REVIEWS AND NOTICES

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The Principles of English Law and the Constitution. By O. HOOD PHILLIPS. London: Sweet and Maxwell. Toronto: The Carsewell Company. 1939. Pp. xvi, 610. (21s.)

In spite of its imperfections, this book is evidence of the changing character of English legal education. It is frankly a text-book, but it does not fit precisely the courses of English law schools. That in itself is an advantage, for the bane of the law teacher is the notion that there is a "subject" called "law", which is divided into courses, each with its "recommended" text-book. Nowhere, I think, have the interesting American experiments in "real" law been followed in England. However, the gain here is not very great, for the book has most of the faults of the text-book. The idea seems to be that the student must store up in his memory, and repeat at examinations, a large number of "facts". The idea is dangerous even in the common law; but it is there less important than it is in public law. The teacher certainly explains what Salmond says and Pollock says and Winfield says, but at least the student knows that he has to read some of the cases and "distinguish" them for himself. In public law, however, many of the "facts" are ideas and opinions about which there can be no precise conclusions, and in respect of which even the infallible House of Lords does not pronounce. The student who is being taught to think must read books and articles where ideas are fully developed; and a text-book which sets out the opinions as "facts" merely produces indigestion and inertia.

This book, for instance, begins with two chapters on "Law and the State" consisting, for the most part, of summaries of summaries of legal theories. At times, however, the author himself contributes opinions without more than a few lines of argument. The theory of the separation of powers for instance cannot be treated cavalierly in four pages. Indeed, every idea in these chapters requires at least an article—and, indeed most of them have already been discussed at length in a vast American and Continental literature. There are similar difficulties in the chapters on legal source. Probably Mr. Phillips is right in his treatment of statutory interpretation. This is a book for first year students; and no doubt such students should first learn what the judges say they are doing, and begin to use their grains of salt at a later stage. The only criticism of Mr. Phillip's method here is that his account of the rules of interpretation is far too short and lacking in examples. In discussing case law, however, he wanders into the realm of fact. Though in chapter I he has nothing good to say for the "realists", in chapter III he suddenly injects the remark that the House of Lords can "evade" a precedent by "distinguishing" the facts; and it becomes clear from a later remark that the facts are always difficult. I have no wish to contest this statement; but it seems to me either that it should be elaborated and the student compelled to read the "realist" literature where ideas of this kind are fully expounded, or the poor little boy should be taught orthodoxy as, let us say, Lord Justice Slesser would expound it.

Mr. Phillips is on safer ground when he moves into his third part, a summary exposition of English constitutional law. It is not wholly

accurate, and a summary exposition of a vast collection of rules is in any case depressing. Like Ridges' *Constitutional Law* and other less worthy books, it contains far too much information. It will not supersede the book by Dr. Wade and Mr. Godfrey Phillips, which has the advantage of containing fewer facts in much the same space, and which is more consistently thought out. Nevertheless, this part is a fair sample of the text-book style.

There are, however, encouraging aspects of the book. Mr. Phillips hints at interesting ideas which his medium does not permit him to express. Just as he is saying something, he remembers that he has to write down to the level of a first year student. I think the assumption a fallacy — it is the business of the teacher to be at least a little above the head of his best students, otherwise he will get them through examinations without teaching them to think. However, the ideas are certainly worth expanding, and there are so few English lawyers interested in these peripheral aspects of law that he would do us a service in writing them up. He has, I think, the right approach. He insists that "logical and historical" reasons must be given for legal rules, since otherwise "most of the law is unintelligible and its study extremely dull". Usually he carries out his precept; for instance, he makes no nice distinction between what is "law" fit for a lawyer to learn and what is not, at least in relation to the Constitution. At times, however, he is afraid of his own conclusion. Twice, for instance, he warns the student against confusing administrative law and "public administration". I am not sure what "public administration" means here. (On the second occasion, at least, the homily seems to be addressed to me, though I know not when or how I have offended.) If it means only that theories about the best methods of public administration ought to be distinguished from the actual content of administrative law (in the English or Continental sense, not the American, which derives from Dicey), we are agreed. If it means that the law must be differentiated from its purposes, Dr. Phillips seems to deny his own principle — for the purposes are the reasons for the law.

However, the book is more important for what it implies than for what it says, and its implications are encouraging.

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Readings in Jurisprudence. By Jerome Hall. Indianapolis: The Bobbs-Merrill Company. 1938. Pp. xix, 1183.

