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Book Reviews

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Book Reviews

Authors

Nathan Isaacs, Horace LaFayette Wilgus, Arthur H. Basye, Leonard D. White, Victor H. Lane, and Edwin D. Dickinson

BOOK REVIEWS

THE NATURE OF THE JUDICIAL PROCESS. By Benjamin N. Cardozo. New Haven: Yale University Press. 1921. Pp. 180.

What does a judge do when he decides a case? It would be interesting to collect the answers ranging from those furnished by primitive systems of law in which the judge was supposed to consult the gods to the ultra-modern, rather profane system described to me recently by a retrospective judge: "I make up my mind which way the case ought to be decided, and then I see if I can't get some legal ground to make it stick." Perhaps the widespread impression is the curiously erroneous one lampooned by Gnaeus Flavius (Kantorowitz). The judge is supposed to sit at a green baize table—the German equivalent in suggestion for our red tape—with nothing before him but a copy of the *Bürgerliches Gesetzbuch*. Personally, he has no equipment but a perfect thinking machine. The facts are presented to him and a mechanically perfect conclusion is automatically reached. Disregarding entirely the unattainability of this ideal degree of the elimination of the personal equation, one may well ask whether the ideal itself is worth striving to approximate.

Curiously enough, the literature in which judges themselves speak of the processes by which they reach their conclusions is very meager. Of introspective analysis by eminent judges there is practically none, unless it be found in those reminiscences that the Victorian lawyers were in the habit of making at one time. Nor am I aware of any objective psychological analysis of judicial opinions aimed directly at the question: through what mental process do judges reach their conclusions? There is, of course, a considerable controversial literature advocating more or less freedom in the judge in the interpretation of existing rules of law, and a polemical literature for and against judicial legislation, but here again we are dealing with ideals rather than actualities. Judge Cardozo's contribution, then, though his subject is as old as the law itself, seems to be a pioneer work.

The analysis of the judicial process around which the book is written divides the conscious from the subconscious. Consciously the judge resorts to logic (Lecture I, *The Method of Philosophy*), precedents, and a consideration of the end to be served (Lectures II and III, *The Methods of History, Tradition and Sociology*). The subconscious elements are dealt with in the last of the four lectures. The overlappings in this analysis are clearly recognized by the judge: the precedents contain their own logic; *stare decisis* has its function; so has the mere logical perfection of a system of rules. Yet this rough classification proves quite workable. In fact, many an opinion proceeds by discussing the matter "on principle" and then by "turning to the authorities," and winds up by a justification on the basis of "policy." Subconscious processes must, of course, be gathered from between lines of

an opinion, except in the case of a very few judges who are given to the habit of dipping into autobiography in their judicial pronouncements.

The relative importance of the several elements must, of course, differ not only in different judges but at different points in the career of a single judge and at any given time in the work of any judge with reference to different topics. An exact *quantitative* analysis of the kind that Judge Cardozo refers to, mentioning Mr. Wallas's book on "Human Nature in Politics," can hardly be made—at least in the present stage of our study. It is enough that Judge Cardozo gives us the *qualitative* analysis of the judicial process in Anglo-American law and makes it so wonderfully clear that within limits the judge is free to emphasize one or the other element. This he does not only on the basis of personal observation but with a rich scholarship which even his abundant humility (*cf.* page 13) cannot quite conceal. It is hard to recall a single instance in which any judge has made such rich use of our legal periodicals and of the works on legal philosophy and history which the Association of American Law Schools has caused to be translated. Judge Cardozo stands in the front rank of American judges today in the use he makes of such material in his judicial work. A typical instance may be found in the case of *De Cicco v. Schweitzer* (1917), 221 N. Y. 31; 117 N. E. 807, in which the doctrine of *Shadwell v. Shadwell* was up for consideration. There the judge in a masterful way contrasted the views of Langdell, Ames, Williston, and Beale, and worked out substantial justice in his own way. Likewise, in this little book he gives more evidence perhaps than has ever been collected between the covers of a single volume heretofore that the judiciary has at length discovered the mine of thought and information in our legal periodicals.

