India Old and New

India Old and New, by Sir Valentine Chirol. New York: The Macmillan Company. $4.00.

SIR VALENTINE CHIROL is an unusual type of the British imperialist. As a special correspondent visiting India at intervals, and for many years foreign editor of the London Times, he was the most influential panegyrist of the Curzonian régime in India during the opening years of the century. But the immense changes in Asia, the part played by India in the war, and his own larger experience, united to bring about a decisive change in his view of Indian polity. He became, in consequence, a missionary among conservative imperialists for a self-governing India, and he has labored hard in the cause.

His latest book, though curiously unequal, is a powerful manifesto of his school. It is somewhat weighted with an introductory survey, designed to summarize the characteristics of India during the great historic periods before British rule. This lengthy section may be serviceable to a good many American readers, but its value is negligible in comparison with the main body of the book—Sir Valentine Chirol's account, from personal observation and inquiry, of the later nationalism, the sudden rise of Non-cooperation, and the emergence of M. K. Gandhi. The seven chapters in which the account is contained have a particular value, as the only serious attempt so far by an English publicist of standing to examine the movement and to form an estimate of its extraordinary leader.

The Mahatma's complete challenge to British rule, and to Western civilization in the mass, was reached by stages. When India became involved in the war Gandhi was not hostile to the British power. He was on friendly terms with the government, and working in close contact with English officials and missionaries. He seems, indeed, to have persuaded himself that through warfare European imperialism might somehow be purged of its worst evils, and India thereby set on the road to freedom—a strange notion for a pure Tolstoyan to hold. He was anxious to undertake relief service in the field. For a time at least he was in favor of an enlarged Indian army. He continued to cooperate with the government and the European community. His definition of Swaraj (home rule), down to the end of the war, did not go beyond "partnership within the empire." But it is perfectly clear that the interval during which such an attitude was possible to M. K. Gandhi must be described as something of an aberration. This position could not be his; these were not his methods. We can see, accordingly, with what absolute assurance, after the war and especially after the Amritsar horror, he planted himself upon his essential nature and principle. He shuddered at the government which could adopt Rowlatt acts, and could employ Dyers and O'Dwyers, as at a diabolic force. And a civilization which could commit suicide as Europe was doing, he saw simply as evil destroying itself. He was even convinced by his Moslem allies that the protest against the dethronement of the Turkish Khalif was "a splendid manifestation" on the part of the Indian Mohammedans, a movement capable of being grafted on to the crusade by which he sought to give political expression to the conceptions of Buddha and Jesus. The success of the crusade, now being carried on by the lesser leaders while Gandhi is in prison, would involve of course the end of British rule, and the working out by the Indian people of their own system of national government. Challenged directly by Sir Valentine Chirol, Mr. Gandhi said that he was proposing to destroy nothing that could not be at once replaced by the free associative agencies of India. Challenged on the same point by Josiah Wedgwood, an admirer of his in the English Labor party, he averred that he would rather have anarchy than the rule of a Satanic alien government. There, of course, is the practical, and terrible, dilemma of the apostles of Non-cooperation; and Gandhi's heartbroken confessions and appeals, whenever there was an outbreak of disorder, seemed to imply that he felt it to be a dilemma too hard for the political leader, however simple it might appear to the religious devotee exalted by self-suffering.

S. K. RATCLIFFE.

A Long View of the Supreme Court

The Supreme Court in United States History, by Charles Warren, formerly Assistant Attorney-General of the United States. Three volumes. Boston: Little, Brown and Company. $18.00.

MR. WARREN has made an important contribution to the history of the United States, and to legal history. His book deserves a wider appreciation than its title and length are likely to obtain. No lawyer or historian should fail to read it, and the numerous company of laymen who enjoyed Beveridge's Life of Marshall should find an equal, if somewhat more sober pleasure, in this quiet, deep-running narrative, covering a longer period and from a different point of view. What Mr. Warren has set out to do is to describe the work of the Supreme Court, term by term, during the first century of its history, in relation to the history of the United States. He has also described, in detail, the successive reorganizations and attempted reorganizations of the Federal Judiciary by Congress; and the history of almost every appointment to the Supreme bench. How deep and thorough is his research—in contemporary newspapers, published correspondence, manuscript collections, and several hundred volumes of judicial opinions—can only be appreciated by one who has gone over the same ground. No such work has been done before; and, for the period 1789-1869 at least, it is never likely to be done better.

Mr. Warren is historically minded. He has approached his task as an historian using law for an instrument, rather than as a lawyer using history for material. By describing each important trial he has revivified the leading cases, and the court itself. We become as well acquainted with great barristers like Wirt, Pinkney, Dexter, Clay and Webster, as with the justices themselves. We feel the background of public opinion, and the interests involved. For the last fifty years, however, this method breaks down. The cases are too numerous and heterogeneous for a term-by-term description. Mr. Warren has been forced into adopting a semi-topical treatment for the chief-justiceship of Waite; at the conclusion of which, having reached his fifteen hundredth page, he quickens his pace, and gallops through the last thirty years in a couple of chapters. This concluding part is a blemish to an otherwise admirable book. Mr. Warren has not the excuse that a diplomatic or political historian might have, of insufficient data for recent history; and he was in a position to gather inside information. Either he should have ended his narrative at 1888, or he should have given the chief-justiceships of Fuller and White a treatment proportionate to their im-

portance—which would have meant another volume. To conclude a history of the Supreme Court with bare mention of the momentous developments in the meaning of "due process," "liberty" and "property," with bare mention of the so-called federal police power, with no mention, save by citing the titles of cases in the footnotes, of the sedition and espionage trials of 1918, with bare mention of the Court's attitude toward labor questions, is to write an incomplete history.

