BOOK REVIEWS


If the term "legal psychology" suggests at first the famous article on "Chinese metaphysics", a careful perusal of the present volume will repel the suggestion. The author has not tried to cull from the doctrines of law and psychology enough seemingly related material to make a superficial synthesis; nor has he rushed into the legal sanctum with a reformer's zeal and cocksureness. Rather he has brought his highly reputed skill as an experimental psychologist to bear upon the psychological assumptions involved in certain legal problems and procedures. A sub-title for the book might well be "Some Principles and Techniques of Psychology Presented for Their Persuasive Relevancy in the Evaluation and Improvement of Existing Juridical Procedures". As will be indicated, the book is somewhat broader in scope than this title suggests.

Most of the discussion is pointed toward professional routine procedures, and should thus prove highly interesting and valuable to the judge and the practicing lawyer. The author has wisely begun with the familiar problems of testimonial procedure (Chaps. II-VI). The second chapter, "Errors in Sensation and Perception", poses as its problem an analysis of the disturbing inaccuracies manifested by casual observers of an exciting event. Every college which boasts an experimental psychologist must now be familiar with the startling classroom experiments conducted upon unsuspecting undergraduates. Fortunately the author uses but little space in discussing the inaccuracies revealed by such experiments, which have been familiar to a wide circle of non-technical readers since the publication of the late Prof. Münsterberg's On the Witness Stand two decades ago. Professor Burtt earns our gratitude by analyzing some of the characteristics of sensation and perception which lead to such errors. Thus, the principle of adaptation of the ocular mechanism to dimly lighted surroundings is illustrated by the following incident:

"In a case where a person entered a rather dimly lighted hallway and fell because of a defect in the stairway and brought suit, another person who had been sitting in the hallway for some time testified that the stairway was distinctly visible. This discrepancy in the statements [of the witness and of the injured person] was due, of course, to the above-mentioned principle." (P. 23.)

Other sections of this chapter deal with color vision, the perception of moving objects out of the corner of one's eye, optical illusions, auditory space perception, and perception of time. The judge and the practitioner will find here many valuable clues for the testing of a witness' accuracy.

The chapter on "Attention" presents less experimental data, but justifies the legal admissibility of testimony regarding the surroundings (sometimes loosely called "res gesta") as a means of determining the witness' attention to the details in question. Another illustration (p. 64) suggests the danger of the jury's view of the scene of an accident as a possible source of over-emphasized attention to a single detail of the scene. The chapter on "Memory" cautiously supports the "spontaneous exclamations" exception to the hearsay rule (pp. 74-75), but adds:

"At any rate, the psychologist is rather skeptical of the accuracy of memory for events observed under conditions of marked excitement caused by shock." (P. 76.)

(1036)
The author here tacitly disagrees with Professor Wigmore's rationalization of the exception, which ascribes the reliability of such hearsay to the emotional disturbance of the shock. Professor Wigmore apparently assumes that the chief danger of hearsay is deliberate fabrication, whereas the author apparently assumes that men err through weakness rather than through wickedness.

The witness who deliberately falsifies receives adequate attention in the three chapters on detection of lying (Chaps. IX-XI). Although Professor Burtt considers the blood-pressure test more reliable than either the association-reaction test or the breathing test, he is too cautious to advocate the wholesale use of either.

"The notion of a 'lie detector' that is sufficiently fool-proof, for example, for use by the members of any police organization is a wild dream. It may be possible for persons without technical training to be taught certain simple techniques for conducting some routine type of chemical analysis; but when it comes to mental examination the situation is altogether different. . . . In fact, at present, only a handful among the trained psychologists of the country could do this type of thing adequately because they have not had special experience with the technique; but, if they have had laboratory training in psychology and clinical experience, they can readily pick up the other details of the technique." (Pp. 246-247.)

Whether or not it would be feasible to train enough expert psychologists for the larger metropolitan police forces, the author does not state.

The remaining chapters bear upon legal problems not confined to procedure. The chapters, "The Mentally Disordered Criminal" and "The Mentally Defective Criminal" (pp. 257-330), summarize in readable form some of the literature on these subjects. The chapter, "Predelinquency," offers valuable suggestions for the recognition and restraint of persons having criminally insane tendencies in the incipient stages, though the lack of an adequate control makes the illustrations of doubtful diagnostic value. How many of the people having these initial symptoms turn out to be dangerous criminals, and how many people would the state have to put under surveillance if it accepted these symptoms as prognostic? Lack of space prevents an analysis of the interesting chapters on "Eugenics", on "Punishment", on "Drugs" (herein of the effects of alcohol), on "Suggestion and Imitation", on "Education and Crime Prevention" and on "Trade-mark Infringement". A final chapter admirably summarizes the author's conclusions.

The present reviewer, unable to judge the psychological adequacy of the volume, can only accept these conclusions and raise the question of their value in the administration and improvement of the law. Many of the human traits "discovered" by experimental psychology are already well-known to lawyers and judges. For instance, the simple illustration of ocular adaptation quoted above is common knowledge; and the suggestive effect of leading questions is familiar to the legal profession. Yet it would be far too hasty to conclude that experimental psychology is merely an "unctuous elaboration of the obvious". Laboratory techniques offer verification (or the contrary) of discriminating analysis applied to the clues obtained from casual observation. No lawyer in the courtroom has ever classified leading questions and tested the relative suggestiveness of the simpler types, as the experimental psychologist has done (pp. 119-130). Again, complaint about the law's delays is as old as the hills, and every layman knows that a witness' memory fades with lapse of time; yet the appallingly swift lapse of memory (p. 87) and the greater ease of lying about remote events (p. 219) reënforce the author's repeated pleas for the examination of witnesses promptly after the event in question. The psychologist's conclusions are thus persuasive in the ultimate evaluation of proposals for improvement in procedure.
A noteworthy feature of the book is the author's commendable restraint, both as to the reliability of the psychologist's conclusions for judicial procedure, and as to the criticism of legal rules. With the possible exception of the assumption (p. 110) that intelligence-test scores are identical with "intelligence" (a terminological device common among psychologists), the author shows no tendency to regard the propositions of psychology as eternal verities. On the other hand, his criticisms of the law are often so veiled or guarded that the casual reader will miss them (e.g., pp. 108, 113, 114, 151, 167, 429). A good many recently reported decisions are cited and analyzed, but unfortunately the citations appear to be taken at random, and there are a few errors. The present reviewer notes with regret the slight attention given to mental competency for civil transactions and to the psychological implications of "undue influence".