Perhaps the most important contribution is the judge's recognition of the subconscious element. "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." This subject is by no means exhausted in this work, nor is it entirely satisfactory to view the personal equation as a "flaw" in our judicial system. (*Cf.* p. 177.) If that is once assumed, perhaps it is all that optimism can do to suggest: "The eccentricities of judges balance one another. * * * One is a formalist, another a latitudinarian; one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements." The subconscious element, however, exists, and must exist as a matter of fact. It is frankly recognized as a valuable factor in the development of civilization in other fields. (*Cf.* the discussion of *Kultur* on page 72.) Why not in law? True, careful analysis can help us isolate features of the subconscious mental process and raise them to consciousness, where they can be scientifically treated. Many years ago the asphalt chower was an important individual in the preparation of asphalt for our streets. He did not know exactly what he did, but somehow or other by biting he was able

to tell whether the concoction had reached the proper stage of consistency. His place has since been taken by the machine which accurately tests the resistance of the substance and records the effect on a dial. And so the judge who talks of public morals or public policy is more or less unconsciously applying standards of ethics and sociology to a case before him. He is swayed by "intuitions of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended." A better trained bar may some day call these elements by their scientific names. But in the meantime we must recognize among the functions of the judge this application of the civilization around him through the personal element to the problems of our law.

Judge Cardozo's little book is a valuable contribution to the study of the judicial process. Lawyers have, to be sure, always had to be cognizant of this process in a measure and to shape their arguments accordingly. Its scientific study, however, is just beginning, and with its development we may expect not only a new understanding of the process of legal evolution, but possibly a reformation that will eventually affect both the teaching and the practice of law.

University of Pittsburgh Law School.

NATHAN ISAACS.

AMERICAN FOREIGN TRADE. By William F. Notz and Richard S. Harvey. Indianapolis: The Bobbs-Merrill Co. 1921. Pp. xv, 593.

This is a valuable book for those interested in the development of our foreign trade. Laymen wishing to know what is possible and probably immediately ahead in our foreign commerce will find here interesting and important information. Lawyers called on to advise and direct will find this a helpful manual as to what has been, and may be, done legally to meet varying situations likely to arise.

The five parts are: Introduction; Origin and Enforcement of Anti-Trust Laws; Coöperation, the Watchword in World Trade; The Webb-Pomerene Law; The Edge Act; Compacts in World Commerce; and an Appendix of Statutes and Forms.

A short history (eight pages) of our trade policy is given: the development of monopoly; origin and enforcement of anti-trust laws; a summary of the prosecutions under the Sherman Act of 1890,—only 18 in the first ten years of its existence, 192 in the next twenty years. The net legal results of these are: combinations by merger, complete ownership, or by holding companies for purposes of monopoly are unlawful; unfair methods of competition are evidence of a purpose to monopolize; but under the "rule of reason" mere size with unexercised power is not unlawful; *prosecution* in court is slow, uncertain, unsatisfactory in result, and disturbing to legitimate business.

These results led in 1914, not to the abandonment of the anti-trust policy, but to a different method of procedure: the creation of a Federal Trade Commission, with power, after investigation, "to *prevent* unfair methods of competition in commerce," and to order offenders "to cease and desist"

therefrom (Act Sept. 26, 1914, 38 Stat. 717); and defining more fully in the Clayton Act (Oct. 15, 1914, 38 Stat. 720) some unfair methods of competition, such as price discriminations, tying contracts, interlocking corporation directorates, and intercorporate stockholding.

