# BOOK REVIEWS

*Liberty under Law: an Interpretation of the Principles of our Constitutional Government.* By William Howard Taft. New Haven, Published for the University of Rochester by the Yale University Press, 1922. pp. 51.

In the compass of a single lecture at the University of Rochester, now reprinted as a little book of fifty pages, the Chief Justice of the United States has given a summary of American constitutional principles and achievements which he who runs may read. It is charmingly written and is a marvel of condensation. The author first shows in what respects our constitution was an essentially novel experiment. It was the earliest attempt to limit the powers of different branches of the government by a written document. It was the first instance in which a federation created a central authority which was truly national in its character and scope. It was the first consistent application of the principle of representative government, and of the system of checks and balances by which the sovereign people may be safeguarded against its own outbreaks of passion or enthusiasm. And, finally, it was the first constitution which carried with it a system of orderly provisions for its own amendment. The book goes to show our chief points of advantage over countries in which the system of checks and balances is not in force, or in which direct action by the people takes the place of deliberation in legislative assemblies. Next follows a clear presentation of the need of a strong party system to make our political machinery work effectively; and of the yet more fundamental need that the people themselves should be well-informed, self-reliant, and self-controlled.

When an author says so much in so little space it seems unfair to complain of what he omits. Yet I cannot help regretting that he gives so few words to the specific political danger from which America finds it hardest to protect herself—the passion for enforced equality at the expense of personal liberty, which now dominates large groups of citizens who are very far removed from being Bolshevists. As long as people care more for liberty than they do for equality, we have little to fear from any form of democracy. We are about as safe with the referendum and the initiative as we are with the legislature and its committees—sometimes much safer, if we may judge from the recent history in the United States and in Switzerland. When they begin to care more for equality than for liberty, no form of government can protect them from reaping the consequences of their own misjudgment. The history of the Fifteenth Amendment—or for that matter, of the Eighteenth—shows how weak are our constitutional safeguards in the face of any organized movement for enforced equality between different classes or different parts of the country. I see no good reason to think that under circumstances like these representative assemblies are more conservative than the people as a whole, and some reason to think that they are less so. When it comes to important questions of policy I would much rather get them directly before the people, and fight them out on intellectual grounds, as we fought out the slavery question from 1856 to 1860 or the currency question from 1896 to 1900. I am in cordial agreement with the author on constitutional principles and ideals, but when I look for means for defending them, I trust less than he does to Congress or the state legislatures, and more to the direct popular vote.

ARTHUR TWINING HADLEY

New Haven, Connecticut

*Cases on International Law.* By James Brown Scott. American Case Book Series. St. Paul, West Publishing Co., 1922. pp. xxxvi, 1196.

In the preface to the first edition of this work, published in 1902, Dr. Scott states that the underlying idea of the volume is that international law is part of the English common law which is also the basic law of the United States. After twenty years of study and active work in the field of international law, he reaffirms this theory with new evidence in proof (pp. xi, xii) and with expression of the hope that all countries may ultimately adopt international law on the same basis—in the words of Sir Henry Maine, "as a main part of the conditions on which a state is originally received into the family of civilized nations." Dr. Scott ventures the further opinion that "they will because they should." If he (Dr. Scott) is mistaken in this, he nevertheless prefers to be generously wrong than to be niggardly right. (p. xiii) With this opinion doubtless he noticed with satisfaction the express adoption of his theory in the recent constitution of Germany and Austria. (p. 18)

The basis of Dr. Scott's philosophy is perhaps best indicated by the following quotation:

"Whether we admit it with open eyes, or ostrich-like bury our heads in the sand, there is such a thing as justice, independent of the State, above it and beyond it, although the formulation of its principles may change according to time, place and circumstances." (p. xv)

Doubtless Austinian jurists will continue to deny the existence of an objective justice apart from a commanding or enforcing political authority but they cannot deny the considerable acceptance of Dr. Scott's theory by the courts or the wealth of evidence he has brought together in this book of the effort of courts to discover and apply objective standards of international justice in the absence of statute or treaty.