Professor Burtt's book will be interesting and valuable to every judge and legal practitioner. It is clearly written and has a good index. It is a substantial addition to the growing literature of empirical legal science.

Edwin W. Patterson.


This is the first case book ever published which deals with the interpretation of statutes generally. Such a situation is the more striking when we consider that courses dealing with statutes have been given in several of our leading law schools for a number of years, and that Professor Freund has been offering such a course and writing on this subject for some twenty years or more. Those who have taught the course, however, have varied its content from year to year, and, until Professor de Sloovere published his cases, no one has ventured to fix upon definite material for class-room work. For one thing, the courses themselves have greatly varied. For instance, the course is sometimes labeled "legislation" and is given as a seminar course for graduate students. Where the course is given to undergraduates, it is usually offered only in alternate years, or during the summer session. Professor de Sloovere's case book is designed for a general undergraduate course, although it could be used incidentally for graduate seminar work.

The book is divided into four parts. Part I deals with Preliminary Problems and in turn has chapters on judicial notice and proof of written law; distribution of power to interpret written law; and the judicial process in interpreting statutes. Part II deals with Interpreting the Statute, with chapters on the words of the statute; the subject matter and purposes of the statute; the context; associated words; parts of the statute in relation to the whole; extrinsic aids; statutes in relation to other statutes; statutes in relation to the traditional law. Part III covers Interpreting and Applying the Statute, with chapters covering common law exceptions and defenses, remedies, exclusive and cumulative, statutory duties, mandatory and directory provisions, statutory powers, statutory rights. The Operation and Effect of Statutes is reserved for Part IV. It has chapters dealing with time of taking effect (herein of computation of time); prospective and retrospective operation (herein of Curative Acts); judicial change of construction; repeal (herein of amendment and re-enactment). The book differs strikingly from

1 P. 47, note 16; p. 75, note 17; p. 138, note 25.
most other case books in that it contains an introduction and a preface of great value. In the introduction, Dean Pound deals with the general theory of statutory interpretation; in the preface, the editor explains his own theory of the case book and his understanding of the proper delimitation of the subject.

Perhaps most courses in statutes now cover much the same ground as that presented in this case book, and the general approach in these courses coincides reasonably with the technique here employed. In its practical aspect this seems fortunate, and bids fair to make the case book widely used. In leaving out problems of statutory drafting, together with a detailed consideration of the mechanics of statutory rules, the editor has selected the meat of his subject by fixing upon statutory interpretation, considered in the realistic sense of a method by which courts can interpret statutes in their decisions. The cases throughout are admirably selected and the footnote material is unusually full and useful. The importance of recent law review material, the particular purposes of this case book, and the place of each case in that plan, make the citation to critical comments and references to contra or comparable cases exceedingly useful. Professor de Slooover has collected an excellent group of cases for his purposes and the learning which he shows in the footnotes will serve both instructor and student without in any way impairing the zest of classroom work.

What, then, may be said of the content of the book as a tool for studying this subject? Thorough yet very readable introductory material has been included in several recent case books to the great advantage of the student's firm grasp of the subject itself. May it not be that a second introduction, in addition to the excellent one of Dean Pound, would be fortunate in this case? Such an introduction would present some account of the theory and practice of interpreting codes under the civil law today, as well as some explanation of the history of statutory interpretation under the Roman law and under the early English law. For instance, where there is a complete code, the problem of interpreting statutes as part of such a code is very different from that which prevails where the traditional element (local law or common law) is still uncodified and enforced directly by court decision. Some brief presentation of continental theories of statutory interpretation would be of great interest and value. Furthermore, in the thirteenth and fourteenth centuries in England, as Professor Plucknett has so admirably shown, statutes, often made in large part by the judges who interpreted them, and proceeding out of a judicial system which was then not sharply differentiated from the legislative and the executive, were much less numerous than they are now and their interpretation was concededly very different. Some account of the historical background of our modern statutory law could be presented in the introduction with great advantage, even supposing the later cases illustrated this historical development in a more systematic way than this case book presents.

A second criticism of this collection of cases turns on a different approach to the subject of statutes from any which appears to be in use at present. We might have one great course divided into appropriate classroom hours upon judicial interpretation of the common law as made by the courts, rather than our present plan of separate courses upon the different subjects, such as partnership, negotiable instruments, agency, and the rest. Perhaps it would be no more arbitrary to have a single course called "common law" and try to work out universal rules for interpreting common law decisions in all subjects, than it is now to have a single course on "statutes", with its present plan of trying to fix upon rules of statutory interpretation that apply generally in all fields of the law. Why should not our single course in statutes treat of statutory interpretation according

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to the substantive law subject matter with which the several groups of statutes deal? As statutes become more important in the total body of the law, will they not take on particular characteristics according to whether they lie in public law subjects, property, negotiable instruments or other distinctive branches of the law, and will we not secure a more realistic and dependable technique of statutory interpretation, if we frankly treat statutes not as an undifferentiated mass but individually, according as the branch of the law in which they lie involves different problems on its statutory side, just as it involves different problems on its common law side? Of course, the divisions for the study of statutes need not be identical with the usual divisions of the substantive common law at present; their precise limits would be worked out pragmatically, somewhat as the present divisions in law school courses have been achieved. For one thing, the divisions for purposes of studying statutes would probably be more general than the present ones for studying court-made law.

