BOOK REVIEWS

The Spirit of the Common Law. By Roscoe Pound. Boston, Marshall Jones Co., 1921. pp. xv, 224.

Dean Pound's main thesis in this volume is that there is a fundamental mode of thought, inherited from feudalism, "a mode of dealing with legal situations and with legal problems . . . . which has always tempered the individualism of our law, and now that the change from a pioneer, agricultural, rural society to a settled, industrial and commercial and even predominantly urban society calls for a new order of legal ideas, has been the chief resource of the courts in the movement which has long been proceeding quietly beneath the surface in judicial decision." * * * * "The first solvent of individualism in our law and the chief factor in fashioning its system and many of its characteristic doctrines was the analogy of this feudal relation, suggesting the juristic conception of rights, duties and liabilities arising, not from express undertaking, the terms of any transaction, voluntary wrongdoing or culpable action, but simply and solely as incidents of a relation." (pp. 15, 20.)

Our public law, the author says, is founded on *Magna Carta.* "But Professor Adams has shown that, as a legal document, Magna Carta is a formulation of the duties involved in the jural relation of the king to his tenants in chief. As the Middle Ages confused sovereignty and property, it was easy enough to draw an instrument declaring the duties incident to the relation of lord and man which, when the former happened to be king, could be made later to serve as defining the duties owing by the king in the relation of king and subject." (pp. 25, 26.)

That every man has certain natural rights deduced from a social compact is pronounced to be "an alien conception in our law. After working no little mischief in our constitutional law in the nineteenth century, this conception of natural rights going back of all constitutions and merely declared thereby is giving way and there are signs that we shall return to the true common-law conception of the rights and duties which the law imposes on or annexes to the relation of ruler and ruled." (p. 26.)

Maine's position that the evolution of law is a progress from *status* to contract "is a generalization from Roman legal history only. It shows the course of evolution of Roman law. On the other hand it has no basis in Anglo-American legal history, and the whole course of English and American law to-day is belying it, unless indeed, we are progressing backward." (p. 28.)

In studying the characteristics of the growth of American common law, Dean Pound marks it off into two periods.

"These periods are (1) the classical common-law period, the end of the sixteenth and beginning of the seventeenth century, and (2) the period that some day, when the history of the common law as a law of the world comes to be written, will be regarded as no less classical than the first—the period of legal development in the United States that came to an end with the Civil War. In the one the task was to go over the decisions and legislation of the past and make a system for the future. In the other the task was to examine the whole body of English case law with reference to what was applicable to the facts of life in America and what was not." (pp. 41, 42.)

This description of what is presented as a second period seems to make too much of English case law as a source of authority. It ignores the claims of legal philosophy and right reason to a share in the work. It limits the field by excluding consideration of the judicial precedents of continental Europe.

Dean Pound discusses at some length the historical events which illustrate his subject, and emphasizes its character as a branch of social science.

"At common law the king is *parens patriae,* the father of his country, which is but the medieval mode of putting what we mean to-day when we say that the State is the guardian of social interests. In the feudal way of looking at it, the relation of king and subject involved duties of protection as well as rights of allegiance. The king, then, was charged with the duty of protecting public and social interests, and he wielded something very like our modern police power. But this power was limited on every side by the maxims of the common law and the bounds set by the law of the land." (p. 68.)

The notion of the supremacy of law was thus in England bound up with that of the supremacy of the sovereign. It was a natural function of constitutional government.