Even the World War has, in Dr. Scott's opinion, verified the soundness of international law:

"It is no doubt true that the belligerent practices of nations have not squared with their peaceful professions. Nevertheless the law of nations emerges from the World War a system with foundations unimpaired, although the structure bears outward marks of violence and unsightly scars, which only time can cover." (p. xiii)

There is always a temptation in a casebook on international law to include diplomatic controversies not strictly cases, but Dr. Scott has not yielded to it. Although the present volume contains more opinions of continental European courts and arbitral courts than did the edition of 1902, it is still strictly a case-book and its sources are still largely within the English-speaking world. (See Preface, p. xvi) It should be noticed, however, that the value of the book is increased through the inclusion in the appendices and in some instances in the text of general treaties and national laws and ordinances bearing upon international law.

In any casebook the editor is met by the dilemma of abbreviating his cases or of confining himself to only a few. Dr. Scott has included 336 cases in 1108 pages—thus he has had to abbreviate. The process of reduction may be accomplished in two ways. In his well known casebook, Pitt Cobbett has tried one. He presents the facts and the opinion of the court in his own language. This method has the advantage of making the facts perfectly clear and of including all the essential reasoning in brief space but it fails to accustom the student to judicial rhetoric. Dr. Scott follows the second method. He prints the opinion in the court's own words but with a rigorous application of the shears to portions which he deems less important. Opinions may differ as to the importance of parts eliminated. Thus the reviewer regrets the omission in the case of *The Paquette Habana* (p. 12) of the court's detailed examination of

the history of the exemption claimed for innocent coast fishing vessels. Only by perusing such an examination can the student appreciate fully the development of international law through custom. Furthermore, with Dr. Scott's method the facts are sometimes obscured. In the reviewer's opinion, a casebook should consist not merely of quotations from judicial opinions but of cases, that is, of reasoned decisions by competent authority upon stated facts. The student has a right to know what of the opinion is *dicta* and what is essential for the decision. There are not many cases in the present volume where a careful reading will fail to reveal the pertinent facts but it is believed a brief statement of surrounding circumstances in the editor's own language would often be of service to the student.

The question of logical arrangement is a difficult one and in this respect Dr. Scott's ideas have undergone modification. The 1922 edition contained seven chapters in two parts whereas the present volume contains 31 chapters in three parts. The classification closely follows that found in most textbooks of international law but its complexity has made necessary the frequent dividing of cases (12 instances have been noted). The question may be raised whether the theory of case-teaching does not forbid a sacrifice of the unity of a case from considerations of logical arrangement.

Not only does the arrangement of the two editions differ, the content is also so different that the present work might properly be called a supplement. It contains over a hundred more cases than the earlier volume and almost two hundred new cases. Nearly a hundred (to be exact, 87) cases of the 1902 edition have thus been omitted. Some of them are ones which teachers using the book will regret. In twenty years of unusually intense international intercourse, including the greatest war in history and several lesser wars, it is to be expected that cases worthy of inclusion in casebooks would have arisen. Still when the law is well expressed in a case long familiar there seems little pedagogical advantage in substituting a new one. Students repeatedly fall upon citation of such cases as *The Belgenland, Jones v. United States, The Parlement Belge, The Scotia, Vavasseur v. Krupp, Wildenhus' Case,* and will regret their inability to find them in this book, though they may be found in the first edition. All users of the book will, however, be pleased at the abundance of cases from the Russo-Japanese and World Wars as well as cases arising from the recent revolutions in Mexico (p. 70) and Russia (p. 61).

The book is provided with ample footnotes, some of them taken from the first edition which in turn borrowed with enlargement from Snow's *Cases* of 1893. It also includes in appendices such documents as the League of Nations Covenant, Statute of the Permanent Court of International Justice, Hague Conventions, Washington Declarations on Submarines and Poisonous Gases, and British retaliatory orders of the World War. The book will unquestionably take its place, along with its predecessor, as an essential in the library of every teacher and practitioner of international law.

