BOOK REVIEWS

CONTRACTS TO MAKE WILLS; Legal Relations Rising Out of Contracts to Devise or Bequeath. By Bertel M. Sparks. New York: New York University Press, 1956. Pp. 230. $5.00.

This book, despite its diminuitive size—two hundred pages of text, probably one-third of it taken up with footnotes—is a comprehensive and unified exposition of its subject. By reason of its clarity, completeness, accurate analysis and cogent reasoning, it will take a place beside other outstanding treatments of specialized segments of the law such as Griswold's *Spendthrift Trusts* and Clarks' *Real Covenants and Other Interests Which Run With Land* as the definitive work in its field.

It is perhaps regrettable that the format, namely, law review style without section division or section headings—the book is a collection of law review articles by Professor Sparks—will tend to discourage use of the book by the practicing attorney. There is, however, a good index. The practicing attorney's initial impression that this is not for him may be confirmed by the publisher's choice of only 10-point type, closely set.

The author adheres to one fundamental thesis: a contract to leave property by will is no more and no less than a contract; its characteristics and consequences derive from principles of contract law, not from the law of wills. Self-evident as this would seem, students of the law of wills, even if their acquaintance with contracts to make wills has not gone beyond that familiar whipping boy of wills courses, *Stone v. Hoskins*,[1] and the dictum of Lord Camden in *Dufour v. Pereira*,[2] upon which *Stone v. Hoskins* relies, know that courts have in fact confused contract ideas with wills ideas to the point, at least, of supposing that a good bilateral contract to make mutual wills is subject to rescission by one party to it provided he give the other party notice; and that even such notice may be dispensed with, according to *Stone v. Hoskins*, if the other party appears not to be prejudiced by the lack of notice. In numerous other instances, as the author demonstrates, some involving substantive rights and some having to do with the type of relief available, error has resulted from failure to appreciate the full import of the contract, or to apply contract principles consistently. Certain examples may be noted.

(*a*) It has sometimes been held that if the promisee in whose favor a will was to be made predeceases the promisor, the promisor is relieved of his obligation and the executor of the promisee has no remedy on the contract. (p. 93 n.70). This, the author points out (p. 93), overlooks the fact that the promise was to transmit the property at the death of the promisor and was not subject to a condition that the promisee survive the promisor. The fact that under the law of wills a devise or legacy to a per-

1. [1905] P. 194.
2. 1 Dick. 419, 420-21, 21 Eng. Rep. 332, 333 (1769).

son who predeceases the testator, under ordinary circumstances,[3] fails by lapse is immaterial. The testator in the present case has undertaken to see to it that the promisee, and by implication, anyone who succeeds to the rights of the promisee, gets the property.

(*b*) Although no court has been so foolish as to order a promisor to make a will pursuant to a contract, a court has enjoined a promisor from making any other sort of will (p. 96 n.81), and has enjoined a promisor from revoking a will which complied with his contract. (p. 97 n.82). Such injunctions are too easily set at naught by a mere secret writing of the enjoined party; and in any event are of little advantage to the promisee—apart, the author concedes (p. 97), from such moral suasion as they may exert—for the promisee's rights at the death of the promisor will not in fact be impaired if the promisor has made or revoked a will in defiance of the contract.

(*c*) An even more obvious error in remedy than the ones just mentioned has been made by a minority of courts in permitting a contract made by the testator to be used as a basis for contesting probate of a well-executed will which does not comply with the contract. (p. 196 n.29).

The author gives us a clear, comprehensive statement (pp. 196-97) of the proper modes of relief wherever the promisor has failed to comply with his contract, either because he has made no will, or made a wrongful will, or has made a will in defiance of a promise to die intestate; *viz.*, an action for damages against the personal representative of the deceased promisor; or, if the contract concerned land or unique chattels, an action in the nature of specific performance "in the same manner as if it had been a contract to sell that had not been fully executed" (p. 197); and, no matter what sort of property was involved, an action in the nature of specific performance if the contract was for all or for a specified fraction of an estate, since "the law court has no suitable machinery for the supervision of an estate accounting." (p. 197).

