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Book Reviews

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Book Reviews

Authors

Edgar N. Durfee, Edwin D. Dickinson, Burke Shartel, Leonard D. White, Evans Holbrook, C E. Griffin, and Ding Sai Chen

BOOK REVIEWS

PROBLEMS OF LAW: ITS PAST, PRESENT, AND FUTURE. By John Henry Wigmore. University of Virginia Lectures on the Barbour-Page Foundation. New York: Charles Scribner's Sons. 1920. Pp. vii, 136.

Although the three lectures contained in this volume are propounded as a "trinity," the reader will not find in them that unity which is of the essence of a trinity, as distinguished from an aggregate of three. The author proposes a "triune division" of legal science, Past, Present, and Future. But the first lecture deals with a particular phase of the past, the second with a remotely related phase of the present, and the last with a quite unrelated phase of the future, so that they have little in common, save the brilliance that sparkles through them all.

The first lecture deals with the evolution of law, and is essentially a critique of prevalent methods and conclusions in this field. The author goes gunning for easy generalizations. "Does evolution mean necessarily progress?" "Do these scholars assume constancy in the evolution of a specific legal institution in all epochs and all communities?" "Do these scholars assume universality of a formula of evolution throughout all legal ideas?" With such simple questions, and a few recalcitrant facts of legal history, De la Grasserie's twenty-eight (count them) canons of evolution are brought crashing to earth, and even Sir Henry Maine's modest ventures in generalization are sadly shaken. Turning to attempts at graphic representation of legal evolution, the author easily demolishes all the curves that have been plotted, from the straight perpendicular line to Goethe's ascending spiral, and, in spite of a labored demonstration in which the author figures as a gyroscopic top, he convinces us that nothing less complex than the planetary system can adequately express the evolution of law. A synopsis of a rigidly scientific method of study leaves us aghast at the task. We feel that Dean Wigmore has spoken the last word upon universal principles of evolution when he says, "All we can assume is the universality of identical effects from identical causes." The last word, because identical causes have never existed and never will. Sadly we surrender universal truth, but consolation we may find in the thought that some of our cherished generalizations may still carry helpful suggestion, or at least provide a useful phrase. "Status to contract" may aid in an understanding of the facts that we see, whether they involve movements from status to contract or from contract to status.

The second lecture is the most interesting and the most vital of the three. Its subject is the mechanism for making law and administering justice. Stripped of illustration and minor argument, and hence of much of its vigor, the lecture runs thus: Though there is no bright line between legislative and judicial functions, there is an inherent contrast between the declaration of abstract rules (law making) and the application of the rules to concrete

situations (administration of justice). "The great problem is how to preserve both. Experience has taught us that masses of men *must* be ruled by general principles; but it has also taught us that these generalities are merely abstractions and ignore concrete realities, and therefore will sometimes lead to results undesirable because inconsistent with the merits of the individual case when surveyed in all its circumstances. Hence the problem is to combine rigidity with flexibility." Human limitations render it impossible to embody in legislation, through detailed provisions, that adaptability to varied circumstances which justice requires. *A fortiori*, it is impossible to provide in advance for change of general conditions. And these observations apply not only to legislative law making by statute, but also to judicial law making by precedent. From these conditions, it results that the law, thus made, cannot decently be applied to many of the situations which present themselves in the administration of justice. And our traditional remedy of appealing to the legislature for a change of law is fraught with such practical difficulties that relief comes tardily, if at all. So far, probably all will agree with the author, but the remedy suggested leads to more debatable ground. Relief is to be sought in enlargement of the judicial function. Two questions are propounded. "Is it necessary that the judge should be the intellectual slave—(a) of the legislators? (b) of the judge's own precedent?" The answer is negative. The judge should be vested with a general power to "flex the statute," and *stare decisis* confined to those rules of property and contract which require stability. "*Stare decisis* is said to be indispensable for securing certainty in the application of the law. But the sufficient answer is that it has not in fact secured it. Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves,—the government of the living by the dead, as Herbert Spencer has called it." The brief lecture perhaps overstates (and this summary certainly exaggerates) the opinion really entertained by Dean Wigmore. He expressly concedes the value of *stare decisis* in the field of property and contract. In other fields, we do not understand him to deny that *stare decisis* is a principle entitled to some weight. "It is the absolute and universal rigidity of the principle that is unsound." "The change in scope of reasoning would not necessarily be as cataclysmal as it might seem. There will always be a controlling intellectual influence by the settled law, wherever a professional class fills the bench." "The statute would remain in force, and in most cases would be rigidly enforced." In spite of the more radical tone of some vivid passages, these sentences, gathered from several parts of the lecture, lead us to believe that, when all returns are in, we have merely an appeal for a *larger* exercise of judicial reason and common sense, and a *less rigid* adherence to precedent and the letter of statutes. Perhaps it comes only to a vigorous arraignment of pettifogging judges, and a prayer for more Mansfields, more Storys, and more Holmes. For these matters have always been largely affected by the personal equation. The larger mind, with a firmer grasp of legal principles,