In the first volume, where his powers of research, presentation, and his historical synthesis are seen at their best, Mr. Warren has brought out much new and interesting data regarding the organization of the Court, its first places of meeting in New York and Philadelphia, and the methods and reasons for the early appointments. In the narrative of this period, the author has exploded several popular fallacies. It is generally supposed that our august tribunal was a modest and a shrinking body before John Marshall brought to it his vigorous intellect and aggressive nationalism. On the contrary, the Supreme Court took its place as the keystone of the federal arch, under Jay and Ellsworth. In 1792, Chief Justice Jay and Judge Washington, sitting as a circuit court, declared an act of Congress unconstitutional, and refused to assume non-judicial functions. In the same year three of the justices declared a state statute unconstitutional as impairing the obligation of contract; and three similar cases (two of them unearthed by Mr. Warren) were decided in the years 1793-99. The doctrine of implied powers obtained its first judicial endorsement when the Alien and Sedition Acts were upheld. The supremacy of the federal government was strongly asserted in 1791, when a state statute was declared void as contrary to a treaty; and in the Betsy case, where the court upheld the exclusive competence of American tribunals over prizes brought into American ports. During the brief chief justiceship of Ellsworth, however, the Court lost ground and rightly so, by asserting the dangerous and unwarranted doctrine that the English common law of sedition was part of the law of the United States; and by political harangues to grand juries. In one of those obscure provincial newspapers from which Mr. Warren has gleaned so much material, we get a flashlight on judicial conditions in 1800 reminiscent of 1918. Judge Paterson, in an "elegant and appropriate" charge to a grand jury, set politics "in their true light, by holding up the Jacobins as the disorganization of our happy country and the only instrument of introducing discontent and dissatisfaction among the well-meaning part of our community."

Many still believe, despite the battle of books ten years ago, that the power of the Supreme Court to declare an act of Congress unconstitutional and void was sprung upon an astonished country in the Marbury case. But Mr. Warren has brought to light several hitherto unnoticed instances of the exercise of that power by federal courts before 1800; and his research into contemporary opinion in equally enlightening. To quote from his own summary:—"The fact is that, so far from being a power usurped by Chief-Justice Marshall and theretofore unrecognized by the general public, the right of the Judiciary to pass upon the constitutionality of Acts of Congress had not been seriously challenged until the debate of 1802 in the Circuit Court Repeal Act. Prior thereto it had been almost universally recognized, and even in 1802, it was attacked purely on political grounds and only by politicians from Kentucky, Virginia, North Carolina and Georgia. . . . From 1789 to 1802 there was almost no opposition to the exercise of the power of the Court to pass upon the validity of statutes. . . . The very men who drafted and proposed the Kentucky and Virginia Resolutions of 1798-99 fully recognized without dispute this function of the courts . . . The history of the years succeeding 1800 clearly shows that, with regard to this judicial function, the political parties divided not on lines of general theory of government, or of constitutional law, or of nationalism against localism, but on lines of political, social or economic interest."

The thesis contained in this last sentence Mr. Warren has successfully maintained; both as regards acts of Congress and acts of state legislatures. There was no state "school" in American history, or any opposition, on dogmatic grounds, to the Court's consistent nationalism. Virginia supported the decision on Green vs. Biddle, at the expense of Kentucky's rights and interests, almost in the same breath that she denounced the decision on the Cohens case. Ohio was a more consistent defier of the Supreme Court than Virginia. The Republican party rode into power on a wave of denunciation of the Supreme Court's nationalism; and the most mischievous legislative interference with the federal judiciary was from a Republican Congress in the Reconstruction era.

The author has in many instances exposed the special interests behind criticism of the Court's decisions. His work would have been more complete had he told us something of the economic and social background of the judges, if only to offset the over-elaborate determinism of Gustavus Meyer's Supreme Court. He has not met the issue of class bias, even in the decisions involving Spanish land claims, in which the court's "scrupulous respect for treaties" opened a wide door to spoliation of the public domain. It seems a bit humorous to ascribe Taney's decision in the Booth fugitive slave case to nationalism. It is supererogatory to defend post-bellum justices from political partisanship, and almost fatuous to adduce the Court's decision on the Oregon initiative and referendum law as proof that the "Court was not grasping for power." We need some other scale than the yardstick of nationalism and state rights to measure the leading decisions of the Court under Waite, Fuller and White.

Mr. Warren, possibly because he has been a political heretic in his own community, takes a malicious pleasure in recording the dismay of "all right-thinking men" at the appointment of Taney, whom he has given his deserved place as the greatest Chief Justice after Marshall. In a most judicious comparison of the two, he says, "Marshall's interests were largely in the constitutional aspects of the cases before him; Taney's were largely economic and social. . . . Under Marshall, 'the leading doctrine of constitutional law . . . was the doctrine of vested rights.'. . . Under Taney, however, there took place a rapid development of the doctrine of the police power. . . . It was this change of emphasis from vested, individual property rights to the personal rights and welfare of the general community which characterized Chief Justice Taney's Court." We wish that Mr. Warren had performed a similar service for the memory of Chief Justice Waite. We know few statements more sound and lucid than the one that in the opinion of the Court in the Granger cases (1877), "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes this property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled