Japan.

Roland S. Morris.

CONFLICT OF LAWS. By John P. Tierman, Professor of Law, University of Notre Dame. Callaghan & Company, Chicago, 1921, pp. vi, 122.

It is to be gathered from the preface that this book is intended for use in instruction in law schools, where the case method of study is not used.
The author states that "in his presentation of this difficult subject in the class room he has produced satisfactory results only by a combination of text, cases, and lecture in proper proportion." He says "instead of merely stating the law, he has by clear, simple language explained it, so as to reproduce, as far as possible, the full value of the class instruction," and that "it is this very feature, it is believed, that will commend it for Law School purposes to instructor and class alike."

The book does not purport to cover the whole subject of Conflict of Laws, the author stating (p. 88) that only a few of the particular subjects have been selected which, because of their difficulty and their practical importance, require special attention.

The book is divided into twelve chapters, a chapter being devoted to each of the following topics—Comity, Torts, Death Actions, Contracts, Remedies, Interest and Usury, Sales and Chattel Mortgages, Marriage, Legitimacy and Adoption, Wills, Crimes and Penal Actions. There is no chapter on any of the important topics of Capacity, Domicil, Divorce, Administration of Estates, Jurisdiction, or Judgments, though some of these topics are treated incidentally in the discussion of other branches of the subject. To omit entirely such important practical topics as Divorce, Administration of Estate, and Domicil and give an entire chapter to Interest and Usury is difficult to understand. Usury and Interest can hardly be deemed more important or practical than Divorce or Administration of Estates.

The plan of the book is to state the law, in the form of definite rules, at the beginning of each chapter and to follow this with text elaborating and explaining the rules, and one or more cases illustrating the rule and text.

The book is written in a somewhat colloquial style. Such expression as "no doubt we have all studied Domestic Relations" (p. 88); "those of us who have studied contracts will recall" (p. 53) give the impression (though it may be an erroneous one) that the text is a transcript of lectures. Some of the language, too, is popular rather than technical, as where the author in dealing with actions for wrongful death speaks of them as "death actions." In this connection it may be noted that the author confuses the action to recover damages for the tort with the tort itself. He says (p. 13), "A death action is a tort" and (p. 16) "a death action, though statutory, in origin, is also transitory, and can be enforced in any state under the general rules of Comity, applicable to such actions." He says (p. 16): "So far, the substance of our discussion of death actions is, that they arise in the state where the injury is inflicted; that they are statutory torts; and that being actions to recover a personal judgment, are transitory," etc.

Exception must be taken to some of the statements of law made by the author. If, as he thinks, a contract is to be governed by that law with reference to which the parties contracted, it seems erroneous to state as he does in the black letter text (p. 21) that the general rule is that the law of the place where the contract was made is the governing law, and then to state as an exception to this general rule that if the contract is to be performed in a place other than the place of making that the law of the place of performance is to govern. In the body of the text, he says (p. 30),
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“there is no difficulty in defending either the rule or the exception, because, as has been said, the _applicatory law_ is the law with reference to which the parties contracted.” If that is the applicatory law it should be stated as the _rule_, the place of making or performance merely affording evidence that the parties intended the law of the one place or the other to apply. Of course it would follow, also, that if the applicatory law is the law with reference to which the parties contracted, that they might have intended the law of a third state to apply, in which case neither the law of the state in which the contract was made—the stated rule—or the law of the state in which the contract was to be performed—the stated exception—would apply.

On page 21, in the black letter text, he states “a contract void where made, or to be expressly performed, is not enforceable in another state” and again on page 43, in closing the discussion of contracts, he states “a contract void where it is made or is to be performed, is void in all states.” Nine cases are cited as authority for this statement. None of these cases support the text, and it is believed the statements do not express the law. The books are full of cases of contracts held to be valid which were void in the state in which they were made, and of contracts held to be valid which were void in the state in which they were to be performed. So the statement (p. 43) that the author says is the converse of the above statement that “if a contract is valid where it is made or is to be performed, it is valid in all states,” is denied by many cases. Indeed, it is inconsistent with the author’s statement on page 30, that the applicatory law is, not the law of the place where the contract is made or is to be performed, but the law with reference to which the parties made their contract. So the author’s statement (p. 68), “a sale is made in that state where the property is delivered” is not in accord with principles of the law of sales.

The author lays down the rule (p. 27) that discharge of a contract is governed by the law of the state in which the contract was made. The only case he cites in support of his proposition is Graham v. Bank, 84 N. Y. 393. In discussing this case, he quotes from the language of the court as follows: “In the present case, the contract was made in Virginia and to be _performed there_. The dividends were there _declared_ and _payable_. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia to his own use and benefit. The payment was therefore valid and effectual and discharged the bank from liability. Minor cites this case for the rule that discharge of a contract by performance is governed by the law of the place of _performance_. (Minor, Conflict of Laws, 465) and Beale cites it for the rule that questions of performance depend upon the law of the place of performance (Beale, Sum. Sec. 96).

It is said on page 95: “as regards realty, all questions in Wills that pertain to it, such as validity, or revocation or construction are governed by the law of the location. There is no exception to this general rule.” Mr. Beale says (2 Beale’s Cases on Conflict of Laws, p. 256 n.): “A will of personal property is to be interpreted, in the absence of strong evidence of a contrary intention, according to the law of the domicile. The same rule is generally followed in interpreting a devise of real estate.” Minor says (p.
A few cases may be found holding that the interpretation of the devise must depend upon the *lex situs*. But here too the weight of reason and authority is in favor of the rule that the interpretation of the devise is to be governed by the law or usage with which the testator is supposed to be most familiar, namely that of his domicil. Story, (*Conflict of Laws*, 8 ed. 671) also says the law of the domicil applies.

