BOOK REVIEWS

INTRODUCTION TO BRITISH CONSTITUTIONAL LAW

By D. C. M. Yardley (Butterworth & Co. Ltd., London, 1960). 141 pp.

A CONSTITUTIONAL HISTORY OF MODERN ENGLAND, 1485 TO THE PRESENT

By F. G. Marcham (Harper Ltd., New York, 1960). 461 pp.

Constitutional history has for long been regarded by honours history students as the most arid and least enjoyable of their courses of study, and it has often been asked whether it can be taught in a manner more appealing. A different question has been asked with reference to young law students faced with a course of constitutional law. How much historical illustration is necessary to enliven the formal structure of a treatise on constitutional law?

For students of history and political science the aim of any course of British constitutional history is surely to identify and illustrate such major principles of government as the rule of law. In practice, this means the exercise of so much centralised control as to ensure that the rule of law is observed. At the same time certain privileges, rights and civil liberties are recognised and, if necessary, asserted, consistent with the defence of the public interest. The extension of the principle of representation is also fundamental to our notions of constitutional government and with it is associated parliamentary control of finance, executive responsibility and the independence of the judiciary. Any writer on British constitutional history or law, and any lecturer directing a course of study can be expected therefore to explain these fundamental principles of constitutional government, and the success of his writing or lecturing will be judged in large measure by how lucidly and cogently he does just this.

To follow this aim gives rise inevitably to problems of interpretation in relation to historical events, economic and social forces, the functioning of institutions and, to particularise, statutes, court decisions and conventional usage. The constitutional historian cannot evade this responsibility any more than any other historian. The task of the writer of a textbook is made more difficult when he knows that students for whom he is writing are not deeply versed in British history; such students lack a sense of its continuity or they are likely to become lost in a maze of unrelated facts of an economic, social or cultural history. Many, too, approach the past from the too limited vantage point in the present and thereby run the risk of over-simplifying the issues of the past. These are problems which beset anyone writing for or teaching American, or for that matter Australian, students of British constitutional history.

Professor Marcham has written a successful textbook for American students. It may be read with profit by students of history, politics and law elsewhere. It is carefully arranged, lucidly written, the major constitutional issues are fairly explained and well illustrated, and there is a good balance between the five parts devoted to the Tudor period, the Stuart period, the Eighteenth, the Nineteenth and the Twentieth Centuries. The author does not follow a chronological sequence in each part. Instead he examines the executive branch of government, the administrative system, the judiciary, parliament and local government within each period. For teaching purposes this adds to the clarity, but, of course, the method does lead to the failure occasionally to bring out the inter-relationship of institutional growth. The order in which he deals with these institutions sometimes raises a query. For instance, he deals with the parliament of the Stuart period last of all after he has discussed the kingship, the administrative system, the law courts and the State and religion. He justifies this by saying that parliament did not often meet, but this is surely unconvincing. His method, too, prevents him from looking deeply enough into the development of the doctrine of sovereignty either in the early seventeenth century with the interpretations of rival schools or after the Revolution of 1688 when the Whigs clung for a long time to traditional notions of natural law.

There is a satisfactory bibliography but footnotes refer almost entirely to Stephenson and Marcham's *Sources of English Constitutional History* (1937). There is practically no reference to the many excellent works listed in the bibliography.

Mr. Yardley's *Introduction* is a slight textbook designed, as he himself says, to lay out the whole province of constitutional law before the young law student and to teach him its geography. It specifically lays no claim to supplant well known, more comprehensive textbooks. But it is clearly written and attractively produced. It should help students to find their way around. The chapters are, however, of uneven merit and the arrangement could be improved. The Executive gets less treatment than its importance warrants and the chapter on 'The Rights and Duties of the Citizen' would appear to better advantage closer to the chapter on 'The Executive.' The section on the 'Principles of Administrative Law' is admirably succinct, but the section on 'The Commonwealth' falls short of the general standard of the textbook.

W. A. Townsley

PRINCIPLES OF LOCAL GOVERNMENT LAW

By Sir Ivor Jennings. Edited by J. A. G. Griffiths, 4th Ed. (University of London Press Ltd., 1960). 306 pp. £1/13/6.