"We may be assured, therefore, that the supremacy of law, established by the common law against Tudor and Stuart, is not to disappear. We may be confident that we shall have, not merely laws, expressions of the popular will for the time being, but law, an expression of reason applied to the relations of man with man and of man with the State. We may be confident also that in the new period of legal development which is at hand as in like periods in legal history there will be a working over of the jural materials of the past and working into them of new ideas from without. We shall be warranted in prophesying that this working over will be effected by means of a philosophical theory of right and justice and conscious attempt to make the law conform to ideals. Such a period will be a period of scientific law, made, if not by judges, then by lawyers trained in the universities; not one of arbitrary law based on the fiat of any sovereign, however hydra-headed. For the notion of law as the will of the people belongs to the past era of a complete and stable system in which certainty and security were the sole ends. Throughout legal history law has been stagnant whenever the imperative idea has been uppermost. Law has lived and grown through juristic activity. It has been liberalized by ideas of natural right or justice or reasonableness or utility, leading to criteria by which rules and principles and standards might be tested, not by ideas of force and command and the sovereign will as the ultimate source of authority. Attempts to reduce the judicial office in the United States to the purely mechanical function of applying rules imposed from without and of serving as a mouthpiece for the popular will for the moment are not in the line of progress." (pp. 83, 84.)

The guarantees of individual rights established by our constitutions have had in England "to give way to modern legislation. In America they have stood continually between the people, or large classes of the people, and legislation they desire. In consequence, the courts were long put in a false position of doing nothing and obstructing everything, which it was impossible for the layman to interpret aright." (p. 103.) "Men are saying to-day that material welfare is the great end to which all institutions must be directed and by which they must be measured. Men are not asking merely to be allowed to achieve welfare; they are asking to have welfare achieved for them through organized society." (p. 109.)

Legislative law-making the author is disposed to extend rather than restrict. In that connection he tells a good story on the authority of Jhering. A question of commercial law was submitted to a German Law Professor. "He returned an elaborate and thoroughly reasoned answer based upon the principles of the Roman law, the basis of the common law of Continental Europe and hence of legal instruction. Upon suggestion that he had omitted to notice a section of the commercial code which appeared to govern, he responded that if the commercial code saw fit to go counter to reason and the Roman law it was no affair of his." (p. 157.)

Dean Pound regards Kant as the prophet of a new dispensation, who established a new method of legal science,—a new stage of legal development, which characterizes the twentieth century. Kant held that "legal justice" is not immutable. Fate is behind it. "The old natural law called for search for an eternal body of principles to which the positive law must be made to conform. This new natural law called for search for a body of rules governing legal development, to which law will conform do what we may." (p. 163.) "Legal principles are not absolute, but are relative to time and place." (p. 172.) Equity has "sought to prevent the unconscientious exercise of legal rights; to-day we seek to prevent the anti-social exercise of them. Equity imposed moral limitations; the law of to-day is imposing social limitations." (p. 186.)

The author closes with this formula of methodology: "In the past century we studied law from within. The jurists of to-day are studying it from without." (p. 212.) This is a good illustration of one prominent feature of his style of composition. It is compact, and antithetic. He relies much on drawing contrasts. He aims to be plain, and talks straight to the point. He has handled a difficult subject with force and spirit.

SIMEON E. BALDWIN

New Haven, Conn.

Essays on Constitutional Law and Equity. By Henry Schofield. In Two Volumes. Boston, Chipman Law Publishing Co., 1921. Vol. I, pp. xxiv, 1-456, xxvi. Vol. II, pp. viii, 457-1006.

The late Professor Schofield, of the Law School of Northwestern University, contributed many papers to the Illinois Law Review; and in these volumes the papers are collected by his colleagues.

As the subjects upon which Professor Schofield wrote were usually unsettled contemporary problems, the treatment is, naturally enough, argumentative, rather than expository. Clearness and fairness, combined now and then with a homely thrust, make the papers peculiarly stimulating and attractive.