It is stated in the chapter on Legitimacy and Adoption (p. 88) that “the law of the state where the infant is domiciled determines validity of legitimacy or adoption.” This is not a correct statement of the law. It is generally agreed that legitimacy is determined not by the infant’s domicil but by the domicil of the father. The principle on which the author states that the domicil of an infant determines the validity (sic.) of legitimacy is that the domicil of an infant is that of his father (p. 89). But, of course, this is not true of illegitimate children.

A grave fault in the book is the idea it conveys to the uninitiated student for whom it is apparently intended, that the law of Conflict of Laws is simple, clear and well settled, whereas no topic of the law is more subtle, complicated and subject to difference of opinion.

William E. Mikell.


The object and scope of this book, which is a thesis approved for the degree of Doctor of Laws in the University of London, are indicated by the title. As the author points out in his introduction, the problems of insanity and mental deficiency have been generally considered in their relation to the criminal law. There is consequently room for such a book as this purports to be. Although the greater portion of the text is devoted to a discussion of the English cases, the author makes frequent references to the law of other countries as well as the British colonies.

In Chapter I the various forms of mental disorder and defect are defined and classified. In Chapter II responsibility for tort is discussed, the *dictum* of Lord Esher in *Hanbury v. Hanbury* (8 T. L. R. 559 C. A.) that responsibility exists “provided the disease of the mind of the person doing the act be not so great as to make him unable to understand the nature and consequence of the act which he was doing” being accepted as a correct statement of the English law. Chapter III deals with capacity to contract. The author recognizes the decision of the Court of Appeal in *The Imperial Loan Company, Limited, v. Stone* (1892, 1 Q. B. D. 599), which permits insanity to be set up as a defense to an action for breach of contract only.
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where this was known to the plaintiff at the time of contracting, as representing the present law of England, but considers the result unsound and unsatisfactory. In his opinion the law should be as follows:

"The alleged contract is void, but, with the object of preventing the lunatic from benefiting from his acts, the lunatic or his estate shall be required to make restitution to the other party where:—

"(i) The lunatic has derived benefit as a result of his act, and
"(ii) Where the other party has suffered loss as a result of the act of the lunatic" (p. 90).

Chapters IV, V, VI and VII are devoted respectively to mental deficiency and marriage, supervening insanity and divorce, testamentary capacity in mental deficiency, and evidence of insanity. In an appendix the powers and duties of the English authorities concerned in the administration of the law regarding insanity and mental deficiency are summarized, and suggestions for the reform of such administration are presented.

This book, viewed as a whole, indicates wide research and careful study by the author. The scope of his investigation is really remarkable, embracing, as it does, in places, the laws of most civilized countries. In the chapter on Insanity and Divorce, for instance, he sets forth the laws of twenty-seven countries in addition to those of the British Dominions and the United States.

The author’s treatment of the subject is generally original, and most of the text shows careful study. In the chapter on testamentary capacity, however, nearly one-half of the text (10½ out of 24 pages) was taken from the opinion of the court in Banks v. Goodfellow (L. R. 5 Q. B. 549). With the exception of two pages, this text appears without quotation marks. Some portions of the unquoted text are paraphrased, while others appear without verbal change. On page 149 the author presents as his own a discussion of American cases, which is to be found in the opinion of the court in Banks v. Goodfellow (supra).

A number of inconsistencies and inaccuracies were noted. In the first place the author frequently confuses mental unsoundness or insanity and mental deficiency or feeblemindedness, although recognizing their fundamental difference in the title of his book. On page 3 he treats feeblemindedness as synonymous with unsoundness of mind and then proceeds to divide this mental state into two classes, (1) "where there is absence or weakness of mind" and (2) "where the mind which once was normal has subsequently become deranged." On page 16 he treats feeblemindedness as a form of mental unsoundness, and on page 17 confuses mental deficiency and lunacy. Chapter III is entitled “Mental Deficiency and the Law of Contract,” while three of the subheadings relate to “insanity.”

There appears to be an inconsistency between two of the author’s statements relative to the English law of testamentary capacity. In one place (p. 132) he states the following: “The law is not satisfied to apply the layman’s test of whether or not the testator is very different from other men, but it applies the general test. Was the testator, at the time of making the will, labouring under delusion?” Later he says: “From an examination of the
English Law Reports there appears to be no doubt that an ordinary lunatic, i.e., one who is deficient in his general faculties, does not possess testamentary capacity." (p. 141.) The second statement is broader than the first, as delusion is but a single symptom of mental disease.

A surprising error occurs in a reference to Blackstone's Commentaries. On page 57 the author states the following: "Sir William Blackstone's view of the liability of lunatics for their torts was that inasmuch as a wrong is the effect of a 'vicious will' (by which Austin says, he means 'unlawful intention or culpable negligence') infants and madmen are exempted because the act goes not with their will," citing IV Comm. 20-24. One need not be very familiar with Blackstone to know that "vicious will" is his test of responsibility for crimes not torts. On page 21 of Volume IV he says: "So that, to constitute a crime against human laws, there must be, first, a vicious will"; and on page 24 he states: "The second case of a deficiency in will, which excuses from the guilt of crimes, arises from a defective or vitiated understanding, viz., in an idiot or lunatic."

In his chapter on Torts the author states: "While the American authorities are agreed that persons non compus (as well as children without discretion) are not responsible for their torts where intention is a necessary element of liability, they state that infants and lunatics, without regard to their degree of incapacity, are liable, in a civil action, for the damage caused by such torts of theirs as would in sane adults amount to a tort of either wilful wrong or culpable negligence" (p. 58). Referring to this statement he says on the same page "there is no authority for it apart from the case of Williams v. Hays" (143 N. Y. 442; 42 Am. St. Rep. 743). Both these statements are incorrect. The doctrine that an insane person is liable for his torts prevails generally in this country. While some courts state that liability is confined to torts not involving intention (Jewell v. Colby, 66 N. H. 399; Feld v. Borodofski, 87 Miss. 727; C. & O. Ry. Co. v. Francisco, 149 Ky. 307); others lay down the rule that an insane person is liable for any tort (McIntyre v. Sholty, 121 Ill. 660; Cross v. Kent, 32 Md. 581; Morse v. Crawford, 17 Vt. 499).

