BOOK REVIEWS

Law: A Century of Progress, 1835–1935. Edited by Allison Reppy. New York: New York University Press, 1937. 3 vols. Pp. xxx, 387, 438, 475. $15.

Two years ago the present reviewer, having the privilege of addressing, as one of its guests, the American Bar Association at its annual gathering at Boston, took as his theme the great interest which the history of the development of American law during the last hundred or hundred and fifty years would present for common lawyers all over the world; and he called attention to the comparative paucity of the literature at present available upon this subject. He permits himself to think that it may have been in consequence of this address that the editor of the University of Chicago Law Review has now extended to him the further privilege of reviewing in its pages this imposing work, a work which goes such a long way to fill the gap of which he had spoken at Boston.

Law: a Century of Progress celebrates the completion of the first hundred years of the existence of the School of Law of New York University. It is in three volumes, of which the first is headed "History, Administration, and Procedure" the second "Public Law and Jurisprudence"; and the third "Private Law." Altogether they comprise thirty-six articles or chapters, extending to 1,300 pages, including indexes, and the very voluminous and valuable notes.

The main theme of the majority of the contributors is, of course, the evolution of American judicial and statute law, both federal and state, during the hundred years under review; but a number of writers have gone farther afield for their subject matter. Thus Mr. Phanor J. Eder, of the New York Bar, contributes a most interesting article, which few but he could have written, on "Law and Justice in Latin America"; and Herr Walter Simons, former Chief Justice of Germany, writes on "One Hundred Years of German Law." In view of its world-wide influence and importance, it is somewhat strange that there is no corresponding account of the evolution of French law during the period. The unceasing process of reciprocal suggestion and imitation between American and English legislators and judges, is, of course, continually adverted to; but the only section specifically devoted to a topic of English law is Professor Alexander N. Sack's chapter on the history of conflict of laws in England. In this very valuable and informative paper the writer traces the somewhat slow evolution in England of the idea that a foreign law could properly be applied in a domestic forum from the primitive canon that a court could only apply its own domestic law—be it common law, the law merchant, admiralty law, or ecclesiastical law—and that where a different law appeared applicable to the case, the parties must be sent to the jurisdiction where that law belonged. But it may be remarked that the process here described rather ends than begins in 1835.

The only pages exclusively directed to a comparison of English and American law, at the present stage of their development, is the contribution of Professor Winfield of Cambridge, in which he examines and criticizes the first two volumes of the "Restatement of the Law of Torts" from the standpoint of a specialist in English tort law.

The topic of American law in the last hundred years is most widely departed from by several of the papers in the second volume, where the editor would seem to have extended to well-known writers a general invitation to discourse on whatever subject appealed to them. So we have Professor Harold Laski, in a paper entitled "The Crisis in the Theory of the State," proclaiming high Marxist class-conflict-revolutionary doctrines—which do not appear, to the present reviewer, to be applicable either to the history or to the present circumstances of America or England; while Professor Corwin analyzes without benevolence, or much reference to history, the opinions handed down by the Supreme Court in the *Schechter* case.

There can be few people who, being equipped with knowledge equal or superior to that of the contributors, are competent to review this encyclopaedic book as it deserves; and the present writer is not one of them. This being so, the best course, so it seems, for him to take, is to endeavour to convey to readers of this Review some impression of the pleasure and profit which he has derived from reading it: and that he can best do by picking out some of the intellectual nuggets which he has encountered.

In the first paper in the book Dean Emeritus Roscoe Pound gives, under the rubric, "A Hundred Years of American Law," a suggestive survey of the whole field. He distinguishes three periods—"a creative period down to the Civil War; a period of systematizing from the Civil War to the end of the century; and a period of reshaping, destined to be a new creative era, since 1900." During the second period "questions of politics came to be thought of as questions of constitutional law. Questions of administration were turned into judicial questions. It was thought that action at law would suffice for the regulation of public utilities. It was expected that taxpayers' suits in equity would prevent waste of public funds. It was expected that mandamus would suffice to hold public officers to their duty." Speaking of the spirit of innovation which has marked the third period, and of the reactions it has excited, he reminds us that "the appointment of Story as justice of the Supreme Court was received with indignation by the solid and respectable elements of the society of his day as threatening subversion of law and of authority." America would still like to think that it lives in Main Street. "We have become big, but we like to picture ourselves as small. . . . . Let us not fear bigness."

