

BOOK REVIEWS

SELECTED ESSAYS ON CONSTITUTIONAL LAW, Vol. I: Book I, THE NATURE OF THE JUDICIAL PROCESS IN CONSTITUTIONAL CASES; Book 5, TAXATION. Compiled and Edited by a Committee of the Association of American Law Schools. The Foundation Press, Inc., Chicago, 1938. Pp. lxi, 928; xxxv, 832. Price: \$15.00.

Much of the best law writing of today is to be found in the Law Reviews. The extent of painstaking effort involved in student notes, wherein each statement is carefully buttressed and each word thoughtfully weighed, would surprise those who have not experienced that stage of cautious venture into print in connection with the vast uncertainties of the law. The authors of leading articles have more play for the imagination and presumably do not sweat out their statements phrase by phrase. Yet their work often represents ideas long mulled over and frequently tried out on the agile and discerning minds of students. The Law Reviews have been accused of lacking levity and sprightliness. But they cannot be accused of lacking meticulous and thoughtful care. The selected essays are drawn from this storehouse of material. In making more readily available much of the best of this material, they perform a most valuable service.

In surveying the essays of legal authors one is often impressed by the frequency with which the ideas advanced have eventually been accepted by the courts. The fulfillment of prophecies may largely be the result of the prophet's own efforts. Teachers affect the law through the respect some courts have for their opinions. By a method which is slower but ultimately more effective they may mold the law through their students, who later comprise the bench and bar. It may well be believed that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Yet the teacher of strong personal force and intellectual power with access to many able minds in their impressionable years can readily give his thoughts a striking competitive advantage. In graduate law schools which train teachers there is a sort of geometric progression in this regard. In any school the business of the law professor is very much affected with a public interest.

Instances are present in these essays wherein the heresy of the past has tended to become the orthodoxy of the present. Surely, when it appeared in 1918, Thomas Reed Powell's delightful article on "The Logic and Rhetoric of Constitutional Law" hardly represented the way the "right thinking people" thought about constitutional law. The articles of Professors Corwin, Field, Hale, Haines and others on judicial review may be read in the light of recent tendencies to contract the scope of judicial review. It may be a bit of craft conceit yet it seems fair to say that if the professors become sufficiently unanimous and vigorous against any rule or theory, its end is in the making.

Volume One of the *Selected Essays* comprises two major topics: The Nature of the Judicial Process in Constitutional Cases; and Taxation. The volume opens with Professor Corwin's great essay, "The 'Higher Law' Background of American Constitutional Law". It furnishes a most worthy beginning for a distinguished series.

The Nature of the Judicial Process in Constitutional Cases is presented under five headings: The Origins of Judicial Review; The Develop-

ment of Judicial Supremacy; The Nature of the Power of Judicial Review; The Exercise of the Power of Judicial Review; and Appraisal of Judicial Review. In all, some nine hundred pages are devoted to this topic; more in fact than are devoted to the subject of Taxation. In the light of the practical purposes of the compilation, the subject, judicial review, appears to have received a disproportionate share of the available space. Yet the term is used broadly and in this group of essays are articles which will be read and reread. Especial mention should be made of Corwin, "The Doctrine of Due Process of Law before the Civil War"; Haines, "The History of Due Process of Law After the Civil War"; Maggs, "The Constitution and the Recovery Legislation: The Roles of Document, Doctrine and Judges"; Biklé, "Judicial Determination of Facts Affecting the Constitutionality of Legislature Action"; and Hamilton, "The Jurist's Art". The student is fortunate in having such papers as these close at hand.

It is at this date doubtless a futile exhibition of personal idiosyncrasy to rail at the inaccuracy of the expression, "judicial supremacy" as used in this volume. Congress may and does give effect to its opinion of unconstitutionality in the rejection of bills proposed and the repeal of statutes. The President may give much effect to his opinion of unconstitutionality through the veto power. The action of the Court in giving effect to its opinion of unconstitutionality has been, at times, tremendously dramatic. Yet the dramatic factors incident to judicial elimination of legislation hardly seem to justify the title of *supremacy*. The term, though inaccurate, doubtless has effectiveness in the curtailment of judicial review. Judicial *supremacy*, taken literally, is manifestly repugnant to representative government.