In concluding that the present law of England as to the capacity of an insane person to contract the author states "the American authorities sustain the principle that lunacy nullifies a contract and that insanity may be either specially pleaded or given in evidence under the general issue" (p. 73) citing Mitchell v. Kingham, (5 Pick. 431) and Grant v. Thompson, (4 Conn. 203). This is a misleading, if not inaccurate, statement of the American law. While it is true that insanity may in certain cases be set up as a defense to an action on a contract, the in-
sanity does not "nullify" the contract, which according to the general view is merely voidable. (Williston on Contracts, Sec. 25ff and cases cited.) Although the author speaks with assurance regarding the American law on the various topics discussed by him he cites but twelve cases, four of which were gleaned from the opinion of the court in Banks v. Goodfellow, as already pointed out: Eight of these twelve cases were decided before 1850. Brigham v. Fayerweather (144 Mass. 48), decided in 1887, is referred to as a "recent" case (p. 69).

It is to be regretted that the author permitted the wide scope of his investigation to interfere with the thoroughness of his research.

Edwin R. Keedy.


This book was issued as an earnest of the work inaugurated last Fall at the University of Lyons when the **Institut de Droit Comparé** opened in consequence of being finally authorized by the Department of Public Instruction as an adjunct of the Foculé des Lettres. The author has been a law professor of the University for the past twenty-five years and has long been specially interested in comparative legislation as taught in the University of Paris and steadily encouraged by the **Société de Législation Comparée**, founded in 1869. Although this society in 1873 was decreed to be an organ of public utility and under the resulting governmental patronage has done such important work in the collection and translation of foreign laws as to attract a world-wide membership, its scope has been confined to the purely continental standpoint of specific legislation and commentaries thereon. Professor Lambert long ago recognized that true comparative study should embrace not only legislation but law generally so that the great body of Anglo-American common law and jurisprudence might be included. He has also constantly urged the importance of comparative legal history covering every form of law. This new departure at the University of Lyons is largely the result of his individual persistent and energetic efforts with the French Government covering several years. Among his former works are: **Fonction du droit civil comparé; La Tradition romaine sur la succession des formes du testament devant l'histoire comparative; Le Problème de l'origine des XII tables; L'enseignement du droit comparé—sa coopération au rapprochement entre la jurisprudence française et la jurisprudence anglo-américaine.** There can be no doubt about his sincere devotion to the subject nor can one believe that he has not been a diligent student. His breadth of conception is revealed in his insisting upon the title of law rather than legislation for the newly created Institut. It is further shown in the titles of his lecture courses: **Introduction à l'étude du droit; Histoire comparative du droit; Science pénitentiaire; Jurisprudence comparative; Droit con-
The last course is quite ambitious and an anomaly in European universities considered from the standpoint of constitutional law in this country. Louvaine University, so rich in book treasures before the Germans destroyed it, has long had the distinction of being the only one teaching the principles of that branch of law in any way resembling ours. Professor Alfred Nerincx, a most learned legal scholar and varied linguist, has long held the chair of Constitutional Law in that University. He has been in this country many times and has conscientiously studied our institutions and our laws. Several years ago he published *Organization Judiciaire des Etats-Unis*, in which he revealed a practical familiarity with his subject equal to our own writers. Unfortunately for Professor Lambert, his researches and studies in preparing this work were not sufficiently tested in his course of *Histoire comparatitve du droit* and he lacked the proper American material to exemplify proficiency in his course in *Droit constitutionnel comparé*—else this book would not have been written. He remains from the outset obstructively overburdened with the European concepts that legislative dominance is imperative because born "du peuple" and that executives and judges should be subservient instruments thereof. He shows no perception of the doctrine of self-checks voluntarily imposed by the people themselves, the strength resulting from the three branches of government being independent, nor the sovereign status of the several states. He sees only a fixed and wilful purpose of our courts to thwart the legislative will, Federal and State. To him a *court* as an impersonal unit cannot be visioned; he sees only *judges* and imputes to them all a readiness to be swayed by unyielding economic dogmatism or by selfish or political interests.