Furthermore, would not this method lead to rules of statutory interpretation that would more nearly represent the delicate adjustment of art and science in interpretation of statutes to which the editor so aptly refers?* The old mechanical canons of interpretation are worn out; and the reviewer suspects that any new general theory of interpretation will soon be found to be almost as barren as the ones which have been discarded. On the other hand, an interpretation of statutes in the milieu of the law with which they deal would lead to a science of statutory interpretation which would be as realistic and as dependable for legislature-law interpretation as the magnificent science we now have for common law or court-law interpretation. We must remember that in fact we have already gone far along this road. For instance, criminal statutes are interpreted in special cases on the basis of their place in the criminal law and in the light of its general presuppositions. The same is true of the interpretation of a constitution, as Chief Justice Marshall has told us, and judges as well as teachers are fully conscious that a different technique of interpretation must be evolved for construing statutes covering general public law questions than in the case of minute regulatory statutes or statutes changing principles of private law. Of course, a treatment of statutory interpretation would involve a consideration of some of the accepted methods of interpretation that seem to be applicable regardless of the particular field in which the statute lies. But, as in the case of the old canons of interpretation, these general rules are dangerous, and often prove to be unsafe guides in practice. It seems reasonable that statutes should be interpreted with respect to the kind of material with which they deal, and our whole presentation of statutory interpretation should take this method of making the statutory law an integral part of the whole armory of the common law system, so that we could consider the rules in a given field of the law and think of them together, though with a somewhat different technique for the legislature-made law than for the court-made law. From such an approach we may work out an effective method of interpretation for our whole system of law, which seems to be moving, to some extent at least, toward ultimate codification. We will thus gain an understanding of the delicate adjustment under which the legislature may enact statutes, but only the courts can apply them and give them effect in the particular case.

If the case book were constructed along these lines, perhaps a good many problems that now loom so large, dealing with a determination of the legislature's intent, would be superfluous or would solve themselves. It is the fashion now-

* De Sloovere, Cases on the Interpretation of Statutes (1931) x, xi (Preface).

**It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding”—Marshall, C. J., in McCulloch v. Maryland, 4 Wheat. 311, 407 (U. S. 1819).
adays to say that we must postulate a legislative intent in the enactment of a statute, even though we know that it did not exist in any realistic sense. This fiction, like the conduct of the reasonable man and other similar tools of the law, is said to be an innocent one and very useful in tying down the courts to an honest enforcement of the legislative statute, and a scientific elimination of the idiosyncracies of individual interpretation. To postulate a general purpose in the legislature, where it enacts a statute affecting private rights, or perhaps a rather detailed intent in the case of a statute involving public law, and dealing with general matters, is in keeping with the facts. But a “science” of statutory interpretation that postulates a specific legislative intent in the case of every statute, no matter how minute or trivial may be its provisions, is essentially artificial, and is not justified by the results achieved. We may be sure that some method of judicial technique which more closely approximates the facts will ultimately supplant any such complicated and abstract system of interpreting legislative intent in every case. Perhaps the result will be that we will work out a technique of statutory interpretation to cover the legislature’s general purpose in passing the statute in cases in which it is conceded that the legislature had no specific purpose affecting the particular provisions. There would then be another method of interpretation to be used for statutes affecting public law generally, in which both a basic purpose and a specific intent would generally exist in fact. And this could be done without involving us in any of the old difficulties of the general and specific intent as in the interpretation of the rule in Shelley’s case. For instance, under the civil law, where there are codes to cover the whole body of the law, the courts do not predicate a specific legislative intent with a series of postulates to determine this. The codes usually have express provisions that deal with this difficulty; sometimes the problem is solved by recognized rules for construing the precise words of the statute apart from a technique of legislative intent; again, it is handled by authority given expressly to the judge to make the law for that case, on analogy to the wording of the statute or what he thinks constitutes the general intent of the legislature to be found in the other provisions of the code.

It seems to the reviewer that these suggested changes in the study of statutes are likely to lead to a more realistic science of statutory interpretation than the approach of this casebook, or the other methods which are now dominant. However that may be, this casebook will prove a useful tool for classroom work. It seems oversanguine for anyone to claim now that we have a developed science.

6 See De Sloovere, Cases on the Interpretation of Statutes (1931) v-viii (introduction by Pound); Landis, A Note on “Statutory Interpretation” (1930) 43 Harv. L. Rev. 886. But see Pound, Spurious Interpretation (1907) 7 Col. L. Rev. 379; Radin, Statutory Interpretation (1930) 43 Harv. L. Rev. 863.

6 Another rule of construction has been referred to by several of the Irish as well as by some of the English judges; viz., that the general intention of the testator was to prevail over the particular intention. This doctrine, which commenced, I believe, with Lord Chief Justice Wilmot, and has prevailed a long time, had, I thought, notwithstanding the use of those terms by Lord Eldon in the leading case of Jesson v. Wright, been put an end to by Lord Redesdale’s opinion in the same case, and by the powerful arguments against its adoption in Mr. Hayes’s Principles, by Mr. Jarman in his excellent work on Wills, and by the judgment of the court delivered by Lord Denman in Doe v. Gallini, in which the opinion of Lord Redesdale is approved and adopted. And, certainly, if accuracy of expression is important, the use of those terms had better be discontinued, though if qualified and understood as explained in the last-mentioned case and in the opinion of some of the judges—Mr. Baron Watson, for example—it can make no difference in the result. Lord Redesdale says ‘that the general intent shall overrule the particular is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise.’” Lord Wensleydale, in Roddy v. Fitzgerald, 6 H. L. Cas. 823, 877 (1858).

7 See Register, Judicial Interpretation of Foreign Codes, supra note 1, and Freund, The Interpretation of Statutes (1916) 65 U. of Pa. L. Rev. 207.
of legislation for Anglo-American law. But surely we cannot go on much longer without developing one. Such a science is needed to make our present statutes do their share of the work of the law, while our present lack of a science of statutory interpretation is the main explanation for the continuance of the traditional Anglo-American attitude, in which statutes are held in contempt and legal growth through legislation is retarded.

Paul L. Sayre.

Iowa Law School.


This book, which was awarded the Charles C. Linthicum Foundation (Northwestern University) Prize for 1929, will be found to constitute a most admirable basis for undertaking the study of a subject which has attracted considerable attention abroad but has only recently become a matter of interest in this country. The subject in question is the desirability of extending in effect the scope of the protection or monopoly at present accorded inventors by our patent statutes. As indicating an existing interest in this subject, attention may be called to the Report of the Committee on Protection of Intellectual Property recently printed and distributed by the Michigan Patent Law Association, of Detroit, such Association however having taken no formal action either approving or disapproving the Report, as well as to a paper entitled "Scientific Property" by Richard Spencer, Esq., of the Illinois Bar, which appears in the American Bar Association Journal, Vol. XXVIII, No. 2, p. 79. Rather curiously, this interest, as remarked by Mr. Spencer, so far at least as the United States is concerned, has apparently been confined almost entirely to the Bar; while steps have been taken to secure the cooperation of scientific bodies in the consideration of the question, the latter have shown a notable aloofness, and the subject has apparently not even been broached to the industrial groups, who would, perhaps, be most vitally affected by any such program involving a very considerable extension of the field of patent monopoly.

As stated above, Mr. Hamson's book will afford a very satisfactory introduction to anyone who seeks to inform himself on this subject, containing as it does an attempt to define so-called scientific property in contradistinction to recognized subject-matter of patentable invention, a sketch of the historical development which for the first time renders conveniently available the various foreign reports and discussions on the subject, and suggestions as to statutory provisions and procedure. The author approaches the subject from a viewpoint that is admittedly European and evidently somewhat biased in that the proposed extension is rather warmly espoused—to the extent, in fact, that the practical difficulties, while noted, are all waived aside. Thus, while in the conclusion to the author's examination of objections it is stated that "the true difficulty of scientific property lies in the definition of the right and the liability it raises", the author nevertheless dismisses "with scant courtesy" the logical objections which he has noted as having been raised and adds that "such of the practical ones as are founded in fact may be avoided without difficulty". No one familiar with the workings of the U. S. Patent Act, as well as those of the various foreign countries, would, it is believed, agree that the draft statute proposed by the author would afford a practical basis for the protection of scientific discoveries, since the scope of the monopoly granted, as well as the determination of what would be the reasonable reward to which a scientist making a discovery should be entitled, and from whom such reward should be collected, is left to arbitrary determination in a way that would constitute an effectual handicap to exploitation.
A much more practical attitude towards the problem is evidenced in the discussion by L. B. Davies of "Constitutional Difficulties in the Australian Commonwealth", found in the appendix; and this is also true of Mr. Spencer's article in the American Bar Association Journal (supra). However, the suggestion which the latter makes that the provision in the United States Constitution (Art. I, Sec. 8), giving Congress the power to secure for limited time to authors and inventors the exclusive right to their respective writings and discoveries, is broad enough as it stands to authorize legislation for the protection of scientific property, is questioned.

As stated by Walker on Patents (6th ed. 1929, Vol. I, p. 23), "The word 'discovery' does not have either in the Constitution or the Statute its broadest signification. It means invention in those documents and in them it means nothing else" (citing authorities).

Attention may well be called in conclusion to the admirable discussion of this subject by Mr. Chief Justice Taney in the leading case of O'Reilly v. Morse. This decision, involving Prof. Morse's epoch making invention of the telegraph, while effectively sustaining the patent which he had obtained thereon, held invalid one of the claims by which it was sought to cover "the use of the motive power of the electric or galvanic current . . . however developed for marking or printing intelligible characters, signs or letters at long distances". The effect of such a monopoly, as pointed out by the Chief Justice, would be more harmful than beneficial, and neither in Mr. Hamson's book nor in any other discussion of the matter, so far as the present writer is aware, has any answer been made to this fundamental objection against the patenting of a principle of nature or, in other words, a scientific discovery.

Jno. F. Oberlin.

Western Reserve University.


This small volume comprises the three lectures delivered by Senator Pepper before the University of Virginia Law School under the William H. White Foundation. The subject is the conflicting and impinging rights and prerogatives of the American Executive and of Congress, particularly the Senate. The first lecture deals with the disputes over Treaties, the second the differences which have arisen over Nominations and Removals, and the third Congressional Investigations.

The discussion covers the respective rights and powers of the two branches of our Government, as written in the Constitution, and as developed by custom and precedent. It is the latter which, as these lectures show, is of the greater influence in the development of the practical workings of government. The subject is not merely law, but history, written with the author's usual charm of phrase, humor, and breadth of vision.

In the chapter devoted to quarrels over the ratification of treaties, the impracticability of vesting the treaty-making power in the Senate alone, as originally proposed in the constitutional convention, is clearly demonstrated. The suggestion that it would be more feasible to vest the treaty-making power in the executive alone is dismissed by the statement "that popular government could not survive, if power to bring about such grave consequences were vested in the President alone". The proposal of James Wilson that the power to conclude treaties should be vested in the Senate and House is met by the statement

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1 15 How. 112 (1853).
“that the firm is large enough already but I oppose all suggestions that it ought to be dissolved”.

The Senate and the House take opposing views concerning the effect of a treaty which involves existing legislation; the Senate takes the position that under the Constitution the authority of the treaty is equal to that of the preexisting law, so that the latter is as effectively nullified as if it had been repealed by Act of Congress, while the House contends that the treaty is inoperative unless and until an Act of Congress is passed to give effect thereto. The view is expressed “that the Senate has altogether the better of the argument,” although it is recognized that if legislation is necessary to accomplish the results contemplated by the treaty, the House cannot be coerced. The author maintains, nevertheless, “that the making of a treaty pledges the faith of the nation and that if ever the House were to refuse to comply with the terms of a treaty so made, we could never, if summoned to answer in an international forum, successfully plead the privilege of the House as a defense”. He contends, moreover, that a treaty will override state statutes passed in the exercise of the police power, although he admits that the statement “will be challenged by champions of states’ rights”. The decision of the Supreme Court in *Missouri v. Holland,* involving the migratory bird treaty, although not referred to by him, would seem to fully support the Senator’s contention.

A most interesting narrative is given of the action of the Senate in rejecting the Treaty of Versailles, including the League of Nations Covenant. The resolution of unconditional ratification is referred to, where the motion was lost 38 to 53 (37 Democrats and 1 Republican voting for, and 7 Democrats and 46 Republicans against the motion). This vote is contrasted with that on the final motion for ratification with the adopted reservations. There the vote was 49 to 35 in favor of the motion, but, since the required majority was 56, the ratification was lost by 7 votes, thus showing “the resolute unwillingness of the Democrats to ratify the treaty with reservations. If seven more (Democratic) Senators had accepted the reservations”, the treaty would have been adopted.

The author does not mention the recent suggestion of Mr. John W. Davis that treaties should be ratified by a mere majority vote of the Senate, but he impliedly rejects it “by affirming the wisdom of our constitutional system, by insisting that the Senate’s participation in treaty-making has abundantly justified itself”.