QUINCY WRIGHT

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*The Problem of Proof.* By Albert S. Osborn. Albany, Matthew Bender & Company, 1922. pp. xxi, 526.

Because of the importance of litigation, books dealing with the problems of preparation and trial of cases are fairly numerous. Such books are of great variety, both in point of view and in seriousness of purpose. It is a subject which seems to tempt authors to over-indulgence in anecdote and reminiscence, and to represent successful advocacy as the ability to win lawsuits in defiance of facts.

Mr. Osborn's point of view is that of an expert witness with long experience in disputed document cases. His book is thoughtful and of serious purpose. He has no bag of conjurer's tricks, no charlatan's magic. He rejects the sophistry which would require a lawyer to accept any statement, no matter how absurd, advanced by his client. To him the sifting and preparation of evidence and its production in court are a serious business, calling for painstaking investigation, thorough study and full use of all the faculties of a trained intellect.

The author's experience and interest have directed his attention, primarily, to situations arising in litigation over disputed instruments. Of the twenty-eight chapters, ten are devoted to that class of cases, six to problems common to all litigation but with especial reference to questioned documents, and the remaining twelve to more general considerations. This classification is not wholly accurate because many chapters belong partly in one, partly in another class, but it will serve, perhaps, as a rough indication of the author's division of his work. The range of topics is unusually wide, especially in the discussion of trials, where are treated such subjects as the atmosphere of a trial, cross-examination from the standpoint of the witness, uninformed "expert" witnesses, and the designing and lighting of court rooms.

Precedents in the law of evidence do not find favor in the author's eyes. Thus, he deals vigorously with those courts which have persisted in refusing to admit standards of comparison of handwritings, as such, on the authority of cases decided before his science emerged from the realm of guesswork. His thesis is right: courts and juries must have all possible assistance from science; and doubtless the law has, in its traditional conservatism, failed to keep pace with the progress of some of the sciences. It is well to remember, of course, that strange claims are sometimes made in the name of science, and that not all such claims are made good. With this caution in mind, however, it must be admitted that the law of evidence is not free from precedents which are respectable merely because of their age, and that courts do exist which appear to set such precedents above knowledge.

If one were to look for faults in a work of such excellence as this, he might not wholly approve the arrangement and order of materials nor what appears to be a tendency to repetition; but neither criticism would seriously challenge the substantial merits of the book. It might also be said that the author assumes greater certainty than is always possible in detecting false claims of clients and in demonstrating the truth in court. These are matters of emphasis, however, and it is refreshing to find here a clear recognition that facts are facts, and a good statement and analysis of the methods best calculated to make them appear as such.

This book is worthy of a place beside the author's earlier work on "Questioned Documents." Together they should be of great assistance in the preparation of any case involving a disputed writing. The present text merits the careful attention of all lawyers, and of all others interested in the efficient administration of justice, despite the statement in the preface that it is not the purpose "to instruct the seasoned veteran." To "those just enlisted" in the law, for whom the author designs his work, it can scarcely fail to prove helpful and stimulating.

WILBUR H. CHERRY

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*Trial by Jury.* By Robert von Moschzisker. Philadelphia, Geo. T. Bisel Co., 1922. pp. x, 452.

This book contains fourteen lectures delivered by the Chief Justice of the Supreme Court of Pennsylvania at the Law School of the University of Pennsylvania in 1921, rearranged in textbook form, to which has been added a table

showing the number of peremptory challenges of jurors allowed in criminal trials in Pennsylvania.

The first three chapters deal with early forms of trial and the origin and development of trial by jury. As the author frankly states, he has set forth only the results of his study of secondary authorities, for he has made no investigation of original sources. Consequently he has made no contribution of value on this topic.