In these aspects he does not stand alone among European writers who attempt to deal with Constitutional Law, and particularly those of France. Duguit (*Traité de droit constitutionnel*) and Esmein (*Eléments de droit constitutionnel français et comparé*), although scholarly men show these same defaults when judged from our American viewpoint. Professor Lambert, manifestly, neglected to make a preliminary study of our text writers on this subject. He cites several hundred essay writers, some State and Federal decisions, most of which have been overruled, and numerous articles in university law magazines, principally that of Harvard, but quotes and that briefly and in antagonistic derision, from only two well known practising lawyers—Morfield Story, of Boston, and Rome G. Brown, of Minneapolis. He cites just one American leading constitutional author—Cooley, and that but twice and inappropriately with manifest misunderstanding. He seems to have lost his way amid the intellectual gesturings of that crowd of hysterical pamphleteers who became increasingly numerous after Roosevelt flourished the "big stick" and advocated recall of judicial decisions. Not a single academic, legal, socialistic or economic "ism" of the past twelve years has been overlooked as approved supports for such demagogic shibboleths as—"Government by the Judges," "Judicial control of legislation," "Judicial supremacy," "Political judiciary," "Struggle of courts against social legislation," "Recall of judges," "Appeal to the people against judicial decisions,"—all recognized by the author as genuine calls
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for help in an apparently sincere belief that this country is engaged in a
tremendous and vital struggle to thwart the political power being wielded
by our courts for throttling the legislative liberty of the people. He de-
clares that until we are free of this strangling grasp of the judges our
legislatures will never be free to give us "social justice," whatever that
term may mean—so often used, but never yet defined. For some reason he
does not give. Professor Lambert dates the "enslavement" of Congress and
the legislatures from the time of the decision of Godcharles v. Wigeman,
113 Pa. St., 431, declaring unconstitutional the "Store Order Act" of 1881,
which he says was an "opinion délivrée en 1886 au nom de la Cour suprême des
Massachusetts." He insistently attributes the apparent protection to labor-
ing miners in this decision as an insidious and sophistical means of the
court to control all legislation. Another oddity appears among the author-
ities cited in support of the soundness of Roosevelt's argument for the recall
of judicial decisions in several quotations from writings or speeches of
"W. Lewis Draper," intended, as appears from the notes, for the former
Dean of this Law School. There are many such errors, but they are merely
amusing. The work as a whole, however, truly arouses commiseration for
this really sincere scholar, able in his usual field, who has mistaken the
glitter of the surface sands for the sparkle of the real jewels he would
have found had he delved deeper. It is to be hoped, moreover, that this
not unnatural literary faux pas in the realm of American law will not
dis-courage the author nor cause him or his colleagues to abate their energizing
labors which have resulted in establishing with every promise of permanency
this latest educational centre for the study of comparative law.

Chairman Comparative Law Bureau,
of the American Bar Association.

THE REVIVAL OF MARXISM. By J. Shield Nicholson, Sc.D., LL.D.,
Professor of Political Economy in the University of Edinburgh. E. P.
Dutton and Company, New York City, 1921, pp. VIII, 145.

The first question likely to occur to the reader is, Has there been a
revival of Marxism? The professed followers of Marx are probably fewer
in this country at the present moment than at any time in the last fifty
years. The same is probably true of Western Europe. But while his pro-
fessed followers are few, there is undoubtedly a revival of interest in Marx
due to the Russian relapse into barbarism. The Western World has taken
progress as a matter of course. It has forgotten that retrogression has been
as prominent a fact in human history as progress. The débacle in Russia
has served as a reminder, and in amazement the Western World has been
trying to find out why it happened. It is not infrequently attributed to the in-
fluence of Karl Marx—hence a revival of interest in his writings and their
amazing influence.

No economist today accepts a single one of the dogmas of Marx. His
materialistic interpretation of history is rejected even by most socialists; his
labor theory of value is antiquated and inadequate. His theory of surplus value is childish. His theory of commercial crises is still held by a few vociferous but uninformed people in spite of the fact that it is a logical absurdity. His theory of the concentration of capital,—to the effect that capital tends to be concentrated more and more into the hands of fewer and fewer persons simply does not work out in fact. His doctrine that all social evolution comes through class-struggle contradicts the observed fact that most of the significant reforms come, not through class struggle, but through the efforts of well-meaning people who have nothing whatever to gain by the reforms they are putting through.

If there is so little of economic soundness in this book, how could it possibly have had so much influence? This question is frequently asked in a manner which implies that there must be more in the book than the critics find; otherwise it could not have had so much influence. It is not easy to determine exactly how much influence the book itself has had. The writer has found many a pronounced Marxian who has never read Marx, but has only read about Marx. His principal work, “Capital,” should properly be placed in a category of books that many praise but few read, and it is a fair conclusion that if more would read it, fewer would praise it.

The first task which Professor Nicholson sets for himself is to explain the popularity of the name of Marx and his presumptive ideas. The answer is found in the fact that Marx contains so many incoherent and contradictory statements that anyone can find proof texts to support any theory he chooses to adopt. His writings are quite rich in striking phrases which can be quoted with effect in support of any kind of a revolutionary program. All forms of discontent with the existing economic system can find literary expression in Marx, just as every form of religious belief,—especially every form of religious protest,—can find literary expression in the Old Testament. The explanation of the professed following of Marx is as simple on the one hand and as inexplicable on the other as the explanation of the influence of the Koran or of the Book of Mormon.

Mention has been made of the possibility of finding in Marx literary expression of different forms of belief and justification for different programs. This suggests the two most prominent types of Marxism, though there are multitudinous variations of each. These may be called the political and the militant. Both aim at the same ultimate result, namely, the domination of the whole political and economic system by the proletarians, with common, public or government ownership of all durable forms of wealth, and the subjection of every individual to the authority of the mass. The difference between them is wholly one of method of attainment. The political Marxians hope to gain their point by outvoting their opponents and gaining control of the government through the regular constitutional machinery. The militant Marxians, of whom Lenin and Trotzky are the most prominent present examples, refuse to waste time over constitutional matters, but prefer to take by direct action or military force what they want.

With the method of procedure of the political Marxians, no rational person can have any quarrel. The thing they hope to accomplish by these
exquisitely constitutional methods is quite as bad and would produce quite as deplorable results as the thing that Lenin and Trotsky by their militant methods have tried to accomplish,—in fact, the results of the two methods are identical. The most important question, therefore, is not whether we prefer to go to perdition by a constitutional or by a militant method. It is whether we want to go to perdition at all or not. The gradual clarification of the ideas of the Western World on this point explains the lack of practical interest in Marx and the falling off of his followers in all except the most ignorant and besotted countries. It is a literal fact that the practical interest in Marx is least in the most intelligent countries and greatest in the most ignorant. Even the workingmen in a country like the United States refuse to call themselves proletarians and rather resent being called such by men with axes to grind, and take practically no interest whatever in Marx and his theories. As you proceed eastward, however, you will find that as ignorance deepens, the practical interest in the alleged theories of Marx expands and the illiteracy of the masses grows.

Professor Nicholson has gone through the writings of Marx, especially his "Capital," for the purposes of seeing whether there wasn't something in Marx that might throw light on the present economic situation. As would have been expected by any thorough student of Marx, he failed to find a single constructive idea, and finds, in fact, that Marxism leads directly to Leninism and a general economic débacle.

The following quotation from his Preface very well summarizes his conclusion:

"I was, however, quite prepared to find on re-reading the Marxian critique of capitalism some ideas that might be of service under present conditions. Other socialists, from Robert Owen downwards, have done good service in spite of their Utopianism in stimulating thought and suggesting practical reforms.

"But the more I read of Marx and his methods the more hopeless and depressing was the effect. Marx is the Mad Mullah of socialists. Marxism in practice on a national scale becomes Leninism."

Thomas N. Carver, Ph. D., LL. D.

Professor of Political Economy
Harvard University


This is a collection of lectures delivered in 1920, at the fourth of the "Unity Schools." They were arranged in conjunction with the League of Nations Union and are designed to provide a historical introduction to an appreciation of the League. The assumption underlying the course and all the lectures is that in the study of social phenomena, the appeal to history is not merely valid, but necessary; that whether we are optimists or pessimists, the prophets of progress or decline, we must invoke historical factors
and justify our arguments by looking to the past in order to find guidance for the future. This assumption seems to the reviewer well founded. As Vinogradoff says, "History, if studied without prejudice, teaches the greatest lesson of all—to treat social life not as a mechanical combination, but as an organic process. . . . Its growth and defects have to be studied in the light of social biology, social hygiene, social pathology, not in that of social mechanics. This is why thoughtful men are instinctively or consciously attracted by the 'links with the past' which are so numerous in our everyday existence."

The volume is brief, but its scope is very broad. The search for material to illustrate the spirit of internationalism begins with Alexander and Hellenism, passes through the work of Rome, the Medieval Church and Grotius, to the French Revolution. Three lectures are devoted to the Congress of Vienna, the Nineteenth Century, and the League of Nations. The lectures are distinguished in their various fields, including Arnold Toynbee, Vinogradoff, H. W. C. Davis, C. R. Beazley, G. P. Gooch, and finally—giving "An Apology for a World Utopia,"—H. G. Wells. Naturally, as in all works of collaboration, there is striking lack of uniformity in treatment and in style. Some of the essays are general, others detailed. Mr. Wells, is breezy and journalistic. His generalizations are appealing and plausible, sometimes perhaps superficial. Vinogradoff, is scholarly, even technical. Gooch is encyclopedic.

It is true that there is a certain unity in the volume derived from the fact that all the collaborators are viewing their respective topics from the point of view of world peace. The essays are bound together, furthermore, by an editorial introductory chapter, which stresses the conviction that we can find in history clear indications that international co-operation is a growing quantity. This may be true. The material as presented, however, does not seem to make plain that there has been anything like a true evolution. Indeed, viewing these successive expressions of the feeling for world unity in the past and the succession of failures to achieve world peace, the reader needs all his courage to believe that we are in reality progressing towards the world federation which the authors regard as desirable. There is a note of doubt which appears, unconsciously but certainly, in various of the chapters, where the authors after stating their theses in plausible fashion fail to support them in the details of their treatment. The impression left by the volume, therefore, is not conclusive. However, desirable the evolution of the spirit of internationalism, it is not clear that the world has progressed as far toward the development of a spirit of unity as some generalizations would lead us to suppose. The absence of a conclusive note, however, does not in the least rob the individual essays of their historical value, and they are filled with pregnant suggestions. It is unfortunate that the references are not more numerous and exact. In some cases the highly important duty of leading the reader to broader study seems to have been undertaken in the most perfunctory spirit.

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Charles Seymour.
The importance of the study of the English constitution has been greatly increased within comparatively recent times by the great growth in power of England, her self-governing dominions, and of the United States. These countries form today the most important political group in the world and have a common source for their institutions, England herself. Moreover, during the past century, English political institutions have been widely copied by other peoples throughout the world. The study of this constitution is important in another way. We can trace its development for over a thousand years and this affords a splendid opportunity to examine into the causes, phases and characteristics of the evolution of a set of political institutions. Further, a knowledge of early English law and courts is of decided value to American law students.

But to the general reader and the undergraduate the subject presents difficulties. The ordinary single volume treatises which are of more than an introductory character are confusing and hard to understand. Hence Professor Adams' work meets a long felt want. In a single volume of five hundred pages he goes deeply into the subject, yet traces clearly in chronological sequence the growth of the English monarchy from Saxon times to the present. Though there is abundant detail, it is kept skilfully in subordination to the main theme, the evolution of the constitution, or more specifically, of the limited monarchy.

Not quite half the book is devoted to the medieval period down to about 1450. Such an amount of space is necessary because the fundamentals of the common law, of the administrative system, of the courts and of the limited monarchy were all established in broad outline during this period. The source of the legal and administrative development, he traces mainly not to Anglo-Saxon practices, but to the powerful Norman feudal state established in England after 1066. The limited monarchy began to develop in the thirteenth century and the underlying principle with which it started, that there is a law by which the king is bound and that he can be compelled to obey it if necessary, had its origin in the political feudalism introduced by the Normans. This principle was enforced against the kings of the thirteenth century so often that it was never forgotten. Parliament which arose in the thirteenth century became by the fifteenth the "guardian of the constitution" and the directing power in the state. It was formed by the addition of certain representative elements to the feudal curia regis and had no connection whatever with the Saxon witenagemot. Thus the influence of the Norman Conquest can hardly be overestimated and the chapters in which this interpretation is developed form the most important contribution to our knowledge in the whole work.