Take, for example, the first three, covering about one hundred pages. Here the problem discussed is whether a federal question under the Due Process clause of the Fourteenth Amendment is raised whenever a state court, through ignorance of state law, gives an erroneous decision. Is it not true that a state court is an agency of the state? When a state court makes a mistake of law, does not the state through this agency deprive the unsuccessful litigant of life, liberty, or property without due process of law? Such is the author's contention in the first of the papers, which appeared in 1908 and was based upon acute reasoning and upon language used in several opinions of the Supreme Court of the United States. Such is his contention in the second paper, which appeared in 1910. In the third paper, which appeared in 1916, he still makes the same contention; but *Frank v. Mangum* (1915) 237 U. S. 309, 35 Sup. Ct. 582, had been decided meanwhile, and, notwithstanding favorable dicta in that case, the author honestly says:

"There is no clear instance wherein the Supreme Court of the United States reversed a state decision administering the local law of the state on the distinct ground of want of scientia in the state decision on a question of law or a question of fact arising under the local state law so gross as to show that the state decision flowed from abitrary power and not from judicial discretion." (p. 83.)

And again he says:

"It is not easy to tell from the majority opinion, however, whether the court means to say that Frank had no federal right at all that could be denied or abridged by the state of Georgia through its courts, or to say that he did have the federal right stated to have the local law of Georgia concerning jury trial in criminal cases

administered judicially and not arbitrarily, and then to decide that on Frank's own showing the federal right was not denied or abridged by the state of Georgia through its courts. The latter seems to be the correct interpretation of the majority opinion." (p. 90.)

And finally he says:

"Frank's case cannot be regarded as a weighty precedent to support the distinct, separate, and independent federal right of litigants in state courts in cases arising under the local state law to have free, fair, and impartial state tribunals, because the existence of the right was not debated at the bar or on the bench, and its existence plainly is debatable; and because as a matter of fact the court did not protect and enforce any such federal right, but declined to do so, refusing even to hear Frank's claim that the Georgia trial tribunal was not free, fair, and impartial because mob-dominated, which refusal can be supported only on the view that such distinct, separate, and independent federal right does not exist." (p. 101.)

Surely no more honorable concession can be made by a contestant who for years has argued for a doctrine by him believed to be just.

From the quotations already made, the quality of the whole mass of papers may fairly be judged. It is impracticable to make further quotations; but as it is important that both the scholar and the practitioner may know whether these volumes contain matter upon subjects connected with their respective activities, a list of the principal titles will be given. The scope covered is a great part of Constitutional Law and a smaller part of Equity. On Constitutional Law the papers include: the Supreme Court of the United States and the enforcement of state law by state courts; *Swift v. Tyson* and the uniformity of judge-made law in state and federal courts; federal courts and mob domination of state courts; the claim of a federal right to enforce in one state the death statute of another; the doctrine of *Haddock v. Haddock;* full faith and credit *v.* comity and local rules of jurisdiction and decision; new trials and the Seventh Amendment; jury trials in original proceedings for mandamus in the state supreme court; the state tax on Illinois Central gross receipts and the commerce power of Congress; cruel and unusual punishment; petit larceny as an infamous crime involving infamous punishment; religious liberty and Bible reading in public schools; freedom of the press; the obligation of contracts and the street railroad problem in Chicago; the state civil service act and the power of appointment. On Equity the papers cover, among other things, the word "not" as a test of equity jurisdiction to enjoin a breach of contract; so-called equity jurisdiction to construe and reform wills; equity jurisdiction to abate and enjoin illegal saloons as public nuisances; right of workmen to enjoin a threatened strike; irregularity in an execution sale as a foundation of jurisdiction of federal courts to manage insolvent public service corporations. These are the chief papers; and there are many others, almost equally important, in the form of brief comments on recent decisions.

This is a long and varied list; but Professor Schofield's colleagues have arranged the material in logical order, and the result amply justifies the labor of author and of editors. It is true that these volumes will disappoint readers who wish merely a digest of decisions; but they will not disappoint readers who enjoy close reasoning and who give the reasoner permission to argue that both the readers and the courts are wrong.

EUGENE WAMBAUGH

Harvard Law School

Oxford Studies in Social and Legal History. Sir Paul Vinogradoff, Editor. Volume VI. *XI: Studies in the Hundred Rolls: Some Aspects of Thirteenth-Century Administration.* By Helen M. Cam. *XII: Proceedings against the Crown (1216-1377).* By Ludwik Ehrlich. Oxford, Clarendon Press, 1921. pp. x, 198, 274.

