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Book Reviews

BOOK REVIEWS

CASES ON THE LAW OF MORTGAGES. (Second edition.) By I. Maurice Wormser. New York: Baker, Voorhis & Co. 1935. pp. xvi, 667. $6.00.

Mr. Wormser's first appearance in the field of mortgages was when he edited a second edition of Kirchwey's Cases, in 1917. This was followed by his own book of which a new edition became necessary because of the bearing of the depression upon the real estate mortgage. The statutory moratorium, as upheld by the Supreme Court, has left results that should be noticed in the class room; and of equal importance is that other line of state legislation, as illustrated by recent laws of New York, which throws safeguards around the deficiency decree.

These points are developed in the present edition, by cases and references that are quite sufficient for the student's needs. While he was about it, however, Mr. Wormser inserted material upon several topics that were absent from the earlier collection. Thus the present edition will enable the teacher to develop the proposition that the mortgage takes different forms in various parts of the country. For example, in Virginia, West Virginia and the District of Columbia, the mortgage is effected by conveyance to a third party in trust for the holder of the mortgage note, with full power of sale in case of default; and in quite a number of states there is the right of statutory redemption after foreclosure. So widespread, indeed, is the latter right (although it is purely statutory and is never to be considered as related to the ancient equity of redemption) that it is a feature of the Uniform Mortgage Law, which was proposed some years ago for general adoption by the states. It is necessary that the student should realize that there are these diversities, and a case book should not let them go without mention.

The present edition is ample in that regard, but the author does not let such things divert him from his main purpose, which is to set forth the characteristics which attach to the security transaction when real estate is the subject matter. In this respect the book occupies a position that is far above that assumed by a certain type of latter day case book. The difference, I think, is that Mr. Wormser does not regard the mortgage merely as a "device," with all the implications which attend the use of that word. On the contrary, he regards it as a subject that deserves serious study from the ground up, a study that can only be developed in the light of equitable principles and origins. When it is so regarded, the mortgage, whatever form it may be given by local practice, always retains its real features. Thus the Virginia "trust," although usually foreclosed by exercise of the power of sale, is a sister of the New York mortgage which is foreclosed by suit and decree. There are always the same fundamentals, a loan and security, a borrower with the right to redeem, and a lender with the right to resort to his security. When the student gets this into his head, and realizes that the whole picture was etched into our jurisprudence by the strong waters of equity, the rest is plain sailing. But to get the proper light upon such a picture, the student should be led to good sources.

Therein Mr. Wormser's work is good. This edition has new material, of course, but more of the old has been retained than is usual in such cases. The mortgage is not viewed against a flat background of modern American cases; on the contrary there is an unusual proportion of English cases—not merely the classics, but decisions rendered by the English courts within recent years. Also, there are appeals, in Privy Council and House of Lords, which show the development of the mortgage in other lands wherein we have interest—Ireland, Canada, Australia. There is a cultural value in this broad view of the mortgage which Mr. Wormser could not have offered had he confined his collection to United States cases of the latest dates to be found.

Guided by a book of this sort, one's study of the mortgage is necessarily basic and unitary. There are no side excursions, nor should there be. The corporate mortgage, as such, has no place here; its proper place is in another course. But one who follows the author's method will find that when he gets through he really knows what a mortgage is. Thus equipped, he will find that he is quite prepared for the corporate mortgage and all other developments.

In his preface to the first edition, the author stated that he had intentionally abstained from "over-indulgence in footnotes." That rule has been somewhat relaxed in the present edition, although respect is still given to the principle that "a case book cannot serve the purposes of a text or encyclopedia." With certain courses, footnotes in case books are undoubtedly of help to both student and instructor. But the footnote idea has been overplayed in many instances; and certainly, in a case book which deals with a thing like the mortgage, it is far better to put the teaching material where it belongs, at the top of the page. There are many things one can say about the mortgage, but footnotes are not adequate for the purpose. Mr. Wormser's method, whereby material is afforded by means of well selected cases and the reprint of typical statutes, with footnote references limited to features which, although closely related, cannot properly be developed in the body of the book, seems preferable.

There is one thing more. The mortgage, although ancient of origin, is of daily use, hence it does not lend itself wholly to seminar methods. There is, however, a great laboratory which teachers sometimes ignore. In order to appreciate such features of the mortgage as the right to income, accountings, and the like, forensic experience is at least a help. Mr. Wormser not only has taught law, but he has actually been at the bar. Hence in using the present book, students and teachers too, will be aided by the point of view of one whose scholarship has been polished by the experience that is the fortune of the active and successful practitioner.

GARRARD GLENN.†

NEW YORK LAW OF EVIDENCE. Including Questions, Rules of Evidence, Procedure, with actual examples taken from the Printed Records on Appeal. Four Volumes. By Roland Ford. New York: Matthew Bender Co. 1935. pp. xliv, (31), 627; viii, 629-1354; x, 1355-2172; xiii, 2173-3043. $36.00.