The second lecture deals with conflicts over nominations and removals. Although the power of the Senate to ratify or reject Presidential nominations is plenary, he is convinced that the President should have a much freer hand in this matter and less interference from the Senate than in the case of the ratification of a treaty. “An executive is much more likely to be effective, and may be much more readily held to strict accountability, if he is given a free hand in the choice of his subordinates”, and therefore the choice of a cabinet officer or a diplomatic representative should be rejected only for the most substantial reasons. Senatorial meddling with judicial nominations is “an unmixed evil”, and “recognition of the responsibility of the bar is the surest way both to improve its own morale and to secure reliable testimony concerning the fitness of names under consideration”. A well deserved tribute is paid to the present Attorney General, “for the courage with which he has resisted senatorial selections believed by him to be unworthy”.

The recent controversy over the confirmation of names submitted to fill vacancies in the Supreme Court indicated the conviction of certain Senators that the Senate must weigh not merely the character and ability of the nominee, but his economic and social views as well. It is the author’s contention that the
debate on the nomination of Chief Justice Hughes disclosed the Senate at its worst, and that "the Senate will best serve the country if, in case of judicial nominations, it will limit its objections to cases in which the judgment of the executive has plainly slipped and has led him to name a lawyer who fails to command the esteem of the bar", leaving to the President and public opinion the matter of the nominee's social and economic views.

The pending litigation between the Senate and three members of the Federal Power Commission is referred to, but not discussed, due, doubtless, to the fact that Mr. Pepper has been retained as counsel for the Chairman of the Commission.

The questions involved in the removal by executive order of officers appointed by the President and confirmed by the Senate are discussed, with special reference to Myers v. United States, in which case Mr. Pepper appeared as counsel representing the Senate. After referring to the fact that "there is no critic of a decision so unreliable as losing counsel", he exhaustively dissects the decision (rendered by a court divided 6 to 3). He emphasizes the narrow question involved, namely, the right of the President to remove a Postmaster, an "inferior officer", appointed by him and confirmed by the Senate, and suggests that if the majority of the court had treated the case as involving but this single issue, there would have been left open the important question of the status of superior officers. The majority opinion, however, declined to recognize a distinction between the two classes of officers, and, as long as the view of the majority stands unreversed or unlimited, it means that "the President is endowed . . . with a power of removal which, so far as executive officers of the United States are concerned, is not constitutionally susceptible of restraint by Congress". The opinion is hazarded that the last word has not been spoken, and that in the future the Myers case may be limited to its exact facts, leaving open the questions involved in the case of the Comptroller General, officers of the military establishment, and other important functionaries, as well as the removal of inferior officers, the appointment of which is vested in the President alone, or in the head of a department. If the decision be taken with its full implications, all executive officers of the United States would be removable by the executive at will, and any President could effectively annul our Civil Service laws and return to the old spoils system.

The fundamental distinction between the questions arising over nominations and removals is thus expressed:

"When a nomination is rejected by the Senate, the most that can be said in criticism of the rejection is that the Senate has abused a conceded power. When an officer is removed by executive order, there may arise, not only the question whether a power has been abused, but whether, under the circumstances of the case, any such power exists at all."

The final lecture, dealing with Congressional Investigations, discusses the question historically, bringing the record up to date with reference to the recent Teapot Dome Inquiry, and the Daugherty and Sinclair contempt proceedings. In referring to the statement of the Supreme Court in the former case, that a witness rightfully may refuse to answer where the questions asked are not pertinent, the comment is made: "The limitation on the scope of the inquiry seems to be largely a verbal limitation, and since, in the nature of things, there can be no precise definition of the issues pending before the committee, a witness will in practice get very little comfort from the assurance that he need not answer any questions except such as are 'pertinent to the matter under inquiry'".

2 272 U. S. 52, 47 Sup. Ct. 21 (1926).
The result of these recent decisions is that "the Court has finally reached a conclusion that the judiciary had better keep hands off the congressional investigations". That "in a day when reserve is a lost art, privacy an illegitimate luxury, and publicity both a means of self-exploitation and a panacea for public ills", the private citizen appearing before a Congressional Committee can be assured of "no guaranty of consideration or fair treatment except such as might result from a code of procedure which the Houses might impose upon themselves or for the good manners which may be developed by individual committee men". "We have evolved worthy standards of conduct for professional baseball players. We are hopeful of a similar evolution in the case of prize fighters. It would be lamentable if only Senators were to be classed as inevitably barbarous."

To avoid friction and secure the most efficient working of our governmental machine, it seems to the author "that the Senate should make a cooperative use of its treaty-making power, an independent use of its power of investigation, and a distinctly subordinate use of its power to reject nominations".

J. Wesley McWilliams.


Looking Forward is the application, through a series of thirty-one addresses and essays, of a consistent philosophy in particular cultural and political issues during a period of crisis unparalleled in history. It is a brave book exhibiting the active and fertile intelligence of one of the most richly endowed and vigorous minds in America; though its optimism is the issue of an Act of Faith, it is manly and courageous in its affirmations and especially in its evangel of understanding as the abiding basis of Liberty. Looking Forward may be read as a breviary to strengthen conviction in Anglo-Saxon principles of democracy, or it may be read as a challenge to those who despair of Liberty and look, however remotely, to any one of the divergent forms of Compulsion as a way out of our present difficulties. Vigorously it defends the five fundamental institutions of our civilization: the family, property, the State, the Church, and the University. While it recognizes the necessity and value of nationalism, it encourages hope in an international harmony and consolidation through understanding, co-operation, and agreement. Against coercion, either in international affairs or in American issues, it throws all its weight of reason and persuasion.