In the volumes already published of Professor Vinogradoff's series of Oxford

Studies in Social and Legal History, the social have outnumbered the legal studies. With the exception of the valuable paper by the late Professor Barbour on *Contract in Early English Equity,* there has been no study until the present volume upon legal history. Dr. Ehrlich's contribution to this volume helps to restore the balance as it is a technical study of certain important phases of thirteenth and fourteenth century law. The title of the essay *Proceedings against the Crown* hardly promises so much as it actually gives, since it covers in a rather wide range many forms of assertion of private or communal right against the king. Dr. Ehrlich studies a series of topics first for the reign of Henry III, then for Edward I's, and then to a little past the middle of the fourteenth century. Beginning with fundamental considerations, as the contemporary postulates of legal thought and the relation of the king to the law, he goes on to consider how these conceptions took form in actual practice in regard to the acts of the king, wrongs committed by him, his privileges, his actual power, and his administrative machine. Then remedies are discussed with special reference to the ordinary courts including *coram rege,* and then restitution or compensation. The king can do no wrong (*Nihil enim aliud potest rex in terris . . . . nisi id solum quod de jure potest.* Bracton, f. 107) means in the law not that someone else has done the wrong, but that the king "must not, was not allowed, not entitled, to do wrong; his acts if against law were not legal acts but wrongs." These wrongs the courts may correct, but no writ can be had against the king. Proceedings against him are by permission. One of Dr. Ehrlich's most important contributions to our knowledge is the establishment of the fact that in the time of Henry III there were no written petitions. They were introduced by Edward I, following a practice at Rome and in some continental states. He supposes that earlier proceedings were begun orally before the council. In this he is undoubtedly right, since that was the form of procedure in the great council in all kinds of cases and probably it was so also in all royal courts before the introduction of prerogative procedure. The study of the development of the petition under Edward I and of procedure upon them in parliament is particularly valuable and is more thorough and illuminating than any before made.

On many topics new light is thrown. The idea that the king is rather an institution than a person is developing and also the conception of public utility as an end to be sought, but at the same time the foundations are being laid of those claims of absolute power which were advanced by the Stuarts. Incidentally the apparent contradiction in Bracton between the king as above the law and the law as above the king is discussed as a reflection of actual conditions in the law. The growth of national feeling, the responsibility of officers for their acts, and the operation of exchequer and chancery courts in the fourteenth century are included. The index to this study is quite unsatisfactory.

If it was Miss Cam's original intention to study administrative abuses in Essex as depicted in the Hundred Rolls, she found herself compelled to devote the greater part of her essay to two preliminary investigations: the development of the articles, the capitula, of the Eyre, and the character and trustworthiness of the Hundred Rolls as historical material. The gradual development of the few simple demands of the Assize of Northampton in 1176 into the sweeping inquiries of the last part of the thirteenth century and their bearing on the *Quo Warranto* investigation is an interesting history. Between 1244 and 1278, 105 articles were added to the list, and before the Eyre was abandoned others still. Probably, however, the part of this study of the greatest permanent value to scholars will be the analysis of the Hundred Rolls themselves. It has generally been taken for granted that these Rolls as printed by the Record Commission can be accepted at their face value, and they have been largely used on that supposition. Miss Cam shows, however, that they are a quite uncritical combination of material from

various sources and of varying value, and that critical study is imperatively needed before they can be used as historical evidence. No one who hereafter wishes to draw upon them can neglect Miss Cam's study.

GEORGE BURTON ADAMS

Yale University

Men and Books Famous in the Law. By Frederick C. Hicks. Introduction by Harlan F. Stone. Rochester, Lawyers' Co-operative Publishing Co., 1921. pp. 259.

