BOOK REVIEWS

RECHTSSCHÖPfung UND RECHTSGESTALTUNG. By Dr. Wilhelm Glungler.

Despite the quarter century devoted to the framing of the Civil Code, the extensive literature criticising the Romanesque substance and artificial form of its first drafts and the effort in their revision to Germanize the one and popularize the other, there is much discontent with law in Germany (22). Compared with the output of her reformers, the stream of Jeremian jurisprudence recently running in our own law reviews is but a murmuring rill. Of some of the German literature, Dr. Glungler's booklet takes account. Its style is effective, it contains many striking passages, and some sound historical criticism; but it is full of the vague wordiness of inferior "philosophic" writing, is strikingly rarefied in atmosphere—containing no single reference to statute, decision, or principle of actual law—and is so exclusively exhortatory that all its scattered hints (for there are no explicit proposals) of methods by which to attain the ends it preaches would not fill one of its pages. The reader who sails on its rhapsody of theory, like an aviator tossed unexpectedly into space, frequently grasps vainly about him for material support; though, to be sure, he can always release a parachute of common sense and land as a qualified member of the "caterpillar club"—if content to be a legal caterpillar while greater scholars disport themselves like eagles far above him. It would be easy to fill this review with quotations calculated to make the book seem, to lawyers of the Anglo-American tradition, ridiculous; but its purpose and spirit merit honest and sympathetic attention. Also it is interesting to compare it with the writings of our own reformers, certainly by no means to their disadvantage.

Nobody questions the soundness of the basic complaint against law—any system of law: positive law, as a whole, is never acceptable as "right"—law; perfected law is found neither in the jurists' intellectual structure of theory nor in actual adjudications; "system and decision are medial points, provisional solutions of a problem that is, in last analysis, insoluble" (13). Therefore, positive law cannot justly be judged by either individual decision or perduing ideal (69). These two—the temporal, what-was-once-upon-a-time (das Einmalige), and the eternal (das Ewige)—are law's two poles; the one element rebellious to its normative, the other to its imperative, character (24, 69).

There are two fundamental problems: of interpretation or understanding (Rechtsdeutung) and of formulation (Rechtssetzung).

With interpretation legal theory deals. Its tools, in our author's opinion, are "deeper insight and new classificatory concepts" (13). Interpretation may be static, dynamic, or "pragmatic" (in a new sense). Their respective questions are: "What is? What can be? What must come to be?"; their characteristics, fixity, freedom, and control (25, 62, 65).

The first, Dean Wigmore's "nomostatics", is a topic upon which anyone can be impractically denunciatory and expansive. Static thinking subsumes the facts of actual cases under theoretical concepts. Elements deemed non-essential in theory are disregarded in life; life is cut to a pattern, its types pressed into the artificial unity of abstract norms; evolution is ignored; letter governs spirit, "an enduring objective meaning of the norm acquires greater importance than the purpose once embodied in the law's command". Concepts, of law and within law, dominate today, Dr. Glungler thinks, even to the point of veritable reification, as by the old-time dogmatists of natural law (37-41). 1

1 As samples of conceptualism from this critic of Begriffsjurisprudenz, consider these: "A pragmatic Plastik removes the objective inconsistency inherent in the simultaneous exist-
He makes, however, certain commonsense admissions. In the first place, the whole static mental structure is, of course, "the snapshot of an evolution" (40), which may be taken either of the present or the past (36). Also, Dr. Glungler even declares that a rule's meaning includes "the delimitation of the social life therein encompassed. Static jurisprudence asks: What falls within the norm, and what is no longer to be subsumed thereunder" (39, 40). But both these admissions, and particularly the latter, make the distinction between "static" and "dynamic" merely one of emphasis. Denunciations of nomostatics because it assumes a rest of balanced forces, and conceives of life as standing momentarily still (37-8, 40, 43), are therefore empty rhetoric. As for concepts, a question of positive law is a call for practical guidance in present conduct (36); "as a principle of legal order" he therefore accepts as inevitable static conclusions, and the static tools of concept and subsumption (39). In fact, human judgments of administrative decency naturally require uniform treatment of identical behavior; in practice, identity must be satisfied by likeness; and law must set essentials, both in comparing variants of conduct and in matching conduct against concept, if we wish to avoid the chaos of the utterly incomparable and the utterly unpredictable. Attacks upon conceptual jurisprudence are misplaced; concepts are absolutely necessary, but not immutable—the fault lies in the lack of historical sense, of social consciousness, in the inertia, of the jurisprudents that employ them. Nobody can plausibly object to the symbol of the scales (40, 49), merely because "static", with reference to individual judgments; the only disputable questions are whether the eyes of Justice should be unbandaged, to permit a view of the persons and interests involved, and whether it is possible to weigh something less transient than immediate utilities.

