BOOK REVIEWS

PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT. By Frederick M. Rowe. Boston: Little, Brown & Company, 1962. Pp. xxx, 675. $22.50.

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This comprehensive and capable study enriches the literature of price discrimination. Mr. Rowe has an exhaustive knowledge of the cases, is highly sensitive to the policy issues, and expounds his ideas with exceptional clarity. His book provides not only an excellent guide through the intricacies of the Robinson-Patman Act,[1] and the best available summary of the act's legislative history, but also an able critique of the law. His point of view is familiar—that the act, as administered, has restrained more competition than it has preserved. But whereas this opinion is often expressed loosely or even intemperately, Mr. Rowe has carefully stated the focus, scope, and degree of his criticism, and the evidence upon which he relies. He has thus made a valuable contribution to the argument over policy, and has fulfilled the hope expressed in his preface that the book will prove useful even to those who disagree with him.

In three major respects, however, Mr. Rowe's position seems to be open to challenge. The first concerns the trend of the law. The present legal status of various types of practice is stated in a manner that sometimes implies, and sometimes declares, that judicial interpretation is mitigating former legal doctrines, and that the law is tending toward acceptance of criteria that Mr. Rowe regards as desirable. The discussion commingles an account of cases involving such decisions with an argument as to the inadequacy or incompleteness of decisions in other cases. The line between what the courts have done and what Mr. Rowe thinks they should do is not always clear. There is persistent argument that the courts should move closer to his position and an implication that they probably will.

To me, this appraisal seems dubious. Any opinion as to the trend of the law necessarily rests upon an evaluation of decisions that differ in rationale and in tendency. It also depends upon holdings in factually different cases in which the issues were selected, stated, and argued with varying degrees of skill. The longer the time period and the more numer-

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[1] 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

ous the cases, the better grounded an evaluation of the trend can be. But Mr. Rowe's trend covers a short period, and his supporting cases are relatively few. Some of them are decisions in private suits that diverge from judicial precedents established in cases originating in the Federal Trade Commission, and that have not yet modified the Commission's standards of decision. Some are proceedings in which litigation stopped below the Supreme Court, with issues and grounds for decision not clearly formulated.[2] Others are FTC decisions inconsistent with previous Commission views. They reflect the influence of Commissioners who have since been succeeded by others more in accord with the Commission's traditional attitudes.[3] Other equally recent cases could be selected to support the view that no such trend exists, or even that the trend is in another direction.

Mr. Rowe is also open to challenge in his statement of the economics of the Robinson-Patman Act. He borrows from economic writing a simplified and controversial interpretation of the bearing of modern economics upon price discrimination. According to this theory, discrimination is a neutral phenomenon that may reflect either monopolistic or competitive forces, and that often may promote competition. This formulation becomes a point of reference for later appraisals, as though Congress had intended to base the statute upon it, and the Commission and the courts had a duty to apply the law accordingly. But such a position does justice neither to the complexity of the relevant economic standards nor to the letter of the law and the spirit that shaped it.

In classical economics, discrimination that was not merely momentary was evidence of monopoly, for competition would eliminate differences in price that did not correspond to differences in cost. Discrimination, therefore, was always objectionable. In modern economics, market analysis centers upon conditions of incomplete competition due to the influences of concentrated control over supply or demand, overhead costs, joint costs,

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[2] Among the 14 decisions most frequently cited are those by the Seventh Circuit in Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952), and Anheuser-Busch, Inc. v. FTC, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960). In the former, review was denied by the Supreme Court on procedural grounds; but much of the circuit court's reasoning was rejected in later cases. In the latter an opinion in favor of the company was reversed by the Supreme Court, and certiorari was later denied after a new decision had found no evidence of injury to competition. How much of the reasoning of the often reversed Seventh Circuit in these cases should be regarded as good precedent is problematical.

Another of the 14 cases is Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (7th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). Here charges under one state law and three federal laws were so commingled that Robinson-Patman issues were not clearly distinguished; and though finding no competitive injury, the decisions nevertheless considered at length the defense of meeting competition. Two Federal Trade Commissioners subsequently disagreed in a congressional hearing as to the grounds for the decision and its significance as a precedent. See *To Amend Section 2 of the Clayton Act, Hearings on S. 11 and S. 138 Before the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., 236-37 (1956).