a livelier realization that law is a function of society, and a broader understanding of all human affairs, has always struck out more boldly into the realms of reason and justice and policy. The smaller mind, dizzied by those uncharted heavens (if indeed it is conscious of their existence), clings to the *terra firma* of statute and precedent. The lecture ends with emphasis upon the need of legislators of greater intelligence and better training. This is the heart of the legislative problem. The other great need, which is suggested though not emphasized in the lecture, is the need of judges of high intelligence, broad outlook, and abundant courage. This is the heart of the judicial problem.

In his third lecture, entitled "Problems of World-Legislation and America's Share Therein," the author points out the great importance for the future of the movement which aims to secure uniformity, particularly in the field of commercial law, among the national laws of the several countries. Of the various methods by which uniformity has been and may be obtained, he regards uniform national legislation as the only one likely to be adequate. How, he inquires, may the United States take an effective part in securing uniformity by national legislation? Attention is invited to three assertions: first, that Congress has no power, either by virtue of its authority over interstate and foreign commerce or by virtue of the treaty power, to adopt a uniform international rule which shall be actually effective throughout the country; second, that the several state legislatures have the power but they never have and never will unitedly exercise it; and third, that the state legislatures may accomplish the desired results by availing themselves of their constitutional liberty, under Art. I, Sec. 10, to make agreements or compacts with foreign countries with the consent of Congress. The author concludes that "it is therefore absolutely necessary for the future international self-respect of this country that this power should be promptly exercised by the leading commercial states of the United States."

These assertions will arouse interest and provoke controversy. Need we despair utterly, it may well be asked, of the national treaty power? Is it not altogether likely that we shall dawdle along until increased international interdependence finally compels us to coöperate effectively? And as that time approaches may we not find it quite as constitutional and much more expedient to coöperate through the national treaty power, a power which certainly ought to comprehend everything that is "properly the subject of negotiation with a foreign country"? In the meantime, Dean Wigmore has rendered a distinctive service in challenging our attention to a problem of the first magnitude. His assertions and the questions which they are bound to provoke deserve the most careful as well as prayerful consideration.

EDGAR N. DURFEE,
EDWIN D. DICKINSON.

THE NATURE AND SOURCES OF THE LAW. By John Chipman Gray. Second edition by Roland Gray. New York: The Macmillan Co. 1921. Pp. xviii, 348.

In the preface to this second edition of a work well known for its high merit, the editor tells us that Professor Gray projected a republication of it before his death, and had done some work in the execution of his purpose. His aim was to publish it in a form which would reach a larger number of readers. It is not easy for us to conceive of realizing such an aim in any marked degree, especially as the book has long enjoyed a popularity as wide as the "reading public" of such works. Nevertheless, the revision represents a real improvement upon the original edition; not a little material is added to the notes to illustrate statements in the text; and it contains some helpful changes in form, such as rearrangement of text, insertion of marginal titles, addition of explanatory notes for the benefit of the lay reader, etc. These changes and additions make the republication well worth while.

BURKE SHARTEL.

ORGANIZED EFFORTS FOR THE IMPROVEMENT OF METHODS OF ADMINISTRATION IN THE UNITED STATES. By Gustavus A. Weber. New York: D. Appleton & Co. 1919. Pp. xv, 391.