Hamilton Odell, a distinguished member of the New York Bar, who died a few weeks ago in his eighty-eighth year, is said to have found keen enjoyment during his last years in reading the Advanced Sheets of the New York State Reports. But it takes a long life devoted to the law to enable a man to find enjoyment and relaxation in such a pastime. A taste for law literature is a cultivated taste. The flood of new law literature, which is overwhelming to a practicing lawyer of to-day, has made the task of keeping up with even the latest decisions an immense one, and discourages lawyers, young and old, from seeking general improvement or relaxation in the reading of reports. I have no doubt Mr. Odell had read Coke's Reports, but I doubt if there are half a dozen of his survivors practicing in New York City who have done so. Except for selected cases, there are probably few lawyers to-day who have any precise familiarity with the ancient literature which instructed the able lawyers who distinguished our profession in the early half of the last century.

Professor Hicks has performed a great service to the legal fraternity, and indeed to the educated public at large, in giving us this thoroughly entertaining little volume. We have here an easy and pleasant means of obtaining a little knowledge of certain legal writings which are monuments in the history of the law. And the sketches of the seven great lawyers whose fame has been perpetuated to our time because of their authorship of these historic documents supplies a need of the profession. This book will fit into a fair sized pocket. It contains interesting and human facts about the men and books it tells about. It will shorten a railroad journey for any educated person, even if he has not had the advantages of pursuing the law as a calling, and will make a lawyer during a quiet evening forget about a dissatisfied female client or the lack of intelligence displayed by a jury.

The great men whose famous books have led Professor Hicks to draw them to our attention were not closet students remote from the great world. Indeed the writings of three of the four Englishmen he treats of, got them into considerable political trouble.

The prerogatives of the King; a disposition in some quarters to extoll the excellence of the Civil Law in comparison with the Common Law of England; the powers of the Court of Chancery to take jurisdiction of cases which had already been decided by the Court of King's Bench; and the "liberties of Parliament" aroused violent feeling among politicians as well as among lawyers during the seventeenth century. It involved some personal peril to write law books in those times.

John Cowell wrote a book on the Common Law of England which won for him some fame. He then proceeded to write another work called *The Interpreter* which was a law dictionary. It is reported that this book gave great offence because of a few statements therein contained. It was brought up in Parliament and received the attention of the King, the Lords Spiritual, the House of Lords, and the House of Commons during a considerable period in 1609 and 1610. All the fuss resulted in the King issuing a proclamation from which we quote a few clauses expressing in the quaint wording of the period sentiments which are not unfamiliar at the present day. After reciting the disposition of "this later age and

times of the world wherein we are fallen," "such an itching in the tongues and pens of most men, as nothing is left unsearched to the bottom, both in talking and writing"; "whereupon it cannot otherwise fall out, but that when men go out of their element, and meddle with things above their capacity, themselves shall not only go astray and stumble in darkness, but will mislead also diverse others with themselves into many mistakings and errors; the proof whereof we have lately had by a book written by Dr. Cowell called 'The Interpreter.'" Wherefore, to prevent the said errors and inconveniences his Majesty "resolved to make choice of Commissioners, that shall look more narrowly into the nature of all those things which shall be put to the press."

But it was not much easier to suppress a published book in 1610 than it is to-day. While Cowell was put under technical arrest during the investigation of his work, he was not actually restrained of his liberty. "Like a wise man he took his leave of the press, and retired to his colledge, and his private studies." A generation later his book figured in the trial of Archbishop Laud, it being charged that Laud had connived at its being printed in 1637.

Lord Coke's character and stiff-necked defiance of the King and his Lord Chancellor have made his career as a judge and politician as famous as his reports and his annotations of Littleton. When the King asked him whether if at any time in a case depending before the judges which his Majesty conceived to concern him, either in power or profit, and thereupon required to consult with them, and that they should stay proceedings in the meantime, they ought not to stay accordingly, the Lord Chief Justice of the King's Bench said for answer that "when that case should be, he would do that which should be fit for a Judge to do."

In a land where we have so many elected judges who receive their positions on the bench from some powerful politician, this famous story cannot be repeated too often or made too familiar.