I make no apology for being a protagonist of local government, particularly of the borough, which was the nursery of democracy in England after the treachery of the Conquest had subjected it to an alien form of government. The system of local government expanded to reach its

probable peak in 1929. Since then there has been a steady attrition, accelerating to a landslide in the post-war years. This textbook gives the conventional principles of local government law as they have operated —and should have continued so to do. The changes are referred to, but not weighed in the balance, nor are the implications for the future assessed. I would have preferred the history to have opened the chapters, and could not quite appreciate the incursion—premature to my mind—into the Housing Act. Of the history, the boroughs have not had the fair balanced deal which they and their history had earned. That there were useless, impotent and corrupt boroughs at the opening of the nineteenth century was correct — *errare est humanum*. But there were also inefficient State Departments and famous schools which rioted and got as low as two pupils. On the other hand, there were quite small boroughs which, by their charters and by their own initiative in obtaining local Acts of Parliament, did what they could for their burgesses in the strife of that changing world—a world in which the cries of the flogged red-coats horrified Napoleon's veterans. They maintained schoolmasters, looked after apprentices, provided dowries, tested weights and measures, bread and ale, kept up the watch, repaired streets, tackled primitive nuisances, compelled householders to put lamps outside their doors, and arranged for clearing refuse, supplied fire pumps and undertook many other tasks. All England was not in the new towns of the industrial revolution.

Those tasks were often done inadequately, but finance was derived from their trading undertakings and land revenues. The rate was still the poor rate. Here again, only a historical review shows the emasculation of the 'sinews of war'. In origin, rates were levied upon certain items of personal property. In the nineteenth century, the claims of agriculture to derating were first recognised and later greatly extended. Industry came in for very substantial derating, so did transport. The quiet logic of this escapes the reviewer. Why did a prosperous industry, possibly catering for internal trades alone, not have to pay a small (relatively) distribution in rates, deductible anyway from income tax? Yet shipping companies, earning foreign exchange, found that income tax payments precluded them from the replacement of ships. Again, since the war, postponements of revaluation in an inflationary era, as well as new statutory deductions, kept the rate revenue narrow and more stable. Government grants stepped in but independence went out, despite a belated attempt to consolidate the grants through the county councils.

The Principles of Local Government Law refer to the transfer of powers to the county councils from the district councils, including the boroughs, and to State authorities—of the utilities of transport (in part), gas, electricity, and recently of water to regrouping areas. The principal powers transferred are listed. But it is only when the proportion of local revenues allocated to those powers is shown (page 181) that it is realised how much, except for housing, the weight has shifted from local government of the borough type (particularly the medium-sized borough

of up to 50,000 population)—save in the case of the county borough. Now this division is most arbitrary. A county borough of 25,000 rubs shoulders with boroughs of 250,000 and possesses more powers than the latter, and a county of even smaller population and resources than many non-county boroughs, *e.g.* Rutland, has powers actually transferred to it. There are several counties with much smaller resources and populations receiving transferred powers than some non-county boroughs which are losing them. Which brings the author, under the title of 'Reform', to the reorganisation of local government.

The great query is whether the break-up has not gone too far; too many *ad hoc* or centralised bodies, and county councils too small to be the subordinate law-making authorities as conceived by the political theory of the 1880s and yet too large (in many instances) to be local administrative units. Democracy's interest is shown by the relative polls, recording a much higher percentage for the boroughs, which in fact normally take only about one-third of the rate levied.

Australia has here a field of experience to draw upon; not only local, but also in relation to the States and the Commonwealth Government. There is likewise a centripetal tendency with much weight and power ascribable to the control of major revenues and loan-raising permission. The success of the county boroughs or 'all purpose' form of local government could well be studied, for there is in Australia no need to set up 'regions' seeing that the States already exist together with their legislatures and powers.

The Royal Commission had reported in England (1871) that 'all powers requisite for the health of towns and country should in every place be possessed by one responsible local authority, kept in action and assisted by a superior authority' (page 36). Wartime experience confirmed the need for this, so that the 'man in the street' had not to go from one authority to another to secure his needs. Yet the break-up has become more marked, and Dame Evelyn Sharpe of the Ministry of Planning and Local Government has confirmed that there is a crisis in the local government of today.