To recognize historical change in law, its social character, to note in it interests and tendencies, is to view it dynamically. This is the field of Dean Wigmore's "nomogenetics". There are various passages more or less satisfying—for example, "Law is a command that both is and is-becoming, not an object of pure existence nor a mere structure of rules" (71). On the other hand, the author's enthusiasm leads him to declare that law is "the energy pressing for expression"; though he criticises Jhering (63) for a similar laxity.

But, given a dynamic vision, our policy might still be that of laissez faire (61). "We must press forward beyond a static understanding and a dynamic evaluation to pragmatic formulation. It suffices not to recognize what is vital as a force outside ourselves. We must join in shaping it, as we ourselves are shaped by it. Law thereby becomes more than reality and possibility: namely, Necessity" (53, 61, 64). "It is not words, mental fabrications or theorems, that solve the problems of legal dogma and legal politics, but vision and action" (69). Mere thinking, through centuries, has been inadequate. It has distinguished law from other modes of social control, and it has disengaged positive law from "right"-law; but "because the separation was carried beyond a conceptual distinction", we have paid a heavy price: the segregation of law from custom, morality, and religion resulting in renunciation by jurists of legal philosophy, and the severance of actual from "right"-law leading to neglect of Rechtspolitik (Dean Wigmore's "nomopolitics"), whose subject-matter is the perfected law of the future. Practitioner and theorist look differently upon positive law; philosopher, statesman, and jurist cannot similarly envisage, or work together for, the law's betterment. Thinking has culminated in antitheses; but betterment demands synthesis, cooperation (11-12, 69).

ence of law both positively and merely in theory, because it transcends the categories of Statics and Dynamics" (74). "Such a pragmatic perspective—which unites reality and idea, the temporal and the eternal, existence and command to-be, the actual and the ideal—overcomes the contradiction between a philosophical inquiry into what is principally right and a political inquiry into what is practically right, inasmuch as it directs nomopolitics to The Necessary" (72). The book is full of such conceptual legerdemain.
The need for nomopolitics was wholly hidden to the writers on Natural Law, since they conceived of that as existing and positive, requiring only exposition (17); and scepticism toward nomopolitics resulted from the belief, fostered by the Historical School, in "silently working forces of legal growth" (18)—that is, unconscious and innocent folk-forces. Jhering so little appreciated the problem as to assume direct embodiment of the Volksgeist in a fundamentally unified Volkskultur, and he could therefore say: "the spirit of the folk and the spirit of the time are one with the spirit of law." If that were true there never could be a problem for nomopolitics (20-23); in that and in other respects (63) he failed to scrutinize critically the assumptions of the Historical School. We have progressed so far that there is general acceptance of the view that "inquiry into the meaning and value of monopolitical labors is today the fundamental problem of the law" (16, 19, 64, 69).

Hence the title of the book: Rechtsschöpfung—the identification or outright creation of "right"-law in theory (15, 65), resting upon a weighing of interests (14, 49, 61, 62, 65); and Rechtsgestaltung—its conversion, by legislative enactment or otherwise, into positive law (13, 51). Essential to this reform are: first, a vision, which Dr. Glungler says must be attained by a "pragmatic perspective"; second, an art, which he designates as a "pragmatic plastic art"; third, a basic principle for measurement of values, which is not "momentary utility" (54, 56, 58), but Wilhelm von Humboldt's principle of "necessity" or "eternal values" (53, 58, 60, 72).

"Nomopolitics can form, by Rechtsschöpfung and Rechtsgestaltung, a law of the future adapted to the folk-spirit of the future" (23). But as to just how this is to be done, Dr. Glungler is uncommunicative. One thing only is clear: we must study legal history. The writers on natural law were static interpreters of eternal principles; the Historical School abandoned eternal for temporal verities, exchanged static for dynamic views; nomopoliticists must repudiate reliance upon "forces impersonally conceived and changes irreducibly thence resulting" (60, 65). Nevertheless, only after law-that-was is revealed by history (and comparative law) as only one among various possibilities, does it become profitable to reflect upon the worth of a given legal institution, or "to adopt as a worthy model that among many possibilities which, under like conditions, had best approved itself". History, therefore, remains the primary source of dynamic thinking about law (15, 47, 48).