But Coke was removed from his office as chief justice. He suffered for his judicial courage and integrity, just as judges in our own time have been refused a re-election, because of their unwillingness to yield to the demand of some powerful politician. It is pleasant to learn, however, that having been retired as a judge he was elected to Parliament and immediately became a leader and an advocate of the "liberties of Parliament." That it was as dangerous to incur the disfavor of the King in Parliament as on the bench is shown from the fact that at the dissolution of Parliament he was arrested and confined in the Tower for nine months.

Blackstone's reputation was based on his *Commentaries,* first issued in 1765, and still largely used by law students. Yet he too had his human side. Professor Hicks tells us that the Commentaries were written late in the evening with a bottle of wine before him "in order to correct or prevent the depression sometimes attendant upon close study." He acknowledged and lamented his bad temper.

Kent's *Commentaries* were but a small part in the busy life of the judge. We are told that the lectures upon which they were based were delivered to a very small assemblage of a few students and lawyers. In the winter of 1794-5 he delivered twenty-six lectures, two a week, to seven students and thirty-six gentlemen, chiefly lawyers and law students who did not belong to Columbia College, where he was Professor of Law. The next year only two students put in an appearance and to these he read thirty-one lectures.

Our author has given us a few pages of Kent's notes written upon his copy of Edward Livingston's *Penal Code* which show how Kent annotated what he read. This is both interesting and instructive.

Edward Livingston occupied many distinguished positions. As a young man he was elected to Congress. Shortly afterward at the age of thirty-seven he became Mayor of New York City, and United States Attorney for the District of New York by appointment of President Jefferson, and he held two of these

offices, if not all three of them, at the same time. Later he became again a member of Congress and a United States Senator from Louisiana. President Jackson appointed him Secretary of State in 1831, and two years later he was appointed American Minister at Paris. He attained all this recognition notwithstanding the fact that his career was burdened through the defalcation of a subordinate in his office as Mayor of New York. He resigned his office of Mayor and accepted responsibility although none of the missing funds had passed through his hands. The debt was finally paid, principal and interest, but not until within a few years of his death. This misfortune led to his removal to New Orleans where his abilities were promptly recognized. While there he found time to prepare a Civil Practice Act which was adopted by the legislature in 1805. He was a member of a Commission to revise the Civil Code of the state, whose work for the most part was adopted by the legislature. But his great interest which occupied him during his whole life was in the preparation of a penal code. This work challenged the attention of the foremost thinkers of the world and is his great monument. Although his penal codes were never formally adopted in the United States "they constitute a thesaurus from which the world has ever since been drawing ideas and principles."

Professor Hicks' book serves to remind us that the law offers fame of an enduring sort for scholarly and literary talent as well as for judicial eminence and brilliant advocacy.

HENRY DEFOREST BALDWIN

New York City

The Law of Sales. By John Barker Waite. Chicago, Callaghan & Co., 1921. pp. xii, 385.

In a rather long preface the author suggests that a text book should be distinguished from a digest by its analysis of the rules on which decisions are based, and that, in spite of previous attempts to analyze the law of sales, it is always possible that a new writer may bring something of value by way of explanation and of reason for the rules, and that there is also possible value in a new method of presentation. This is certainly true, and it is matter for regret that so little can be found to commend in the author's efforts. The book is not clearly written and, in the main, the author makes slight attempt at original analysis, and often is content to say in substance that some courts decide one way, and some courts another, and that the whole matter is much confused. There are frequent repetitions, as, for instance, on pages 42 and 49, specification as an indication of transfer of title is dealt with twice, when one statement would have been enough. On page 180, we find a paragraph on "What a warranty is." On page 187, the same inquiry is repeated under the heading of "What are Warranties?" Nor is the book free from absolute inaccuracies. One would hardly expect a professor of law to say that a decision in Alabama "expressly overrules" a Massachusetts case. Such a method of statement is of course of no great moment, but it illustrates a loose and confused style throughout the book. The author says (at page 29) "An undertaking by the seller to deliver the goods to the buyer at a particular place seems occasionally to have led to a holding that title did not pass until such delivery had been accomplished." Presumably all courts would hold that such was the presumption, though doubtless it is possible to transfer ownership at an earlier time. The author's statement would lead one to infer that the decisions of the courts to which he refers are of doubtful validity. There is but a brief treatment of the subject of transfer of ownership by bills of lading, and the author does not refer to the Pomerene Act, which seriously affects the correctness of some of his statements.