As in his earlier book, The Faith of a Liberal (Scribner's, 1924), Dr. Butler again discloses in this new book the fact that he is a faithful trustee of what he calls The Great Tradition of Liberalism. His function is precarious, for the prestige of Liberalism as a philosophy and as an attitude of mind was perhaps never so low as it is today in the English-speaking world. Elsewhere it was never strong but the recent pressure of philosophies of Compulsion have tended to force it to its nadir even where it should be most tenaciously preserved and proclaimed. Communism is a fact in Russia, Fascism is a fact in Italy; Imperialism of a threatening variety was never more ominous than in Japan at this moment. Yet in the face of the strength and triumph of these rival systems, President Butler not only retains his faith in liberty and democracy but perseveres to estimate justly their achievements and undeveloped possibilities in a world order. The address on "New Critics of Democracy" is worthy of comparison with Lord Morley's reaffirmation in a similar temporal context, "Liberalism and Reaction"; indeed, Dr. Butler's essay might well be considered a pendant to
Morley’s rigorous and honest appraisal of the values of democracy in spite of the fierce corrosives of anti-democratic criticisms. “The critics and opponents of Liberty,” Dr. Butler stalwartly asserts, “propose to substitute for it Compulsion in some one of its many forms. . . . In the face of these powerful assaults, it is no longer possible to rest content while pointing with pride to past achievements. . . . The appeal for self-examination, for self-criticism, for self-improvement and for reflection upon the meaning of our fundamental institutions is peremptory. We can fail to heed it only at our gravest peril.” That is the Great Tradition: in President Butler’s words we hear the voice of the old Lion roaring; the Lion of Liberalism which was in Burke, in Mill, in Matthew Arnold, and in Lord Morley.

As one reads Looking Forward, he is also minded to look backward and reread Matthew Arnold’s The Future of Liberalism. The correspondence in temper, in tolerance, in sagacity is striking. “. . . of man in society,” said Arnold (Mixed Essays, p. 385) “the capital need is, that the whole body of society should come to life with a life worthy to be called human, and corresponding to man’s true aspirations and powers. This, the humanization of man in society, is civilization. The aim for all of us is to promote it, and to promote it is above all the aim for the true politician.” Dr. Butler has created for himself an original role in the American scene and that role is tremendously important. Without ever holding public office, he has consistently sought to be a disinterested student of national and international affairs and has made his office as President of a great university a creative opportunity to exercise his influence in the formation of a right public opinion. He has been the intimate friend and learner of the great men of the modern world for the last forty years; statesmen, philosophers, scientists and artists have been his unofficial dons. With truth he could say of himself as Matthew Arnold said of himself sixty years ago, “I do not profess to be a politician, but simply one of a disinterested class of observers, who, with no organized and embodied set of supporters to please, set themselves to observe honestly and to report faithfully the state and prospects of our civilization.” (Mixed Essays, pp. 80-81).

Like Arnold, President Butler is an educator, but, unlike Arnold, he has achieved an exalted official position in the educational world. In a democratic society, the University is destined to play a significant role; as we work out the conception of the University, its complex and heterogenous company of scholars, critics, and philosophers may become the articulate voice of democratic intelligence—the process of becoming that is not yet complete, because of the prevailing confusions as to what a University is or should be; yet there are not wanting signs to indicate that universities are becoming conscious of their possibilities and power as ganglia of the American scheme. Dr. Butler formulates this conception robustly and clearly: “The university,” he says (p. 288) “is by its nature free and must always be free. It can neither acknowledge nor submit to any master, whether one of economic interest, of political tendency, or of religious faith. In order to be truly free, the university must be tolerant. It must be able to find a place for every sort and kind of conviction which is completely and intelligently arrived at and which is honestly and sincerely held, in order that the fittest of these convictions may survive through free competition in the fields of intellectual inquiry and tested human experience.” As if to illustrate the practical working out of this conception he has created, during the forty years of his Presidency of a University, a free and creative society of scholars, scientists, philosophers, artists, and engineers whose qualifications for appointment were that they were both competent in their mastery of sound scholarship and the love of learning and in a quick alertness to sense the march of events and the flankings of fact and opinion which are so rapidly remaking
the modern world. Though he does not presume to articulate the corporate
voice of this society, he has by laudable intellectual and spiritual teachableness
learned from his contacts with his colleagues, and in the free but austere theatre
of learning has not only amplified his mind but has given shape and direction
to a living tradition. In one of his few personally revealing passages, he has
beautifully phrased the sentiment which animates his philosophy: "For myself,"
hesaysonpage205,"it is exactly forty-six years since I made my first youthful
visit to the mother country. Almost every year from that time to this... has seen me on these shores. And I have a habit... as the time comes for
me to turn my face toward the Homeland and the setting sun, to go for an hour—a quiet hour

“To the hush of our dread High Altar
Where the Abbey makes us We.

“I like to stand alone there for half an hour and think; I like to read the
names of ancient kings, of statesmen, of churchmen, of great poets, of men of
letters, of modern men of science, of discoverers, of servants of mankind in
every form. I like to move from one to the other and to let the sweet, softly
falling waters of memory fall over the drier places of the mind to bring forth
new fruit, new flowers of recollection and understanding. I like to start on the
westward journey refreshed by spiritual contact with my spiritual ancestors, and
I like, when opportunity offers, to tell those who will listen that this is the secret
of civilization—this intangible, invisible force and influence, coming down
through the centuries and before that through the ages. It is that which has
given us this life in which we find ourselves, difficult, complicated, desperately
hard for so many, yet tested, proved, developed, enriched by century after cen-
tury of human experience. The responsibility of the English-speaking peoples
of today and tomorrow in preserving the peace, the good order, and the progress
of the world, in uplifting the masses of mankind, in the doing of the kindly and
helpful thing for the less fortunate; the responsibility of the English-speaking
peoples wherever they may be, is as trustees of their great traditions."