This book, published under the auspices of the Institute for Government Research, in its *Studies in Administration*, is intended as a reference and guide to the organized agencies which have been established in such large numbers in recent years to convert the traditionally easy-going American administrative system into a governmental machine more suited to twentieth-century conditions. These agencies proved to be so numerous that, in order to keep the work within the limits of a single volume, it seemed necessary to exclude a considerable number of relevant organizations of the type of the civil service reform associations, the Short Ballot Association, and associations seeking to improve methods of judicial administration.

Within the area selected for analysis the various agencies are grouped in three main divisions: the first composed of agencies for research in government; the second, organs of central administrative control; and the third, legislative reference and bill-drafting bureaus. The bulk of the volume is concerned with the first group, in which is to be found a considerable description of the Institute for Government Research, a bibliography of congressional inquiries with special attention to the work of the Cockrell Committee of 1887, the Docking Commission of 1893, the Keep Committee of 1905, and President Taft's Commission on Economy and Efficiency, together with an account of the various state and city efficiency and economy commissions and unofficial agencies such as the bureaus of municipal research.

The second main division of the work includes references to the California State Board of Control, the Wisconsin Board of Public Affairs, the Supervision of Administration in Massachusetts, the Department of Finance

in Illinois, and the Tennessee State Budget Commission. In the sphere of city administration reference is made to the Board of Estimate and Apportionment of New York City.

The third section opens with a reprint of the report of the American Bar Association Committee on Legislative Drafting, and then summarizes the work of the various agencies for bill drafting and for legislative reference. As complete a bibliography of materials as could be secured has been included. Dr. W. F. Willoughby has written as an introduction a very useful account of the development of the modern efficiency movement under the title, "The Modern Movement for Efficiency in the Administration of Public Affairs."

To the student of public administration, the value of such compilations as the present work is not to be measured, and it is much to be hoped that the Institute for Government Research will continue its interest in this sort of activity. Municipal government has been provided with its bibliography; but the task yet remains to be accomplished for administration, for legislation, for state government, and for other fields of investigation. Specifically, it is to be hoped that this volume will be kept up to date by frequent revisions. Already the number of new agencies of administration appearing since its publication is considerable, including among others the Congressional Committee on Reclassification of Salaries, a number of state committees having similar functions, Governor Smith's Reconstruction Committee, the Connecticut Commission on a Civil Administrative Code, the Maryland report by Griffenhagen and Associates, a flock of state departments of finance, the Idaho Department of Law Enforcement, the Administrative Board and the departments of business control and of efficiency of the state of Washington. Agencies such as the National Research Council,¹ on the one hand, and the professional associations of civil employees, on the other, are also pressing for admission.

In preparing a compilation of this nature, it is always difficult to draw the lines of inclusion and exclusion. It may be suggested that the section referring to legislative drafting and reference agencies seems to have been somewhat forcibly included and to have required the relatively irrelevant reproduction of the American Bar Association Committee Report. Certainly it would seem that in a book summarizing the agencies for improvement of administration the work of the National Civil Service Reform League and its state and local analogues, the numerous commissions on reclassification and standardization, and perhaps publications like *Good Government* are entitled to recognition.

No attempt has been made by the author to evaluate critically the work of the different agencies; in many cases they have written their own accounts of their work. It would be interesting to know how high has been their mortality rate. Some were sinking to an early grave when the work was written; others have since ceased their activity. One leaves the work, however, with the very definite impression that the decade 1910-1920 will be rated by the historian of the epoch as a period of real improvement in

methods of administration, and with the conviction that the science of administration has been placed on a more substantial basis by the bibliographical and analytical summary herein presented.

University of Chicago.

LEONARD D. WHITE.

A SELECTION OF CASES ON THE LAW OF DOMESTIC RELATIONS AND PERSONS.

By Edwin H. Woodruff. Third edition. New York: Baker, Voorhis & Co. 1920. Pp. xviii, 753.