The author's main puzzle seems to be why it is that shipment of goods by a seller to a buyer in fulfilment of an order or contract should pass title on delivery of the goods to the carrier. He says (page 48): "The rule is a purely arbitrary one;" and again (page 50): "The theory on which this holding is based is anything but clear." On page 269, in dealing with the Statute of Frauds, he refers to the same matter again. His difficulty is that he rightly enough is unable to see any authority on the part of the carrier to assent to the transfer of ownership; and he wrongly supposes that such authority must be assumed in order to produce the result. Of course the truth is that the buyer has himself previously assented to the shipment as a means of delivery. The carrier receives the goods as agent or bailee for the buyer, but it is the buyer's previous assent which produces the transfer of ownership. If the buyer had said, put the goods into a particular hole in the ground for me, the ownership would have been transferred when the seller fulfilled the order, for precisely the same reason.

Pages 286 to 336 are devoted to a reprint of the Uniform Sales Act, with very slight annotations of decisions. There seems to be little reference, however, to the effect of the Act in the body of the book.

The volume because of the size naturally invites comparison with the brief treatises of Tiffany and Burdick, and the comparison is much to the advantage of the older books.

SAMUEL WILLISTON

Harvard Law School

Cambridge Studies in English Legal History. Harold Dexter Hazeltine, Editor. *The History of Conspiracy and Abuse of Legal Procedure.* By Percy Henry Winfield. Cambridge, Cambridge University Press, 1921. pp. xxvii, 219.

Increasing the interest which this work, the first volume of a new series of publications, naturally inspires is the general preface written by the editor, Professor Hazeltine. Even though the hopes and promises there held out are only partially realized, we shall ultimately have a set of studies embracing both monographs and editions of texts which will enrich the literature of English legal history.

In its largest aspect this book is a study of the abuses connected with legal procedure down to the end of the eighteenth century. The term conspiracy in its earlier sense signified an illegal combination to abuse legal procedure, to promote false accusations and suits before a court. Slightly more than the first half of the work is given over to a detailed and careful account of the early history of this subject. There was both a civil and a criminal side to conspiracy, the civil procedure being begun by the writ of conspiracy, and the criminal procedure by presentment before a court. A particularly full treatment of the writ is given (it was statutory, no writ of conspiracy existing at common law), its scope, and the essentials of liability to it. On the last point it is interesting to note that though from almost the beginning the rule was that the writ would not lie against indictors or jurors, there was no case which laid down the immunity of witnesses generally, apart from those who informed the grand jury, till 1549. There is no reference to conspiracy as a crime before 21 Edward I. From then on the records show that the crime was a common one, even in high places. "The writ of conspiracy, originally destined to stop false accusations, was being employed to stifle honest ones. Evil doers who had been properly indicted procured their acquittal by a favorable inquest, and then sued writs of conspiracy against their indictors," in spite of the rule that the writ would not lie against indictors. In the fourteenth century one of the commonest uses of conspiracy was in connection with combinations to restrain or to interfere with trade. With the coming of the Tudors, conspiracy on its criminal side was greatly affected by the Star Chamber, a court without a jury, and strong enough to crush combinations to abuse legal procedure

which might have overawed a weaker court. Moreover, the Star Chamber influenced the later conception of conspiracy by greatly extending the meaning of the term. By the reign of Elizabeth criminal conspiracy had come to bear very much its modern meaning.