We have nothing but praise for this book. It is a work of such general excellence and of such extraordinary value to trial lawyers that we consider it worthy of exemption from the expression of adverse criticism of certain relatively unimportant details. Such criticism would under the circumstances be captious and itself deserving of disapprobation. Mr. Ford has rendered a unique service to the trial bar of every state. He has supplemented a clear and comprehensive presentation of the general rules of the law of evidence and those pertaining to the examination of witnesses, not merely with the exposition of the reasoning by which those rules have been arrived at, as set forth in extended excerpts from the opinions of judges, but he has made conveniently available a vast array of "Examples" from actual examinations of witnesses, showing just how lawyers peculiarly skilled in the art have conducted their examinations and, wherever possible, precisely how they have framed their questions. This is a work which has never so far as we know, been done by any other commentator on such an extensive scale. It has been done

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by others to a limited extent.[1] But Mr. Ford has presented such a variety of examples of the examinations of witnesses, direct, cross, re-direct and re-cross, taken from nearly every kind of case, civil or criminal, that can fall within the jurisdiction of a state court, that he has, it is fair to say, supplied material upon which the trial lawyer may draw for helpful suggestion in whatever kind of a case he may have.

In this connection it should be made clear that the richness of Mr. Ford's material has not been diminished by the limitation of his sources of supply to the "New York Law of Evidence." Here in this one state he has found adequate, even ample, material for the exposition not only of the general principles of the law of evidence and those pertaining to the examination of witnesses, but also for the technique of examination in all its phases.

Nor has the value of the work been appreciably impaired by the fact that the examples which have been taken from the earlier New York cases, when the records were printed under the old rule requiring that testimony be "reduced to narrative form," have precluded the possibility of setting forth questions and answers exactly as given in the court room. In these cases it is not difficult for one to spell out with reasonable accuracy the form of the questions eliciting the evidence. In those cases where appeals have been taken since the adoption of the present rule requiring that the record be printed in "question and answer form," the reader has before him the precise language of the questions propounded to the witness. This book supplies the need, so far as any book can do so, of the inexperienced trial lawyer who would perfect himself in the art of examining witnesses.

Evidence is such a tremendous subject, embracing such a multitude of rules, many of which the average student if left too much to himself is inclined to consider more or less arbitrary, that the teacher working in the limited time necessarily allocated to the subject is compelled to confine his attention and that of his classes to the exposition of the actual rules of the law of evidence and those pertaining to the examination of witnesses and the reasoning upon which they are based. No matter how extensive his experience in trial work may have been, no matter how great his skill may be, no matter how capable he is of giving instruction in the art, the teacher of evidence has practically no time to devote to the enlightenment of his pupils in the technique of examination. The result is a complaint frequently voiced by the young lawyer: "I know my rules of evidence. I know pretty well what I can do and what I can't do. But what troubles me is that, when I know that I am entitled to get certain matters in evidence, I don't know how to frame my questions." Now, it may be, of course, that the fault does not lie entirely in the lack of classroom instruction; it may be that in many instances the reasons for the difficulty are to be found in the man himself. He may lack imagination, be slow and clumsy in his mental processes, deficient in vocabulary, unready and maladroit in the use of language. But even one who labors under the handicap of these defects may do much in the way of supplying his deficiencies by the study of the "Examples" made available in this work. The benefit that he will derive therefrom can hardly be measured; but there can be no doubt it will be great. He will at least see at once how questions should be asked. Later on as he supplements what he has read in this book by actual experience in the court room he will realize that he is progressing more rapidly toward the attainment of a

1. The following are a few which may be mentioned: CORNELIUS, CROSS EXAMINATION OF WITNESSES (1929); WELLMAN, THE ART OF CROSS-EXAMINATION (1923); SCHWARTZ, CROSS EXAMINATION OF PLAINTIFFS IN PERSONAL INJURY ACTIONS (1923); SCHWARTZ, TRIAL OF AUTOMOBILE ACCIDENT CASES (1928); WIGMORE, EVIDENCE (2d ed. 1923), contains a relatively small number of specimens of actual examinations.

respectable degree of skill in the examination of witnesses than would have been possible had he not availed himself of the assistance so liberally extended by Mr. Ford.

But the aid to be derived from this rich and convenient storehouse of material is not limited to those who are deficient in native aptitude for trial work. The reading of these "Examples" cannot fail to sharpen the wits and amplify the powers of even those who are by nature endowed with the inestimable gifts of perspicacity and perspicuity. Again, lawyers who are older and more experienced will find here much that will augment their wisdom. Even they have not passed the point where they have nothing to learn from the experience of others. We believe that the reading of this book will be distinctly beneficial to every practicing lawyer, no matter what may be the type of his mind, or the stage of his development.

This work, however, is one which in our opinion is not suited to the student still in law school, (except in connection with moot-court work) and the author probably never intended it for such. Its very size, the amplitude and nature of its content render it unsuited to the student. Until one has acquired a knowledge of the general rules of the law of evidence and those pertaining to the examination of witnesses and the reasoning upon which these rules are based, he is not prepared to meet the mass of material which this book contains. He is not fitted to orient himself and maintain his sense of direction in his passage through such an extensive work. The law student therefore should defer the study of this work until the completion of his regular law course. When he shall have done that then we think that there is no one text book that he can read with greater benefit than this. When he does take it up he will, we are confident, experience several agreeable reactions. He will say to himself and probably to others: "This is not only the most informative text book that I have ever read, it is the most entertaining; it is the most exciting." He will feel time after time that he has been transported to a court room; to a court room tense and vibrating with the varied notes of human interest. He will, in imagination, see himself standing in the place of the examining counsel; feel that he himself is the one who is facing the problems of the trial; that it is his own mind that is functioning; that upon his resourcefulness and skill depend the outcome; and this may be in a trial where the issue is one of life or death.