Probably any text, even if it deals exhaustively with a relatively limited subject, will fail in the opinion of some reader to do full justice to certain problems. As examples, in respect to the present work: (*a*) In the discussion of the Statute of Frauds as a defense to a contract to devise or bequeath, required to be in writing, one would have liked to have learned the author's opinion of cases where, there being an oral contract to make mutual wills, the surviving party has received the benefit of compliance by the first party to die and then has altered his own will and died leaving his property otherwise than as called for by the contract—in which cases courts have sustained action brought by a third party beneficiary under the contract and have held that the executor and the devisee or legatees of the promisor, *i.e.*, the second party to die, are estopped to set up the Statute of Frauds.[4] Obviously, this is not ordinary equitable estoppel.

3. But, as the author points out (p. 93), it is usually held that a devise or bequest made in satisfaction of an obligation does not lapse.

4. Notten v. Mensing, 3 Cal. 2d 469, 45 P.2d 198 (1935).

It goes even beyond the range of promissory estoppel. The case is, however, analogous to one where the testator leaves property to *A* on *A's* oral contract to hold in trust for *B*. Although the Statute of Wills prevents equity from enforcing the express trust, *B*, quite illogically, is allowed to get the property from *A* by means of a constructive trust, the courts talking of "constructive fraud" as they also do in the mutual wills case. The only defensible relief in both cases, it would seem, is restitution for the benefit of the heirs or next of kin of the promisee.[5]

(*b*) Where a person, when single, has made a contract to devise or bequeath property, and thereafter marries, and is survived by his spouse, the claims of the promisee under the contract may conflict with the protected rights of the spouse such as to dower or a forced share in the estate of the promisor. The author's position as to the proper resolution of this conflict is not in all respects clear. This reviewer understands him to say that if the contract is merely for specified property, and not the entire estate, the rights of the promisee are like a lien created for value before the marriage, and therefore are superior to the claim of the surviving spouse. (pp. 172-73, 199). But if the contract calls for leaving the entire estate to the promisee, it is against public policy (as in restraint of marriage) with regard to any property in which the surviving spouse has a protected right such as dower or a forced share. (pp. 178, 199).

One reviewer of the present work, Professor Rheinstein, puts the case of a contract to leave Blackacre and all the promisor's personalty to *B* and then a marriage by the promisor to *W*.[6] Professor Rheinstein understands the author to contend that *W's* dower interest in Blackacre should be subordinate to *B's* interest under the contract, and that *W* would be required to pay to *B* the value of whatever indefeasible share in the personalty of the deceased husband *W* takes by law. Query if this understanding on the part of Professor Rheinstein is correct if, as his hypothetical case implies, the contract was, in effect, to transmit the entire estate of the promisor at death to *B*.

One other situation under this general topic troubles the present reviewer. Suppose in a community property state like California the promisor, having contracted to leave all his property to *B*, marries and dies shortly thereafter, intestate, leaving only separate property. As to such property the surviving spouse has no protected interest. The promisor could have left it all by will to *B*. It is understood that Professor Sparks would uphold *B's* right to the entire property, leaving the surviving spouse empty-handed. On the other hand, Professor Sparks cites (p. 170), as if it sustained his general position where a contract to devise an entire estate is concerned, the leading case of *Owens v. McNally*,[7] but fails to note that the *Owens* case was precisely the situation above put and that in that case

5. See Scott, *Conveyances Upon Trusts Not Properly Declared*, 37 HARV. L. REV. 653, 670-88 (1924).

6. Rheinstein, *Critique: Contracts To Make a Will*, 30 N.Y.U.L. REV. 1224, 1235 (1955).

7. 113 Cal. 444, 45 Pac. 710 (1896).

the court held that the contract was against public policy not as to *W's* protected interest in community property, for there was none, but as to her unprotected interest as an heir with regard to the decedent's separate property. The promisee was remitted to a restitutionary remedy, *quantum meruit,* for services rendered under the contract.

So far as this reviewer knows, Professor Sparks is the first to emphasize the importance of wills contracts as estate planning devices available in a considerable range of situations, not only with respect to family arrangements, *e.g.,* to provide care for an elderly testator, to protect a child surrendered for adoption or custody, and to play a part in antenuptial and divorce settlements—but also in business connections, *e.g.,* as a device to maintain control of a corporation, to plan the disposition of partnership assets, and to retain the services of a valuable employee. (pp. 187-91, 200). It has been pointed out elsewhere [8] that lawyers would have been interested in some further treatment of this matter, particularly in respect to the tax consequences of the use of wills contracts. However, Professor Sparks, a property man, may well have felt that tax questions had best be left in other hands. The profession, in any event, is enormously indebted to him for bringing illumination to a little discussed, and in some ways confused, area of the law.