These acts are analyzed and the results of *prevention* as compared with *prosecution* are indicated (44 pages) showing: the gradual growth of a code of unfair trade practices numbering more than 30 (Appendix, Exhibit XXIV); the consideration, in five years, of 1978 applications for complaints; 954 of which were discussed on the preliminary investigation; 570 investigations not completed; 454 completed, resulting in 603 formal complaints; 294 of these were heard, 56 dismissed for lack of proof, and 238 "cease and desist" orders were issued; 194 of these were voluntarily complied with; and in all, only five appeals to court were taken.

Then follows a rapid review (38 pages) of the world-wide trade combination movement in Europe before the Great War; the effect of the war; the rapid movement to rehabilitate such combinations immediately after the war, not only in Europe, but to extend them in Australia, Canada and Japan; the necessity of coöperation among exporters from this country if the United States is to secure and retain its proper position in world trade; the comprehensive report of the Federal Trade Commission (June 30, 1916) on the subject, with recommendations that combinations in export trade be allowed; the embodiment of these in the Webb-Pomerene bill in Congress; the endorsement of President Wilson, and its enactment April 10, 1918, "to promote export trade," by associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such," to be exempt from the Sherman Act as to *export*, but not as to *domestic* trade, and subject to the jurisdiction of the Federal Trade Commission over "unfair methods of competition."

Part IV (160 pages) is a discussion of the necessity, importance and meaning of this act; it breaks new ground in foreign trade; establishes higher standards of trade ethics; points a way of control and regulation of coöperative combinations, preserving their value and curbing their dangers, which has met with approval and partial adoption abroad.

Export trade means under the act "solely trade or commerce in goods, wares or merchandise exported or in the course of being exported from the United States or any territory thereof to any foreign nation, but not the production, manufacture or selling for consumption or for resale within the United States or any territory thereof." Price fixing or allotment of goods, division of territory, nor manufacturing expressly for export, nor operating transportation lines nor selling to brokers at seaboard for export, are not *exporting*,—this contemplates the physical transmission of actual goods, consummated in a sale thereof abroad, directly or through agents there located. Such associations cannot ship goods to Hawaii, Alaska, Porto Rico, the Philippines, the Panama Canal Zone, Guam, Tutuila, Virgin Islands, Guano Islands, Wake, Baker, Howland and Midway Islands, for they are not "foreign nations." Such associations may be formed in Hawaii

Alaska and Porto Rico,—they being territories,—but not in the others, for they (except the Philippines) are not territories, and the Philippines are probably excluded by the Philippine Act, August 29, 1916.

Such associations may be any combination of "persons, partnerships or corporations" formed by contract or otherwise; under state laws (Delaware being the favorite), or under federal law, should Congress so provide; foreigners operating only foreign plants could not, but if operating plants located in the United States could, it would seem, form such associations solely for exporting such goods from the United States. Such associations shall not restrain trade "within the United States," nor "the export trade of any competitor"; nor engage in "unfair methods of competition"; trusts to export foreign markets or to injure foreign competition by such unfair methods are subject to the jurisdiction of the Federal Trade Commission, although such acts occur abroad; this extra-territorial jurisdiction, though quasi-criminal, is probably constitutional and valid, at least as applied to residents and the "nationals" of the United States.

In Chapters XV, XVI and XVII (61 pages) are discussed the methods of forming and operating such associations; the economic questions to be considered and provided for; the proper legal clauses to meet these conditions, such as methods of control, stock issues, limitation of activities to export trade, violation of agreements, amalgamation only, or complete combination, joint representation in management, joint selling of trade-marked products, etc. These clauses are taken from important precedents, most of which are given in full in the Appendix, such as the organization papers of the Consolidated Steel Corporation, American Tobacco, Powder, Aluminum, Dye Stuffs, and Cement Association agreements. Forty-five such associations have been formed, comprising 754 members and about 1000 plants in 46 states, covering a large variety of products, and including both large and small producers.