This book contains the elements that make a law book valuable; it is informative, it is clear, it is accurate and it is interesting. It constitutes a distinct and noteworthy contribution to the bibliographic wealth of the profession.

LLOYD M. HOWELL.†

CRIMINOLOGY. By Albert Morris. New York: Longmans, Green & Co. 1934. pp. xii, 590. $3.50.

As a hand book, this addition to Longman's Social Science series is of value. Professor Morris undertakes to show who criminals are, how an individual comes to enter into the criminal class of our population, what means to prevent the development of criminal behavior have been devised in our day, the methods employed to ensure the apprehension and conviction of law-breakers and, finally, the means used to restrain convicted criminals from continuing their anti-social careers.

The author seems to regard his work as "scientific," since he identifies science with method—that is to say, with the process which "involves making a working hypothesis, observing and recording facts, classifying and organizing the data so

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gathered, generalizing, the making and testing of new hypotheses, and the predicting of human conduct."[1]

On this definition any body of knowledge could be given the name "science," and then we should have no criterion for distinguishing philosophy, poetry, history, or what not, from science. It is probably more accurate to reserve the term "science" to that knowledge which consists of a system of laws based on some natural or rational determinism. Method should be regarded as that which marks what is excellent in science, but not the factor constitutive of it. This is all the more necessary because criminology, like all social science, is quite destitute of any laws commensurable with those known to mathematics, mechanics, physics, chemistry, or biology.

What is it which passes under the title "criminology"? The answer which one may gather from an examination of this text book is that it consists of a description of crimes, the classification of types of criminals and, finally, some historical treatment of ancient and modern procedure in handling criminals. Considerable emphasis is placed upon the principle that the problem of crime is the problem of the individual delinquent. Until we learn how to recognize the incipient criminal, we shall be unable to prevent his emergence from society. But what are the marks of incipient criminality? Unfortunately, they vary from case to case. To detect in advance the individual who in some future time will become an available candidate for the jail or gallows calls for the insight of a genius who has been touched by the gift of prophecy. It would seem that there are very few detectors of incipient criminality.

While men continue to be direct descendants of Adam, all of them will be sinners—and some of them criminals. The criminal, we have with us always. So the real question becomes this: what shall we do with criminals if we are efficient and lucky enough to catch them before they acquire fortunes sufficiently large to enable them to retire to their country estates, there to enjoy their self-esteem and the respect of their neighbors? Professor Morris is thoroughly in favor of individualization of "treatment." He thinks that probation and parole should be more extensively used, but he is fearful that not enough good can be accomplished by these means. To solve the crime problem it is necessary, he thinks, to follow the example of the Mexicans by removing from our courts the power of imposing sentence on convicted criminals. He says: "Treatment should be based upon individualized study and diagnosis, so that every method used, whether old or new, would be applied intelligently and purposefully, rather than blindly, as at present."[2]

This "scientific individualization of treatment would require (a) limitation of the power of the Courts to the determination of guilt . . . [since] it is obviously silly for legislators to prescribe in advance, or for judges to fix at the time of trial the amount and type of punishment which will make a convict safe to receive his freedom."[3] The time when a prisoner is fit for return to the community should thus be decided by expert diagnosticians.

The vocabulary of modern treatises on criminology, including the book under review, is replete with terms like "treatment," "diagnosis" and "adjustment." Borrowed from the pragmatists by way of biology and physics, they imply an effort systematically carried out to reduce social phenomena to the bio-physical order. This reduction process requires the modern criminologist to deny human freedom and to adopt the belief that human criminal behavior is merely the necessary result of the convergence in the person of the offender of lines of physical force over

1. P. 3.
2. P. 514.
3. *Ibid.*

which he has no control. The criminal is considered to be sick, in the physical sense of that word.

Let us, therefore, substitute the idea of hospitalization for that of incarceration. This guinea-pig philosophy also, like the poor and the criminals, is always with us. It is the enemy of mystery, poetry, responsibility and human dignity—if we may be permitted to heap together things not obviously related, although in fact they are intimately connected with one another.

Professor Morris, by means of his book, exemplifies one fact, to wit, that there is a kind of inevitability about human thought and action when carried out on an implicit non-reflective level. This we might call the level of sub-intellectual induction. On it men including Professor Morris are to a considerable extent bound by what have been called culture compulsives. But the strictly human man transcends this level and comes to know himself as the carrier of a power to make choices, with resultant personal responsibility. To have this power of choice it is not required that one should be a Doctor of Philosophy. Anyone whose conscience has not been dulled by vice deliberately engaged upon or masked by pedantry, is a free man and should be treated as such. As a matter of fact, if the American people continue to retain some vestiges of the common sense for which they have been celebrated, it is most improbable that they will abandon the traditional belief in the criminal law predicated upon free will and personal responsibility.