Mr. Eder, in the paper already referred to, dwells upon the strong spirit of legalism which the Spanish colonists carried with them to South and Central America, and implanted there; but he points out that in those regions the force of law resides rather in public opinion than in the legislatures and the law courts; and the result is not wholly unsatisfactory. The bibliography and notes to this article should prove of great value to comparative lawyers.

Mr. Vanderbilt's paper on "One Hundred Years of Administrative Law" is noteworthy. Although, as he records, Maitland, so long ago as 1888, had called attention to the fact that the law of public administration was winning its way to a leading place in the framework of the law, "it is to American scholars . . . . that the credit for the investigation, analysis, and presentation of the principles of administrative law, simultaneously with their development in actual practice, must go"—with particular reference to Goodnow, Freund, and Frankfurter. The inevitable growth of the administrative activities of government is tending to bring in question the doctrine of the Separation of Powers. "The fact remains that our government to-day is largely a government of administrative agencies, many of them exercising powers legislative or

judicial in their nature." This gives rise to two primary questions: that of the extent to which the legislature may delegate its powers to the executive department; and that of the extent to which it may endow administrative agencies with judicial powers. Both in England and in America the problem remains to be solved, how, in an administrative age, to provide the private citizen with adequate remedies against wrongful governmental action. "This evil cannot persist indefinitely; sooner or later we will reach the point where the state itself will be obliged to live up to the standards it imposes on its citizens. When that point is reached, we will have much to learn from foreign experience with *droit administratif*."

Professor R. W. Millar's contribution on "The Old Regime and the New in Civil Procedure" is one of the most instructive and interesting articles in the book. Reform may be said to have begun in England with the act of 1832 which prescribed uniformity of initial process in common-law actions. In America its decisive beginning is marked by the bold and enlightened New York Code of Procedure of 1848, which established the principle of the fusion of common law and equity, an example followed in England by the Judicature Act of 1873. Professor Millar makes the interesting remark that as regards smoothness of working, the English reformers were the more successful, because they faced the fact that as regards substantive law the distinction between legal and equitable rules could not be abolished, and that "what was really aimed at in speaking of fusion was the concurrent administration of the two kinds of rules in the same suit when the circumstances so required." In America "it is not to be disputed that the constitutional preservation of jury trial as it existed at Common law, with the statutes passed in pursuance of it, a circumstance constantly militating against completeness of fusion."

Dean Wigmore, writing on "Jury-Trial Rules of Evidence in the Next Century" is severe in his criticism of the present state of the corpus of evidence-law, no less than of its practical application. What the Dean would like to do, at any rate as one step towards reform, would be to formulate a simplified set of rules "based on experience of human nature already embodied in the present jury-trial rules," and then to try them out experimentally in a jury-less court. If they worked in such a court, then perhaps bench and bar might be willing to use them in jury-trials. Such a code of simplified rules Dean Wigmore then propounds—devoting eighteen pages to the topic,—and the result is a most interesting and suggestive collection of maxims, duly illuminated by illustrative examples.

Coming to the second volume, the reviewer was particularly impressed by Professor Kocourek's chapter on "The Century of Analytic Jurisprudence since John Austin." Professor Kocourek refuses to follow the crowd in condemnation of Austin's logical system. "We believe it is entirely right to say that in substance Austin's analyses are correct and that he deserves to be accorded the rank of primate in the field under discussion." His fault was that he failed to discover "the conceptual nature of the State and of sovereignty."

If the reviewer may interpose a reflection of his own, which he believes to be in line with Professor Kocurek's philosophy, it is to the effect that much of the confusion which troubles legal speculation is due to a failure to distinguish between law as a pure social fact, and law as based (not without solidity) upon wish-beliefs. When the law is certain, it does not greatly differ in character from a railroad time-table. When it is uncertain, it rests upon the collective desire that law be invented by such a

technique as will make it seem to be discovered. An interesting feature of this article is the high praise given by the author to Henry T. Terry's "Leading Principles of Anglo-American Law," and to Wesley N. Hohfeld's "Fundamental Legal Conceptions as Applied in Judicial Reasoning."

Professor Kocourek's paper is followed by one by Professor Kelsen on "The Function of the Pure Theory of Law." In the opinion of the reviewer Professor Kelsen is embarrassed by the fact that the language in which he presumably thinks and writes is German. The first and most difficult task which a German thinker has to discharge is to free his mind from the ambiguity of the word "Recht"; whereas the English or American philosopher is protected by his mother tongue from any danger of confusing "law" with "right" or "righteous."