Beyond this all is vague. The road of nomopolitics "lies through the creation and putting into effect of 'right'-law" (70); "perspective vision reveals the way to 'right'-plastic vision that to positive law" (73); "pragmatic perspective marks the direct way to solution of the problems of nomopolitics" (72); "a pragmatic Plastik unites the static and dynamic fields of vision, and thereby attains a conception of The Necessary" (74). In short, it is all a matter of intuition. "This concept of 'perspective' is designed merely to describe graphically the peculiar character of nomopolitical vision, which through realities sees and keeps in sight the ideal, and the peculiar character of the nomopolitical legislative process that converts the ideal into reality. . . . Such a pragmatic perspective . . . guides nomopolitics to The Necessary" (72). More specifically, "As a dynamicist sees the law in change and heeds the forces shaping it"—which he must do, by definition,—"he perceives its tendencies, and arrives necessity at a value judgment" (47). "Thus the dynamicist, strictly so labeled, can simply treat as identical the law growing before him and that demanded by nomopolitics; for to him they are the same" (50). But this can only mean that, to the discerning eye, the principle of "right"-law is always present: why, then, the necessity (65, 13) of sometimes creating such law de novo? And why, too, is any science of nomopolitics necessary? All we need is a dynamicist. Either one has the power of seeing in the darkness that "This is functionally sound and that is not", or one hasn't. When
somebody who claims the gift is believed really to have it—and American law
teachers will agree, the chances are good that aspirants will announce themselves—
clearly he should be made supreme lawgiver! However, he must be something
of a historian and something of a politician, for "precisely to satisfy the popular
will is essential. Therein lies at once the guaranty of political success for a legis-
lative program and a prime requisite of 'right'-law in the sense of the dynamic
ideology" (50).

But even though Rechtsschöpfung be thus simplified, the practical problem
of Rechtsgestaltung remains. The pragmatist "shapes the future so far as it is
open to his influence" (62)—but how far is that? On legislation our author
says nothing. There is one bare reference to the ministry of justice (58). Legis-
lative draftsmen, and a powerful civil service, have long existed in Germany, and
their influence has doubtless been comparable to that of their brethren abroad.
Alfred Zimmern (America and Europe, 202 sqq.) has pointed out that they have
altered fundamentally the very nature of the British Parliament; there are many
signs of similar development at Washington. The consultation of experts, the
hearings of interested parties, the meaning of lobbying and the question of its
desirability, the merits and possible future of Soviet representation, are all topics
whose discussion is pertinent to pragmatism in law-making. As for the judges,
"the central problem of delimiting law and discretion has from remotest times
perplexed both theorist and practitioner"—but "the question to what extent oppor-
tunistic considerations must or may decisively intervene in judicial and administra-
tive judgments", is not regarded as within the purpose of the author's essay . . .
"Even more weighty is the fundamental question how far utility may properly
influence or dictate political action, and thereby nomopolitical development. This
too, is an age-old problem, it was already well known to Aristotle" (55). On
both, Dr. Glungler’s attitude is evident. A judge is no machine but a living man,
who approaches legal problems as a "teleological interpreter". His acts are "con-
crete creative expressions of the state's will", but only "within general limitations
and directives"; and that such expression, in an individual case, "must conform to
the same principles as must the formulation of generalized commands in statute
or ordinance, is the most important postulate in pragmatic legal thinking" (67).
Dynamic practice "judges and administers in the spirit of an interest-jurispru-
dence. However, where free scope to that is denied by positive law, it submits
to the 'foreign will' therein expressed" (49, 74). The problem of evaluating
precedents stands here, indeed, at the threshold, but to that, also, there is but one
mere reference (25). Thus, on all these great questions Dr. Glungler offers
nothing novel or suggestive.

One passage, if taken literally, is amazing: "One may say that an attitude
basically dynamic is the characteristic mark of present legal practice, and, con-
versely, that practice is an adequate embodiment of the dynamic attitude". But,
immediately continuing, we read: "As we found an emphasis upon theory to be
the distinctive mark of static jurisprudence, so an emphasis upon practice is the
mark of dynamic jurisprudence" (49); "theory is predominantly statically, prac-
tice dynamically, focussed" (73). Now these latter statements are quite accept-
able, being essentially mere matters of definition. The two preceding statements,
however, present questions of fact. Possibly the first of them may be true of
Germany; at least it was intended as written, for Dr. Glungler elsewhere declares:
"Static sentiment is gone." However, he completes that statement thus: "an
unripe dynamics masquerades as finality" (77); and this, and various other pas-
sages (25, 40-1), are quite irreconcilable with the statement that present practice
adequately expresses the dynamic attitude. Like the above-noted remark about
the dynamicist, it is one of an ideal rather than of present fact.

Many critical remarks in the book, incidental to its main argument, are sound
and helpful. Such are his criticisms, above noted, of the Historical School
Interesting is his review of the literature engendered of Spengler's generalization that Roman law was characterized by a "static" character, contrasted with the "dynamic" character of the law of the modern Occident (29-35). Just is his complaint that writers on politics have, through centuries, ignored law as an instrument of politics (16). However, such a complaint must be confined to writers—law has not, in that respect, been ignored by statesmen, politicians, rebels, or even the passively resisting victims of interest-judgments; and though he adverts to this fact (16), the shortcomings of other writers would have justified fuller reference by him to the lessons nomopolitics may derive from past revolutions due to economic alterations and political innovations, or from the gradual correction by mere time, statutes, or decisions, of many undue divergencies between legal norms and the actualities of life.