In the opinion of this reviewer, the chief merit of the work of Professor Morris consists in the clear, temperate way in which he reports facts and describes current opinions. The principal defect of the book resides in its implied and expressed philosophy. To this philosophy we raise a single objection, namely, it is unsophisticated.

EDMUND C. COLLINS.†

THE IUDICIUM QUINQUEVIRALE. By C. H. Coster. Cambridge: Mediaeval Academy of America. 1935. pp. vii, 87. $2.25.

The *iudicium quinquevirale* was created by a law issued under the names of the Emperors Valens, Gratian, and Valentinian II (*Codex Theodosianus,* ix, 1, 13; 11 February 376). Governors of suburban provinces were to refer for sentence cases involving a capital charge against a senator to the Prefect of the City, who would be assisted by five senators as judges, the *iudicium quinquevirale,* chosen by lot from present or past holders of administrative offices. Mr. Coster believes that the chief importance of the statute is as evidence of the powerful position of the senatorial aristocracy in the later Roman empire. He is inclined to think that Lécrivain was mistaken in his belief that the *iudicium quinquevirale* was in existence in Constantinople in the time of Emperor Leo VI (886-911). The *iudicium quinquevirale* established by this statute had jurisdiction only over cases arising in Rome and the suburban provinces.

Before the establishment of the *iudicium quinquevirale* relations between the Senate and the Emperor had reached a critical state. Mr. Coster traces the course of the struggle from 367 when Valentinian directed the Prefect of Rome to submit to him all cases against persons of senatorial rank in which the charges were such as to call for some form of capital punishment. Gratian's measures completely reversed the policy of his father. The senatorial aristocracy, which had been almost crushed by Valentinian I, was restored to its full position in the government. The Senate was protected and favored by a series of laws, of which one of the most important

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was *Codex Theodosianus,* ix, 1, 13. If the Emperor did not reserve decision for himself, then the case came either before the appropriate pretorian prefect or, if it had arisen in Rome or the suburban provinces, before the Prefect of the City and the *iudicium quinquevirale.* Mr. Coster argues that the *iudicium quinquevirale* was a court of criminal jurisdiction only, dealing solely with serious accusations. In the absence of further evidence, he supposes that the *iudicium quinquevirale* had jurisdiction over charges of treason as well as other capital crimes.

More than one-third of the monograph is devoted to the discussion of the trial of Boethius. Of these twenty-three pages not more than three are concerned directly with the trial itself and the problem of the *iudicium quinquevirale.* The three questions which Mr. Coster seeks to answer are: what was the crime with which Boethius was charged? before whom was he tried? was he guilty? The general opinion from the sources has been that Boethius was accused of treason and magic, tried in his absence by the Senate and condemned, kept in prison by Theodoric for some time after his condemnation, and finally executed. Mr. Coster agrees that the charge was treason and magic. Cessi, Bury, and Sundwall hold that Boethius was not condemned by the Senate. Mr. Coster thinks that he was, but that the action had no effect on his fate. He does not feel that he can state that Boethius, and perhaps Albinus and Symmachus, were tried by the *iudicium quinquevirale,* but he does feel that the evidence presented points to that conclusion, not only by an affirmative hint in *Anonymous Valesianus,* but by its exclusion of other tribunals. Possibly Mr. Coster is right, but the evidence is slight and not wholly convincing. Mr. Coster concludes that Boethius was guilty of trying to suppress the evidence of acts which he knew would amount to treason in the eyes of Theodoric. He dismisses the charges of divination as ignorant or insincere interpretation of his scientific activities.

Is it a sufficient explanation of the small amount of evidence for the *iudicium quinquevirale* to say that the sources (historians, chroniclers, letters, apologies) are seldom interested in the legal aspect of state trials? Do the statutes of Gratian and Honorius, the trial during the reign of Theodoric, prove that the *iudicium quinquevirale* was an important and living institution? Mr. Coster has made the most of every bit of evidence, he has hazarded elaborate reconstructions, but the significance which he attaches to the *iudicium quinquevirale* seems to this reviewer unwarranted.

There is no separate bibliography, references are cited in the notes. The notes are placed at the back of the book, a great inconvenience in a monograph of this type.

ANNE SHEEDY.†

JOHN JAY. By Frank Monaghan. New York: Bobbs-Merrill Co. 1935. pp. 497. $4.00.

When, in what Lord Acton calls the ardor of rising absolutism, Louis XIV revoked the Edict of Nantes, other soils gained the Huguenot strength, shrewdness and talent. John Jay's grandfather, Auguste Jay, was a Huguenot refugee.