[3] See, *e.g.*, P. Lorillard Co. v. FTC, 267 F.2d 439 (3d Cir.), *cert. denied*, 361 U.S. 923 (1959).

ignorance of market alternatives, and obstacles that impair access to these alternatives. The business world is regarded as quasi-competitive or quasi-monopolistic. But in destroying the basis for the old appraisals, this view does not supply a new set of generally agreed appraisals. It lumps together all departures from perfect competition, whether inevitable or avoidable, and leaves the policymaker to develop anew relevant economic standards. When such formulations are applied to price discriminations, a simple condemnation of all lack of concomitance between cost differences and price differences is no longer adequate. It would mean, for example, that wherever a seller's costs differ, he must make prices differ exactly as much. But what is economically appropriate is far from clear. There is not yet a consensus among economists either as to the nature of the "effective" or "workable" competition that can and should be sought in a quasi-monopolistic environment, or as to the role of policy toward price discrimination in assuring such competition. Some economic arguments against the present law rest on the view that competition is so strong as to eliminate discrimination quickly without harmful effect. Others rest on the view that competition is so weak that the unintended and reluctant broadening of discriminatory concessions is an indispensable part of it. Some economists argue that cost justifications under the present act are too narrow; others that prices should reflect demand rather than be pegged to costs. Though these divergent views (all included in Mr. Rowe's summary of the "elementary" economics of the subject) are convenient tools of criticism, they do not re-enforce one another in suggesting positive standards for policy.

Nor has the Robinson-Patman Act much to do with any version of sophisticated economics. It was enacted primarily to protect independent merchants from corporate chains in the context of the institutions and practices of the food industries. Its statutory content is an unblended assortment of prohibitions as to discrimination, proportionality, and payment of brokerage. No economist has suggested that the brokerage provisions or the proportionality provisions make economic sense. The part that has to do with discrimination carries as its key the concept of injury to the competitive capacity of persons who compete with a discriminator or his beneficiary. If this injury is shown, there is no need to consider the broader market effect. Reference to competition was a convenient way to hitch these innovations to the antitrust laws; but the concepts themselves were formulated as a means to protect economic groups. They are logically and historically related to what I have called elsewhere the political idea of discrimination. They are related to competitive ideology only in the sense that protecting groups of competitors, and particularly groups of small competitors, sometimes, but not always, protects competition. It is easy to wish that the law had been directed toward other objectives and had embodied other concepts. But it is unfair to criticize the Commission and the courts for acknowledging and giving effect to the language and spirit of the statute.

My third challenge grows out of the second. If, as Mr. Rowe thinks, the law expresses, or can properly be interpreted to express, the "elementary" economics of price discrimination, and if the courts are already leading the Commission toward such interpretations, Mr. Rowe is justified in the hope with which he concludes—that, with congressional reform remote, and administrative reorientation doubtful, the judicial process may best adapt the law to the economic setting. But the possibilities of interpretation are limited. A law may be construed in accord with its wording in disregard of its spirit, or in accord with its spirit in disregard of its literal wording; but a judge may not easily ignore both letter and spirit to pursue preferred substantive standards. If what needs doing lies beyond the possibilities of interpretation by conscientious judges, the appropriate course, even though difficult, is to enact a more satisfactory law. The difficulty of such a course is great; but it arises from the fact that important groups prize the law as it is, and that those who dislike it want different changes in policy, or do not know what they want. In other words, it arises from inherent conceptual and political differences. These are matters appropriate for a legislature, not a judiciary. To argue that the responsibility lies with the Commission or the judges is merely to retard the legislative effort.

PRINCIPLES OF THE LAW OF PROPERTY. By JOHN E. CRIBBET. Brooklyn: The Foundation Press, 1962. Pp. xviii, 354. $7.00.

Elmer Mayse Million †

As the newest contribution to the University Textbook Series, Professor Cribbet's excellent little book admirably fulfills the Series subtitle as a work "Especially Designed for Collateral Reading." Elaborating on an idea implicit in the first word of the title, the author states that his book has two primary objectives: to give the reader the "big picture" of property law in terms both of its history and its scope; and to make students aware of the changing nature of property law, with the concomitant need for critical, responsible reform. (P. vii.) In order to achieve his first objective, the author purposely omits a mass of minute rules, minor refinements of leading principles, and many subcategories into which property doctrines may be divided. Pursuing his second goal, he freely understates

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those authorities which conflict with what he considers the modern and more desirable view.[1]

Substantively, the book is devoted to the main principles of modern American land law. Although passing reference is made to several personal property topics, the text does not deal extensively with that field.[2]

Structurally, the book has five parts. Part One, an introduction, succinctly illustrates how a wide variety of interests may simultaneously exist in a single parcel of land. It also comments on the legal and social nature of private property. Part Five, little more than a full page in length, exhorts students to promote change in the law of property. However, it admonishes them to do so wisely and only after careful study. In writing this section, the author may have overlooked the danger that those who have read a summary of the law are apt to be so firm in their convictions regarding the "big picture" that they will forget the warning to undertake change only when they understand the full picture.

A great deal of material has been expertly condensed into the book's three main parts. Part Two deals with the historical background of Anglo-American land law. The author discusses equitable uses, the various permissible estates, and such vestigial rules as Shelley's Case, Worthier Title, and Destructibility. In Part Three, transfers of ownership and modes of title assurance are considered. Part Four, appropriately titled "The Use of Property," describes the law relating to easements, licenses, natural rights, and public interference by zoning, planning, subdivision control, and eminent domain.

The volume is intended as a summary and as such does not purport to discuss future interests (*e.g.*, p. 65 n.58), mortgages, cooperative housing, rent control, mining, oil and gas, and similar specialized fields.[3] There is, however, a substantial summary of the leading principles of the competing systems of water law. (Pp. 296-318.) The need for brevity excuses the fact that description of the water law of the eastern states is based almost exclusively on Illinois decisions. (Pp. 300-18.)

Because the book was not intended to be a commercial case finder, the modest number of case citations is not a defect. A disproportionately large number of the citations are to Illinois cases,[4] giving the volume special value for Illinois students and practitioners. But this fact does not substantially reduce the text's usefulness as collateral reading for students and

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[1] See, *e.g.*, p. 191. The statement that a few jurisdictions are contra should be compared with 2 POWELL, REAL PROPERTY ¶ 222 (1950).

[2] The author cites readers to BROWN, PERSONAL PROPERTY (2d ed. 1955) as "so complete that any extended duplication of that subject matter is unwarranted." (P. viii.)

[3] Although not listed in the table of cases, the landmark racial covenant decision of Shelley v. Kraemer, 334 U.S. 1 (1948), is discussed. (P. 279.)

[4] In addition to the water law coverage (pp. 300-18), see pp. 121-79 (50 Illinois citations and 130 from all other jurisdictions), and pp. 180-204 (49 Illinois citations and 26 from all other jurisdictions).

lawyers in other states. In many instances, the author has also borrowed sections from the published works of others (*e.g.*, pp. 161 n.31, 184 n.18), or from those of his own (*e.g.*, pp. 136 n.55, 296 n.16), including the casebook of which he was co-editor. (Pp. 205 n.2, 232 n.74.) [5]

Without retracting my warm praise of the book, I would like to emphasize, by way of warning, the deceptive certainty inherent in any summary. In the two pages devoted to community property, Professor Cribbet unqualifiedly states that income arising during marriage from separate property is itself separate property. (P. 89.) Other authorities state that three of the eight community property states have a contrary rule.[6] In a concise and useful statement on assignments by lessors, the author fails to note that a tenant may be protected for rent payments made subsequent to, but in ignorance of, the landlord's assignment. (Pp. 203-04.) The language may in fact be misunderstood as implying a contrary rule.[7] The discussion of liability for voluntary, permissive, and meliorating waste fails to mention equitable waste or persons holding "without impeachment." (P. 192.) Also the statement that a tenant is liable for acts of strangers is too broad.[8] The author states that if an adverse possessor claims "only for a life estate or a lesser interest that is the property right secured." (P. 235.) In doing so, he ignores two discordant lines of authority.[9] Finally, the statement that a conveyance to two unmarried persons as tenants by the entirety creates a tenancy in common (p. 92),[10] overlooks several distinctions based on differences in deed phraseology.[11]

Overall, the author's style is relaxed and even sprightly. There is frequent resort to second person pronouns. The book is also enlivened by occasional interpolations of humor. Topics which I think are excellently presented include land contracts, equitable conversion, and escrows; the chapter on methods of title assurance, which contains a critique of each method and suggested reforms; and the three-page treatment of lateral and subjacent support. Most readers will admire Professor Cribbet's incisive characterizations of rules, problems, and solutions. Some, however, will disapprove of his impatience with courts which refuse to overrule well settled but anachronistic principles of property law.

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[5] Citing CRIBBET, FRITZ & JOHNSON, CASES ON PROPERTY (1960).

[6] See, *e.g.*, Moynihan, *Community Property*, in 2 AMERICAN LAW OF PROPERTY 143 (Casner ed. 1952). This monograph might be more useful to students than the treatises cited by Professor Cribbet at 89 n.33.

[7] *But cf.* LESAR, LANDLORD AND TENANT § 3.60 (1957); Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193 (1890).

[8] *Cf.* 2 TIFFANY, REAL PROPERTY § 643 (3d ed. 1939).

[9] 4 TIFFANY, REAL PROPERTY §§ 1151, 1173 (3d ed. 1939); Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L.J. 219, 222-29 (1919).

[10] Coleman v. Jackson, 288 F.2d 98 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 933 (1961), is a recent case which holds contrary to the only case cited by the author.

[11] For example, To H and W, his wife; to H and W as tenants by the entirety; and to H and W as tenants by the entirety with the right of survivorship.

To sum up, this is an excellent summary of American land law, arraying the leading principles in an orderly and understandable sequence, with enough editorial characterization and policy comment to help immeasurably the understanding of the whole by those students who have faithfully done their casebook briefing.