Only a single chapter is devoted to the Tudor period largely because absolutism was not to be the final form of the constitution. The author explains clearly the causes of the rise of absolutism, the machinery through which it worked and the grave danger with which the progress of limited
monarchy was threatened. The seventeenth century was an age of struggle between the partisans of absolute and limited monarchy. The issue was after some time sharply drawn as to where sovereignty lay. The final result was a compromise, at the time only imperfectly understood, by which the king remained in form and appearance sovereign, but the reality of power lay with parliament. This compromise has never been challenged by the king since 1688, in great part because for a long time he had a position of great real power, for a longer time an appearance of great power, and permanently a place of real dignity and immense influence. This peculiar arrangement facilitated the adoption of the English system by states during the last century which were faced with the necessity of abandoning absolutism. The result of the struggle in the seventeenth century had immeasurable effects in extending the influence of the English constitution. The age was important in another way. During the struggle the theory of the sovereignty of the people was developed. After a brief experiment, the English rejected it. In the simpler societies of the American colonies, this theory was taken up and never abandoned. Thus English constitutional development split into two parts, one in England and the other in America, both advancing toward democracy by different routes.

The eighteenth century saw the formation of the cabinet by means of which parliament secured indirectly the complete control over the direction of the policy of the state. Finally in the past century, the social and economic changes effected by the industrial revolution have led to universal suffrage and the responsibility of cabinet and parliament to the people has been established. England has become a democracy with the forms of a monarchy.

Baldly stated this is the theme of the work. What makes the book remarkable is the consummate skill with which an immense mass of institutional detail of all sorts has been marshalled to show the steady growth of the constitution.

One expects from an expert medievalist like the author an able account of the medieval period. But his contribution does not stop there. It would not, for example, be easy to find a clearer or more profound account of the issues and significance of the seventeenth century or better chapters on the origin and growth of the cabinet.

Some knowledge of the political narrative is necessary to understand fully this history. The more important documents should be read in a source book. Limitations of space have prevented Professor Adams from discussing some topics of importance as fully as a class requires, but this is no disadvantage to a teacher.

*Sidney K. Mitchell.*

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LOCAL GOVERNMENT IN THE UNITED STATES. By Herman G. James, J. D.,
Ph. D., Professor of Government in the University of Texas, D. Appleton
and Company, New York, 1921, pp. XV, 482.

Notwithstanding the frequent quotation of De Toqueville’s assertion
that “municipal institutions constitute the strength of free nations,” it is only
in comparatively recent years that professional political scientists, as dis-
tinguished from practical, political scientists, have devoted much attention to
this sphere of Government in the United States. For thirty years now, how-
ever, city Government has been increasingly studied. Within the last decade
local rural Government, especially the county “dark continent of American
politics,” has been critically explored, and the pamphlet, report, and conference
literature of this exploration has attained considerable proportions. Books on
city Government have been numerous. Fairlie’s “Local Government in Coun-
ties, Towns and Villages,” 1908, and Gilbertsons “County Government,” 1917,
stood almost alone in the rural field the former to a considerable degree
treating of historical development. Professor James attempts to present the
subject of local government as a co-ordinated inter-related whole. In the
main he has succeeded admirably, especially in view of the fact that there is
not one system of local Government in the United States, but forty-eight.
This is the chief merit of the book—that it affords the general reader and
the student, within moderate compass, an up-to-date description of condi;
tions, recent changes, and tendencies in local Government without overmuch
detail, yet with quite satisfactory thoroughness. The style is clear and read-
able.

The first chapter of sixty-odd pages covers in a sort of compendium
form English and French local Government, stressing the differences be-
tween the former as the prototype of our American system and the latter
as an example of continental centralization. Of the steady development of
greater administrative control in England and the agitation for decentraliza-
tion in France the author says, “the ideal scheme, if such there be, will be
found somewhere between the two extremes,” and “in both countries, with
the formerly undreamed of expansion of governmental activity, the national
Governments are in danger of being completely swamped unless more and
more functions are entrusted to subordinate divisions,

From the second chapter, in which is treated the origin and development
of local government in the United States, it would seem that several pages
describing certain State systems in detail might well have been omitted.
Then come two chapters on the county—organization and functions. The
former shows effectively that the county acts as an administrative agent
of the State in exercising those functions which attract the greatest citizen
interest, law enforcement and the administration of justice, and that there
is hardly anywhere one county government, but rather as many as there
are independent county officers, each a law unto himself. The discussion of
functions would have been improved by a fuller description of what progres-
Sive counties are doing and less consideration of the relative amounts of county expenditure for different purposes in various sections of the country.

Following a chapter on the subdivisions of the county, appear two chapters on the organization and functions of city Government, which constitute a good introduction to the study of municipal Government. Unfortunately, not much can be done with the police department in five pages, with waste disposal in one, or the housing problem in a generous half-page. The opinion that education should be administered as a department of the city Government will doubtless arouse opposition. But this position is logical. "From the point of view of sound principles of Government administration there is nothing to be said for the independent school authority," although "the cities in which the school board is appointed by the mayor, the theoretically superior system, have not shown any conclusive evidence of their superiority in the respects enumerated above."

As developments and tendencies of the past decade, home rule, State control, county and city consolidation are dismissed.

The author concludes that of the two kinds of local Government, that one which is distinctly urban, consisting of populations from 500 upwards, fulfill necessary functions peculiar to its physical and social conditions, and as a natural unit for the conduct of local affairs should be retained subject to a larger measure of State administrative control especially in matters of general State concern, but he finds no need for other units of local Government. "The American county is neither a natural unit for the administration of State affairs, nor does it constitute a natural division for the conduct of local affairs," . . . "the non-urban subdivisions of the county are ineffective areas of local Government." But since the abolition of the county is too radical a proposal for accomplishment in the near future, he advises the conferring of larger powers on the county along the line of local welfare and public works activity. This change would often be properly accompanied by an enlargement of the county area, the separation of all sizable urban communities, and the elimination of areas of rural local government smaller than the county. Some may hereupon lament the deprivation of the rural population of the opportunity Bryce noted: "Nothing has more contributed to give strength and flexibility to the Government of the United States or to train the masses of the people to work their democratic institutions than the existence everywhere in the Northern States of self-governing administrative units such as the township . . . small enough to enlist the personal interest and subject to the personal watchfulness and control of the ordinary citizen." What would Jefferson say? "Those wards called townships in New England are the vital principle of their Governments" . . . "so do I [conclude] every opinion with the injunction, 'Divide the counties into wards.'"