Sixty years after the revocation, in 1745, John Jay was born in New York City. In order to appreciate him it is essential that we understand his background. His ancestors bequeathed to him, and to all their progeny, a deep and abiding anti-Catholicism, which they strengthened by their system of education. Mr. Monaghan says: "This consciousness of a background of persecution and of popish cruelty was a family heritage . . . during his youth he was untouched by, indeed was unaware

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of, any of the new deistic thought of the age—the wicked insinuations of libertines."[1] The first evidence of this prejudice Jay reveals in the address to the people of Great Britain, which he wrote for the first Continental Congress. In it he appealed to the "no-popery" spirit of the British who had been alarmed by the liberal terms of the Quebec Act, which had given religious freedom to Catholics in Canada. This perfect expression of his own private feelings modified Canadian enthusiasm for the American cause, and later, when he wrote the congressional letter asking for aid the Canadians remembered, and refused.

Similarly, when Jay, whom Mr. Monaghan regards as the author of the Constitution of the state of New York, was working in the convention that drafted the instrument, he proposed to give Catholics civil rights only on the condition that they swear in court that no priest, pope or foreign authority have power to absolve them from allegiance to the state. Yet this man was an important factor in both Continental Congresses, the author of the first important state constitution, the negotiator of our peace, and our first Chief Justice. All this Mr. Monaghan reveals slowly and with great care. Manuscripts have been opened to him which no historian has ever seen before and the author has handled them carefully, conscious of his task and of his privilege.

This book might very well be called "The Evolution of a Patriot." Jay had been sent to the first Congress by the conservative element of New York. As a conservative he supported the Galloway plan. It was clearly against the desire of the conservatives that he signed the non-importation agreement called the "Association." He did not want a war but having it, accepted it. Yet he accepted it with reservations, for as late as 1778 he regarded it as a physical attempt to restore harmony. Events, as Mr. Monaghan shows, shaped his mind and he allowed it to grow. Professor Schlesinger has called the Revolution a state of mind and the growth of that mind is in many respects the growth of John Jay. Long after the war was over he wrote: "It has always been and still is my opinion and belief, that our country was prompted and impelled to independence by necessity and not by choice."[2] Jay, who had been made President of the Second Congress, was sent to Spain to get aid, physical or financial. We know he got neither. What he did get was training in the ways of diplomats. While in Spain he was chosen as one of the emissaries to make peace with Great Britain.

That America has never won a peace conference is almost a proverb in the American mind. Like most proverbs it is not true and is believed. Mr. Monaghan does much to dissipate it. The peace of 1783 he shows to be one of our most brilliant triumphs. It is one of his best chapters. Jay, picking his way with caution, suspicious of both France and Spain, hating his instructions, making his own peace, all this the author tells with full consciousness of its dramatic interest and of his ability to dramatize it. These instructions were, in effect, to consult France at every turn. Franklin regarded them as binding: " 'But, surely, Jay, you would not deliberately break those instructions?'

" 'If those instructions conflict with the fundamental honor and dignity of America, I would break them', and here Jay swiftly rose and hurled his long clay pipe into the fireplace, 'like this.' The pipe, in a hundred pieces, lay among the ashes and the glowing embers. Mr. Jay had reached a decision."[3] If Jay had done nothing else than negotiate this peace America would be, and is, in his debt forever.

Jay was, too, a member of the New York convention that ratified the Constitution.

1. P. 25.
2. P. 85.
3. P. 197.

He also contributed to the Federalist Papers which, however, were largely the work of Hamilton. Andrew McLaughlin in his new Constitutional History reminds us that: "The Federalist probably had more effect after the new government went into operation, than in the days of uncertainty when the fate of the union seemed to hang in the balance."[4] To mention this is not to disparage the Federalist, but it makes all the stronger Mr. Monaghan's case for the great influence of Jay's Address to the People of New York in turning that great state to the Constitution.

Of particular interest is the treatment of Jay as Chief Justice. It was Jay who refused to allow the Supreme Court to become a part of Hamilton's machinery; he refused to allow the Court to refer to the financial structure of Hamilton, to allow it to give advice to the executive. It is well to remember about him the following things. "Sitting in the circuit court Jay had the pleasure of asserting the principle that treaties formed a part of the highest law in the land and thus declared invalid a state law which infringed upon the provisions of a treaty. In the same court he declared another state law invalid because it was contrary to that part of the Constitution which upheld the obligation of contracts against state action. In 1792 he held that an Act of Congress was invalid because it was contrary to the constitution. The decision in the case of Chisholm v. Georgia was an important blow at state sovereignty . . . it was an early forecast of the bias against the pretensions of state sovereignty that the court later manifested under Marshall. His decision in Glass v. Sloop Betsy did as much as any other single decision of the court to assert the sovereignty and international rights of the United States."[5]

The chapter on the famous Jay Treaty seems to me less satisfactory. Mr. Monaghan gives me the impression that he is trying to minimize its badness. The twelfth article, forbidding American vessels to carry molasses, sugar, coffee, cocoa and cotton to any ports in the world save their own, is even now incredible. It is true that Hamilton was greatly responsible for the bad treaty, yet while Jay had been secretary for foreign affairs he had sent a secret report to Congress justifying England's holding the western forts. Jay was willing to give up the navigation of the Mississippi in 1786—Mr. Monaghan finds a technical reservation here, *i.e.*, Jay was unwilling to yield our *right* to navigate. Mr. Monaghan admits the distinction—but were the pioneers stupid because they felt Jay had held the rind and let the fruit go? Mr. Monaghan points out that the signature of Great Britain to a treaty with us was an event of epochal significance. There are those of us who do not think so—nor did Hamilton, who said it was the work of "an old woman."