About the beginning of the present century an eminent English jurist expressed the view that the term jurisprudence was a "stench" in the nostrils of the English profession. If one may judge from the scant material which has come from England dealing with the more fundamental problems of law during the last forty years, this attitude to a large extent still persists. What passes by the name of jurisprudence in England, and to an even larger extent in this country, if indeed the subject is given recognition at all in Canada, is really an "introductory" course to the study of law, concerned with the elucidation of such barren concepts as "right", "duty", "theory of possession", etc. Despite the valiant attempts of some English writers to evade the Austinian influence, the prevailing attitude towards law rigidly excludes all philosophical discussion and takes a form-

of positivism which is about as deadening to the spirit as it is unproductive of result. This attitude towards the science of law is reflected in the trend of our whole system of legal education. Undoubtedly the general tendency both in England and in this country is to deal with "laws" rather than "law", with *lex* rather than *jus*, *Gesetz* rather than *Recht*. We fill our students full of "laws" as though they were some type of legal haversack, but it is extremely doubtful whether we furnish them with any guide to the fundamental purpose of all law, the methods by which law is developed, and the very real philosophies which have taken and are taking an extremely important, even though sometimes inarticulate, place in the development, not merely of laws but of the legal order.

Jurisprudence is undoubtedly thought of by the practising lawyer as an educational frill. The concern of teaching is to give the students the "law as it exists". But what is law? This is a problem which no one has ever been able to answer satisfactorily, and yet it is fundamental to any approach to the teaching and training of lawyers. So long as we deal only with individual laws, we are handing out to students information which in many cases is falsified by the turn which events are taking while the "law" is being stated. One of the main problems of jurisprudence must deal with this fundamental question concerning the nature of law itself. On the other hand there is the question of what might be styled "right" law. What is needed, not only in law teaching, but as a solution to actual social and economic problems, is some criterion by which we can test the "rightness "of our existing law. Throughout the ages men have been seeking for some such test and the natural law theories from Plato, Aristotle and St. Thomas Aquinas, down to the modern French school, have all been reflected in the development of our own legal system. What is the aim of the legal order? English jurists, in the main Austinian in approach, exclude questions such as these from their discussions, or if they do not, they make some grudging allowance for the historical school of Savigny, but shun as though it were a plague European and American thought concerning "just law". And this, notwithstanding that even our courts occasionally refer to "natural justice", "equity and good faith". Are such terms as these self-explanatory, and is a person trained only in the minutiae of statute law and rules of procedure suddenly to be endowed, on entering the profession, with the wisdom of the ages in solving such problems?

The present volume of readings in jurisprudence is an heroic endeavour to present, in the main for students, a collection of readings designed to illustrate thought concerning law and the legal order from the earliest times to the present. It is a courageous effort and even though no two persons will agree on choice of material or arrangement on so vast a subject, Professor Hall must be complimented on the manner in which he has produced the present volume. To those persons who are accustomed only to the barren English books dealing with jurisprudence, the present volume is recommended as a glimpse into another world. Whether a selection of passages chosen from various writers is an effective way of dealing with jurisprudence is a question on which we express no opinion. Certainly it is a far better and fairer system than expounding to a student the lecturer's own views which the student is given no option to accept. The very diversity of point of view in such a book as the present serves to produce the only thing which any valuable educational system can produce, the ability to think. While much of the writing on jurisprudence

is extremely heavy going, for this reason alone it has a decided advantage over many of the platitudinous text books which are so popular in legal education in England and in this country.

Professor Hall has arranged his material in three main parts. The first he styles Philosophy of Law, which includes chapters of Natural Law, Historical Jurisprudence, Transcendental Idealism, Utilitarianism, Social Functionalism and Pragmatism. The second part is styled Analytical Jurisprudence, and purports to deal with the nature of law rather than criteria for testing the "justness" or "rightness" of law. In this part one finds much more than one is accustomed to under the heading of "Analytical Jurisprudence" and the editor includes material on legal method, as for example in chapters 12 and 13 dealing with the "syllogism" and the process of reasoning by "analogy". Part III is styled Law and Social Science, and in part deals with the scientific method generally, and in particular the modern empirical school of thought and its approach to law as one of the social sciences rather than as a thing apart.