The textbook deals adequately with central control, more in evidence today than ever before, and with judicial control. As an introduction to the basis of statutory powers and duties, chapter IX should be read by all law students, whether they are interested in English local government or not. Sooner or later they will be called upon to advise either a plaintiff or a defendant authority, be it government, board, commission or council. There is quite a lot of law relating to negligence, nuisance, *ultra vires*, non-feasance and to the present use of Prerogative Writs and other remedies. Also in an earlier chapter (page 143 *et seq.*) the author considers the powers of the chartered corporation as opposed to the statutory corporation and deals briefly, but adequately, with *A.G.* v. *Manchester Corporation* [1906], *Re Sutton's Hospital* (1612), and *A.G.* v. *Leicester Corporation* [1943]. The *ratio decidendi* seems to run straight, and

yet it is eighteen years since the Leicester Corporation case, and one would have thought that when the chartered corporations—for such are boroughs—are faring so badly, extensions along this line might well have been sought. Perhaps the solution lies in central control (chapter VIII); for what can be achieved without loan sanction? Also, there is the power of the auditor and the possibility of a personal surcharge, *Re Hurle-Hobbs* [1944]. This textbook was first printed in 1931. It has been revised since; but the practice of local government, and of government generally, has progressed further from the practice of 1931 than even substantial revision can indicate. Indeed, it would appear that Professor Griffiths, in his Preface, himself feels the need for a complete recasting.

J. E. Siddall

SNELL'S PRINCIPLES OF EQUITY

Edited by R. E. Megarry and P. V. Baker, 25th Ed. (Sweet & Maxwell Ltd., 1960). CXXXV and 639 pp. £3/10/-.

Apart from deleting the chapter on Partnership, there has been no substantial alteration as regards content in this new edition of Snell. There has, however, been a considerable amount of revision and reformulation in the text, to a varying extent, throughout the book. The introduction of new material is comprehensive and has been particularly well done in the chapter on Trusts where the difficulty of selecting recent cases which suitably illustrate principle is obvious. The recent legislation on Charitable Trusts (*Charitable Trusts Validation Act* 1954; *Recreational Charities Act* 1958; *Charities Act* 1960) has been effectively incorporated into this chapter.

It is axiomatic that the law relating to Charitable Trusts is a confused and confusing subject. We suggest that there is room for improvement in Snell's present treatment. This is particularly so in the sub-section dealing with 'public benefit' where no clear line is drawn between the four heads of charity in *Pemsel's* case and the varying requirement of public benefit under each head: see P. S. Atiyah in *M.L.R.*, 21 (1958) 138. Perhaps it would be more conducive to clarity if a modification of the general analysis of Charitable Trusts by J. W. Brunyate in *L.Q.R.*, 61 (1945) 268 were adopted by distinguishing between (1) questions of substance, and (2) questions of interpretation. Under (1) there may be a valid trust, but it is a question of whether the object is exclusively charitable. In this section the four heads of charity in *Pemsel's* case and the necessary element of public benefit under each head could be considered in turn. Under (2) it is a question whether there is a valid trust at all, the object of which is exclusively charitable. In this section the 'charitable and/or benevolent' type of case could be discussed. A question of interpretation is also involved in gifts '*virtute officii*'. They could be considered separately but under the general heading of interpretation.

A more general criticism of the chapter on Trusts is that it is doubtful whether a completely satisfactory discussion of the topic can be

compressed into some ninety pages. Its importance would seem to merit a more expanded treatment. In their Preface the present editors rightly assert that a student looks for lucidity and enlightenment in every line, and there is no doubt that Snell fulfils this expectation with a clear and accurate exposition of principle. However, we feel that the student's interest would be more readily awakened and maintained by including in the text much more discussion and some assessment of the more important cases. As an example, this method could be profitably employed with the recent case of *Re Endacot* [1960] Ch., which raised four or five important points relating to Trusts, rather than relegating it, with one exception, to the footnotes.

This expanded treatment of Trusts would seem to be very well worthwhile but may necessitate the abandonment of other chapters in order to keep Snell within reasonable limits of size and price. In view of the fact that Administration of Assets and Mortgages are quite adequately dealt with by other student textbooks, and in more appropriate contexts, either one or both of those topics could safely be deleted.

The putting forward of what are merely tentative suggestions for improvement is in no way intended to question the considerable merits of Snell in its present form. This new edition is one which we can certainly recommend.

M. Howard

GENTLEMEN OF THE LAW

By Michael Birks (Stevens Ltd., 1960). 300 pp. £1/14/6.

The lawyer has always been a fascinating figure for the social historian but, as the author points out, the first real attempt to depict the lawyer against the background of English society appeared in 1959, when Dr. Robson published *The Attorney in Eighteenth Century England.* In relation to that period the present volume and Dr. Robson's study are in a sense complementary, because each author had access to different materials.