Bowers in his Hamilton and Jefferson[6] finds Hamilton standing behind Jay "holding a mirror . . . which reflected the American negotiators' cards to the enlightenment of the suave and smiling Grenville." But Jay's mind, it seems to me, was not running at top speed from the beginning. He did not regard it as extraordinary that England should not adopt our principle of neutrality—free goods, free ships—at the very time he was negotiating. This Mr. Monaghan seems to regard as realistic, but it is this sort of realism that led President Wilson's ambassador to Great Britain, Walter Hines Page, to commit treason to his country in the Dacia case. "Grenville," says Mr. Monaghan, "had finesse, but Jay had congenital suspicions." Finesse, I think, is preferable especially when even the suspicions retreat. Mr. Monaghan finds it hard to see wrong in his hero.

But we can afford to admit wrong in a man, who as Governor of New York refused the proposal of Hamilton to redistrict New York, thus making the electoral vote Federalist, a man who therefore allowed the election of Jefferson in whose

4. McLaughlin, Constitutional History (1935) 209.

5. Pp. 323-324.

6. Bowers, Hamilton and Jefferson (1927) 270.

principles he did not believe. That act of honor outweighs treaties, most eloquence and a thousand silly wars.

Mr. Monaghan has pickled the times and the man in a strong brine—the Revolution, the Congresses, the Adams-Lee alliance, our early aims, our early achievements; none of it is far away, it is our own and those of us who run should pause to read.

FRANCIS DOWNING.†

CIVILIZATION AND THE GROWTH OF LAW. By William A. Robson. New York: The Macmillan Co. 1935. pp. xv, 354. $2.50.

The author, Barrister-at-Law of Lincoln's Inn, Reader in Administrative Law in the University of London, Doctor of Philosophy, Master of Laws and Bachelor of Science in Economics, has published five earlier works. In the present treatise he refers to works on the laws and customs of Hittites, Kaffirs, Bedouins, Hindus, Egyptians, Japanese, Chinese, Mohammedans, Romans, Greeks, Teutons, Celts, Hebrews and Polynesians. He cites works of philosophy, both general and legal. He alludes to general histories as well as to special historical treatments of economics, law, political and social ideas, institutions, and religions. Use is made of volumes dealing with jurisprudence, anthropology, international law, biography, semantics, ethics, psychology, economics, demography, sociology and political science. Among dictionaries and encyclopedias, he has employed the Oxford Dictionary, Dictionary of National Biography, Dictionary of Philosophy and Psychology, Encyclopedia of the Social Sciences, Jewish Encyclopedia, Encyclopedia Britannica, and the Encyclopedia of the Laws of England. When he desires to speak of modern science, its methods and meaning, he utilizes the writings of Pearson, Sullivan, Whitehead, Ritchie, Cohen, Wolf, Singer, Eddington, Jeans, Planck, Dingle and MacIver.

Well—what do we make of all this? The argument of the book has three movements. In the first part there is discussion of the origins of law; then a treatment of the law of nature and, finally, remarks on the nature of law. In the section on origins, we are told that men have differed concerning the definition of law—citing Cicero, Aquinas, Bede Jarrett, Hooker, Kant, Blackstone, Austin, Pollock, Lee, Hartland and Pound. Nevertheless, on the authority of Malinowski, law originates in custom and consists, among primitives, of those rules which are too practical to be of concern to religion, and too burdensome to be left to the mere good will of their subjects.[1] We are not, however, because of Malinowski's findings, to lose sight of the fact (probably as established to the author's satisfaction by Frazer) that early law is embedded in a "morass" of superstition, mythological belief, and religion.[2] The primitive is "devoid" of any conception of rational order.[3] He believes, therefore, that his rulers and his laws are divine. This was true even of Rome. And this "mystical influence [has] . . . impeded the scientific development of the private law. . . ."[4] Secularization of law is an immense achievement accomplished in our own day.

Our author now digresses to a consideration of criminal law in primitive societies. He tells us of the follies of our savage ancestors, who were ignorant of the necessity

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1. P. 13.
2. P. 15.
3. P. 16.
4. P. 54.

of looking for the *mens rea*, and who, consequently, proceeded criminally against irresponsible humans and, what is more notable, against beasts and inanimate objects which had injured men. Next there is discussion of the part played in law by curses, blessings and oaths. And having asserted that the oath is no longer to be regarded as a satisfactory method for eliciting truth, Professor Robson goes on to declare that "the time will come when we shall have to deal seriously with the question of inventing new ways of persuading people to tell the truth, in circumstances where their private interests may be adversely affected by their so doing, by some method which does not rely upon an outworn creed [that is, belief in God] and a threat no longer feared [that is, of punishment hereafter]."[5]

