BOOK REVIEWS

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Science of Legal Method: Select Essays by Various Authors. Translations by Ernest Bruncken and Layton B. Register. Introductions by Henry N. Sheldon and John W. Salmond. Editorial prefaces by John H. Wigmore and Albert Kocourek. Modern Legal Philosophy Series, Vol. IX. (Boston: Boston Book Company. 1917. Pp. lxxxvi, 593.)

"Do not talk to us of the meaning of the Statute;" said Hengham to Malmesthorpe at a hearing in the Michaelmas term of the thirty-third year of the reign of Edward the First. "We understand the Statute better than you, for we made it."

The theory of the separation of the executive, legislative and judicial powers has so firm a hold upon Anglo-American methods of legal thinking that Hengham's easy method of arriving at the intention of the legislator seems to belong to a period that has gone forever. Mr. Justice Holmes may invoke this principle to show that the court is justified in finding that a mandate, which, issued within the personal recollection of its members, ordered the lower court to do just what that court actually did; but as a means of construing the acts of the legislature, we feel that it is as obsolete as the real actions. The belated survivor of this intimate union between the judicial and legislative departments perished three-fourths of a century ago when a member of the New York senate, acting as judge of the court of last resort, relied upon his personal knowledge of what took place in the legislature to aid him in determining whether a statute which created a joint stock association was intended to create a body corporate or not.

But progress in law, as in everything else, is likely to be in a series of ascending spirals rather than in a straight line; and as we read this volume, we find that modern juristic thought is ready to deny the wisdom or even the possibility of a separation of legislative and judicial powers, and is ready to claim that the Plantagenet method of constru-

ing a statute possesses advantages which are lacking under our neat fiction that the legislative power and the judicial power are the two hands of our body politic, neither of which knows what the other is doing until the ultimate product is displayed to the world. We see that even before the great war the profound feeling of dissatisfaction with existing social institutions in general and, from our viewpoint, with the laws in particular, had influenced the men who had made a special study of juristic science, and who appreciated both the wonderful accomplishments of the law and the defects in its development and in its administration far more intelligently than those who assumed the benefits of law as a part of the order of the universe, and who criticized the actual results with but the slightest notion of the means by which different and desired results might be obtained.

The expressions of opinion which are collected in this volume agree upon a common dissatisfaction with existing conditions. The jurists of the continent of Europe, the land of codification, rebel against the rigidity of the codes, and demand that greater liberty of judicial action which its prophets term "free judicial decision;" while the Anglo-American jurists, from the land of judicial precedent and of legislation which, until recent years, has been scanty and haphazard, rebel against the iron chains with which their courts have in part fettered themselves and with which in part they have been fettered in response to the actual demands of popular government. The movement is not bounded by national lines. From France, Gény, from Austria, Ehrlich, and from Germany, Gmelin, join in the same demand that Pound makes for Anglo-American law—a demand for such freedom of judicial action as to make law primarily a means of administering justice and not a set of rigid rules to be applied mechanically without regard to the quality of the ultimate product.

The feature of the existing law which causes the most dissatisfaction is likely in each country to be that feature which is most characteristic of its law in its present condition. In the United States the rigid character of the codes of civil procedure and of the rules of common law, the growing rigidity of the rules of equity, and the haphazard character of legislation in general is felt to be the cause of that feeling of dissatisfaction which on the continent of Europe bursts forth against every idea of a rigid, complete and all-embracing code.

As might be expected, there is some discord as to the means of reaching this desired end. While Ehrlich looks on England as the classical country of free legal decision, which is unable for that very reason

to understand what the law of nature meant; Berolzheimer regards England's freedom of judicial decision as a constant appeal to the law of nature; and in opposition to the fundamental assumption of both of these authors, Gerland and Lambert insist that Anglo-American law has gone much farther than continental law, both in isolating law from the social environment in which it was cradled, and in setting forth more frankly and more crudely the fiction that the judges have no part in creating law. Either they look at Anglo-American law with different eyes, or freedom of judicial decision means different things to the different writers.

Whether, as Alvarez and Freund, they emphasize the need of a rational and intelligent legislation which shall serve as a basis and stimulus for a fresh juristic start and not as a means of mummifying the law, of paralyzing thought, and of substituting obedience for growth; or as Wurzel, they show what we are really doing when we engage in what is called juridical thinking; or as Pound and Ehrlich, they insist on greater freedom of the court in applying legal principles; in the main they agree as to the general path which the evolution of the law must follow. We must cease to believe that it is possible for either legislator or court to frame a set of immutable rules which will govern all future cases as they arise. We must realize that law can live only if it adapts itself constantly to social forms which are in a constant state of renewal; and that, since we are living in history, the incessant bending of the law to fit the facts of life, which is assumed in all historical study of the law, did not end with feudal tenures or with common law actions; and that it must therefore be no longer ignored in modern legal study. We must realize that while it is possible to set up a series of legal concepts and to deduce exact results from them by verbal logic, the results thus obtained will bear no relation to life, or to a law that fits life, as all law that is alive must fit it. We must give up our artificial separation of the legislative power from the judicial power—a separation which never was true in fact; and we must seek rather a reincarnation on a higher plane, of the Roman praetor whose edicts were legislative and who administered the law which he had made. The work which has been done subconsciously, by pushing difficulties out of the law and by passing them on to the facts; by the assumed existence of a complete, perfect and unchangeable body of law which is known only to the judge; and by the use of "India rubber rules," which stretch or shrink as desired, or of "safety-valve concepts" which open when explosion impends—this must be done frankly, consciously, intelligently, so as to adapt the means of law to the end of producing a just result.