Dean Woodruff's excellent casebook, which has so well stood the test of time and use, now appears in a third edition, with changes which promise to make it even more valuable and usable than the earlier editions. It has always had one very marked advantage over other casebooks in its field, in that it embraced not only the subjects of the domestic relations (Parent and Child, and Husband and Wife, including Marriage and Divorce), but also the subjects of incapacity—Infancy, Coverture, Alienage, Insanity, and Intoxication, the latter three being generally omitted from casebooks purporting to cover this field. This advantage is retained in the third edition and the editor has added many cases (most of them fairly recent) which indicate the development of the law in the subjects within the scope of the work. The progress of society has been reflected in the law as to married women perhaps better than in any other field, and Dean Woodruff's collection of cases makes possible a very interesting and suggestive survey of the changes already brought about both by statute and by judicial interpretation, and of the possibility of still further change. In the present edition many ancient and obsolete phases of the law have been relegated to footnotes (perhaps more might safely have been done in this direction) and many notes have been added which contain references to articles in legal periodicals. On many questions (as, for instance, the right of one spouse to recover for loss of consortium caused by injury to the other spouse, and the right of an infant to recover consideration paid by him under a contract which he later disaffirms) the book, though primarily designed as a tool for teaching, actually presents a more complete and informative discussion than is found in most textbooks. Altogether, the present edition, even more than the earlier editions, is a most excellent basis for the study of a very important field of the law which is too often slighted and inadequately treated in our law schools.

EVANS HOLBROOK.

ALLIED SHIPPING CONTROL. By J. A. Salter. Carnegie Endowment for International Peace; Economic and Social History of the World War, British Series. Oxford: The Clarendon Press. 1921. Pp. xxiii, 377.

The war has furnished us with many experiments which may, if properly interpreted, yield valuable lessons for peace time. In a sense, war time experiences were involved in extraordinary complications. On the other hand, developments that would ordinarily have required years of slow evolution

were compressed into a brief period, and some of the petty difficulties of private interest were submerged or, at any rate, subordinated. In these respects the war period presented an unprecedented opportunity for experiment in national and international administration of economic affairs. It is of the greatest importance that the records of these experiments be faithfully and carefully recorded by competent observers and that any valid principles which they may yield should be gleaned from them. It is in this spirit that Mr. Salter has undertaken his discussion of Allied Shipping Control.

The author is admirably equipped for his task. During the early part of the war he was Director of Ship Requisitioning and in close touch with the control of England's shipping, and in the latter part of the war he was England's representative on the Allied Maritime Transport Council and secretary of that body and later chairman of the Allied Transport Executive. In spite of his close connection with the events of which he writes, he successfully avoids the bias of an apologist.

The main subject, that of the experience of England and later of the allies in controlling and allocating shipping, is prefaced by a remarkably clear and suggestive description of the forces which, in the normal peacetime working of our competitive system, distribute shipping among the various trades, supplying ships when, where and in the quantities needed. In an ordinary shortage of ships those products which are most in demand will be carried even though others have to be left behind, because the traders dealing in these products will be able to bid the highest rate for the service of the ships. The market for tramp vessels, and these constitute by far the largest part of the world's tonnage, furnishes one of the best examples of the operation of almost perfect competition. For some time after the outbreak of war the English Government was content to enter this competitive market and bid for ships. Only when this practice had led to extremely high rates and it was still impossible to get the necessary shipping services did the government adopt a plan of requisition. Even then the new and thorough policy of government control was approached with an extreme caution that is difficult for Americans to understand. After the English and other allies had definitely asserted the priority of government needs and the right of the government to direct all vessels under their control to the trades deemed most important for the successful prosecution of the war, it still remained to bring the shipping controllers of the several allies into one body for the formation of a common policy and for joint administration of their combined fleets. It was not until 1918 that the final step was taken in the formation of the Allied Maritime Transport Council.

In this organization we had a single international administrative body controlling employment of the largest part of the world's shipping services. At a time when the demands for ships for carrying provisions for the civil populations, raw materials for their industries, munitions, and soldiers were far in excess of the supply of ships for these services, at such a time a control of shipping meant a control indirectly of the industries and food supplies of a large part of the world.

There are many lessons to be drawn from this great experiment in international administration.

