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Book Reviews

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Standards of American Legislation. By Ernst Freund, Professor of Jurisprudence and Public Law in the University of Chicago. The University of Chicago Press, Chicago, Ill. 1917. pp. xx, 327.

This book gives in somewhat expanded form the substance of a series of lectures delivered at Johns Hopkins University in March, 1915. The origin of the book explains its character: it is an essay of constiuctive criticism, and not a systematic treatise. Its purpose is to suggest the possibility of supplementing the established doctrine of constitutional law which enforces legislative norms through *ex post facto* review and negation by a system of positive principles that should guide and control the making of statutes, and give a more definite meaning and content to the concept of due process of law. It is not a law book, although it deals entirely with courts and legislatures. It is rather an economic treatise covering the subject of the relation of statute law to life, considered historically and philosophically, and as a problem of government as well as jurisprudence. It addresses itself to the statesman rather than the lawyer, but it deserves careful reading by every student of economics or law.

The learned author of "The Police Power" deals with modern welfare legislation, judicial decisions which check the onward course of such legislation and the demand for a superior legislative product. Does the due process clause of the federal constitution secure cardinal principles of justice which do not change, or merely declare a fundamental policy of distributive justice which is entirely indefinite and which changes with the process of economic and social thought? The Ives case (201 N. Y. 271) proceeded on the theory that a just law sustained by public opinion was void because it introduced a new rule of compensation for industrial accidents but the latter theory of legislative and judicial power is now favored by the courts. In Noble State Bank v. Haskell, 219 U. S. 104, Mr. Justice Holmes says that the police power may be put forth without constitutional amendment in aid of what is "held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." In Klein v. Maravelas, 219 N. Y. 383, Judge Cardozo says, discussing the Sale of Goods in Bulk Act: "the needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past," and concludes that that which to a majority of the judges in 1905 seemed arbitrary and purposeless, they can see now must have been a real need. The court therefore adopted the conclusion of the dissenting judges in Wright v. Hart (182 N. Y. 330) and affirmed the validity of the statute there held unconstitutional. That which was unconstitutional in 1905 had become constitutional by the gathered experience of the interval of twelve years. The doctrine of judicial power over statutes has thus developed from a mere following of precedent to a shifting test of reasonableness, lacking in precision and clearness, but seeking to follow, with somewhat lagging steps, any insistent and sustained public demand. Professor Freund indicates that the result of

the empirical nature of this treatment of the subject is to oppose legislative discretion by judicial discretion and thus to destroy confidence in all constitutional doctrines. He points out that courts swing from illiberality (Ives v. South Buffalo R. Co. *supra*,)to liberality (N. Y. Central R. R. Co. v. White, 243 U. S. 188) and back again in the negation of legislative power, and he seeks to substitute some positive principle for the unrelated decisions of isolated law suits. The condition seems an uncorrectible flaw in our form of government where efficiency is not the first consideration. As Hamilton pointed out in the Federalist, power given to the many invariably results in the oppression of the few by the many and power given to the few results in the oppression of the many by the few. That fundamental rights of the few exist and should be safeguarded, none venture to deny. That legislative justice has often been inferior to judicial justice is of course true.

Constitutional limitations upon legislative power, being imposed by the people, would be lightly worn if left to legislative interpretation, nor would political rebuke from the electorate be expected if such limitations were to be tested by political expediency only. If the issue becomes a political one merely, the checks and balances of the constitution are destroyed. If it remains a judicial one, courts will continue to say in regard to one statute that an appeal must be made to the people and not to the courts to sustain it and in regard to another that it is a proper restriction of personal liberty under the police power of the state. The difference will often rest on the angle from which a single judge views the question, which may depend upon his college, legal or political training, his familiarity with or ignorance of conditions of life in large cities, or the degree of his respect for legislative bodies. If legislative discretion is the test, public opinion and not the fundamental law controls. Widespread and long continued beliefs concerning matters of personal liberty may arise which may be entirely opposed to the rights of the minority. The test of public welfare is the constitution with its restrictions upon unlimited legislative power, but the application of the test depends upon the mental attitude of the final arbiter. No perfect harmony can exist between courts and legislatures when the question is one upon which reasonable men may reasonably differ.

In the application of correct principles of constitutional law the courts are exposed to a double danger,—of confusing public welfare with public demand and of refusing to recognize that constitutional law is a progressive science, and that the social structure is not ossified. When the people accept the judicial decision, they approve the firmness of the court in protecting the individual from confiscatory legislation. When the decision is unpopular, it checks but slightly the execution of the people's will. The courts should show undue alacrity neither in holding that the constitution is a suggestive rather than a binding force, nor in forcing an appeal to the people in doubtful cases. Statutory policies should be construed with full comprehension of the social issues involved, and with slight consideration for the wisdom of past generations as expressed in judicial decisions which have become arbitrary and purposeless and out of keeping with the spirit of the times. To condemn as unconstitutional legislation that

corrects the individualistic tendencies of the common law, and to fail to recognize that in the development of the modern state the community becomes more and more concerned in the common welfare of its citizens, is to adhere to a reactionary policy long since discredited.