It might be an invidious comparison to say that this is the best volume of the series. It is certainly the most stimulating and helpful one. While the other volumes show us the past trend of legal thought or the present place of the law, this unbars the door of the future. We may not agree with all the conclusions of the authors. For that matter, they do not agree among themselves. We may feel that a closer study of what is known of the formation of primitive custom would narrow the gap between primitive custom and law made by judicial decision; that a study of judicial decisions in America, where the mass is so great that no individual now dominates, would show that the weight given to the opinion of certain individual English judges was an accident of a time when judges were few and great judges preëminent, and not a characteristic of Anglo-American law; and as for the praetor, is he not here today in the great administrative commissions, branches of the executive, who make rules which have the force of statute law, and who then administer them.

This volume, like several others of the same series, is a collection of essays, of monographs, and of excerpts from the larger works of several different writers. Contributions have been levied upon Gény's *Methode d'interpretation et sources en droit privé positif;* Ehrlich's *Freie Rechtsfindung und freie Rechtswissenschaft;* Gmelin's *Quousque;* Kiss's address delivered before the Congress of the International Society of Legal Philosophy in May, 1910; Berolzheimer's *Gefahren einer Gefühlsjurisprudenz in der Gegenwart;* Kohler's *Lehrbuch des Bürgerlichen Rechts;* Roscoe Pound's *Courts and Legislation;* Gerland's address delivered before the Society of Juristic Medicine; Lambert's *La Fonction du droit civil comparé;* Wurzel's *Das Juristische Denken;* Alvarez' *Une nouvelle conception des études juridiques et de la codification du droit civil;* Gény's contribution to *Le Code Civil, 1804–1904, livre du centenaire;* and Freund's work on *Standards of American Legislation.* It has the merits of its necessary defects. It gives us, in broad survey, a comparison of the views of a number of writers and thinkers upon the same topic and at the same time it gives us but fragments of each writer's thought and a detailed study of the views of none. It is to be regretted that it did not prove practicable to give Ehrlich's views in their later form, as set forth in his *Grundlegung der Soziologie des Rechts;* but no one would be rash enough to think of discarding anything from the selection that has actually been made. It needs all these different viewpoints to enable us to grasp the great problem that they present to us. The volume is like Giovanni's wheel, made up of a multitude of men; from

whose lips issue scrolls of all different colors except white; and all of different meanings but each ending "Such is Truth." As the wheel revolves, the objects and colors blend; and then it appears as stationary and white, the color of truth. As the different views of these writers move before us, we see indeed that "Such is the Law."

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The Monarchy in Politics. By JAMES ANSON FARRER. (New York: Dodd, Mead and Company. 1917. Pp. ix, 342.)

Abundant and painstaking care has been bestowed on *The Monarchy in Politics*, and with only a little extension of the plan Mr. Farrer's book might have filled a gap in the constitutional history of Great Britain that has long existed, and has long been obvious. As it is the book lacks an adequate setting; and while it is a thoroughly acceptable and serviceable addition to the literature of English constitutional history, and particularly to the literature that is concerned with the evolution of the cabinet, it does not quite fulfill its title. Mr. Farrer's aim has been to trace the influence that the monarchy had on the policies of cabinets from the reign of George III to the reign of Victoria; and also to show, as he does with much interesting and informing detail, how tardily and reluctantly George III, George IV, William IV and Victoria accepted the doctrine of parliamentary government, and of the responsibility of the cabinet to the house of commons, and through the house of commons to the electorate. George III, as far as he could, repudiated this doctrine; and his successors accepted it only when it was forced upon them, and they realized that there was no alternative and no appeal.

But the phrase, "the monarchy in politics," implies much more than this; for domestic political questions have their origin in the constituencies; they are finally determined in the house of commons; and to influence or control politics with any effect or certainty the monarchy must be active in electioneering. It was active in the elections until the end of the reign of William IV. George III was the most active, the most venturesome, and, from his point of view, the most successful of the many English kings who engaged in what the Countess of Bessborough once described as "electioneering jockeying." In this country George III would be described as a party boss; and there has never been a boss in the municipal, state or federal politics of the United States who could