Chapters four to twelve inclusive contain much valuable practical information for the law student who intends to practice in Pennsylvania. Besides explaining generally the conduct of the various stages in a trial, the author, drawing upon his experience as trial lawyer, trial judge, and justice of a court of last resort, points out many pitfalls in the Pennsylvania rules of procedure. What young practitioner would suspect the dire effects of electing to move to take off a voluntary nonsuit, where he had not reserved leave to move therefor, instead of merely beginning a new action? How would he know that if his witness stated the result of his observations in the form of a conclusion, without objection from opposing counsel, the evidence would not support a verdict; whereas if he stated the facts upon which he based his conclusion, his evidence would be worth its face value? Would he imagine that a motion to instruct the jury to disregard evidence might be proper when a motion to strike out the same evidence would be improper? The exact effect of the form of objection to evidence, the result of a wrong ruling on the scope of cross-examination, he certainly could not work out on the basis of reason. These and other niceties of the rules of the game, the Chief Justice explains concisely and clearly. He also expounds the methods and purposes of motions for new trials and motions for judgment notwithstanding the verdict as developed at common law and under Pennsylvania statutory provisions. In his last two chapters he treats more generally the constitutional guaranties of trial by jury, the power to waive such trial, and the requirements for unanimity in verdicts.

Chief Justice Moschzisker is an admirer of trial by jury, and he considers the procedural rules in Pennsylvania as approaching the ideal. But, with all due deference, his lectures demonstrate Pennsylvania trial practice to embody what Mr. Wigmore calls "the sporting theory" of litigation. It is important that men who go to the bar where that theory is applied should know the rules of the game and should realize the penalties that follow infractions of them. But is it not equally important that they should understand that the object of a lawsuit is the ascertainment of truth, and that no rule of procedure has any justification for existence save as a means to that end? The Chief Justice has rendered the law student and the young lawyer of Pennsylvania a service in so clearly putting before them a guide for conduct in the court-room, but would he not have rendered the entire profession a greater service by lending the weight of his position and authority to a rationalization of the rules of procedure in his jurisdiction? It is high time that both bench and bar should realize that our rules of pleading, practice, and evidence need thorough reformation.

EDMUND M. MORGAN

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*Inheritance Taxation.* By Lafayette B. Gleason and Alexander Otis. Third edition. Albany, Matthew Bender & Co., 1922. pp. lxix, 1224.

Messrs. Gleason and Otis have again rendered to the profession most valuable service in collating the statutes and decisions of the forty-seven jurisdictions in which inheritance taxes are imposed and in bringing such collation up to August, 1922. The statutes, decisions and other material are conveniently arranged and lawyers investigating the subject will find this a convenient starting point for their work and will frequently find here all they need.

The mass of detail involved and the number of jurisdictions covered make it impossible to answer all questions finally and it is no just disparagement of the book to say that many cases which are intricate or of especial importance probably will require an examination of the original statutes and decisions. The treatise is a guide which will always be of assistance.

What the reviewer thinks are some limitations are suggested in a notice of the second edition in (1920) 29 YALE LAW JOURNAL, 947.

The author speaks on pages four and five of "natural rights." On page eight appears the black-letter statement that an inheritance is "not a tax on property but on the right to transmit and inherit it." As Professor Hohfield and others have pointed out, the words "property" and "right" as here used have so many possible meanings that clear thinking is difficult unless other words with more sharply defined meanings are substituted. The power of transmission and the privilege of inheriting would seem better usage. So too the term "natural right" is now in some dispute.

The definition of the tax (p. 1) as "a tax levied upon any form of donative transfer from the dead to the living or by the living in contemplation of or effective at death" puts an unusual signification on the word "donative." Intestate succession is not "donative" in the ordinary meaning of the word.

It is to be said that in this use of terminology the authors have followed the courts as quoted on pages nine *ff.* although some courts speak of the "privilege" of succession. But it seems that a careful analysis in more exact terminology would conduce to clearer thinking and that it is not necessary to delay making it until all courts have done the same thing.