A chapter (v) is devoted to showing how the modern action of malicious prosecution developed out of the disuse of the statutory writ of conspiracy and the substitution therefor of the action on the case in the nature of conspiracy. At this point the subject of conspiracy, as such, is brought to an end, to give place to a discussion of the related subjects of champerty and maintenance. Notwithstanding Coke's contention to the contrary, it would seem that writs of champerty and maintenance did not exist at common law. Rounding out the general subject we have a chapter on embracery and the misconduct of jurors. In the mind of medieval judges there was no sharp distinction between maintenance and embracery, and it is a debatable question whether embracery, as distinct from maintenance, was ever an offence at common law.

It is a pleasure to note the consistent use made of material from the Year Books, much of it from Year Books which are to be had as yet only in the old black letter editions. It is our hope that the editing of these later Year Books does not lie outside the province of the Cambridge Studies in English Legal History, that the editor may have had them in mind when he referred to later editions of legal-historical texts "which have not as yet been published in a form consonant with modern critical standards."

GEORGE E. WOODBINE

Yale University Law School

An Introduction to the Problem of Government. By Westel W. Willoughby and Lindsay Rogers. Garden City, Doubleday, Page & Co., 1921. pp. x, 545.

This volume is intended for student use, and seeks to analyze the chief principles underlying the organization and conduct of government. Although the chapters are of somewhat unequal merit, the volume should serve as a valuable aid in college courses, if used with a book giving more detail about the structure of the important governments of the world.

Although the book under review is chiefly devoted to principles of government, this plan is departed from with respect to certain chapters. There is a chapter on State Government in the United States, which is too brief to be effective, and seems out of place in the volume. The chapter on Political Party Control in Congress also somewhat interrupts the unity of the volume as a general discussion of governmental principles.

Chapters X to XXIV of the volume present a satisfactory and interesting analysis of the concrete problems of government. The functions of the legislative, executive, and judicial departments are clearly discussed. The different types of governmental organizations are outlined. The chapter on responsible parliamentary government is particularly good. That on presidential or congressional government is not so good, in part because it limits itself to the national government of the United States. In the consideration of local government, the authors devote no attention to cities, and thus ignore one of the most important factors in the government of modern states. In the discussion of governmental problems they follow the policy of substantially all other authors, in the notion that different types of local government may be discussed independently.

The authors are most effective in their discussion of concrete governmental problems. The first three chapters are the weakest in the book, and the first nine are less effective than those that follow. No college student can be expected to display great interest in chapter II which is devoted to preliminary definitions, especially when the thought is concealed behind such complex sentences as:

"It does not need to be said that no such community of completely rationalized and moralized people has ever existed, and there is little evidence to indicate that such a perfected group will come into existence within any future time to which any finite limits may be set." (page 25.)

Chapter III on the sphere of government is interesting but somewhat mechanical, and presents no incisive discussion of the expansion of governmental functions. In this chapter the authors find the distinction between civil and criminal acts easier than did the United States Supreme Court in *Hepner v. United States* (1909) 213 U. S. 103, 29 Sup. Ct. 474.

Some misleading statements appear, but in view of the large field covered there is substantial freedom from actual error. The authors imply that a method of state constitutional change is common in this country, which has long disappeared from all states except Delaware. (pages 89-90.) They place the burden upon the voter for unsatisfactory government in this country (page 137), and do not sufficiently emphasize the fact that the complexities of governmental organization place an impossible task upon the voter. In chapter IX, dealing with Representative Government, the initiative and referendum deserve more attention than they receive. In their discussion of judicial control over legislation, the authors assume to some extent the traditional but erroneous view that a declaration of unconstitutionality involves little or no discretion in a court, though at the same time making an exception from this view with respect to "due process of law." (page 391.)

Special attention has been given to the typographical form of the book under review. It is easy to read. The authors have added materially to its value for student use by appending to each chapter a group of "Topics for Further Investigation." There is need for a volume of the type which the authors have produced, and the volume under review probably best meets this need; although some improvement can be made in the second edition.

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