Part One closes with a demonstration of the fact that the Middle Ages knew nothing of omnipotent legislatures. They had believed in an objective justice antecedent and superior to all human power to which that power was in subjection. The modern scientific ideal is, of course, realized in modern England, where we find "the unfettered free secular legislature possessing sovereign power to make new laws as a deliberate and conscious process."[6] This achievement the modern world accepts "as a commonplace scarcely deserving of note, but it was utterly beyond the ken of the medieval world. . . ."[7]

It is difficult to find any principle of unity in the hodgepodge which makes up Part One. It covers 184 pages and has at least 420 citations. I am reminded of John Selden's remark on learning: "Most men's learning is nothing but History dully taken up. If I quote Thomas Aquinas for some tenet, and believe it, because the School-men say so, that is but History. Few men make themselves masters of the things they write or speak."[8]

Professor Robson does not seem to trouble himself to make those whom he quotes (and presumably believes) agree with one another. He accepts Malinowski, who asserts the existence among primitives of certain rules specifically matters of law, and thus outside mere practice and fashion as well as religion, and yet insists that among primitives legal rules are embedded in a "morass" of religion, superstition and myth.

The ancient practice of proceeding against animals, and irrational objects which had harmed humans, he does not seem to think can be shown to be in any way rational. It simply reveals the profound ignorance of pre-modern men. Yet there are at least two explanations which make the practice understandable. Declareuil, discussing the disposition on the part of early Roman law to disregard intention in relation to delicts, said, "The question of imputability [in a material and visual sense] was the only question raised."[9] While the attention of our forebears was adherent to the material aspects of wrongful action, we should expect them to be seriously concerned with visible disturbances in right order caused by non-rational agents. The formal prosecution of lunatics, animals and inanimate objects, granted the premises of our ancestors, establishes their rationality, not their lack of it.

And yet, after imputability came to be a matter not merely of physical relationship between effect and cause, but also of the psychological-moral condition of the wrongdoer, the practice survived of formally proceeding against homicidal animals. Why? Because punishment, it was thought, might be rightly bestowed where there was *cause*, although there was no *fault*.[10] Moreover, the natural horror evoked by

5. P. 159.
6. P. 183.
7. *Ibid.*
8. SELDON, TABLE-TALK (1898) 74.
9. DECLAREUIL, ROME THE LAW-GIVER (1927) 198.
10. This precise point was made by Aquinas in SUMMA THEOLOGICA IIa, IIae, Q. 108,

the perception of the disorder involved when an animal or any other agency harmed an innocent man goes far toward explaining the seriousness with which our forefathers set about rectifying the situation.[11] Do we behave very differently in our treatment of mad dogs?

Relative to the practice in the early Middle Ages of using compurgators in order to acquit one accused of crime, Professor Robson says: "The custom of oath-helpers arose no doubt from the principle of group responsibility. . . ."[12] This is far from the truth. The practice of requiring in some cases additional oath-takers who would swear with the accused in favor of his innocence was predicated not on any notion of collective responsibility, but on the gravity of the offense charged. Thus a woman might be required to produce seven women[13] to assist her by their oaths. This is far from illustrating the operation of the principle of collective responsibility as that term is understood by modern anthropologists. It should also be noticed that the compurgators were not designated by the defendant alone. Some of them were selected by the defendant, and were called *advocati*, while others, chosen by the plaintiff, were known as *nominati*. The practice, in short, was not as irrational as Professor Robson would seem to suppose. As to the admiration for the omnipotent legislature which Professor Robson manifests, an American cannot for a moment share it. If we have any political value worth being preserved, it consists in our belief in government by laws and not by men. Remove that principle, and the American system vanishes.

If we turn now to the second part of the author's argument, we find him telling us that, until our own times, philosophers and jurists have always believed in the existence of a natural law which, in respect of human positive law, has been regarded as the standard of its rightness. This belief in natural law has always operated as a check to the works of tyranny. In more recent times it has begotten the doctrines of Natural Rights, which smashed the French *Ancien Régime*, and also the effective fiction of a State of Nature. Natural Law by imperceptible changes in the 19th century was also invoked to justify the wretched condition of the poor in the early days of the modern industrial order. Professor Robson treats this most important subject of natural law exactly as one would expect a dilettante to handle it. Many views of its character are cited, but no effort is made to discriminate the true from the false in terms of some criterion of truth. The fact of the matter is that any definition of natural law is necessarily in function of one's entire philosophy. False views on the meaning of substance, cause, God and similar objects of metaphysics must work a perversion in one's conception of natural law.

To a Scholastic and Theist, natural law has a distinct, firm and intelligible meaning. It signifies a dictate of practical reason naturally made, that is, spontaneously made by conscience, bidding the human person to do the good and avoid the evil. It means also a rule or measure enabling man to discern, on primary questions relating to face-to-face relationships, what is good and what is evil. Its character, moreover, is such that it binds not hypothetically, but categorically, because it is the eternal law of God as received by men. Its mandate, finally, though peremptory, is not compelling, owing to human freedom.