Numerous references to special administrative areas such as drainage and irrigation districts occur in the book, and there is frequent mention of the recent extensive development of State administrative supervision of local Governments. Both these subjects, in the reviewer's opinion, deserved treatment in separate chapters. One could wish that the author had found some
space or more space for methods of local property assessment, actual county and city utilization of the merit system, the activities of parties in local affairs, and the administration of civil and criminal justice. But all books must have an end somewhere.

In view of the many details presented and the frequent recent changes in local Government organization, the volume seems remarkably free from erroneous statements.

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AN INTRODUCTION TO THE PROBLEM OF GOVERNMENT. By Westel W. Willoughby, Professor of Political Science, Johns Hopkins University, and Lindsay Rogers, Associate Professor of Government, Columbia University. Doubleday, Page and Company, Garden City, N. Y., 1921, pp. x, 545.

The well-known authors of this excellent book have selected a few outstanding problems in government, such as its sphere, its relation to political parties, the means of making it representative in character, the relation of the executive and legislative branches and the peculiar functions, of each, the need of proportional representation, budgetary procedure and the peculiar questions arising from federal government. Each of these problems is discussed in the light of the experience of the United States and other leading nations.

The task is not an easy one. The authors met with the same difficulty which faces all comparative studies—the selection, digestion and interesting presentation of essential points in widely varying systems. But the work has been well performed, is sound, scholarly and thorough. A few examples will show the practical importance of the problems discussed. In chapters 10, 11, 12 and 13 on the making and execution of the laws, the vital need of leadership is set forth. The authors show that the legislature's true functions are publicity, criticism, and the approval or rejection of policies. The necessary emergence of the executive as leader is implied. The growing policy of passing outlined law, for which the details are to be supplied by the administrator, is commended. The authors do not hesitate to favor European practices where these have borne fruit. Again in the chapter on the judicial function, the advantages and disadvantages of Judicial nullification of legislative acts are considered.

It might be wished that the book had included the new governments of the German states in the discussion. Where comparisons are made with Germany the monarchical form is usually described. The volume possesses, among many virtues, one which the lawyer and the advanced student will especially appreciate, it deals in general principles but always gives particular applications. Its style is clear, its references are profuse and well chosen, covering a wide range of authors. The method of expression is temperate and well balanced. It will be found admirably adapted to the
needs of an advanced college class in government and will commend itself to the reader who enjoys a well proportioned use of inductive and deductive reasoning on political subjects.

James Thomas Young.

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Alberico Gentili was born in Spain in 1532, and having attained eminence as an international scholar, was appointed representative of the Spanish interests in the English Court of Admiralty during the years 1605 to 1608, while Spain was at war with the Dutch, and England was neutral.

This book was published by his brother five years after his death, and is divided into two parts, the first relating to the cases in International Law with which he was concerned while acting as representative of the Spanish Court, and the second relating to private law.

The reproduction is in the well-known workmanship of the Carnegie Endowment and is a most valuable aid to the student of International Law. Of the contents much may be written, too much for this review. We can only point out that the learned reader will be amply repaid by dipping into the pages of this almost medieval treatise. He will read about pirates, Turks, and Barbary corsairs; of the change of title to property by capture juri belli; of the immunity conferred by neutral territory; of the title to property acquired by purchase from pirates, and so forth, each case bringing, even to an ordinary imagination, a faint glimpse of the days of James I. of England, Philip III. of Spain, and Henry of Navarre.

The second book contains topics which have a more modern interest; the depositions of absent witnesses, res adjudicata, appeal from an interlocutory decree, and two curious discussions, which have a scholastic flavor, of the proof of a storm, and the proof of ignorance and knowledge.

With this cursory glance at the interesting contents we will leave the book to the learned reader in the confidence that he will not regret the time spent in reading it.

Roland R. Foulke.

BOOK REVIEWS


Professor Williston’s Casebook is a second edition, the first having appeared in 1903. The general plan and subdivision of the first edition remains unchanged excepting that the chapter on the Statute of Frauds has been cut down to include only cases relating to contracts not to be performed within a year and the elaborate footnotes, which in the opinion of some teachers burdened the first edition, have been pared to a minimum. The author refers the student to “the existence of several newly published exhaustive treatises on the subject” apparently with approval of their use by the student as a supplementary course of reading. The book now appears in one volume instead of two, notwithstanding the fact that upwards of sixty new cases, decided since the appearance of the first edition, have been included. Nothing need be said in praise of a work which has proved its value during two decades as the accepted casebook in many of our best law schools.

Professor Corbin’s Book, while containing about 150 cases found in the earlier casebooks contains about 450 cases first selected by the author; of the total of 594 cases 258 have been decided since 1900, 224 between 1800 and 1839 and 112 prior to 1800; 185 cases are English and 409 American. The author has laid emphasis on modern American law as contradistinguished from English law, although he, in his excellent prefatory note, directs attention to the importance of the early cases for the purpose of studying the growth of our system of contract law. The difficulty of presenting sufficient material to give the student a comprehensive grasp of principles and rules and historical growth are amply suggested by the author and the very special debt owed to Professor Hohfeld is, as in the author’s edition of Anson on contracts, again acknowledged.