One lesson is that in time of crisis such as a great war the ordinary machinery of competition breaks down—not because of inefficiency of private business, but because the fundamental principle of distribution of goods upon which the competitive system operates is inconsistent with national purposes. This competitive principle is that goods shall be allocated between several possible classes of consumers or between alternative uses on the basis of the price bid for the goods by these several classes. This whole conception breaks down as soon as the interests of the nation or of allied nations as a group are given precedence over the interests of the individuals within the group.

Another conclusion is that it is impossible to compare the efficiency of government in war time with the efficiency of private business in peace time. Nevertheless, it is clear that the government, or several governments working together, can control, in a large way, world economic affairs with a fair degree of success, judging success by the attainment of their desired purposes.

Third, it is demonstrated that governments can successfully cooperate for the regular administration of international affairs. In the past most international dealings have been of a legislative, treaty making, or judicial nature. The work of food control and shipping control was executive and administrative in character. It is the opinion of the author that this more prosaic function of administration must play a relatively larger part in international affairs in the future.

Some conclusions concerning the technic of international administration are drawn. For one thing, the author is convinced of the importance of direct contact of the responsible authorities in the several national administrations. For example, in an international control of shipping the responsible ministers charged with shipping in the several countries should form themselves into an international administrative body. This body should decide upon policies. And the same principle of direct contact should apply to the experts who administer these policies; that is to say, it should be possible for them, in the conduct of their business, to communicate directly with corresponding experts of another country and not necessarily through the chiefs of their respective departments.

Considerable stress is laid upon the beneficial effect of such direct contact upon the several governments represented. "These officials in their own national departments represent the international point of view and in their international organization they must represent the national point of view." By this constant contact they will be able to harmonize the policies of their own governments with the requirements of effective international administration. At several points, however, the fact seems to be overlooked that in this country the department heads very often have little influence upon legislative policy.

The author looks forward to the time when a minister will feel called upon to explain and justify a tariff passed by his government to the satis-

faction of his colleagues on an international administrative body. No doubt great good would come from this constant contact between the minister of commerce of one country with corresponding officials of other countries.

It is apparent through much of the discussion that the author is writing with an eye to the possible application of his principles to such an organization as the League of Nations, and the principle of direct contact is in the final chapter definitely applied to the organization of the League. "If the League is to remain in contact with the realities of the life of the world, it must have its permanent roots in the administrations of the world."

The book is thoroughly worth reading, both as an authoritative contribution to the economic history of the war and for its lessons and suggestions in the field of international administration.

University of Michigan.

C. E. GRIFFIN.

MODERN CONSTITUTIONAL DEVELOPMENT IN CHINA. By Harold Monk Vinake. Princeton: Princeton University Press. 1921. Pp. xi, 304.

The lack of an adequate treatment of the constitutional development of modern China has been long felt by the reading public. So far as the reviewer's knowledge goes, there were, before the appearance of the present work, only three books of its kind worth mentioning, viz., "A Survey of Constitutional Development in China," by Dr. Hawking L. Yen, of Columbia University; "China's New Constitution and International Problems," by M. T. Z. Tyau, of London University," and "Modern China," by Dr. S. G. Chen, of Oxford University. Professor Vinake's book is particularly welcome as filling a timely need and as being the work of an unbiased and learned scholar.

The book under review treats of modern constitutional development in China from 1898 to 1918. It is but a very short period in the life of a nation, especially in that of China, which proudly claims to be the oldest on the globe. China, however, during the period specified has been undergoing more vicissitudes than she has had in the last fifty centuries. To quote the author's words, "From an oriental despotism to a limited monarchy; from monarchy to republicanism, and back to monarchy for a day before the restoration of the republic; from a parliamentary republic to a division into two states * * * such have been the political mutations in China during the past twenty years." A general survey of the political situation in China is unquestionably much to be desired, and Professor Vinake has fittingly performed the task.

The book, as indicated by the title, is historical rather than critical in nature. Yet it is not lacking in fair and just criticisms or comments throughout. The author's residence in China certainly helps him a great deal in understanding the currents and cross-currents of the country's politics, so often lamentably confused or misunderstood in books not written by native scholars.

