

## REVIEWS AND NOTICES.

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### POLITICO-JURISTIC STUDIES.\*

Dean Inge says that he can find pleasure in almost all books, but that there are certain kinds he cannot abide, and in his group of *biblia a-biblia* he classes law-books. But we all know the sort of thing he has in mind: it is a book in which the author takes a leading principle from some branch of legal science and instead of expounding it with light and leading buries it deeply under a tangle of technicalities and a hopelessly pedestrian style. Professor Kennedy is not that kind of a citizen in the commonwealth of letters. It is his wont to turn the dry places of the law into a pleasant garden of exposition. He could not be dull if he tried.

\* \* The book in hand embodies a course of four lectures delivered last year by Professor Kennedy at Lafayette College on the Kirby Foundation. He explains that they are printed just as they were delivered, and that they "make no claim to be a contribution to juristic or legal learning." We do not concur in this modest disclaimer. It finds no support in the content of any of his four lectures. Juristic scholarship is there, and if we disagree with his views we know that we differ from one who has plenary authority on call. Then, too, his treatment of dubious points would merit the approval of Judge Cardozo, for he leans towards "the impressionism that illumines without defining and imprisoning."

In the opening discourse Dr. Kennedy deprecates the "many loose and invalid ideas" now abroad concerning the nature, the functions, and the interrelations of the State and the law; and, after admonishing us that "the days for clear thinking are come if the democratic State is to survive," he proceeds to clarify his subject of much of the confusion of thought which surrounds it. He leads the enquirer away from the doctrine espoused by Austin, and derived by him from the *Leviathan* of Hobbes, that the sovereignty of a State is absolute and indivisible, and that law is to be obeyed because it is the command of the sovereign.

\* *Some Aspects of the Theories and Workings of Constitutional Law.* By W. P. M. Kennedy. New York: The Macmillan Company, 1932. Price \$1.25.

English political thinkers, prone to individualism, when startled by the portents of coming change in the latter part of the nineteenth century imagined that the best way to perpetuate the liberty of the individual was to increase the powers of the State. But this idea of 'grandmotherly government' suffers in our day from the fact that we have private corporations, and associations recognized by law, with obligations and loyalties that intersect the legal relation of their members to the State and thus weaken the grip of government on the individual. So out of the ferment of opinion Dr. Kennedy (not without the countenance of modern French jurists such as Michoud and Saleilles, and nothing daunted by the disinclination of English lawyers to think in terms of 'philosophical and sociological jurisprudence') would lead us to the bourne of sound doctrine by envisaging the State as a "socially created association" exercising "in a given territory and on behalf of society within that territory authoritative control through socially delegated powers of sovereign authority—its machinery functioning in executive, legislature and judiciary as an agency of the social order for the social order."

Having so expressed his concept of the State Dr. Kennedy would have us think of law as "only those regulations which enable the State to carry out its peculiar functions." Most of us will accept that definition with no more than the Socratic qualification that if it isn't right then something very like it is. But we might be permitted to point out a slight element of inconsistency in the learned professor's discourse. Speaking of the State at one place he says that it is not a sacred thing, at another that law has not of necessity any moral significance. But turning to other passages in his discourse we find disharmony as between them and the passages containing the views we have just stated. In the former he affirms security and stability for the State "because the society which calls it into being wills the State to endure, wills to its institutions coercive power." That he would assign to this social will an ingredient of morality is apparent from the following: "In forming a concept of the State and of the law and in deriving from it a rational citizenship, the conclusion of the whole matter is that 'no man liveth to himself'; that we enter 'into life because we love the brethren.'" Surely this is an evocation of a moral rather than a utilitarian support for the State and the law. It would imply the practice of altruism by the individual citizen, and to will the general good in possible opposition to selfish interest operates as a consecration of the will and at the same time lends an element of sacredness to the object willed. The act of obedience to the State and its regulations connotes the recognition of a duty, and duty in its turn is an ethical

thing. When Jellinek says that law is a minimum ethics he means no more than that law is the civil expression of rules of conduct embodying an ethical content. Those rules subject citizenship to the restraints of a portion of morality in action. Del Vecchio in his *Formal Bases of Law* puts the matter clearly enough when he declares that "law and morals are correlated ethical categories, presupposing a common base." This closely approaches Aristotle's notion of ethics as πολιτική τις. Nor does Vinogradoff hesitate to say that "law cannot be divorced from morality in so far as it clearly contains, as one of its elements, the notion of right to which the moral quality of justice corresponds." Let us close our case with a quotation from Korkunov: "In reality law is never wholly separated from morality . . . Norms for the delimitation of our interests cannot be established without making a comparative moral evaluation of ends."

We have discussed at such length the first of Dr. Kennedy's lectures that limits of space prevent us from reviewing the remaining three, entitled respectively, "Theories of Law and the Constitutional Law of the British Empire," "Law and Custom in the Canadian Constitution," and "Some Problems in the Workings of Canadian Political Institutions." But the mere mention of these more practical subjects will compel attention to them by persons interested. That attention will be found fruitful of value. We justify this commendation by the fact that we have only found one slip of a practical kind in the first discourse. At page 18, in speaking of remedies against the Crown in Canada, Dr. Kennedy says: "In torts we have no procedure at all." That statement overlooks the fact that a remedy lies by statute in the Exchequer Court of Canada for death or injury to the person or property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon any public work. But we heartily agree with Dr. Kennedy's view that the law should not immunize the Crown in Canada from delictual liability to the extent it does at the present time.

\* \* The use of this book is greatly facilitated by a table of cases cited, and in addition to an excellent general index the reader is assisted by an index of the names of the constitutional text-writers cited throughout the work.

CHARLES MORSE.

## JAPANESE COMMERCIAL CODE.

*The Commercial Code of Japan, Annotated.* Volume I. Published by The Codes Translation Committee, The League of Nations Association of Japan. Tokyo: Maruzen Company, Ltd., 1931.

This volume is an annotated English translation of Books I. and II. of the Commercial Code of Japan, dealing with General Provisions and Companies, respectively. The Committee responsible for its production, consisting of several members of the Japanese Bench and Bar, and Messrs. Baty and Gadsby of the Inner Temple, are to be congratulated on the general excellence of their labours. Full and clear annotations are given of the provisions of the Code, interspersed liberally with the facts and decisions of a number of cases. An appreciation of the nature of the various kinds of corporations is assisted by reference to the corresponding conceptions in other systems of law. A fairly extensive historical introduction by Professor Takayanagi gives a clear view of the Japanese legal system and the history of the Code. This work should prove of real value to students of conflicts of laws and of comparative law.

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*The Classics of International Law: De Legationibus Libri Tres.* By Alberico Gentili. *Elementorum Jurisprudentiæ Universalis Libri Duo.* By Samuel Pufendorf. *Quaestionum Juris Publici Libri Duo.* By Cornelius Van Bynkershoek.

This series of republications of the classic works connected with the history and development of international law was begun by the Carnegie Institution of Washington in 1906 at the suggestion of Mr. James Brown Scott, under whose supervision as General Editor the series has since been published. In 1917 the commendable project was transferred to the Carnegie Endowment for International Peace, and the publication of the series was continued by the Endowment's Division of International Law. The series now comprises some 15 works and is published for the Endowment by the Clarendon Press, Oxford, England, and by the Oxford University Press, New York. The text of each author is produced photographically; thus readers have the benefit of an authentic text not corrupted by the mistakes which must inevitably creep into new editions. Each of the works is edited by an expert in international law, and there is an English version made expressly for the series by a competent translator.

C. M.