It soon became apparent after the war that international trade could not be revived nor carried on without provision for extensive credit; the impoverished buyer could not buy except on long time credit, which the seller was not in position to extend. Congress has undertaken to meet this situation in the United States by the Edge Act (December 24, 1919), amending the Federal Reserve Act (December 23, 1913), authorizing the formation of corporations under federal charters to do foreign or international banking, to finance exports, and to carry on other financial operations necessary to promote the export trade of the United States; they are authorized to take the bills or notes of the foreign buyer, or foreign government securities, industrial stocks, or mortgages on foreign plants and property, and issue their own debentures against these, sell them, and pay the exporter for the goods he ships to the foreign purchaser.

Part V (33 pages) discusses the methods of forming such export banks and the rules and regulations imposed thereon by the Federal Reserve Board. Five or more persons may incorporate under the act, for twenty years, with a minimum capital stock of \$2,000,000, \$500,000 to be paid up; a majority of

shares must be continuously owned by citizens, or by firms or corporations the controlling interest in which is owned by citizens of the United States; their business is limited to international or foreign trade transactions, but they have extensive powers of discounting and dealing in foreign commercial paper and securities, purchasing coin, bullion and exchange, borrowing and lending, and issuing their own debentures not exceeding ten times their capital stock; and may establish branches abroad, all under the general supervision of the Federal Reserve Board, with whom they must file their incorporation papers and to whom they must report. The rules and regulations and forms of articles of association and organization certificates are given in full in the Appendix (Exhibits IX, XIV, XV).

Part VI (52 pages) reviews many of the important combinations heretofore or now existing in world commerce, such as Railmakers, Shipping, Tobacco, Explosives, Aluminum, Glass, Bottles, Quinine, Dye, Indigo, Wireless Telegraph, and Electric Lamps, and concludes that the time is at hand when such should be incorporated under international treaty provisions, and regulated under some sort of an international league or commission, with powers over international trade similar to those of the Federal Trade Commission, to prevent unfair methods of competition and trade practices therein. This, although a consummation devoutly to be wished, is perhaps too much to hope for soon.

The work is careful in its conclusions, accurate in its statements, temperate in its treatment, and very stimulating in its suggestions and outlook upon the great subject of which it treats,—the proper organization of American foreign trade.

H. L. WILGUS.

COMMONS DEBATES FOR 1629, critically edited, and an Introduction dealing with Parliamentary Sources for the Early Stuarts. Edited by Wallace Notestein and Frances Helen Relf. Research Publications of the University of Minnesota, Studies in the Social Sciences, No. 10. Minneapolis: The University of Minnesota. 1921. Pp. lxxvii, 304.

This volume is divided into three parts: (1) an introduction of some sixty pages; (2) carefully edited texts of five sources—the *True Relation*, *Nicolas's Notes*, *Grosvenor's Diary*, *Nethersole's Letters*, *March Second Account*; (3) an appendix with critical apparatus for a detailed study of the *True Relation*.

The introduction is necessarily a critical examination of the sources actually presented, but it is more than this: it is a most suggestive study of the nature of parliamentary source material for the early Stuart period; it is a valuable contribution to our knowledge of the embryonic newspaper and of the dissemination of news. It points out, as well, the growing desire to break away from parliamentary secrecy, to develop publicity for parliamentary proceedings, and thus to influence public opinion. One need not be a specialist in the seventeenth century to find here not only instructive hints on the assembling of source material, but also general information of interest and value to any student of history.