"The hundred days reform" in 1898 marked a decided break with the

past. But its significance is often over-estimated. Professor Vinake says that the very nature of the changes proposed in 1898 revealed a lack of appreciation on the part of the reformers of the fundamental nature of the weakness of the Chinese administrative system. He ascribes the desire for a change on the part of the emperor to the ambition to regain the power which he unfortunately lost to the Empress Dowager rather than to the strong conviction that there was a necessity for it. He says further that the failure was a happy one in the long run for China, in that "it gave an impetus to the work of those who felt that change could come and progress be made only with the overthrow of the Manchu dynasty" (cf. p. 40).

In speaking of the nature of the Great Revolution in 1911, he says (page 101): "The history of the Great Revolution in 1911 shows, however, that it was not the result of a carefully planned movement, but was rather a spontaneous and contagious uprising at isolated points, which was later partially unified and coördinated." It is due to this fact that a unification of China after the revolution has not been as easily effected as might be expected. But its quick and almost bloodless success, a great spectacle in world history, may be ascribed to the same fact. "All had a common determination that the Manchu must go, and this hatred of the reigning dynasty provided the bond of union which held the revolutionary leaders together so long as the common foe existed." As soon as the common foe disappeared from the field, differences and divisions manifested themselves as a matter of course.

Yuan Shih-Kai was made the provisional president in 1911 by a dual mandate, one from the former dynasty, another from the provisional Republican Government in Nanking. In the eyes of the people the Imperial mandate meant much more than the mandate issued by the Nanking government, for the simple reason that the Nanking Republican Government was such a new and novel creature that the people could not visualize it yet. The author analyzes Yuan's position by saying that "unquestionably Yuan was greatly strengthened in the eyes of his countrymen because of the powers bestowed upon him by edict, although the Imperial authority had ceased to exist." No student of the modern history of China can fail to note that this was a vantage ground of much importance upon which Yuan relied to wield his power against political enemies. "His election as president was a compromise, pure and simple, made necessary by his control of the north of the Yangtze. The easiest solution was to confer on him the dignity of the presidency and then, by constitutional provisions, to strip that office of all real weight in the government. In other words, the intention was to legislate Yuan out of his control of the situation" (page 124). Indeed, this was the shortest path to the solution of a chaotic situation. History tells us, however, that law is not always a good match for the sword, although undoubtedly the ultimate victory lies with the law. The struggle between the law and the sword is still going on in the Flowery Kingdom, but the reviewer is happy to say that the trend of recent events indicates that the rule of law

will soon begin its glorious reign over that great nation. The author expresses the same view (page 263).

Regarding Professor Goodnow's connection with Yuan's monarchical movement, the author is rather inclined to think that his memorandum setting forth the advantages of a limited monarchy in China and Yuan's ambition to mount the throne were but coincident phenomena. If this were really the case, then the coincidence was indeed an inopportune and unhappy one (see page 183).

The principal difficulty that presented itself in the making of a permanent constitution in 1916 was that regarding the status of the provinces. The holdings of the two opposite parties are clearly and admirably set forth in the tenth chapter of the book (page 225). This obstacle no longer exists, inasmuch as many of the provinces have made their own constitutions during the last two years and a line of demarcation between the central and provincial authorities can be clearly and easily drawn. Recent developments have unmistakably indicated that the constitutional tendency in China is toward federalism. When a legal parliament sits again in China a permanent constitution peculiarly suited to the situation in China will surely come into being.

In spite of many failures on the part of the republicans to make a permanent constitution, and of the chaotic conditions existing in China now, the author is by no means pessimistic with reference to the future. "What the future will bring forth," he says, "it is hard to say. The anti-Japanese feeling in China, if it develops far enough, may conceivably make possible a union of the provinces for the purpose of protection against external aggression" (page 263). Pressure from without upon China during the last decade is undeniably responsible for the situation in which she now is; it is, however, not without some good results, in that it helps to unify the Chinese people as a nation in the true sense of the word.

The author is very fair and just in saying that "aside from the purely internal factors responsible for the representative government in China, the outside world, and particularly Japan, must share the responsibility." Neither the author nor the reviewer is of opinion that "Japan should bear the blame for the failures of the Chinese to stabilize conditions in their country." But Japan's policy in loaning money and in acts of aggression in China has made it more difficult for the Chinese to set their house in order (pages 272-3).

University of Michigan.

DING SAI CHEN.