Specific discussion of the various essays and addresses in Looking Forward
would involve a comprehensive essay beyond the competency of this reviewer.
Criticism or dissent would also be irrelevant if the reviewer’s notion be right
that oratory, like prayers, may be ignored but not criticized or dissented from.
Oratorical style differs from discursive because of its purpose of persuasion
through eloquence, sentiment, and appeal to the moral and social appetite for
edification. Oratory approaches the tonal melodies of music and evokes states
of assent through the magic of imagery and thus may, because of the gifts of
the orator, excite emotional conditions which are more responsive than are those
produced by the less charming and less seductive processes of expository or
discursive modes of expression. The danger of oratory is that it tends to be-
come purely ceremonial; a ritualistic and sacerdotal gesture. This danger
President Butler has avoided. He has succeeded in retaining the elegance of
exalted speech while proposing ideas and courses of action which are not popular
today. He cannot be classified with conventional labels, for he exhibits a fine
and free play of mind without dispensing with or concealing some firm convic-
tion. His addresses fall into three general groups; those dealing with inter-
national tendencies and achievements; those concerned with American political
and economic problems; and those which clarify the function of the university
in a democratic society. Taken separately, each of these three groups indicates
forcefully and clearly the speaker’s mind, yet philosophically the present re-
viewer finds difficult the problem of reconciling the principle of international
consolidation which President Butler urges and the principle of American dis-
integration into a Jeffersonian localism which he also urges. Perhaps there is
some unstated principle which reconciles these divergent proposals; they are not
necessarily opposed or contradictory when they are read in the light of Dr.
Butler's often-repeated belief that, given the condition of a disposition to learn
and to understand, to co-operate, and to agree, Liberty in American and inter-
national conditions rests on an essentially indivisible dualism: we must operate
through established nationalism to a greater concordance with other nations;
and at the same time throw weight against the threatening pressures which in
our country are squeezing out those local possibilities for diversity of develop-
ment which constitute, not only the potential riches of our body politic, but also
the fundamental aspirations of the Great Traditions which we have inherited
as one of the English-speaking peoples.

William S. Knickerbocker.

University of the South.

CASES ON SURETYSHIP. By Morton C. Campbell. Published by the editor:

To one who feels that to standardize legal education is to ruin it, and that
the principal advantage of a law school course over office study lies in contact
with a critical and independent-minded faculty, the reviewing of a casebook is
not particularly enlivening—it is just source material. One concedes that it is
arranged primarily for the editor's own needs, with emphasis on those points
in which he is particularly interested for the moment, while other points favored,
perhaps, by the reviewer are slightly touched on or omitted. In other words, it is
a problem of pedagogy, the dullest of the arts. Still a new casebook from
Harvard is an event of interest to law teachers, and offers an opportunity to state
one's preferences—or prejudices, if that is the appropriate term. For comparison
one turns naturally to the casebook of Dean Ames to whom the editor offers
grateful acknowledgments, as, indeed, must all teachers of Suretyship. Most
significant is the inevitable change of attitude toward English cases. Professor
Ames used them in his book with great liberality, as did all his distinguished
contemporaries. It was a period of mild Anglo-mania in the fashionable world,
so that it was quite natural for Cambridge to peep over Bunker Hill in the
direction of Westminster Hall. The modern American mode turns from mis-
guided and discredited Europe to the contemplation of oil derrick and prairie, and
this book, like most of the recent casebooks, follows the trend of the times.
American cases, especially recent cases, are concerned with transactions and
present problems that convey to the average student a greater sense of reality
than English cases, owing to the evergrowing divergence of our respective
cultures. Nevertheless there are appreciable losses in giving up English cases:
the sentimental one, based on the historical unity of our systems of jurisprudence;
and the practical one, that the judges of the higher courts in England are more
given to reasoning on principle than their contemporaries in our state courts,
who show an increasing tendency to rely on facile dicta culled from encyclo-
pedias and digests. Of course, by using cases that avoid lengthy discussion, there
is a saving of space, and this object is enhanced in Professor Campbell's book by
a rigorous cutting down of the judgments and the rewriting of the statements of
fact in simple language capable of being understood by college graduates. This
will drive the cautious instructor many times to the original reports—for, after
all, what the judge says is the law of the case. The abbreviated cases are supple-
mented by quiz questions skilfully framed, which will prove a godsend to the
young S. J. D. directed by his dean to take the suretyship course at a moment's
notice. But the reviewer (a creature of habit like all lawyers) does not like this
arrangement of the text and would prefer to have the quiz questions, if necessary, in a separate pamphlet or assembled in the back of the book. Such was the arrangement of the Juvenal used in his time in college, where all the indelicate passages were abstracted from the text and assembled in an appendix where one could take them or leave them. The difficulty with quiz questions is that, if the use of the casebook is continued for several years, the answers to the problems inevitably work their way into the ready-made digests which are the bane of the law schools. At any rate, the problems will have to be supplemented constantly by others from the current reports.

To the great credit of the editor is the admirable arrangement of the material. The equities arising out of the relation of the parties are treated at the beginning of the course which is most convenient, since many of the surety’s defences against the creditor arise out of the disregard of these equities and can be better appreciated after the equities are understood. Much material that also belongs to the contracts course is excluded, including some problems long familiarly associated with suretyship. But new problems crowd in for recognition, duplication must be avoided; and if the course is to be limited to a half year, as is usual, the material must be confined to topics that belong exclusively to suretyship. The notes contain many useful references to additional authorities as well as to textbooks and the various collections of annotated cases. There is also a good index. The reviewer will know more of this book when he tries it in class, as he hopes to soon, but, in reading it, the feature that impressed him most was its complete modernity. The major part of the cases are important and recent and deal with controversial problems that are troubling the courts at the moment, and, although, for all we know, some of these difficulties be as old as Pharaoh’s, still youth is best served by dramatizing life’s ever-recurring folly, the chief concern of suretyship and guaranty, in the dress of the day.

University of Pennsylvania.

William H. Lloyd.


Professor Bays of Northwestern University brought out the first edition of this work in 1914 and the second in 1923. The third edition is an enlargement of the earlier work.

The first division of the volume touches on the nature, sources, forms and expressions of law and then proceeds to classify the branches of law and to mention certain matters pertaining to crimes and torts. It might have been better to omit entirely the references to crimes and torts rather than to attempt to compress a sketchy treatment of these two topics into eleven pages.

In the second division there is a careful study of the general law of contracts. The method pursued by Professor Bays is to state the facts of a case illustrating a legal point and then to quote part of the judge’s opinion showing the rule of law which controlled the decision. This case material is supplemented by many editorial notes, and a question is inserted after each case to help bring out the point at issue.

The third division relates to agency. The fourth relates to bailment, shipment and sale of personal property. The fifth relates to negotiable instruments and the sixth to partnerships, corporations and business trusts. The seventh relates to bankruptcy.