Our legal science has not developed an adequate system of principles of legislation and our political science has not attempted to do so. If statute law is to be respected as a rational ordering of human affairs, the agreement of reasonable persons as expressed in legislation, it must be something more than constitutional. Legitimate and valuable interests should not be suppressed to meet a remote or conjectural danger. Indefinite penal provisions, like the penalties of the anti-trust laws, should be avoided. Statutes must harmonize with one another and their satisfactory or just operation must be provided for. To the disregard of such principles by the legislature, to uncertainty, instability and lack of uniformity of statutes, rather than to any essential conflict with the constitution, may be attributed many decisions holding legislation judicially unenforcible where a sound legislative policy scientifically expressed might have been more considerately dealt with. Experts in drafting statutes which shall be constitutional, comprehensive and practical, are not numerous, probably for the reason that there can be no incentive for that peculiar kind of training with its toilsome preparation and infinite pains, so long as the supply of legislative lead pencils remains undiminished. The lack of proper standards of American legislation to which many of its failures are chargeable, is due firstto the absence of definite and comprehensive legislative policies and, secondly, to want of technical knowledge of how successfully to translate a given policy into the terms of a statute. To stimulate interest in this subject and its vast possibilities has been the aim of the author.

The Public Defender. By Mayer C. Goldman, of the New York Bar. With a foreword by Justice Wesley O. Howard. G. P. Putnams' Sons, New York. 1917. pp. xi, 96.

This small volume is an argument addressed to the public, for the creation of an office of Public Defender, as "a necessary factor in the administration of justice." It is claimed that injustice is constantly being done to impecunious criminals who are unable to present properly the merits of their defenses, or the facts in extenuation of their acts, under the present machinery of our courts.

The Public Defender would stand in relation to these persons as does the District Attorney toward those interested in prosecuting crime. Where the District Attorney, as a public official, accepts pleas of guilty, attempts to convict by a trial or consents to a dismissal according to his views of the merits, so the Public Defender, as a public official, would advise the defendant to plead guilty, or would attempt to secure an acquittal on a trial, or would make suitable recommendations to the court, on behalf of those unable to secure private counsel, according to his view of the merits of their case.

The author is a member of the New York Bar and has been active in attempts to obtain legislation in this state favorable to this project, and to provide for this office in the constitution framed by the last convention. Thus far his efforts have been unavailing. He gives in

the book a history of such an office in the judicial systems of different states and countries; necessarily brief, it must be admitted. The system of "assigned counsel" is attacked and disapproved. Public prosecutors are criticized for undue zeal. The arguments of those opposed to this reform are discussed with a view of discrediting them. Prophesies of the onward step of this reform in criminal practice are based on the favorable comments of those few who have had experience with it. Los Angeles County, California, seems to be the only place where there has been any real trial of this experiment. There legislation establishing this office was obtained in 1913, and in January, 1914, a Public Defender was appointed. Specific facts are too meagre in those places where there has been such an office to give to a candid reader much impression of the value of this new scheme among the many modern plans for social uplift.

No one can read the book without gaining a distinct opinion of the author's sincerity, and of his serious devotion to the cause he advocates. If his theories seem somewhat fanciful at times and his arguments not fully lawyer-like, it must be remembered that he is addressing his arguments not to the profession but to a popular audience.

He admits that bar associations and other similar bodies have not been attracted toward this innovation, but he seems to have made progress with "Public Forums," women's clubs and the like in advancing this propaganda, if one may judge by studying the chronology of the movement in the appendix.

Very likely the test of time, in those places where the experiment is being tried, will influence the public view as to whether this is a needed reform in procedure or otherwise.

Handbook of the Law of Torts. By H. Gerald Chapin, Professor of law in Fordham University and New Jersey Law School. West Publishing Co. St. Paul. 1917. pp. xiv, 695.

Jaggard on Torts is old and in two volumes: there was therefore, a striking gap in the Hornbook Series for Chapin on Torts to fill. It does rather more than fill the gap. One who wants to "refresh his memory," as publishers euphemistically put it, on a tort topic of importance, may pick up the book with strong hope of finding what he wants and with confidence that what he finds will be supported by citations that bear looking up. A useful mark of the recency of the work is the considerable attention it devotes to the rapidly growing subject of interference with business and labor relations (Chapter xvi, "Interference with Contractual Rights"). A little less than half the book is occupied by "Part I, General Principles," and a little more than half, by "Part II, Specific Torts." The style is clear and readable. The index, though not lengthy, is unusually useful.

H. W. E.

The Law of Eminent Domain. By Philip Nichols. 2d ed. Matthew Bender & Co., Albany. 1917. 2 volumes. pp. cclii, 1577.

The first edition of this work was published in 1909 and was very different in size and scope from the present edition. In the preface to the first edition the author declared the scope of the work to be

"limited to fundamental principles which underlie the power of eminent domain, define its extent, and restrict its exercise," and by limiting the discussion to these topics the work was confined to a volume of four hundred and twenty-two pages. The book was favorably received, and has been very much used by the legal profession, but still the reviewers at the time of its appearance quite generally expressed disappointment that the author had not covered the whole field of legal problems involved—the exercise of the power of eminent domain.

In the preface to the present edition of the work, the author tells us that the demand upon him "to cover all phases of the law of eminent domain has been sufficiently insistent to induce him to attempt the task, and the present treatise is the result." Through this change of policy we now have a work of eighteen hundred and forty-two pages, and the citation of over twenty thousand cases, a third of which the author tells us, are not cited in any other discussion of the subject.

It is certain that members of the bench and bar will greatly appreciate the increased usefulness of Mr. Nichol's work, resulting from its broadened scope. The chapters on the measure of compensation, including the set-off of benefits, and the several chapters on procedure in condemnation proceedings, will prove very generally useful, as well as the author's more exhaustive treatment of constitutional questions. The author is also to be commended for the very full index, which makes the material contained in the two large volumes easily available to the student or the practitioner.

C. K. B.