The substantial revolution of the past few years in constitutional law has emphasized the ephemeral character of the summary or digest type of article. That the editors have chosen their articles wisely is evidenced by the fact that so little of the work offered as Constitutional Law has yet passed into the realm of Constitutional History. This is no trivial feat, particularly in the field of taxation. This subject is presented under six main topics, as follows: Some Limitations Held to Result from the Due Process and Equal Protection Clauses; Jurisdiction to Tax; Taxation Affecting Interstate Commerce; Taxation of Governmental Instrumentalities; Special Limitations on Federal Taxation; and Miscellaneous Topics.

Of these, the one most recently involved in substantial flux is that of Taxation of Governmental Instrumentalities. Here some of the articles are particularly timely. Thus articles of Professors Corwin and Powell deal with national taxation of the income from state and municipal bonds. In the former an assertion is made of "correct theory" under which the national government can reach such income. In the final result it may well be wondered whether "correct theory" is quite as important as the anxiety of Senators and Representatives in Congress Assembled over the borrowing power of their respective states and the interest rates which must be paid by them.

The searcher for a generic criticism of the volume may find his cue in the words "correct theory". The reader will be aware of a constant quest for sound doctrine. He may feel that, on the whole, law writing is too content with an elaboration of doctrine, without enough concern for economic, social, and political considerations. There is merit in the idea that in a collection of essays on constitutional law there should have been more attention paid to work evaluating these forces which play so large a

part in shaping the law. That this is true does not minimize the importance or the excellence of the doctrinal discussions included.

There is a familiar statement to the effect that what is not in the index is not in the book. In other words what is not readily available is not available at all. The exaggeration emphasizes the great value of availability. The editors of these essays have done a difficult job extremely well. In making more readily available this important material they have performed a most useful service to all students of American constitutional law.

F. D. G. Ribble.†

SELECTED ESSAYS ON CONSTITUTIONAL LAW, Vol. II: Book 2, LIMITATIONS ON GOVERNMENTAL POWER. Compiled and Edited by a Committee of the Association of American Law Schools. The Foundation Press, Inc., Chicago, 1938. Pp. lxii, 1546. Price: \$15.00.

The Association has again performed a public service in bringing together the 84 essays and notes contained in this valuable work. The present book is devoted entirely to Limitations on Governmental Power. These are classified on a broad basis in six main divisions—General Ideas, Particular Doctrines, Government Interference with Business Enterprise, Eminent Domain, Political and Social Rights, and The Administration of Justice.

At first glance it seems that the Committee might readily have used a simpler grouping corresponding more nearly to the familiar classifications of constitutional law. However, the excellent table of contents, table of cases and index remove the force of this criticism.

The reader is offered a notable repast rich in the products of writers on American constitutional law and political theory. These include the brilliant historical essay of Arthur T. Hadley on "The Constitutional Position of the Property Owner"; the spacious, philosophical reasoning of Roscoe Pound on "The New Feudal System" and "Liberty of Contract"; the scholarly and dependable handling of "Liberty under the 14th Amendment" by Charles Warren; F. C. Bonbright's interesting discussion of "The Economic Merits of Original Costs and Reproduction Costs" in utility regulation; E. S. Corwin's historical summary of "Freedom of Speech" and Zechariah Chafee's zealous brief for the same; the illuminating discussion by B. H. Hartogensis of "Denial of Equal Rights to Religious Minorities in the United States"; and in the criminal law field a notable survey by Robert P. Reeder, "Comment upon Failure of Accused to Testify". All these writers and many others are represented in samples of their best work.

The editors are to be congratulated on their success in the selection of writers and topics and especially on the impartial forum-like nature of the symposia. They have resolutely adhered to the determination to present all important shades of the spectrum of opinion.

In a banquet of such excellent quality and such large proportions it may seem ungracious to look for different viands, or more. Only hasty running comment need therefore be made upon the materials which might have been included. So, for example, at the time of going to press there was already much discussion, in the field of transportation, of the Federal Motor Transportation Act, governing bus and truck traffic. In labor there

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were the decisions on *West Coast Hotel v. Parrish*,¹ and *National Labor Relations Board v. Jones and Laughlin*.²

On freedom of speech there was much more and much better material than the one and a half page law review note on Huey Long's press gag law and its decent burial in *Grosjean v. American Press Company*.³ So, too, there was available a far better treatment on *Near v. Minnesota*⁴ regarding previous restraint on newspapers. Likewise *Dirk DeJonge v. Oregon*⁵ and *Herndon v. Georgia*⁶ had aroused many articles on freedom of expression and assembly. The reader misses especially any discussion of the present irksome and indefensible government interference with radio expression yet there has been an abundance of good material on this problem in the *Air Law Review*. Likewise, the rule of censorship by previous restraint denied in press regulation but permitted in radio and movie expression would be of interest to attorneys.

The abandonment of Federal common law after eighty years of *Swift v. Tyson*⁷ is also worthy of note. So also the treatment of "equal protection" has been confined chiefly to problems of race and alienage, although the practicing attorney deals with this safeguard largely in business questions. The omission of the notable essays on "Constitutional Rights" in the January 1938 volume of *The Annals of the American Academy of Political and Social Science* is probably due to the editors' time deadline in going to press, yet several of *The Annals* essays are of such philosophic breadth and importance as to merit inclusion.

These passing references to differing and additional materials are not intended as criticisms. The mechanics of operating an editorial committee composed of widely scattered and busy men, in the production of a book of 1540 pages, would alone explain some though not all of the omissions. The editors have produced a compilation of great value which will be useful to the attorney, the law school teacher and the political scientist.

James T. Young.†

JUDGMENT INTUITIVE. By Joseph C. Hutcheson, Jr. The Foundation Press, Inc., Chicago, 1938. Pp. vii, 227. Price: \$2.00.

Judge Hutcheson of Houston, Texas, and of the Federal Circuit Court of Appeals for the Fifth Circuit, gained his greatest fame ten years ago when he wrote of the "judgment intuitive", or "the function of the hunch in judicial decision". "Hunch" was a striking word, well calculated to shock the old-fashioned lawyer who had been taught that the common law is complete and immutable, and that the function of the judge, to use Bacon's words, is only "to interpret law, and not to make law, or give law", or, to use Blackstone's phrase, is not "to pronounce a new law, but to maintain and expound the old one". Nowadays Holmes, Gray, Pound, Cardozo, Stone and others have made familiar to us the truth that neither statutes nor customary law can ever cover in advance all the questions that come before the courts, that if cases are to be decided the common law

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1. 300 U. S. 379 (1936).
 2. 301 U. S. 1 (1936).
 3. 297 U. S. 233 (1936).
 4. 283 U. S. 697 (1931).
 5. 299 U. S. 353 (1936).
 6. 295 U. S. 441 (1934).
 7. 16 Pet. 1 (U. S. 1842).

must be made to grow answers to novel questions, and that judges of necessity must legislate, as Cardozo said, to fill "the open spaces in the law". Here, of course, is the opportunity for the judicial wisdom, the statesmanship, and the understanding of social needs that characterize all great judges and are lacking in judicial misfits. In this process Judge Hutcheson's "hunch" is only the cultivated instinct or, more exactly, intuition, of the thoughtful, profound and experienced jurist; an instinct or intuition that is none the less right because it is hard to put in the form of a syllogism. That it is usually right should be no more surprising than is the soundness, as to the ordinary affairs of life, to be found in the unreasoned judgments of a wise man or woman who has lived thoughtfully and observantly.

But there is more to Hutcheson than a challenging word or phrase. The present book is a collection of his addresses and writings covering nearly twenty years. They reveal him as he is,—an intelligent, sincere, kind man who has been ripened by life and experience into one of wisdom and understanding. He is a sane liberal of the school of Holmes, Pound, Cardozo, Brandeis and Stone. He says, "I accept gladly and with all its implications, the view that as life is always in flux, so the common law, which is merely life's explanation as the lawyer and the judge, law's spokesmen, are always making it, must also be."¹ But he shows no sympathy with the theories of arbitrary power that today disguise themselves in the cloak of liberalism, and run rampant in our law schools, where young men are being taught that the impartiality and independence of the judiciary, and individual rights as well, are myths; that there is and ought to be no law except the will of the numerous and strong; and that force, not reason, has a right to prevail. I like to think that such doctrines seem to him as barbarous as they do to me. But learned men are receiving money from law schools for teaching them, and consider old-fashioned the liberalism that Hutcheson expounds. I say that certain learned men are being paid to teach these things, because it is hard to see how they can possibly teach principles of law and of human rights while they insist that no such principles exist. The hope for America is that her youth may not be too docile in their acceptance of such destructive ideas.

A few extracts from the book show its philosophy better than could any paraphrase of mine.

"Every period has thought it was the only period which had real problems to face. . . . Even intelligent and patriotic men, when they have a political axe to grind, an idea to put over, a social nostrum or panacea to administer, sometimes forget that without them there was a yesterday, without them there will be a tomorrow. They speak and act as though, but for them and their ideas, the world would be lost. But the really, the deeply wise, know better. They have always known that the good life, social as well as individual, is rooted deep in proven, though changing, ideals."²

"Writers who would remake America anew overnight should, I think, study more closely the American scene and the history of the common law, for the philosophy and theory of the establishment and the growth of this country, the character of its people, the sources and the character of their ideals. If they did, I think they would see that their insistence that any particular group which has governmental power must, merely because it is in the majority, have its unhindered

1. P. 142.

2. P. 191.

way, is a complete negation of the justice and liberty for the preservation and furthering of which this country was established. . . . I think they would see that those who take the tabu position that the application of constitutional principles should bring the same result yesterday, today and forever, and those who take the view that there should be no constitutional principles, are both wrong."³

He says,

"I know that it is not fashionable now to talk of the individual or of individualism. Great sounding phrases have swelled and puffed our speech until it is as inflated as our currency. . . . We hear no longer the old, plain, individualistic words—industry, fidelity, honesty, purpose, friendship, courage, unselfishness, kindness, conscience. But we used to know and hear them, and I thank God that it is as certain as that there is a God, that they will be back in current speech again."⁴

Judge Hutcheson has been prominently mentioned for appointment to the Supreme Court of the United States. His opinions, expressed in this book, ought to be favorable to his advancement, even though they may displease the devotees of a tyranny of administrative tribunals, which is only a few short steps removed from totalitarian tyranny. But I doubt not that were he required to choose, he would rather be right than be a justice of the Supreme Court of the United States. *Perchè non i titoli illustrano gli uomini, ma gli uomini i titoli.*

Henry T. Lummus.†

INTERSTATE COMMERCE COMMISSION LAW AND PROCEDURE, CASES AND MATERIALS. By Clarence A. Miller. National Law Book Company, Washington, 1939. Pp. xxxiv, 620. Price: \$12.00.

The author of this practical treatise is General Counsel for The American Short Line Railroad Association, a member of the faculty of George Washington University Law School and author of *The Legislative Evolution of the Interstate Commerce Act* published in 1930. The professed aim of the book is to present in a single volume the fundamentals of the Interstate Commerce Act, the essentials of pleading, practice and procedure before the Interstate Commerce Commission and the principles of judicial review of the Commission's decisions in such a manner as to serve not only as a guide to the student, but also as a practical handbook for the active practitioner.

The case method of presentation has been employed, and for that reason the book will be found particularly useful to students and to junior members of the bar. The leading cases decided by both the courts and the Commission have been well selected, and the arrangement of the subjects is logical and shows clearly the development of the law. To enable further research with a minimum of effort, references are given, in the footnotes, to leading articles and case notes in the various legal periodicals.

Considerable space is devoted to offenses and prosecutions under the Elkins Act. But cases arising under the Motor Carrier Act have not been included because, as the author states, they have not developed in sufficient number, so far as settlement of principles is concerned, to justify inclusion.

No effort has been made by me to verify statements in the text or quotations from decisions. However, attention is called to what is believed

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3. Pp. 169, 170.

4. P. 10.

to be an error appearing in the section dealing with certificates of public convenience and necessity¹ to which I had occasion to refer while the book was on my desk.

The author, in his summary of *Texas v. Eastern Texas R. R.*,² states that the case held "The power of the I. C. C. to authorize abandonments of railroads wholly within a single state is limited to interstate commerce." The excerpt from the opinion of the Court which follows shows that the Court held the power was so limited where, as was found to be the fact in that case, the continued operation of the railroad in intrastate commerce would not burden or affect interstate commerce. The headnote to the next case cited, *State of Colorado v. United States*,³ reads "Power of I. C. C. To Authorize Abandonment of Railroad or Part Thereof—Limited to Interstate Commerce Where Road Located Wholly in One State." In the author's summary of the case it is said that the case held "The authority of the Commission to authorize abandonment of line of railroad located wholly within a single state is limited to interstate commerce. No such certificate may be issued as to intrastate commerce." However, I believe that a careful reading of the decision in that case will show that the Court held specifically that where the continued operation in intrastate commerce of a branch of a railroad (all that was involved) will burden or affect interstate commerce, the Commission may authorize its abandonment, as was done in that case.

In a book of this magnitude some such errors are to be expected, but they should not be permitted to detract from its otherwise high quality, for on the whole the book is exceedingly well prepared and will prove to be a valuable addition to the comparatively small list of good textbooks dealing with the Interstate Commerce Act.

Ezra Brainerd, Jr. †

TRADE ASSOCIATIONS IN LAW AND BUSINESS. By Benjamin S. Kirsh and Harold R. Shapiro. Central Book Co., New York, 1938. Pp. 399. Price: \$5.00.

The law of trade regulation has long been in a state of flux, but the tempo of change during the decade that has elapsed since the publication of the first edition of this book is unusual even for this dynamic branch of the law. The intervening period has been crowded with events of great significance to the trade association movement. The trade association of the first edition was an instrument for rationalizing competition during a period of unexampled national prosperity; the present study is concerned with an institution that has been battered by depression, transformed by N. R. A. and beset by the perplexities of alternating periods of depression and recovery. Such legal developments as N. R. A. with its revolutionary reversal of governmental policy toward competitive institutions; the *Appalachian Coals*,¹ the *Cracking Process*,² the *Sugar Institute*³ and *Interstate Circuit*⁴ cases, with their reformulation of anti-trust doctrine; the

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1. P. 89.

2. 258 U. S. 204 (1922).

3. 271 U. S. 153 (1926).

1. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933).

2. *Standard Oil Co. (Indiana) v. United States*, 283 U. S. 163 (1931).

3. *Sugar Institute, Inc. v. United States*, 297 U. S. 553 (1936).

4. *Interstate Circuit, Inc. v. United States*, 306 U. S. 208 (1939).

interesting legislative changes effected by the Robinson-Patman,⁵ Miller-Tydings⁶ and Wheeler-Lea⁷ Acts, as well as the current intensification of anti-trust enforcement, have all left their impress on trade association law and practice.

With the establishment of the Temporary National Economic Committee, the stage has been set for a thorough examination of the trade association and its place in the modern economic scene. The completely revised and enlarged edition of Mr. Kirsh's book is addressed to that Committee, and its timely publication should make it of great value to the members of the Committee and to other students of the trade association movement.

The new volume, with revised text, has the breadth and scope of the old edition. There are chapters on statistics, cost accounting, trade relations, credit bureau functions, boycotts, patent interchange and cross-licensing agreements, basing points, collective purchasing and foreign trade functions of trade associations. No case, statute, book or law review comment relating to trade associations has escaped the scholarly attention of the authors; the many developments of the past decade are fully noted and discussed. There is copious annotation to the economic as well as to the legal literature on the subject, and the footnotes are a treasury of bibliographical detail. Kirsh on *Trade Associations* may therefore lay just claim to being the standard work on the subject.

Most of the shortcomings of the first edition⁸ have been happily corrected. However, the authors' preoccupation with the practical aspects of their subject is the root both of their strength and of their weakness. While they are to be commended for avoiding the empty abstractions of disembodied theory, they might fruitfully have explored more deeply the theoretical implications of the problems which they discuss. A greater attention to the refinements of economic and legal theory might have sharpened their analysis and clarified their discussion of the inhibitions, actual and potential, imposed by the anti-trust laws.

The trade association plans in the few cases that have come before the Supreme Court have been most comprehensive in scope. The Court has passed upon the legality of associational programs only in their totality. There is thus no authoritative determination of the several components of an elaborate association plan. Yet a slight change in any particular program may mark the difference between legality and illegality. In practice, the legal adviser of a trade association must consider the effect of each element in a proposed trade association plan upon its legality. His task is hardly facilitated by the generality of the Court's opinions and the small number of trade association situations upon which it has passed judgment. It is the office of theory to isolate the factors which may condition the legality of each element of such plans. An adequate theory can only be fashioned upon the basis of the history of the legal concepts of restraint of trade and monopoly and in terms of the precedents old and new. It is not enough to appraise the reasonableness of constituent parts of a program from a business point of view. The rule of reason in anti-trust law is a technical rule of construction calling for evaluation in terms of the effects of the arrangement on the competitive texture of the industry, rather than in terms of its business advantages or of the absence of any demonstrable injury to the public. It is not the abstract reasonableness of a proposal but

5. 49 STAT. 1526 (1936), 15 U. S. C. A. § 13c (1938).

6. 50 STAT. 693 (1937), 15 U. S. C. A. § 1 (1938).

7. 52 STAT. 111, 15 U. S. C. A. § 52 (1938).

8. See Handler, Book Review (1930) 16 A. B. A. J. 189.

its relation to the maintenance of free competitive conditions which is controlling.

These truisms are not ignored by the authors. It would be unfair to imply that the book is deficient in its analysis; the present criticism is concerned only with a matter of degree. It is believed that the value and utility of the book would have been enhanced had the analysis been more refined and pointed.

A set of forms of trade association agreements, charters and by-laws, as well as a series of tables cataloguing (1) associational activities which undoubtedly contravene the anti-trust laws, (2) those which undoubtedly are consistent with the maintenance of competition in industry and (3) activities which are still in the area of uncertainty, would have been welcome additions increasing the practical value of the book.

The trade association movement has no more devoted historian and analyst than Mr. Kirsh and his book should enjoy a wide popularity.

Milton Handler.†

A SELECTION OF CASES AND MATERIALS ON THE LAW OF CONTRACTS. By George Knowles Gardner. Harvard University Press, Cambridge, 1939. Pp. xii, 1276. Price: \$7.50.

The content of this book is in line with the revision of the Harvard curriculum, the object of which appears to be the inclusion of the fundamental courses in the first two years.¹ All the matters usually included in a first year contracts course are present, and in addition, there are brief treatments of the topics of interpretation, the parol evidence rule, remedies and introduction to negotiable promises. The editor frankly acknowledges his indebtedness to Williston, Corbin, Costigan, Patterson, Goble and others for ideas and materials.

The novelty of this collection lies in the arrangement, a feature which makes an appraisal of its value as a classroom tool difficult for one who has not used it. At the outset is a group of cases showing the historical development of the various remedies of covenant, debt and assumpsit. Then follows about one hundred and fifty pages of modern cases in which the problems of offer and acceptance and of consideration are divided among the sub-topics of special assumpsit, general assumpsit, unilateral contracts and bilateral contracts, followed by a few cases on the modern law of sealed instruments. The next chapter of about two hundred pages deals with nature of integrations, including the parol evidence rule, interpretation and consequences of integration, the proof of agreements not integrated with which is more material on offer and acceptance, and—briefly—the effects of mistake and deceit. The third chapter is entitled Scope and Limitations on Remedies. In this is included introductions to the remedies of damages, specific performance and restitution and, under the sub-heading of limitations on choice of remedies, the problems commonly classified as breach of contract and implied conditions, including impossibility. Express conditions are included in a fourth chapter entitled The Scope and Limitations of the Parties' Power to Control the Legal Consequences of Their Agreements. In a fifth chapter are included the various methods of discharge and amendment. By now we have covered about nine hundred and fifty pages, and would seem to be near the end of the five semester

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1. Simpson, *The New Curriculum of the Harvard Law School* (1938) 51 HARV. L. REV. 965.

hours allotted to the course at Harvard. There remain Part II of two hundred pages in which are included assignments, third party beneficiaries and introduction to negotiable promises, and Part III of one hundred and twenty pages dealing with illegality. The value of this arrangement can only be determined by the pragmatic test of use. The editor has no doubt proved it to his own satisfaction by his years of experiment in rearrangement in his classes prior to the publication of this book. It is a debatable question how far students should be diverted from the classifications of the digests and text writers and Restaters of the Law in such an old and stabilized topic as contracts. It will probably be a profitable exercise in finding the law, when they try to use the other materials. They should develop ingenuity in transposing from one set of categories to another. The arrangement may help to solve a difficulty this reviewer has had in teaching contracts. The facts in the cases are often more complicated than in other first year courses such as torts and crimes, and the legal concepts involved are more difficult to grasp. The student is inclined to lose sight of the ultimate object of the law suit, viz., the giving of relief to the victim of a broken promise. While the editor in his topical headings frequently refers to "concepts", it is clear that they are merely means to the end of determining what judicial relief, if any, is available. The arrangement should help to emphasize results and not merely segments of reasoning.

Besides the peculiar order of arrangement another novelty in the book is the absence of footnotes. The instructor must supply the citations to other cases and to collateral reading. There is no advance notice of the collateral problems which may be discussed in the classroom.

The opinions are well edited. Omissions are indicated, and sometimes the matter omitted is briefly summarized. Extreme examples of editing are the omissions of the opinions in *Mactier's Administrator v. Frith* and *Tinn v. Hoffman*. Why the editor has included names of counsel in nearly every case is a mystery.

Judson A. Crane.†

DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES. INTER-AMERICAN AFFAIRS, 1831-1860. Selected and Arranged by William R. Manning. Carnegie Endowment for International Peace, Washington, 1838-39.

THE NETHERLANDS, PARAGUAY, PERU (Vol. X). Pp. xxxvii, 913. Price: \$5.00.

SPAIN (Vol. XI). Pp. xlii, 1017. Price: \$5.00.

At first glance the tenth volume of Dr. Manning's excellent series¹ seems ponderous and futile. However, though the subjects covered are obviously minor this correspondence repays perusal. For the student of Latin American history it contains a wealth of information and interpretative comment. More interesting, though perhaps less valuable substantively, is the light thrown on the character of the diplomatic service of the United States and the spirit which permeated it at the time. The atmosphere of Manifest Destiny is pervasive. Suspicions of the designs of Great Britain and France and an unfriendly attitude toward those powers often burst forth. Imperial Brazil is constantly viewed askance. South America is a rich field for commercial exploitation by the United States. The Monroe Doctrine—which should frequently be applied with the "big stick"—should

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1. For reviews of earlier volumes see Dutcher, Book Reviews (1937) 85 U. OF PA. L. REV. 862, (1938) 87 U. OF PA. L. REV. 134.

be enforced through thick and thin. The diplomatic agents, not without reason, considered themselves better informed than the State Department and better qualified to determine policies.

Among the 23 letters in the Netherlands section are entertaining ones by Christopher Hughes and Auguste Davezac, a devoted disciple of Jackson, referring to Texan and Oregon affairs in the 1840's. The Paraguay correspondence of 103 items begins only in 1845. It would be difficult to parallel in American diplomatic files the letters of the first agent to Paraguay, Edward A. Hopkins, for naïveté, brashness, and conceit. It is incredible that such ludicrous and impudent epistles could have been seriously addressed to the Department of State, were it not that his deeds were no less injudicious. In happy contrast was the skill of James B. Bowlin in clearing up the mess in seventeen days—one of the most business-like missions in American diplomatic annals.

The Peruvian correspondence of 430 items reveals the level-headed devotion to duty of Samuel Larned, James C. Pickett, and John Randolph Clay in lonely and turbulent surroundings. Clay's sane handling of the Lobos Islands affair stands in pleasing contrast to the infelicitous muddling of the question by no less a person than Daniel Webster as Secretary of State. Clay's lively interest in the international problem of the navigation of the Amazon was laudable, though his discretion in the matter may sometimes appear questionable. The careful handling of difficult problems of international law by these three humble diplomats deserves commendation though uniform approval may be withheld.

While the eleventh volume deals with diplomatic relations between the United States and Spain affecting Latin America, the material presented concerns, in very large measure, Cuban affairs. The only other items of any significance have to do with Spanish recognition of the independence of Latin American states and with the possibilities of Spanish intervention in Mexico, Venezuela, and Santo Domingo about 1860.

The 161 letters originating from the State Department, mainly from secretaries of state, are very important for their revelation of the modifications of national policy especially toward Cuba from administration to administration. Down to 1848 the policy was explicitly and firmly negative, to the effect that the United States would oppose the passage of Cuba under any dominion other than that of Spain. Buchanan's instructions of June 17, 1848 to Romulus M. Saunders, minister at Madrid, mark a sudden change to the affirmative desire to purchase Cuba. This policy remained in force until 1860, except that Secretary Clayton retreated to an even less clear affirmation of policy than had previously been in force. The Buchanan idea of course reached its climax in the Ostend Manifesto to which he was a party. On this affair Marcy's letter of November 13, 1854 is significant. In general the letters and instructions from the various secretaries of state reveal a firm, intelligent, and conciliatory tone. In contrast, however, Marcy's style becomes overbearing and truculent.

The 485 remaining documents listed as Communications from Spain are principally valuable for their evidence of the character and behavior of the American ministers at Madrid and for the consular reports from Cuba upon conditions and difficulties in that island, notably with regard to the expeditions of Lopez and other filibustering enterprises and to the *Black Warrior* and similar cases of interference with American vessels in Cuban waters. Of the ten individuals in charge of the American legation in Madrid during these three decades, the genteel and accomplished Washington Irving and the impossibly troublesome Pierre Soulé represent the two extremes. The others were more or less competent and satisfactory

incumbents. Particularly creditable were Cornelius P. Van Ness of Vermont (1829-37) and Romulus M. Saunders of North Carolina (1846-49) who each handled with discretion and skill the difficulties of keeping on satisfactory terms with the rapidly changing administrations in Spain. The United States was not so fortunate in the secretaries of legation who happened to be temporarily in charge for brief periods. Students of American diplomacy should read the letters from Thomas C. Reynolds of South Carolina and Horatio J. Perry of New Hampshire as amazing instances of almost incredible officiousness of underlings clothed with brief authority.

As usual, Dr. Manning has done the editorial work excellently, but unfortunately the proof reading is for some reason not up to the usual high standard.

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