

BOOK REVIEWS

CASES ON BUSINESS ORGANIZATION. (Volume two.) By Roswell Magill and Robert P. Hamilton. West Publishing Co., St. Paul, 1935. Pp. xxiv, 1349. Price: \$5.00.

The first volume of this two-volume series is limited exclusively to the law of Agency and has been reviewed in an earlier issue of this *LAW REVIEW*.¹

The present volume is devoted to the law of business associations, both incorporated and unincorporated. The materials are divided into three major sections with comparatively few subdivisions. The first section is entitled "Nature and Formation"; the 128 pages allotted to this subject are divided into five parts, (a) partnerships, (b) corporations, (c) limited partnerships, (d) joint stock associations, and (e) business trusts, of which only 19 pages relate to corporations. The second section is called "The Going Concern" and has four principal subdivisions: (1) allocation and exercise of powers of management, (2) duties and liabilities of managers, (3) creation of claims against the enterprise, and (4) distribution of assets. Each of these subdivisions contains separate subsections devoted to each of the five aforementioned types of business associations. This second section contains 791 pages, 565 of which concern corporations. The final section, "Solvent Dissolution", has four subdivisions, (1) causes and methods of dissolution, (2) powers, duties and liabilities of liquidators, (3) liability for claims against the enterprise, and (4) distribution of assets. As in the earlier sections, each of these subdivisions presents separate subsections on partnerships, corporations, limited partnerships, joint stock associations and business trusts. Of the 318 pages in this section, 133 are devoted to corporations.

It thus appears that corporation law occupies only about 58 per cent. of the book. An even smaller percentage of the text-cases are selected from the corporate field: the volume contains 188 principal cases, of which 101, or less than 54 per cent., involve the law of corporations. Such a division of the materials would appear to accord undue emphasis to partnerships and other forms of unincorporated associations. Owing to the phenomenal increase in the use of the corporation as a business device, remarkable development in the law of corporations has occurred during the past three decades. Throughout the same period a correlative decline in the commercial popularity of the partnership has brought about a virtual standstill in the development of the law of that subject. The consequence is that for an adequate course in the law of corporations there is required today more material and more time than the orthodox course of four semester hours allows; conversely, the law of partnerships today scarcely justifies a separate course of even two semester hours. One of the advantages of combining the subjects of corporations and partnerships into a single course should be that thereby the treatment of the law of corporations could be expanded and that of partnership decreased without unbalancing the curriculum, while at the same time creating a highly desirable opportunity to compare the functioning, from a legal standpoint, of the corporation with the unincorporated association, whenever such contrast might be deemed valuable. The present volume, by unyieldingly dealing with the law of partnerships, limited partnerships, joint stock associations and business trusts under each subdivision at the expense of additional corporate material, thus fails to achieve one of the principal justifications for its existence.

The disproportion between the attention given to unincorporated associations and to corporations in this volume is emphasized by comparison with other

1. Steffen, Book Review (1933) 82 U. OF PA. L. REV. 190.

standard casebooks on these subjects. About 520 pages are here allocated to unincorporated associations; the latest edition of Crane and Magruder's *Cases on Partnership* contains about 570 pages and the recent volume by Clark and Douglas has less than 700 pages. On the other hand, Canfield and Wormser's casebook on Private Corporations contains over 1100 pages and the 1924 edition of Richards' casebook has about 1000 pages, as contrasted with the 730 pages on corporations in Magill and Hamilton's book despite the many new developments in the law of Corporations since 1924.

The inclusion of so much material on unincorporated associations apparently caused the editors to omit or minimize some currently important fields of corporate law. For instance, the vital problems surrounding the issuance of securities are almost totally disregarded—such topics as overissues, Blue Sky laws, watered stock, fraudulent subscriptions, conditional subscriptions, *etc.*, are virtually omitted. Promoters receive scant attention. The matter of instituting and defending actions other than shareholders' suits is not presented. No detailed consideration is given to accountancy, especially with reference to dividend payments. Statutory mergers and consolidations, redemption of shares, statutory reduction of capital stock, borrowing and lending for short terms, transfers of shares, holding companies—these and kindred matters are neglected. All problems relating to the insolvent enterprise have been excluded for the excellent reason, as explained by the editors, that this topic overlaps the field occupied by other courses. But it would seem as if this exclusion need hardly have been carried to the rigorous extent of omitting all mention of such a famous decision as *Case v. Beauregard*,² especially as so much other partnership material is included.

Of the 1250 pages exclusive of the appendix over one-quarter consists of text-notes containing discussion of other authorities and references to periodical literature supplementing the reported cases. Tremendous industry on the part of the editors is here revealed, and the material collected and cited in these notes should prove of great aid to those embarking on analytical studies of the subjects to which the notes relate.

Alexander Hamilton Frey,†

LIQUID CLAIMS AND NATIONAL WEALTH. By A. A. Berle, Jr., and Victoria J. Pederson. The Macmillan Co., New York, 1934. Pp. xv, 248. Price: \$2.50.

This book is a very thorough study based on the whole economic literature about the subject and amplified by valuable statistical compilations and interesting observations. It seems, however, doubtful whether the authors, promoting the argument further into the direction of "shiftability" (to use this term of a modernistic school), have really brought the problem of liquidity closer to a solution.

"Real" liquidity (*i. e.*, quicker convertibility into cash) is, in the authors' opinion, based on the flow of perishable goods to the consumer which is supposed to be kept at a relatively even tempo by the dynamo of effective demand: "'Artificial' liquidity exists where either the asset itself cannot be sold without the intervention of some financial mechanism, or where the time required for it to reach its destination at the going price is so long as to make it virtually non-convertible into cash unless some financial device is interposed to 'carry' the asset until the demand appears and is made effective." But it is easy to see that in fact there is no artificial liquidity at all because the total amount of wealth (whether represented by titles or not) is so much greater than the available flow

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2. 99 U. S. 119 (1878).

of savings, even during a whole year, that only unlimited creation of fiat money could satisfy an unusual demand for conversion. Indeed the sooner the investor gets rid of the notion that he can have at the same time the usual return from his capital and convertibility at face value, the better for the organism of the capital market. The superiority of the European market for mortgages and mortgage bonds over the American market does not consist in any greater "liquidity", secured by a central mortgage bank, but in the fact that banks as well as investors never hesitate to allow free play to the secular variations of the long-term interest rate on the market value of their securities. For this reason the increase of so-called liquid claims (in Berle's meaning) relative to national wealth from sixteen *per cent.* in 1880 to forty *per cent.* in 1930 was not dangerous for the stability of the financial system; on the other hand it becomes more and more inevitable as the small entrepreneur vanishes and as the lower middle classes get rid of the habit of putting savings into stockings.

Liquidity has, therefore, to remain a banking concept in the sense that it governs the investing policy of commercial banks which have to meet large obligations in the form of bank notes and demand deposits. Any kind of short-term paper (bills or short-term bonds) would suffice to keep the bank solvent as long as the claims for legal tender are only small. The working capital concept as elaborated in the last hundred years by the orthodox banking school, and again by Berle and Pederson in their concept of real liquidity, claims much more; namely, to meet also a great demand for conversion and to regulate the volume of bank credit (and thus of purchasing power in so far as based upon bank credit) according to the legitimate needs of business. Both arguments have undergone heavy and convincing criticism; it is therefore surprising that the authors have paid no more attention to this important side of the liquidity concept.

Here the weakest part of the book is to be found. A complete analysis of economic circulation in the different phases of the business cycle is lacking; the monetary side of circulation is entirely neglected and on the real side only the flow of perishable consumers' goods is dealt with, while an analysis of the flow of capital goods and durable consumers' goods is absent, obviously because the effect of demand for these goods is thought to depend on the heavily fluctuating flow of savings.

The case for or against liquidity in the classical sense of short-term paper representing mainly working capital of the debtors is, therefore, not closed by this book. In the reviewer's opinion, despite the severe criticism applied to the arguments of the orthodox banking school by numerous writers, the case for liquidity in this classical sense is not a hopeless one as long as commercial banks are not limited in the handling of demand deposits to any greater extent than they are limited in the issue of bank notes.

Hans Neisser.†

DE JURE NATURAE ET GENTIUM LIBRI OCTO (Volume one—original; Volume two—translation by C. H. Oldfather and W. A. Oldfather). By Samuel Pufendorf. Oxford University Press, New York, 1934. Pp. 66a, 1002; 64a, 1465. Price: \$10.00.

JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Volume one—original; Volume two—translation by Joseph H. Drake). By Christian Wolff. Oxford University Press, New York, 1934. Pp. vii, 411; lvi, 411. Price: \$10.00.

Students of international law have long been indebted first to the Carnegie Institution of Washington and later to the Carnegie Endowment for International

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Peace for putting at their disposal the texts of the Classics of International Law. One after another the great treatises which mark the growth of international law during the seventeenth and eighteenth centuries have appeared, and each time the student has had new light thrown upon the historical background of his subject. Outstanding among the volumes that have already appeared in the series of Classics are the works of Victoria, Grotius, Zouche, Pufendorf, Bynkershoek and Vattel; while those of Legnano, Ayala, Gentili, Rachel and Textor have been only to a lesser degree valuable aids to the study of the origins of our present law.

The special contribution of Pufendorf to the development of international law consists perhaps in his assertion of the supremacy of the "natural law" as against the force of custom and treaties. This thesis is developed in a series of eight books, in the first six of which the author deals with such broad problems as the origin and variety of moral entities, the rule of moral actions or law in general, the natural state of man and the law of nature in general, the natural equality of men and the duty of keeping faith when promises are made, the acquisition and occupation of property, contracts and partnerships, and domestic relations. The last two books deal with the establishment and internal structure of states, the forms of states and the sovereignty of the state over its citizens, the law of war, treaties, changes within states, and the dissolution of states. Throughout his work Pufendorf is seeking the true sources of a judicial system, and these he finds to be in the law of human reason and in the "nature of things". While it can not be said that the abstract theories of Pufendorf produced any very significant direct effect upon the development of international law, they did influence greatly the views of a number of subsequent writers and they greatly strengthened the moral foundations upon which law must ultimately rest.

The contribution of Wolff was not unlike that of Pufendorf in so far as he too made the law of nature the basis of his system. But Wolff undertook to give a much more specific application of his principles to the practical problems of statesmanship. The Introduction to the volume, by Nippold, emphasizes the fact that the principles laid down by Wolff,—equality, liberty and the sovereignty of the people, are the principles of the living present. While Wolff's system was peculiar to his own age and is not in keeping with the conditions or methods of thought of the present day, "he created," says Nippold, "the postulates of all future progress". On the title page of his treatise Wolff calls attention to the fact that he is treating the law of nations "according to a scientific method" in which "the natural law of nations is carefully distinguished from that which is voluntary, stipulative and customary." The successive chapters of the work deal with the duties of nations to themselves and to one another, the ownership of territory, treaties, the law of war and of neutrality, treaties of peace, and the law of embassies. While the fame of Wolff was general throughout Europe, it is doubtful whether his work would have exercised its widest influence had not the Swiss scholar Vattel undertaken to popularize it in a work on the Law of Nations, published in 1758, which became a manual for statesmen for the next hundred years.

The translations of the two works are ably done and present the thought of the two writers with smoothness and clarity. In the case of both works attention must be called to the very able introductions, the one by Walter Simons surveying the life and influence of Pufendorf and the other by Otfried Nippold giving a similar critical appreciation of Wolff. Once more it must be emphasized that the scientific study of international law as a basis for its constructive development will be greatly assisted by these and other volumes of the Classics of International Law. The present problem of statesmanship is to devise ways and means of extending international law into new fields hitherto left to the discretion of the

individual state and a source of international controversy. The regulation of relations within a number of these fields is essential as an alternative to international anarchy. There is reason to believe that the solution of this vital problem will proceed more effectively if it be approached with an understanding of the development of international law within the past three hundred years.

C. G. Fenwick.†

ECONOMIC ESSAYS IN HONOUR OF WESLEY CLAIR MITCHELL. Columbia University Press, New York, 1935. Pp. ix, 519. Price: \$3.75.

This collection of seventeen essays, presented to Professor Wesley C. Mitchell by his former students on the occasion of his sixtieth birthday, offers eloquent testimony to the inspired teaching of a great economist. Moreover, since it runs the gamut of economic research from practical studies of real estate fluctuations to considerations of the inchoate state of some sections of economic theory, it testifies to the catholicity of the interests that Professor Mitchell has evoked in those who have had the good fortune to work with him.

Perhaps the decision to arrange the essays alphabetically by authors saved some embarrassing problems of classification but, in one sense at any rate, it is to be regretted since it deprives the volume of any organic unity. The browsing reader will find something worth thinking over on almost every page, but to the layman the haphazard miscellany may prove rather trying since he is compelled to jump from an exegesis on the Marxian theory of value to an analysis of the relationship between capital goods and consumer's goods, and then on to a consideration of the problems of urban decentralization. Moreover, one might wish that the volume had included a brief essay on Professor Mitchell himself, and an index would have been invaluable to any one of the many people who will wish to keep this volume at hand for further reference.

Despite these superficial defects, however, there is an essential harmony to the book, in that it represents a joint effort to elucidate further the problems that confront us in a dynamic economy—an effort with which Professor Mitchell's own name will always be associated in the minds of students. As Dr. Frederick Mills admirably says, "Each generation faces anew the problem of interpreting its experience. The formal guides to such interpretation which are provided by the doctrines of past generations are always, in some degree, irrelevant and inadequate. Defects in the doctrines may be revealed when the test of new experience is applied. Perhaps more important, in a changing world, are the alterations which time brings in the conditions of existence" (p. 357).

With this idea in mind, one might well begin with Professor Florence's analysis of the obstacles that exist in economics to a precise and measured scientific approach, and follow this with Dr. Mills' study of the changes that have recently occurred in the structure of economic life. Both of these essays are excellent, and form an admirable prelude to Mr. P. W. Martin's provoking appraisal of the advantages and disadvantages of economic planning. With these ideas in mind—although few readers will be able to agree completely with all three essays—the rest of the book can be approached in any one of several ways. One might take first the essays dealing with the practical problems of housing and real estate, proceeding to those concerned with such subjects as the problems of mass purchasing power and the role of the middle classes in social development, and ending up with the closely reasoned contributions to economic theory furnished by such outstanding students as Dr. Kuznets and Dr. Thorp.

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This, however, is only one of several alternative ways in which the feast can be enjoyed and it can safely be predicted that, no matter in what order he may sample the courses, the reader of this volume will not be disappointed. In no other volume that has come to the hands of this reviewer in recent years are there collected so many diverse analyses of different aspects of the economic problems that confront us.

F. CYRIL JAMES.†

THE EFFECT OF AN UNCONSTITUTIONAL STATUTE. By Oliver P. Field. The University of Minnesota Press, Minneapolis, 1935. Pp. ix; 355. Price: \$5.00.

This book is a treatise on a small special sub-topic under the topic of judicial power, but this special topic is thoroughly treated. Most of the chapters in the book have been heretofore published in various law magazines, but new chapters on *res adjudicata*, *stare decisis*, overruling decisions, mistake of law, and judicial review have been added. The first work of Mr. Field in this study was published in the *Indiana Law Journal*. Since that time Mr. Field has attained a mature grasp of the whole subject, and a ripening of judgment, and a facility of expression which make this book a product of real scholarship and an authority upon the subject treated.

The book contains twelve chapters. Chapter I is an introduction which explains the various theories as to the effect of unconstitutional statutes. Chapter II develops these theories so far as they relate to the organization of private corporations and Chapter III so far as they relate to the organization of municipal corporations. The author shows that, except where there have been no dealings between the parties, there can be a *de facto* private corporation under an unconstitutional statute, either because of the *de facto* doctrine, or because of estoppel; but that in the case of a municipal corporation, the void *ab initio* doctrine is not applied even to this extent. Chapters IV and V relate to the status and liability of public officers. In Chapter IV it is shown that only persons in official capacity, claimants and independent officers, not including inferior officers, may assail an office under an unconstitutional statute so far as concerns the creating, filling, and the particular functions of that office, although a private individual may sometimes assail the creation of the office. Chapter V shows that officers are liable for refusal to act if a statute turns out to be constitutional; and are liable for taxes paid under protest; and for interference with personal liberty under unconstitutional statutes; and that there is conflicting authority for their liability for interference with property and for the executing of process under unconstitutional statutes; but that the government is not liable because of the rule that it is not liable unless it consents to be sued.

In Chapters VI and VII the author points out the difference between the rule of *res adjudicata* and the rule of *stare decisis*, and shows the effect of overruling decisions. His treatment of these topics is very clear, and his illustrations are illuminating. However, there is one illustration which the reviewer wishes that Mr. Field had used. Suppose that an amendment to a constitution is declared by a state supreme court not to have been adopted because not receiving a majority vote of the electors when the court took the view that a majority of the electors meant a majority of all those voting in an election. Suppose that a later decision should overrule this first decision in a case involving another amendment, when the court adopts the rule that the majority of the electors means a majority of those voting on the amendment. Will the new decision

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have the operative effect of making the first amendment constitutional? The reviewer takes the position that it would not because of the rule of *res adjudicata*, but that it would have the operative effect of reviving a third amendment which had not been declared not adopted, provided it had received a majority of the electors voting on the amendment, because only the rule of *stare decisis* would apply to such an amendment.

Chapters VIII, IX, and X have to do with the liability of private parties and the government on bonds and their rights where there have been payments under mistake of law. In Chapter VIII there is pointed out the difference between the liability of private parties on bail bonds and bonds for the lease of property and bonds for loans to the government and the non-liability of the government on bonds for loans to private individuals. In Chapter IX it is shown how, in the case of mistake of law, equitable disposition of the cases is made in the case of private payments to private individuals, and private services rendered to private individuals, and recovery is allowed in the case of private donations to the government; whereas, no recovery is allowed in the case of the rendering of private services to government: and that, in the same way, in the case of payments by one government to another government, recovery is allowed, although in the case of payments to officers or other individuals the cases are in conflict. Chapter X traces the law which permits preventive relief before unconstitutional taxes are collected but denies recovery after taxes have once been paid, unless they are paid under protest or compulsion, or unless refunding statutes provide for repayment. In such cases, apparently, the doctrine of void *ab initio* is ignored for other doctrines considered of more importance.

Chapter IX treats of methods of making effective again legislation which has been declared unconstitutional, and Chapter XII gives a brief summary discussion of judicial review as a device of government rather than as a mere legal doctrine.

The book also contains a good table of contents, table of cases, and a general index. Most of the chapters end with a conclusion, or summary, which gives the book added practical value.

The reviewer is glad to have the book for his own personal reference and recommends it for the use of law students and teachers.

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