There is much valuable material in this large and well printed volume. The selection of the cases, together with the statements of facts and the excerpts from
the judicial opinions, show that pains have been taken to make the work useful. Furthermore, it is clear that Professor Bays has read and studied widely and wisely. However, a fundamental question which is raised by a book of this sort, is the feasibility of combining brief editorial and other notes with brief extracts from judicial opinions. On the one hand, we have various standard textbooks which state legal principles in proper order and explain them in their bearings upon one another. On the other hand, there are standard case books which set forth leading judicial opinions in their entirety, or at least give generous portions of such opinions. Professor Bays attempts to merge these two methods of treatment. While he does this successfully in certain parts of his volume, in other parts the results are not quite so creditable.

Undoubtedly, however, in the hands of a good teacher, this work can be made a most valuable basis for the study of business law. Besides, there is apparent throughout the volume a ripe scholarship, together with a happy choice of interesting cases containing many references to quaint and peculiar features of early law and apt historical illustrations, all of which enhance the value of the work as an inspiration to the development of the student’s interest in our laws and institutions. Excuse, therefore, must be found for occasional strayings from the subject in hand of which the editor may be guilty. If we have in mind the purpose of the work, which is to serve as a useful tool in the higher education of college students, the choice of materials seems to be fully justified.

John J. Sullivan.


In this second edition, Professor Aigler has added to the first edition of his Cases on Titles seventy-six pages of new matter, including more recent cases and notes of more recent decisions, which add very much to the value and effective quality of the work for law school instructors and teachers, by indicating the progress of this branch of the law since his first edition appeared in 1916. There are some changes in arrangement, the most important of which is the shifting of the short chapter on Accretion from Part I (Original Titles) to a subdivision of Chapter III, Part II (Derivative Titles). In other respects the new edition is the same as the old. It is too well known to students and teachers of the law of Property as a work of very special excellence and high scholarship, to require any extended review.

As part of a series of four volumes which together purport to cover the subject-matter of the law of Property this work is open, however, to very definite criticism. The law of Property is naturally and intrinsically a single subject which to be dealt with in the most effective way demands treatment in the law schools as a single subject. A distinct disservice was done to the cause of legal education when so many of our best law schools, following the lead of Harvard, made Future Interests a separate elective course treated with an intensity of detail and an extensive mass of material altogether out of proportion to other equally important divisions of the law of Property. The result has been that a very considerable majority of the students in these schools refused to elect this course, and know nothing of this fundamental branch of the law of Property. Those who took the course suffered, not because of its difficulty, which is typical of law students need, but because of the necessary loss elsewhere arising from too much time and attention to this subject. Specialized work in modern problems in this field might well be reserved for graduate study.
Many of the best schools still persist in giving a separate course in Personal Property, and start their first-year students off with this course, which consists of an ill-assorted grouping of remnants left over from courses on Sales and other subjects, including Fixtures and Emblements, which are distinctly part of the law of Real Property. Harvard led the way in a genuine and needed reform by making their introductory course in Property a general course including both real and personal property. The strong modern tendency to eliminate by legislation old distinctions between real and personal property, where that can be done, should put the final quietus on separate courses in Personal Property.

The introductory course in Property should develop early in the course a thorough study of possession and ownership. The law of property is the law of its ownership, and the exceedingly close relation of possession or seisin to ownership is known to all who have even the sketchiest acquaintance with legal history. Except for definite weakness in historical matter Harvard takes care of this adequately in the early chapters of Warren's *Cases*, but it is badly scattered in the West Publishing Company's series of case books. Certain phases of this law are covered in the *Cases on Personal Property*, something is added in Professor Bigelow's "Introduction" to the first part of his *Cases on Rights in Land*; but the first adequate treatment of this matter in this series appears in Professor Aigler's *Cases* in the chapter on Possessory Titles, coming in the second year of the law student's course. This historical matter does not belong in a course on Titles. It is the fundamental basis of the law of Property and should be adequately covered both as to real and personal property early in the first year.

The historical basis of ownership and possession, of seisin and disseisin, is not adequately covered by the very brief extracts from Maitland, Pollock & Maitland, Bracton and Littleton in Professor Aigler's *Cases*. Warren has nothing at all of this kind. On the subject of Estates Warren has a series of extracts from Littleton, with a few extracts from statutes and cases utterly inadequate as an historical basis for this work, and amounting to very little more than a series of definitions of the legal terms involved. Professor Bigelow's "Introduction" above referred to, very brief and without citation of cases or other authorities, is the method of covering this matter in the first year course in the West Publishing Company's series. In this volume by Professor Aigler in the chapter entitled "Estates Created", pages 579-629, estates in fee, fee tail and for life are treated thoroughly and effectively. The forty-eight pages of this chapter devoted to tenancies less than freehold, landlord and tenant, seem a quite inadequate treatment in view of the great practical importance of the law of landlord and tenant to the modern lawyer. A thorough study of estates should surely come in the first year following the chapters on possession and ownership and on possessory interests in chattels. It should be preceded by or accompanied with a thorough study of the history of the feudal system, of tenure and of estates, including tenancies for years. Postponing this fundamental and elementary part of the law of Property to the latter part of the second year seems quite indefensible.

No doubt this unfortunate result is made necessary by the taking up of Profits, Easements and Covenants in the first year following Personal Property and the general introduction by way of definition of terms. Why the unfortunate beginner, after the disjointed and fragmentary course on Personal Property, should be thrown into easements and other incorporeal rights, and the highly technical subject of Covenants, after merely glancing at estates by way of definition, is a mystery. Gray did it first, and his example has been followed with very little thought or discrimination. The result has been an overemphasis of easements and incorporeal rights far beyond their relative importance in the law, making necessary the relative neglect of the law of landlord and tenant, dower, curtesy, etc.
The only excuse for treating the substantive law of estates under the subject of Titles is that the failure to treat the topic adequately in the preceding volumes of the series made it necessary. The subject of Titles has to do with the form, execution and delivery of deeds, with recording and priorities. It is the practice side of the law of Property. It ought to be clear that it should follow after the substantive side, as the substantive law must be known before the practice side is brought into play. Its details are best learned by actual experience in practice. No important substantive division of the law of Property should be slighted in order to develop unduly this simpler and less important part of the law of Property. The fact that nearly six hundred pages of this volume are devoted to these topics and only forty-eight pages to estates for years, at will, and from year to year, sufficiently indicates the lack of balance in this series of casebooks on Property.

New York University Law School.

William F. Walsh.
BOOKS RECEIVED


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