Lowell Turrentine †

REINHOLD NIEBUHR, HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT. By Charles W. Kegley and Robert W. Bretall, Editors. New York: The Macmillan Company, 1956. Pp. xiv, 486.

Reinhold Niebuhr is unique among theologians in the extent of his influence beyond the company of those concerned with theology. In his chair of "Applied Christianity" at Union Theological Seminary, his principal concern has been with the relation of biblical theology to problems of social ethics.

The book being reviewed starts with an "Intellectual Autobiography" by Niebuhr and ends with his "Reply" to the twenty "Essays of Interpretation and Criticism." Several of the essays raise questions as to Niebuhr's hostility to the concept of natural law. This aspect of Niebuhr's thought is the more striking because he rejects as well the reasoning of typical enemies of natural law. He vigorously attacks the position that ethical judgments are only expressions of personal preference and that there are no objective criteria for criticism of legal institutions. Thus, he rejects the ethical subjectivism and cultural relativism which underlie modern positivist philosophies of law. Both his writings and his political

8. Rheinstein, *supra* note 6, at 1237.

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activity testify to his conviction that criticism of law in terms of justice is meaningful. But for all this, his attitude toward even the cautious modern versions of natural law philosophy is one of "increasing rejection."

Niebuhr criticizes the natural law concept principally on two grounds. He sees in it a pretentious rationalism which does not recognize that principles of justice are products of history perhaps more than of reason. But even more important is Niebuhr's insistence that natural law reasoning has typically been used in claiming a status of immutable principle for dubious legal institutions of some particular historic culture. He cites both Catholic writers who have absolutized institutions of mediaeval society and Protestant writers who have invested with similar sanctity nineteenth century ideas as to free enjoyment of property. In this recurring phenomenon Niebuhr sees the operation of man's stubbornly sinful tendencies. As the essays in this volume indicate, the analysis of these human tendencies is perhaps Niebuhr's greatest contribution, and some of his most convincing illustrations have been drawn from man's pretensions in relation to justice.

Examples of the misuse of natural law reasoning, however, do not establish the unsoundness of the natural law approach—the attempt to derive ethical and social criteria from inquiry into the nature of man. While rejecting natural law terminology, Niebuhr does not in fact reject this approach. Paul Ramsey, in the longest chapter in this volume, shows how the affirmative elements in Niebuhr's ethical theory actually constitute a Christian doctrine of natural law.

In a sentence, that doctrine is that freedom is the essence of man's nature and that love is the natural law for man. Man in his finiteness has a power of self-transcendence, a dimension of freedom and self-criticism which "points the self toward a more ultimate harmony." Man is made for life-in-community and requires an object of devotion beyond himself, an "indeterminate field of fellowship." Love is the ultimate law for man because " 'every realization of the self which is motivated by concern for the self inevitably results in a narrower and more self-contained self than the freedom of the self requires.' " (p. 84). Principles of justice are general formulations of what love requires under the conditions of civil society made necessary by man's sin. Ramsey considers this the principal theme of Niebuhr's ethical writings, most clearly stated in 1935 in *An Interpretation of Christian Ethics,* but also recurring in recent books. Niebuhr thus places himself, according to Ramsey, within the great tradition of natural law.

Other contributors to the present volume take Niebuhr's strictures on natural law more at face value. Emil Brunner finds in Niebuhr's writings no adequate concept of justice (p. 30); and Robert E. Fitch considers that the dominant note of Niebuhr's ethical analysis is one of "historical relativism." (p. 306). In his Reply, Niebuhr is less concerned about these somewhat unbalanced criticisms than he is about Ramsey's devoted effort. He acknowledges that Brunner's "whole theological position" is

close to his own, but notes a recent and rather wide divergence in ethical theory "through his [Brunner's] increasing adoption, and my increasing rejection, of the concept of 'Natural Law.'" (pp. 431-32). On the other hand, Niebuhr agrees "perfectly" with Fitch that criticism of natural law must be directed *only* against "too detailed and too inflexible 'rules' of conduct." (p. 440).

The reply to Ramsey seems almost a comedy of errors. Niebuhr does not hide his impatience with the elaborateness of Ramsey's defense. He apparently misreads Ramsey as basically disagreeing with *An Interpretation of Christian Ethics* and hastens to "eliminate an area of difference" by disclaiming any ability to defend positions taken in that book. This seems to leave Ramsey suspended in mid-air: where Ramsey finds Niebuhr to have expressed a sound position with greatest clarity, Niebuhr insists he was only dimly seeking his way—yet Niebuhr does not actually reject the position which Ramsey takes such pains to attribute to him.

These aspects of Niebuhr's Reply leave one musing on the hazards of theological polemic and on the limitations of "dialectical" modes of expression. In any event one seems justified in concluding that Niebuhr is not likely to extend the olive branch to natural law unless it changes its name. Nor will he welcome efforts to mediate even from those who have sat at his feet. This is unfortunate; for he thus gives an exaggerated impression of his divergence from contemporary non-Roman theologians like Casserley, political philosophers like Wild, and philosophers of law like Fuller. These men warn as sharply as Niebuhr against trying to derive fixed and detailed precepts from the natural law, but they regard natural law terminology as appropriate for ethical theory which develops from inquiry into the nature of man, and they look to such an approach for ethical criteria relevant to the criticism of law.

Niebuhr does use his insight into man's sinful state in criticizing political and legal institutions. As John C. Bennett expresses it, "Niebuhr's theological teaching about human nature determines the limits of what should be attempted in society." (p. 49). In his Gifford Lectures, Niebuhr locates sin in the will-to-power with which man attempts to gain relief from the anxiety inherent in his finite freedom. Niebuhr has come therefore to reject Marxism because of its optimism as to human nature and because he sees tyranny as the inevitable result of union of political and economic power. His odyssey in regard to Marxism, Socialism and the New Deal is traced in the essays of Bennett, Arthur Schlesinger, Jr., and Kenneth Thompson. Niebuhr recognizes also the ubiquity of greed and acquisitiveness, envy and sloth, and he has criticized British Socialists as sharing "the Marxist illusion that there are limits to 'human . . . desires and ambitions.'" (p. 74). He warns against "pretentious schemes to be imposed on society by 'abstract modes of social engineering,'" and places his hope for justice in the equilibration of power. (pp. 76, 147).

With his understanding of human nature, Niebuhr presumably understands the hazards of economic adjustment through personal confrontation

of power and also the hazards of trying to obtain equilibrium of power through political action. Perhaps he would recognize that, for men as they are, a system in which power is dispersed would be preferable—in which economic adjustments come about through impersonal markets for goods and services which do not rely upon the capacity of men for voluntary accommodation of conflicting interests. Perhaps Niebuhr believes that apart from government action business men have almost unrestrained power, that competitive market disciplines are practically non-existent. Perhaps this is the only reason why he tends to brand defenders of free-market enterprise as "doctrinaire individualists" or "decadent liberals." On the other hand, perhaps a more explicit recognition of the value of impersonal market mechanisms for adjustments among sinful men would bring Niebuhr to re-examine his appraisal of the vitality of market disciplines and to weigh the possible advantages of protecting and maximizing this vitality against the advantages he expects from trying to balance power with power.

Wilber G. Katz †

JAMES WILSON, FOUNDING FATHER, 1742-1798. By **Charles Page Smith.** Chapel Hill: The University of North Carolina Press. Published for the Institute of Early American History and Culture. 1956. Pp. xii, 426. $7.50.

No man makes a swifter, a more utter passage into oblivion than the deceased lawyer. Renown in the profession may have been his, but this will barely survive him. Even the historic importance of the causes with which he has been associated will not serve him as a passport into the gallery of the posthumously famous. This is a matter which the biographers alone are privileged to decide, and they have come to exercise their prerogative only in favor of the lawyer who was translated to the bench or who achieved political eminence. What induces such biographies is usually the sum of what is told. For in the published lives of judges or of political personages whose profession was their first bread, how much is ever related to their practice, their skill as advocates or counsellors, their contributions at the bar to the shaping of the law? Justinian's *suum cuique* is a precept laid upon all men. It is one to which the biographer, in particular, should give first obedience. To write a half-life is unpardonable.

James Wilson practiced law in Pennsylvania for more than two decades. He was a leader in his profession when, in 1789, Washington appointed him to the United States Supreme Court. Here he served nine years. As a member of the Continental Congress he had participated in the

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framing of the Articles of Confederation. Subsequently he played an important role at the Constitutional Convention of 1787. He delivered the first law lectures at the Philadelphia college which merged with the University of Pennsylvania, and thus cut himself a niche in the history of American legal education.

This was a life lived as a lawyer, and later as a judge, in a period no less critical for the future of the law than for the political fortunes of the states and of the nation. Only if written in these terms can a biography of Wilson render him his due. This Mr. Smith has not done. He has, instead, elected to tell his tale in terms of the political events and thought of the times. The morsels of fact about Wilson's professional activities before his elevation to the bench, even, indeed, of his work as a judge, are dispensed with a sparing hand. The effect is episodic, and is not mitigated by the fact that the items were chosen in contemplation of their relevance to the sort of story Mr. Smith has chosen to tell. A first example is the account of Wilson's apprenticeship in John Dickenson's law office.

Manuscript material has been preserved in sufficient amount to reconstruct an informative picture of what the course of study in a late colonial Philadelphia law office involved. Mr. Smith, however, seems concerned only in what these sources reveal with respect to a grounding in political ideas. It is interesting, of course, to learn that young Wilson conned the fashionable philosophers. He must, however, have done something more substantial to satisfy his preceptor. The study books listed by Mr. Smith include the names of twelve philosophers as against but four who wrote on the common law. He mentions no law reports unless the cryptic reference to "Hardwicke" can be taken to refer to *Cases temp. Hardwicke*. On this showing Wilson would have come to bar with a defective foundation in the law. In view of his record this seems improbable. We should not be left to wonder how he equipped himself for a profession in which he was to make his mark.

Wilson began his career at the bar as a country lawyer. What the nature and range of his practice was we are not told. Mr. Smith states in his notes that he examined the judicial records of Berks, Cumberland and other counties. Yet beyond statistics on the number of the cases in which Wilson appeared as counsel at certain terms of various courts of common pleas no exact details are vouchsafed. The compilation of such details from manuscript records is dull business, as this reviewer can testify. It seems not unreasonable, however, to expect that in a biography of one who was one of the first appointees to the United States Supreme Court, searching inquiry would be made into the subject's work at the bar for the light it might throw upon his professional competence. Unlike some of the colonies where practice in local courts was small beer, indeed, Pennsylvania had made its courts of common pleas the chief locus of original jurisdiction in civil causes. Here Wilson seems to have conducted the major part of his practice. He had also been admitted to the provincial Supreme Court in 1769 and Mr. Smith intimates that he travelled the circuit. The oppor-

tunities to develop a high degree of professional skill were obviously present. The question remains what Wilson made of them.

In 1778 Wilson moved to Philadelphia. Mr. Smith assures us at the end of his chapter, "A Philadelphia Lawyer," that Wilson had "one of the largest and most successful practices in America." There is precious little offered in support of this assertion. Except for the pair of treason cases of Carlisle[1] and Roberts,[2] and an account of Wilson's employment by Benedict Arnold to argue Olmstead's claim in the appeal of the sloop "Active," no samplings of this practice are mentioned. Two executed traitors and one who barely escaped the noose seem hardly the type of clients to promote a volume of retainers.

It happens, however, that in the first two volumes of Dallas' *Reports* is discreted some further evidence on Wilson's practice. Mr. Smith indicates in his notes that he consulted both volumes and it is remarkable that he should have overlooked the numerous cases where Wilson appeared as counsel and where the arguments are summarized. On many occasions Wilson had co-counsel and here the task of fixing what his own contributions may have been presents a problem. Dallas states in the preface to his first volume that he had access to the briefs of counsel, and it would seem to have been an obvious move to discover if any of these are still extant, and, if so, to examine them. There is no indication that this was done. These cases in *Dallas* played a role in the development of Pennsylvania's law, as a glance at Mr. Shephard's admirable *Citator* will reveal. Surely Wilson's part in *Pollard v. Shaffer*[3] wherein McKean, C.J., was led to remark on the status of equity in Chanceryless Pennsylvania, to the discomfit of Wilson's client, is at least as deserving of examination as his views on the law of treason. But Mr. Smith was impelled to the strange choice of *Carlisle* and *Roberts* as a prelude to an attempt to father on Wilson the treason provision of the United States Constitution. He fixed on Olmstead's claim because he is persuaded that the case of the sloop "Active" is "one of the most famous cases in American legal history"—an opinion this reviewer does not share.

Of Wilson the judge Mr. Smith has a little more to say than of Wilson the lawyer. Nevertheless, even for a reader conversant with the early history of the federal judiciary it will be difficult to evaluate Wilson's contributions on the basis of what is presented in this book. This is due chiefly to the fact that Wilson's judicial opinions are noticed in the course of a general narrative of events in his personal life, in particular his business speculations during this important period. Furthermore, the examination of Wilson's work in the circuit courts is woefully incomplete. It is, perhaps, excusable that contemporary newspapers, which Francis Wharton and after him Charles Warren found useful sources, were not searched. It is not easy to understand, however, why Wilson's published opinions were

1. Respublica v. Carlisle, 1 Dall. 35 (Pa. 1778).
2. Respublica v. Roberts, 1 Dall. 39 (Pa. 1778).
3. 1 Dall. 210 (Pa. 1787).

not fully considered and why clues in the reports respecting his activities in the circuit courts were not pursued. The Judiciary Act of 1789 conferred upon these courts a large original jurisdiction. Mr. Smith, however, has given only two samples of Wilson's work as trial judge—*United States v. Ravara*[4] and *United States v. Henfield*.[5] These are examined without reference to the issue then boiling up, whether or not there was a federal common law—a matter on which Wilson had decided opinions. As for the appellate jurisdiction of the circuit courts, Mr. Smith mentions only Wilson's circuit opinion in *Hylton v. United States*.[6] The fact that certain causes came to be finally adjudicated in the Supreme Court is no excuse for ignoring intermediate appellate opinions, especially in a biography of the man who delivered them. Indeed, his views cannot be otherwise understood, because when opinions were delivered seriatim in the Supreme Court the Justice who had spoken at circuit abstained from expressing his own conclusions in the higher court. It would be no less enlightening to have the circuit opinion in the instances where the Supreme Court's decision was per curiam.

Admittedly, some of Wilson's circuit opinions are not of a character to entice a lay historian. But this cannot be said of the cases precipitated by the enforcement of Washington's neutrality policy. For example, Wilson had the Middle Circuit when *Glass v. The Sloop Betsey*[7] came up from the district court. While on the Southern Circuit in 1794, he appears to have given an opinion in *Strannock v. The Friendship*[8] and also in *Talbot v. Jansen*,[9] a case out of which a prosecution for piracy resulted that Wilson tried. No search for these opinions or others unpublished appears to have been made. So few were the years that Wilson sat on the bench, so small the volume of judicial business which came before him that no effort should have been spared to settle how well he adorned his office.

If these criticisms seem to go primarily to questions of judgment in the choice and handling of legal materials, they nevertheless raise inferentially the question of competence. A scholar's critical apparatus is the place where a reviewer looks to resolve his doubts. This book, unfortunately, is so meagerly footnoted that one is led inevitably to wonder how exacting was the search and collation of judicial records as well as of the extant Wilson papers. This could not, it is believed, be done effectively without some working knowledge of eighteenth century English law, particularly in its colonial and post-Revolutionary manifestations. Mr. Smith's qualifications in this particular are revealed in the course of discussing Wilson's first law lectures at the College of Philadelphia.

4. 2 Dall. 297 (C.C.D. Pa. 1793); see WHARTON, STATE TRIALS OF THE UNITED STATES 90 (1849).

5. *Id.* at 49.

6. 3 U.S. (3 Dall.) 171 (1796).

7. 3 U.S. (3 Dall.) 6 (1794).

8. 4 MOORE, INTERNATIONAL ADJUDICATIONS 150-51 (modern series 1931).

9. 3 U.S. (3 Dall.) 133 (1795).

Mr. Smith believes that, in America, a legal revolution began "in the early seventeenth century and ended, for all practical purposes, in 1789." (p. 318). He starts with the Puritans who "were emphatic in their rejection of English law and their substitution of Biblical law." (p. 316). The experiment failed but

> ". . . the attitude of opposition to English law which the Puritans carried with them prevailed as the dominant pattern throughout the colonies. . . .
>
> "Colonial America was, for the most part, anti-legal or a-legal well into the eighteenth century. Lawyers were looked down on and even legislated against. They had less status than honest artisans, and indeed constituted in colonial eyes a pariah caste." (p. 317).

It seems strange in this day and age to come upon an uncritical acceptance of the undocumentable thesis of the utter supremacy of the Bible in colonial law. What is no less curious is that there should be a new subscriber to the doctrine, so long cherished in certain quarters, that the early history of the Bay Colony holds the explanation of everything that took place in less God-fearing provinces. Our acquaintance with a variety of colony records indicates that the sources of many colonial rules and practices are to be found in English local law and custom. As ignorance yielded to learning, the rude imitation of models, themselves of a provincial cast, was succeeded by an inexorable movement toward an ever increasing absorption of common law. Furthermore, if one is justified in supposing that litigiousness is the very contrary of an "anti-legal" or "a-legal" disposition, the scores of minute books of colonial local and superior courts are conclusive on a passion for going to law not of a flight from it. As for the lawyers, the pristine seventeenth-century prejudice may be laid as much to the half- or un-educated men who were first to practice in this land as to the bias of settlers who had had unhappy brushes with the law at home. Surely, Mr. Smith does not believe that early eighteenth-century lawyers like James Emott in New York, Andrew Hamilton in Pennsylvania, the elder Daniel Dulany in Maryland or John Randolph in Virginia, and their fellows were viewed as so many social outcasts?

Mr. Smith next advances the view that the increasing complexity of colonial society "forced the gradual acceptance of common law, and by the middle of the eighteenth century, colonial America was ready for a great legal renaissance." (p. 317). It is his opinion that "where the legal revival in England expressed itself in excessive formalism, colonial law, while by no means unaffected by this English trend, was forced into broader and more democratic channels." (p. 317).

Lawyers who have occupied themselves with the problem of the transplantation of law to America are cognizant of how little the growing complexity of society had to do with the process of imitating or adapting common-law rules and practices. Some of this reception was the result of

local administrative action as, *e.g.*, in New York, where primogeniture and entail came in under Dorgan (1683-88). But for the most part it was the tightening of imperial controls, which began under Charles II, and the immigration of lawyers that hastened the process. By 1750 this process of absorption and accommodation was far advanced in many of the provinces, and the power of this movement was not spent until long after independence. As long as the Crown exercised its power of review, there was little or nothing provincial legislatures could do to cut "broader and more democratic channels." The proposition remains to be proven that the conduct of litigation cut such channels when everything, English law-books, legal education and the appellate structure, conspired to assure that practice should be molded in the image of English prototypes. If Mr. Smith found support for his proposition in the Pennsylvania manuscript records consulted by him, he should have proffered it, particularly as the colonial cases in *Dallas* read otherwise. The effect of this naked assertion upon the reviewer was merely to heighten a suspicion that the author is not sufficiently conversant with the law of the times to do justice to his subject.

The comments on the shortcomings of this book have been confined to the treatment of only one aspect of Wilson's active and varied career, for it is this phase of the book that the writer believes he is most competent to judge. Much could be said, however, about the handling of Wilson's personal life and political activities. The whole is smothered with so much undocumented, indeed palpably fanciful detail—it is dotted with so many "perhapses," "probablies" and "no doubts," that this reviewer at least had the sensation of fishing through a superfluity of sauce for an occasional scrap of meat. It may be a mere matter of taste to prefer the gaunt text of the *Journal of the Continental Congress* to a version with such interpolations as "Wilson was heard with respectful attention" (p. 83); or to find it easier to follow Madison's *Notes* on the Constitutional Convention without such glosses as Dickenson's "face flushed with annoyance." (p. 226). Embroidery of this sort is not necessarily harmless, for it has often, as in the instances cited, a tendentious quality, and when it has should be clearly labelled as author's conjecture. A desire to make history interesting is praiseworthy, but it should not be indulged to the point of shaking the reader's confidence in a writer's candor in what he presents as facts.

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