Of the sources printed, the *True Relation* is the longest and most important, although the editors feel that *Grosvenor's Diary* "is their most valuable contribution to the source material of this period." The *True Relation* has long been known and has been several times printed; the problems in connection with it arise from the many manuscript versions which the editors have found—no less than forty-eight, each different from one another and from the printed versions. The editors had to grapple with a real problem of criticism here, and they seem to have arrived at a sound solution. The *True Relation* is made up of two kinds of material: the weekly or monthly news-letters, and "separates"—i. e., single speeches which were sometimes given out (against the rules of parliament) by the speakers themselves, but which were more often "gathered by ignorant, careless and often unscrupulous scribes in roundabout ways and hastily put together for immediate circulation." The *True Relation*, therefore, is not to be taken as final and absolute authority, even though its accuracy is as great, in the eyes of Professors Notestein and Relf, as that of the semi-official *Commons Journals*. The editors have made their main task the collating of the various versions of the *True Relation* and the reconstructing of the day-to-day account from the fuller and the seemingly more accurate texts. Their version of the *True Relation*, therefore, is unlike any other, either in print or manuscript, but by the use of the full footnotes and of the critical appendix all variations may be traced. The other sources present no such editorial problems, except the authorship of the *March Second Account*, of which there are two manuscripts.

The reviewer is not qualified to answer the question whether or not the material here presented will modify our former conclusions in regard to the character and work of the last parliament of Charles I before the "eleven years of arbitrary rule." He is happy to note that the old story of the spectacular close of this parliament has not gone the way of Pocahontas and John Smith. What cannot fail to impress him is the unusually careful and sincere work of the editors; their critical work is excellent both in matter and in form. It is to be hoped not only that the future volumes promised by Mr. Notestein and Miss Relf may soon appear but that their example may be followed by others. It is not the Stuart period alone for which the *Parliamentary History* and the *Debates of Parliament* are inadequate.

Dartmouth College.

ARTHUR H. BASYE.

THE AMERICAN PHILOSOPHY OF GOVERNMENT. By Alpheus Henry Snow. New York: G. P. Putnam's Sons. 1921. Pp. iii, 485.

This collection of nineteen essays by the late Alpheus H. Snow comprises a series of papers written in the years from 1906 to 1919 and deals chiefly with two general topics, the underlying philosophy of the government of the United States and the problem of association of nations in some form of international organization. The essay entitled "A League of Nations

according to the American Idea" serves in a way to bind these two general subjects together.

The author's understanding of the American philosophy of government revolves around the notion of fundamental rights, equivalent to the natural rights of an earlier school of political theorists, and recognized but not established in the Declaration of Independence and the Fifth and Fourteenth amendments to the United States Constitution guaranteeing to the individual the enjoyment of life, liberty and the pursuit of happiness, and to a certain degree, property. The source of this fundamental law, whose existence cannot be proved but must be accepted as self-evident truth (page 23), is human society itself as an organized unitary community.

An analogous metaphysical creation is the natural Law of Connection and Union of Free States, likewise recognized in the Declaration of Independence and the Territory clause of the federal Constitution. The relation of the Philippine Islands to the United States is thereby deduced, "the present American Union would be the supreme judiciary head, with power to finally determine the questions arising out of the relationship, not by edict founded on will and force, but by decision * * * applying * * * the principles of the Law of Connections and Unions" (page 64). Thus the Philippines bow not to the power of America but to the Law of Connection, which is a part of the Law of Nature, a distinction which would perhaps appeal more to a New England conscience than to native intelligence.

The essays dealing with international subjects other than the League of Nations exhibit much historical research and appear to be the most useful parts of the collection. Three essays dealing most directly with international organization reveal an interesting chronological development. In the essay entitled International Law and Political Science, published in 1913, the author approves the idea of an international organization endowed with the right of armed intervention; in 1917 (International Legislation and Administration) the use of physical force seemed equivalent to international autocracy, and reliance was therefore to be placed on the compulsive power of conciliation; in 1919 the League of Nations is denounced as incompatible with the American Philosophy of Government (The League of Nations according to the American Idea). Mr. Snow allied himself with that wing of the Republican party which interpreted the league to involve a diminution of the sovereignty of the United States, the establishment of a superstate, and the partial submergence of the United States therein (page 157).