The purpose of the book is 'to relate the story of solicitors in terms of actual persons . . . to show the sort of people who became solicitors at different periods, the kind of lives they led, and how they fitted into the social pattern'. We can readily affirm that this purpose has been achieved to produce a valuable indication of the contribution that lawyers have made to the development of society in the common law countries. Although the author is concerned primarily with the solicitors' branch of the profession, the nature of the subject necessarily includes a discussion of the progress of other sections of the profession and also the contribution of the legal profession to other callings such as accounting, broking and banking.

The prologue includes a brief survey of the profession as it is today and gives a general introduction to the subject. This is very helpful from the layman's point of view. The early chapters reveal painstaking research into ancient records and authorities such as the Pipe Rolls and

the Year Books which has produced a masterly analysis of the possible origins of the Common Attorney. Included is a reproduction of a painting showing the Court of Common Pleas in the time of Henry VI and containing what may be the earliest portrait of an attorney. A practical note adds to the interest of the reader by the inclusion of an example of an attorney pleading by default during the time of Edward I. The exchanges between counsel and judge and the general approach to the problems raised are little removed from present-day court practice.

Mr. Birks easily convinces the reader that 'although no history of the solicitor's profession would be complete without some account of the scriveners their influence is not as great as one would have supposed.' Indeed, the reader feels that the course of history was directed against the scriveners from the moment of their emergence as a professional body.

The chapter entitled 'The Age of Transition' traces the effect of the Renaissance and Reformation upon the profession, and emphasizes the influence of the introduction of printing on legal education—an aspect which is often neglected by many textbook writers. Of historical interest is an Order-in-Council of 1557 showing that contrary to popular belief it was the Council who wished to exclude all attorneys from the Inns of Court, and that the Inns themselves would exclude only those attorneys who would not 'use the exercise of learning and mooting'. Practical illustration of the seventeenth-century period is afforded by copious references to the personal diary of one William Powell (1581-1656).

It might be objected. however, that a chapter on the history of the Law Society is in no way novel, yet in addition to the usual textbook information Mr. Birks gives the reader a rather critical glimpse of the contemporary practitioner; this treatment ranges from a consideration of the quantity of food consumed by members to the more serious matter concerning the efforts of the Society to ensure compliance with those statutes which regulate the profession.

Of special interest to students is the chapter 'A Smart and Dashing Clerk' which presents a balanced account of the life of an articled clerk in the seventeenth and eighteenth centuries.

The author then shows how it appeared to the conservative legal profession that the coming of law reform involved the threat of reduced fees; however, this was not the case and reform was tacitly accepted by practitioners who paused only to form themselves into various organisations. Although litigation ceased to be so lucrative, legal work increased in other directions.

The chapter 'A Gentleman of the Law' is perhaps the most characteristic of the book. In it Mr. Birk examines the development of the profession during the nineteenth century, painting an intimate portrait of the legal gentleman, from the hours of his work to the cut of his gown when attending court. On a more serious plane he narrates the gradual adoption of modern business methods in the face of the conservative approach of the profession as a whole.

Mr. Birks does not overlook the establishment of the profession in the colonies. The form which the law took in each colony depended, of course, upon its stage of development in England when the colony in question happened to be settled. In America the Puritan settlers had little liking for lawyers, for to them the common law seemed an instrument of oppression against dissenters. But nevertheless a system modelled on English local courts soon appeared, for it was realised that law and lawyers were necessary for the maintenance of justice. However, at first, barristers appeared only in the wealthy colonies of the south or in India.

The difficulties experienced in Australia are well illustrated by a letter from Governor King to Lord Hobart: 'There are many bad characters who have practised a sufficiency of law in England and . . . among these we have two infamous characters, whose private advice and actions requires the knowledge and abilities of a professional man to counteract their artful chicanery or detect and prevent it.' Nevertheless, as was the case in other professions, the convict system provided several of the most notable early Australian lawyers.

The final pages review the profession as it is today, and the book closes with a discussion of the question of merging the two branches. One sobering note is the observation that 'the Bar as a profession seems to be in some danger of becoming extinct.' The proposal that partnership between barristers and solicitors is a practical solution to this problem (in the smaller jurisdictions at any rate) is exemplified by our own Tasmanian system.

Throughout the book the wealth of references ranges from the Pipe Rolls to the diary of Samuel Pepys, as well as drawing upon much hitherto unpublished material. The facile use of refreshing humour combines to produce a work worthy of a place in any law library.

S. A. Burbury