The third volume, entitled "Private Law," is even more closely packed than the preceding two with matter of first-rate value. In the first place we have Professor Winfield's article, already referred to, on the "Restatement of the Law of Torts." Among other interesting points, we may notice the writer's remark that the Restatement does not emphasize the distinction (which, in Professor Winfield's view, lies at the base of the present English law) between (a) negligence as a method of committing independent torts, and (b) negligence as itself an independent tort.

Dean Leon Green's paper on "One Hundred Years of Tort Law" cannot be passed by without a tribute. Dean Green bases his review upon the pregnant truth that the development of tort-law has been effected by the judicial activity of individualizing specific types of "hurts worthy of governmental protection."

Professor Llewellyn's most illuminating paper, "Through Title to Contract and a Bit beyond" is devoted to the problems presented by Sale of Goods, with particular reference to the Uniform Sales Act. Professor Llewellyn's leading criticism is to the effect that transfer of title furnishes a wholly inadequate clue to the solution of the problems presented by a sale. "The results [of an exploration of the mercantile phases of the field] indicate that Sales situations are more complex than one would suspect from reading merely about the Seller, the Buyer and the Goods; but, especially, more complex than one would suspect from reading merely of Title and Assent." To the eye of a realist, title is a complex idea, of which the component parts are often to be found divided between the different parties to a transaction. An appendix to the article lists a series of suggested amendments to the federal Sales Bill. An English reviewer cannot read without pleasure Professor Llewellyn's fine, though not uncritical, tribute to the pre-eminence of the late Lord Justice Scrutton as a commercial judge.

The last paper which the reviewer finds it impossible to omit from specific notice is Professor Walsh's article on "The Growing Function of Equity in the Development of the Law." The great interest of this paper is in no small measure due to its explicitly historical character. "The purpose of this article is to outline the more important contributions of equity to the development of the common law prior to 1835, the establishment of equity in the United States, and the more important developments of equity since that date." Quoting Dean Pound, the writer relates that "the real history of equity in this country begins after the Revolution. One might almost say that it begins in the second decade of the nineteenth century." Like Professor Millar, Professor Walsh dwells upon the difficulties encountered in many American jurisdictions in bringing about a satisfactory fusion of equity and law. But "the outstanding

importance of code merger of law and equity lies partly on the fact that reforms in our legal system arising in equity out of the application of equitable principles in an ever-widening stream no longer have to be 'adopted' at law as did the reforms initiated and established in equity prior to code merger." Some of the more important lines of progress which have had their origin in equity have been the development of equitable relief in tort cases, the development of specific performance, the increasing readiness to relieve against fraud and mistake, and statutes permitting declaratory judgments. The reviewer is prompted to ask whether the right of action of the third party beneficiary under a contract is so universally established in American jurisdictions that there is no longer room in this field for the liberalizing influence of equitable doctrines? In England this question would call for an answer in the negative.

Turning over once again the pages of this fine book, it occurs to the reviewer to applaud the many pages of notes and references, by which the value of the majority of the articles is greatly increased; to remark upon the total absence of any allusion to the law of domestic relations; and to mention two minor errors noticed respecting English law. Both of these occur in Professor Tooke's excellent contribution on "The Progress of Local Government, 1836–1936." Owing to the frequency of so-called private acts regulating and amplifying the powers of cities, municipal organization is by no means uniform in England. And the statement that "in England women under thirty years of age may not exercise the franchise" ceased to be true in 1929, under the Act of the previous year which assimilated the franchise of men and women for both parliamentary and municipal selection.

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The English Business Company after the Bubble Act, 1720–1800. By Armand Budington DuBois. New York: Commonwealth Fund, 1938. Pp. xxii, 522. $5.00.

Students of the corporation law have long realized the gross inadequacy of law reports and statutes as sources of information as to the legal forces actually operating to control business practice. In the words of Professor Goebel, "There waft into the courts only occasional gusts in the varied and perpetually changing weather of commercial transactions. A climate cannot be delineated from a jar of captured raindrops."[1] The present volume, however, represents probably the first successful effort to unearth materials from which a more adequate picture may be painted. Mr. DuBois has combed general sources such as periodicals and pamphlets and has struck a rich vein of material in records of proceedings before administrative officers of the Crown. But even more effective is his use of minute books and correspondence in the archives of a score or more of the large companies of the period, and particularly the private opinions given by counsel. A surprising number of these opinions has been unearthed in corporate files, at the Inns of Court, and in other private and public archives. As earthy material for an understanding of law in action, these opinions are surpassed only by confidential communications of business men to each other. Thus Matthew Boulton, the associate of James Watt, has left immortal evidence of the appreciation of one practical advantage of the unincorporated form of organization. In 1788 he

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[1] P. vii.