Referring to details, the reference on page five of Sir William Blackstone as "Mr. Blackstone" sounds odd. "Blackstone" or "Sir William Blackstone" would be more ordinary usage. Also it would be more convenient if amendments taking the place of earlier statutes were inserted in place where the repealed matter would have occurred. For example, in Connecticut, sections 1261 *ff.* (Gen. Sts. 1918) were amended by later acts. The book would be easier to use if the amended sections followed section 1260 rather than appearing some pages later.

HARRISON HEWITT

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*Political Ideas of the American Revolution.* By Randolph Greenfield Adams. Durham, N. C., Trinity College Press, 1922. pp. 207.

This first volume in the series of Trinity College Publications is one of the ablest and clearest monographs in the literature of American political theory. Mr. Adams has carefully limited his subject, has treated his material from a sanely critical yet sympathetic viewpoint, and has shown admirable perspective in placing his conclusions in their relations to American political thinking and to world politics. This work successfully constitutes, as the author hoped it would, "a contribution to International Law," "a chapter of Britannic Imperial History," and "a fragment of the history of the United States." The "monster of sovereignty," deplored by George Washington, is shown to be the chief stumbling block of international coöperation. "Jealous nationality will not surrender its title to a supposed supremacy, and as a consequence, international adjustments are rendered difficult, if not impossible." In the British Empire, or the Britannic Commonwealth of Nations, a most completely equipped laboratory for the study of international relations, there "is being worked out the idea of a league of nations without too much idle discussion as to the residence of sovereignty." The period before the American Revolution, in which the thirteen colonies were struggling to become self-governing dominions, marks the beginning of the evolution of this concept.

Most of the ideas which the Americans formulated during the Revolution but after the separation from Great Britain are regarded by Mr. Adams as stamped with a different character by the fact that the thirteen colonies had decided to declare their independence and to call themselves states, so he expressly reserves them up to the Convention of 1787 for a future study on the "Political Ideas of the Confederation." He feels justified in considering only incidentally the ordinary political philosophy of the Revolution, the discussion about "natural rights," "natural law," "social compact," and related controversies having been adequately treated already in the works of Mr. Dunning, Mr. Merriam, and others.

The ideas of the nature of the relation between England and her colonies expressed by Burke, Pitt, Franklin, Thomas Jefferson, John Adams, and many other men of this period in America and in the British Isles are analyzed and classified under three general theories, and these theories are described and diagrammed. The term, "The British Empire," represented the theory of colonial dependency, or of a mother country and her children colonies; this was the conception most generally held before 1784. The British Imperial Federation Theory might have been worked out in many ways but required representation of the colonies in an imperial parliament and was the logical result if the colonial demand of no taxation without representation were to be satisfied by representation in the taxing body. The Britannic Commonwealth of Nations or the theory of Britannic Partnership was seen only dimly by even the most farsighted and acute thinkers of the revolutionary period but is the one most generally held in the "British Empire" to-day. John Adams, Thomas Jefferson, and James Wilson seem to have thought of the Mother Country and her American daughters in some such relationship but received almost no hearing either in America or in England.

The special emphasis placed by Mr. Adams on this early discussion of the problem of British imperial order as an American contribution to the theory of sovereignty and to the philosophy of International Law is the most important addition made by him to the history of American political theory. He gives excellent reasons and strong evidence for characterizing this family debate as including a very early anticipation of the idea of a league of nations, and contends very convincingly that the most practical working out of this idea is going on to-day within the British Commonwealth of Nations. He quotes the statement of the late Mr. Maitland: "The state that Englishmen knew was a singularly unicellular state, and at critical times they were not too well equipped with tried and rational thoughts with which to meet the case of Ireland, or some communities, commonwealths or corporations in America which seemed to have wills, and hardly fictitious wills, of their own, which became states, and United States." (p. 10) Mr. Adams maintains that the "centralizing force which is trying to devise some central agency for reminding each of the groups of society of its responsibility toward every other group" and "the decentralizing force which would preserve to each group sufficient authority to develop freely according to its own genius," the seemingly mutually incompatible forces now involved in the efforts for international association, are to be observed in the political thought of the American Revolution; further, that "it was partly because of the inability of men to preserve the balance between them that the Revolution occurred and terminated as it did." (pp. 11-12)

One of the most valuable qualities of this excellent book is that, by promoting a clearer comprehension of a much misunderstood and generally misrepresented controversy, it helps to lay the foundation for the Anglo-American entente which will be the most powerful force for world peace and international justice. The teaching and writing of Professors George Burton Adams, McLaughlin, Van Tyne, of the late Mr. George Louis Beer, and of a few other Americans have already

done much to allay unreasoning and unreasonable anti-British prejudice in the United States. Mr. Adams' conclusions in his scholarly essay on the Revolutionary controversy seem to place him among those who are hoping and working for joint Anglo-American world leadership.

EDWARD JAMES WOODHOUSE

Smith College

## BOOKS RECEIVED

*The British Year Book of International Law, 1922-1923.* New York, Oxford University Press, American Branch, 1922, pp. vi, 260.

*The Coöperative Movement in Jugoslavia, Rumania and North Italy.* By Diarmid Coffey. Published by Carnegie Endowment for International Peace. New York, Oxford University Press, American Branch, 1922. pp. vi, 99.

*A Guide to Diplomatic Practice.* By Ernest Satow. In two volumes. Second Edition. New York, Longmans, Green & Co., 1922. Vol. I, pp. xix, 419; Vol. II, pp. ix, 438.

*Grotius Society Publications; No. 3: Grotius' "De Jure Belli ac Pacis."* Translated with an Introduction by W. S. M. Knight. London, Sweet & Maxwell, Ltd., 1922. pp. 84.

*Cases under the Interstate Commerce Act.* By Felix Frankfurter. Second Edition. Cambridge, Harvard University Press, 1922. pp. xii, 789.

*An Introduction to the Philosophy of Law.* By Roscoe Pound. New Haven, Yale University Press; London, Humphrey Milford, Oxford University Press, 1922. pp. 307.

*Jurisdiction and Procedure of the Federal Courts.* By John C. Rose. Second Edition. Albany, Matthew Bender & Company, Inc., 1922. pp. viii, 790.

*The Labor Injunction.* By John P. Frey. Cincinnati, The Equity Publishers, 1922. pp. ix, 197.

*The Law of City Planning and Zoning.* By Frank Backus Williams. New York, The Macmillan Company, 1922. pp. xvii, 738.

*The Law of the American Constitution.* By Charles K. Burdick. With Two Introductory Chapters by Francis M. Burdick. New York, G. P. Putnam's Sons, 1922. pp. xviii, 687.

*Legislative Series of the International Labor Office (Geneva, Switzerland), 1920.* London, Harrison & Sons, Ltd.

*Military Industries of Japan.* By Ushisaburo Robayashi. Published by the Carnegie Endowment for International Peace. New York, Oxford University Press, American Branch, 1922. pp. xv, 269.

*The New Constitutions of Europe.* By Howard Lee McBain and Lindsay Rogers. Garden City, Doubleday, Page and Company, 1922. pp. xiii, 612.

*Old Testament Law for Bible Students.* By Roger S. Galer. New York, The Macmillan Company, 1922. pp. viii, 194.

*Report of the Forty-Fifth Annual Meeting of the American Bar Association.* Baltimore, The Lord Baltimore Press, 1922. pp. 1028.

*A Summer Sojourn Among the Inns of Court.* By Cornelius Comegys. Scranton, Pa., International Textbook Press, 1922. pp. 131.

*Trade Association Activities and the Law.* By Franklin D. Jones, New York, McGraw-Hill Book Company, Inc., 1922. pp. xii, 360.

*Digest 41, 1 and 2.* Translation and Commentary by F. De Zulueta. New York, Oxford University Press, American Branch, 1922. pp. 75.

*Fundamental Legal Conceptions and Other Legal Essays.* By Wesley Newcomb Hohfeld. Edited by Walter Wheeler Cook. New Haven, Yale University Press, 1923. pp. 420.