A comparison of the books of Professor Williston and Professor Corbin shows that although the law of contracts is not a closed subject and is being modified under the changing conditions of society, it is fairly well rounded out, and the order of arrangement of the subject matter has been almost entirely standardized. If changes shall take place in the next half century it is probable that they will be superinduced by the recognition of the principle that the third party to the contract, to wit, the public, is becoming the dominant party and that the public aspect of contracts may become most important. That we are at the beginning of a new era of development in our philosophy of social relations is a generally accepted truism. To what extent this will influence the development on our law lies within the realm of prophecy and is therefore beyond the ken of the reviewer. In the meantime teachers of the law of contracts have three admirable collections of the first rank from which to choose, Keener’s and Williston’s cases directly based on
Langdell's work, and the newer work of Corbin, likewise based on the work of the old masters but showing a decided tendency to strike out into more modern paths of investigation.

David Werner Amram.

University of Pennsylvania Law School.


The law schools of the country are practically agreed upon the proper method of instruction for those who intend to make the law their means of livelihood. While some profess to use the case system entirely, and others attempt to combine with that system a limited recourse to texts, every law school of standing bases its instruction primarily upon cases as a foundation, both in order that the student shall be taught to cultivate his powers of inductive reasoning, and in order that he shall become familiar with the tools with which he will later have to work. So valuable is this training of the mind, that there is a constantly growing demand in business for "law-trained" men, but because of a demand for the special knowledge which they have accumulated, but because of the demand for accurate thinking and reasoning power in the commercial world.

Colleges of business administration, on the other hand, are by no means in accord on the method by which Commercial Law should be taught, nor are they even at one as regards the subjects which should be discussed. In fact, it may be seriously doubted whether many of them have a clear conception of the ends to be attained by this instruction, although all offer some work in law as a matter of course. The field, then, is still new, and an outline of the tendencies therein is essential to appreciate the value of Professor Spencer's work.

The first texts written for classes in institutions of collegiate rank other than law schools were informative merely, and the information given was poorly selected. Some of these books were professedly for both High School and College use, and were suitable for neither. These texts have gradually been improved by better selection of material, and new books have been produced with the same end in view, until it may safely be said that there are several good books on the market which give satisfactory information both to the student and business man about the law. Further improvement along this line is scarcely necessary and further effort along this line seems ill-advised, as advance in the instruction of commercial law must be along another line, the one adopted in this text. The reasons therefor may be summarized as follows: The raison d'etre of the college of business administration is to train business men, as distinguished from the "commercial college"—correspondent or otherwise—whose function is to make available to those whose opportunities are limited, information which may be of practical and immediate value to them. While the commercial law text is valuable for the latter purpose, it signally fails as a means of giving to the lay student the real value of the legal training
BOOK REVIEWS

obtained in law schools. If colleges of business administration are to attain their end, they should make technical legal training unnecessary by furnishing the student with its essentials, without wasting his time in non-essentials. This they may do by adopting the case method of inductive reasoning in combination with text for the purpose of saving time, and adapting it to the needs of those who do not intend to follow the law as a profession. That this is the trend of the times is suggested by the fact that within the year at least three texts have been published with this idea in mind.

The conception of the book, then, is excellent. Now as to detail:

The author has approached his problem by very properly offering a background for the study of law, by setting forth the development of our legal system, by explaining the mechanics of procedure, and by discussing numerous incidents of the operation of law which appear to the lay mind as often useless technicalities. He has then proceeded to give text and cases on introductory topics and has gone on to the fundamentals of Torts, Contracts, Agency and Property. In Volume II, under the title, Law and the Market, he has taken up Market Transactions (Bailments and Sales) and Market Practices (Unfair Competition and Restraint of Trade). Under the title, Law and Finance, he has discussed, both by text and cases, as before, Legal Devices for securing Money and Credit (Negotiable Instruments, Stocks and Bonds, Mortgages and Liens, Suretyship) Powers of Creditors, and Privileges of Debtors. The third volume, not yet published, will undoubtedly deal with Partnership and Corporations.

The selection of cases is very good indeed, and excellent judgment has been used in pruning the opinions of the court so that the student may gain herefrom all that is material, and avoid the immaterial. Questions at the end of each case, based upon it, are framed with discrimination, and offer perhaps one of the best features of an altogether first-rate book. The author has set out to accomplish a well-considered purpose, and has more nearly attained his end than is the case with most. To some it may appear that the first part of Volume I is too technical for those who are becoming acquainted with the law for the first time; that the text (as distinguished from the cases) might deal less with the philosophy of the law and more with the elements, simply stated, of the branches of law about to be discussed; that a teacher of great experience and judgment is necessary in order to keep the student in a straight line to his goal; and it is very doubtful whether the arrangement of the progress of the work or the new terminology of subjects has anything to commend it in preference to the well-established order and divisions of business law. Yet all in all, the work is of a high degree of excellence, and is a distinct and practical contribution to available material for the teaching of commercial law in colleges.

Harold L. Perrin.

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The Year Book is the British substitute for the American Journal of International Law. It hardly invites comparison with the American publication, but it must be very serviceable to its home readers for all that. It is, therefore, fortunate that this second issue of it seems to convey assurance of its annual appearance from this time on.

The present volume contains articles—thirteen in all—by such writers as Sir H. Erle Richards, Dr. B. C. J. Loder, Professor Pearce Higgins, Sir Cecil Hurst, Professor Borel, Dr. Baty and others, those by the first two being on the new Permanent Court of International Justice. The last hundred pages include notes on recent international conferences, Belgian Prize Court decisions, a digest of recent decisions of British Courts touching questions of international law, obituary notices, a list of international agreements entered into between January 1, 1920, and May 31, 1921, reviews of books, thirteen in number, and finally a bibliography on books and articles on relevant topics, published between April 1, 1920, and May 31, 1921. The make-up of the volume is in every way respectable.

Edward S. Corwin.

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