The book is marred by the provincialism of the author, to whom the Declaration of Independence and the American system of government seem to furnish the final political types for the whole world. Thus we read: "Our system is therefore just, scientific and practical. It is more just, more scientific and more practical than any other system * * *" (page 193); "The American Idea is the highest standard possible" (page 163); "when all the states have adopted written constitutions according to the American

Idea * * * a League of Nations * * * might be possible" (page 170); "The ruling classes still deride the American Idea or parody it in terms of the French Declaration of the Rights of Man" (page 165).

University of Chicago.

LEONARD D. WHITE.

OCCASIONAL PAPERS AND ADDRESSES OF AN AMERICAN LAWYER. By Henry W. Taft. New York: The Macmillan Co. 1920. Pp. xxvi, 331.

Mr. Taft's book is made up of a collection of papers and addresses dealing with questions at the time of more or less public interest. They naturally classify themselves as those having a peculiar interest for lawyers because they deal with matters having a definite relation to their profession, such as are of a political nature, and a few of a more general character. Papers of the first class plead for high ideals for those who make and those who are engaged in the administration of the law and give evidence of having emanated from one earnestly interested in the maintenance of those ideals. Those of the second class show their author to be a citizen first and of the first rank—one interested in the welfare of the state and devoted to its service. A "patriot" we would have called him a decade ago, and meant to praise, before "dying for one's country" had begun to fade in the light of that larger phrase, "sacrifice for the world." It must be said that the matter is not peculiarly original, nor is much of it such as to give promise of permanently commanding, in a large way, public interest.

The author tells us in his preface that he is led to the publication of this book by reason of having encountered difficulties "in collecting addresses of my father delivered three-quarters of a century ago." Somebody, in what would seem to have some ear-marks of a lucid interval, said something to the effect that there are two reasons only which justify one in writing a book: assuming the matter he would say is what the world ought to know, it should be true either that it has not been said or that the author can say it better than any other has said it. We fancy this was Carlyle somewhere in his "Sartor Resartus." Our copy has been loaned (we thought it was a loan at the time) to one of those pathological friends who suffer from amnesia, or we would verify this—if we could. Is it possible that our psuedo (if so it should turn out) Carlyle is too narrow in his limitations? For what would he have us use our bookstacks? V. H. LANE.

THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES. Translation of the Official Texts. Carnegie Endowment for International Peace. New York: Oxford University Press. 1920-21. The Conference of 1899. Pp. xxi, 883. The Conference of 1907. Three volumes; pp. xv, 703; lxxxix, 1086; xci, 1162. Index Volume. Pp. viii, 272.

There has been a great deal of loose talking and writing about the International Peace Conferences held at The Hague in 1899 and 1907. We have heard extravagant praise and excessive censure. On the one hand, it has

been pointed out that these Conferences created and perfected the so-called Permanent Court of Arbitration at The Hague and laid the foundations for a real international court of justice. On the other hand, we have been reminded that by far the greater part of their energies were spent in an attempt to revise and codify the laws of war and neutrality, thus creating a vain phantasm which was certain to vanish in the ugly heat of war. The Conferences have been extolled as marking "an epoch in the history of international relations" and denounced as mere shams bringing forth "a progeny of shams." Whatever the truth may be—it is safe to say that it lies somewhere between the extremes—the printed record is now available to everyone. Instead of resorting to the four ponderous tomes of the original, printed in the official French, the reader or student may now refer to much more convenient volumes in English translation. The reviewer has sampled the translation at random. It appears to have been satisfactorily done. The indexes of the original volumes, notoriously inadequate, have been greatly enlarged and expanded, thus making the mass of varied materials much more accessible than it has been hitherto. The Carnegie Endowment for International Peace has again earned the gratitude of all who are interested in international relations. The appearance of the translation is especially timely because of the recent suggestion, which seems to have been taken seriously in some quarters, that President Harding's promise of an association of nations may be fulfilled by reviving The Hague Peace Conferences.

EDWIN D. DICKINSON.

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