There is much to be said for this arrangement, but each individual teacher can adapt the material to his own uses. The three problems fundamental to jurisprudence seem to be, as I have partly indicated before, first, the nature of law including the theories of the historical or imperative school and the modern empirical school with its many variations. Secondly, theories of justice or, if you like, standards of criticism for the determination of "right" law, or the philosophical aim towards which law is directed. Under this head come all the natural law schools, and indeed utilitarianism and pragmatism, both of which set up tests for determining the justness of law, as indeed does the historical interpretation. In the third place, as law is a means of progress towards some end, some method, usually referred to as the legal method, must be studied. Of late years, particularly in the United States, considerable attention has been focussed on legal method. Mr. Justice Cardozo has used the phrase "the judicial process" as indicating the type of thing with which we are chiefly familiar, and yet the legislative and administrative process, and the manner in which social problems can be dealt with by legislation are of equal importance in this connection.

All these items are dealt with, although not in the order indicated, in Professor Hall's book. In the reviewer's opinion the production of books of this nature is a further indication, if indeed any be necessary, of the extent to which American legal scholarship and American legal education has far outstripped anything which has yet been found either in England or in Canada. Books of the present kind are an effort to train, not legal mechanics, but persons who can truly claim to be members of a profession whose function it should be to administer and interpret the legal order, rather than juggle existing legal rules with no further interest or concern other than that of rank opportunism.

C. A. W.

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Our Eleven Chief Justices. by *Kenneth Bernard Umbreit.* New York and London: Harper & Brothers. 1938. Pp. xiv., 539. ($3.75)

American judicial history has belied the contention of Alexander Hamilton in *The Federalist* that the judiciary would be "beyond comparison the weakest of the three departments of power". The defeat of President

Roosevelt's court reorganization plan bears witness. That he succeeded indirectly in persuading the Supreme Court, to some extent at least, to square his policies with the Constitution indicates merely that in a very real sense the patterns for American society depend on the utterances of its Supreme Court. The history of minimum wage legislation and attempts at federal regulation of labour relations are illustrative. It was Professor (as he then was) Frankfurter who recently stated that "lawyers, with rare exceptions, have failed to lay bare that the law of the Supreme Court is enmeshed in the country's history; historians no less have seemed to miss the fact that the country's history is enmeshed in the law of the Supreme Court."

Mr. Umbreit's biographical portraits of the eleven men, including the present incumbent, who have presided over the Supreme Court of the United States to date, are an excellent introduction to an understanding of the position which the Supreme Court holds as the final arbiter in disputes between the federal and state governments and between government and the individual. The lawyer, the student of government and the historian will find that the book is easy and absorbing reading, and a bibliography is appended for the benefit of those who would investigate further. The biographies of the Chief Justices reveal that they came to their high office after greater or less experience in the political and administrative life of their country. Jay, the first of the Chief Justices, returned to political life after his resignation and later declined a second appointment to the office. Ellsworth ended his judicial services with a diplomatic appointment. Under Marshall the Supreme Court asserted its complete independence of the executive and legislative branches of the government. He dominated the Court as did no other Chief Justice and established its prestige in the face of Jefferson's hostility. A strong hand was needed in the Court's early days. Appointments to it did not then carry the prestige that now go with them, and Mr. Umbreit's contention is that Marshall's strong leadership destroyed any possibility that the Chief Justiceship would develop into a Lord Chancellorship, the incumbent of the office changing with party changes in the government. To Taney, who succeeded Marshall, fell the task of giving logic and continuity to the decisions of the Court and of ensuring that its position would survive the death of Marshall. The reputation of Taney has been re-established after it had been obscured for years by the shadow of the Dred Scott decision.

The post Civil War era of the United States saw the beginning of governmental regulation of activities formerly characterized as purely private. The Supreme Court, because of its position in the constitutional scheme, was called upon to reconcile a new conception of the functions of government with a Constitution based upon private property and individual rights. Waite's contribution was *Munn* v. *Illinois*, in 1877, which upheld legislative power to fix rates to be charged at grain elevators. His successors in office, Fuller, White, Taft and Hughes have had to deal with similar but more far-reaching problems of regulation. These have compelled the Court to pronounce upon the permissible area of administrative control, a question not far, if at all, removed from political controversy. Criticism of the Court in recent years have been severe, and they have added to the difficulty of its task of easing the strains in the economic life of the United States consistently with the Constitution. Mr. Umbreit's book in dealing with the important decisions of the Court shows how this task has been discharged.

BORA LASKIN.