Before passing to the third part of Professor Robson's argument, brief mention should be made of the declaration appearing on page 206, that Aquinas and the Stoics

art. 4, ad. 3, and the distinction mentioned was thereafter placed in canon law; *sine culpa, nisi subsit cause, non est aliquis puniendus.*

11. See the record of one of these formal trials in 3 COULTON, LIFE IN THE MIDDLE AGES (1931) No. 76.

12. P. 152.

13. 2. DICTIONARY OF CHRISTIAN ANTIQUITIES (1880) 1417.

held the same views of reason and nature. This opinion is full of absurdity. The meaning of the passage cited from Aquinas does not support the author's point.[14] In Part III, our author hopes to "outline a synthesis. . . ."[15] His fundamental objective is to reconcile human law with the laws of nature formulated by natural scientists. To accomplish this he lays down as fundamental this proposition: ". . . it is the human mind which both formulates the pattern of physical conduct we call natural law [he means here scientific laws], and also establishes the pattern of social conduct we call human law. Human law, said Spinoza, is a plan of living which men have laid down for themselves. To which one may add that science is a plan of knowing which men have laid down for themselves."[16] In a word, both the universe of the laws of nature (laws of mechanics, physics, *etc.*) and the universe of "jural law," are simply constructs of the human mind. Professor Robson is here trying to utilize some of the writings of modern students of the theoretic value of natural science, who have emphasized the mythic elements entering into the composition of scientific theories, and the abstract character of scientific laws.[17] There can be no doubt that there is some sense in which our knowledge is "subjective." But the question is in what sense is it such? This is the very heart of the most difficult problem of epistemology.

To the question "What is the status of our object, of knowledge?" two solutions, both false, are apt to be proposed. The first, miscalled realism, involves the belief that the human mind passively receives from "out there" exactly what is existing there, in the same mode as that in which it is existing. Look and you necessarily see. The other, often called idealism (the solution adopted by Professor Robson) involves the formal denial that anything is "out there." What we know we construct or create. These errors are as ancient as philosophic speculation. The truth is that something is "out there," but we must be prepared in order to "see" it. But granted preparation (by experience, reflection, normal faculties, *etc.*) of the subject-knower, such that it renders him *accessible* to the object-knowable, then he *submits* to it and does not construct it. On the other hand, until a prepared mind is related to something knowable, that thing is only potentially knowable. The theorems of Euclid, for example, are "invisible" to an infant's mind. To know signifies collaboration, therefore, between knower and knowable. Knower and knowable in the knowing process are both active and passive.

Human Law is, in a manner of speaking, created. I mean that a given positive law is always a rule chosen from among alternatives. But it is law and not masked violence only on condition that it is a rule accommodated to the exigencies of an objective and therefore a given situation. The law, then, before it is conceived, has objective immanence in respect of the state of facts which, when conceived, it is intended to order. Once produced, moreover, another type of objectivity is achieved by law, because it now falls into the objective existential order of cultural objects, and as such can be known in the same way as we come to know anything else requiring intelligence. My knowing of human law is from this viewpoint not so much constitutive of it as it (the law) is constitutive of my knowing. Nevertheless,

14. If anyone is curious about this, he should consult not only SUMMA THEOLOGICA Ia, IIae, Q. 91, art. II, ad. 2, which is Robson's passage, but also Ia, IIae, Q. X, art. I, corpus.

15. P. 328.

16. Pp. 328-329.

17. In addition to the works cited by Robson, pp. 329-331, see LENZEN, THE NATURE OF PHYSICAL THEORY (1931) 10; DINGLE, SCIENCE AND HUMAN EXPERIENCE (1932) 47; DINGLE, THE ATOM IN THE NEW WORLD ORDER (1932) 16-32; NEEDHAM, THE SKEPTICAL BIOLOGIST (1930) 233; BLOUD AND GAY, OÙ CHERCHER LE RÉEL? (1927) 7-45.

even here there is a legitimate sense in which I may say that to know is to constitute the object known, in that to know is to constitute an object as an element of consciousness.

The human legislator and judge, who are said to create law (the former in principle, the latter for the case), do not proceed by extracting the law from nothing. Their enactments and decisions are limited by law already existing, as lived by them, and by innumerable natural facts outside the legal order—facts economic, political, glandular, climatic, *etc.*, again as lived by them. To know is, in a sense, then, the same as to create, if by creation we mean a rational selection. Also, to create is to act according to objective knowledge and other objective facts which serve as stable limiting principles.

How do human laws compare with laws of science? Human laws and laws of science are alike in the sense that both are constituted as *elements of consciousness* by the creative activity of human mind. They are also alike in that both imply extra-mental objective situations in which they are immanent before human thought busies itself with them. They differ by virtue of the fact that laws of the sciences are formulæ, exhibiting the necessary behavior of their objects (these objects need not exist), while human laws are formulæ revealing the forms of action which are necessary for their objects (men), should these objects freely determine for any cause, ethical or otherwise, that it is good for them to act as the law directs, or to omit acting in ways which the law proscribes.

Professor Robson has written a book, animated by a spirit of monistic naturalism, which is unscholarly, inexact in interpretations, and philosophically false. Tourtoulon says somewhere that the difference between myth and fiction is that the latter is understood for what it really is. On this distinction, I suggest that Professor Robson's book is packed with myths, which, unlike those used in scientific theories, have not the advantage of clarifying, but succeed rather in befuddling thought.

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