In the fashion of our own reformers, Dr. Glungler casts laboriously about for principles and analogies in various other fields of learning. He himself recognizes the danger of faulty applications (30), and himself illustrates them. Of course he shies at Jhering's chemical analogies—processes of "analysis", logical "concentration", talk about "elements" of which "jural material" was composed,—as though they had no usefulness (26). His own preference is for the analogies of physics, in which matter is not dead but significant only "as the subject-matter of conditions and processes" (27). But is matter in any other sense recognized today? And of what importance that supposed difference, anyway, in our misguided talk about the corporeality or locus of legal interests that are really incorporeal? He recognizes the vagueness and manifold meanings of "static" and "dynamic" (31), yet descants upon both, and even bases serious argument (30, 37) upon the distinction. He rejects the geological analogy of "faults" to indicate the breaks in legal customs caused by cultural changes (23); and himself, to express the lag of law in readjustments to such changes, advances the electrical analogy of phase-differences, to be applied "as an extension and profundization"—any neologism seems pardonable in discussing this subject!—"of the undulatory theory"; that is, of Menger's "social undulatory theory", not Jhering's purely "historical undulatory theory" (20-23). He even seems to drag in the quantum theory, for he regards historians as dodging difficulties by assuming a Kontinuum (22; cf. 24). Not all of these ideas are pure conceits, since some of them are capable of application more or less fruitful. If we conceive, for example, of the law at certain dates statically, as a deposit by custom, court, and legislator, it might be very illuminating to study the faults later produced therein by eruptive forces of social change; a vast body of illustrations, already assembled and available, could be taken from standard books. Such a study would at the very least have a merit similar to that of a series of doctoral dissertations, prepared under a noted German professor, on "animal names", "plant names", "insect names" (etc.) in Anglo-Saxon literature—the merit, namely, of requiring examination of all the sources; and might yield new and enlightening conclusions. The results of a study of cultural phase-displacements, though expressed in other words, would necessarily be quite the same. To suggest for myself a new analogy, a search in law for dominant and regressive characteristics might be fruitful of suggestions. But an analogy proves nothing, it only sets a problem. Why, then, should ardent reformers, insistent upon the law's immediate betterment, so abound in references to analogies through which somebody might possibly some day learn something about the law's past? They remind one of the Indian about to hunt bear who believes success guaranteed by shooting an arrow through a bear's image, or the Nootka wizard who, to bring food, puts a

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2 "It has become almost the extreme fashion to infix all juristic problems within the contrast of Statics and Dynamics" (30). See 2 SPENGLER (Munich ed.) 97-8; "The law of the ancient world was one of elements (Körper), our law is one of functions", etc.
wooden fish in the water in the quarter whence fish should come, on the principle of imitative magic that like begets like. They betray bewilderment before the problem facing them; they illustrate their own impracticality and present unpreparedness.

Aside from analogies and history, the substance of Dr. Glungler's essay can be found—expressed in better order, in clearer terminology, with greater economy of words and vastly greater restraint of pretensions—in two articles by Dean Wigmore.\(^3\)

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A critical review of a comprehensive digest would tax the ingenuity and test the capacity of a single mind. Were it to be attempted, the effort would be poorly spent and the result likely to be a humiliation. It is with this thought in mind that the three large volumes of Abbott's *Trial Evidence* are taken up for examination and comment, and it is to be understood that the task is one which can be undertaken only with advance notice that expectation of comprehensive analytical treatment of the text must not be entertained.

The work is a growth into which Abbott put not only the original spark of life but a reserve of vital energy which has been sufficient to carry it through two generations and is so little exhausted as to insure its continued active service to the profession so long as our system of judicial trials remains unchanged.

In his preface to the first edition, the original author leaves no uncertainty as to the kind of a work he put before the profession. Not as a work on evidence but as a guide to the application of the principles with which he assumed his readers were familiar, the book was offered.

The author, whose labors in the realm of legal bibliography were lifelong, says, in 1880, the year of original publication of this work, that his conclusions are "drawn from the decisions of all the American and English Courts and from the works of the best text writers" and, if he had said all the decisions, one could readily believe from the wealth of citations that it would not have been an overstatement.

The reviser in the preparation of the Fourth Edition has followed closely in the author's footsteps. From the stream of decisions which have flowed uninterruptedly from the Courts, illustrative of the principles put forth by Abbott for the trial of cases, he has chosen a vast number to add to the formidable list already used. That they have been wisely selected only the lawyer who steers his course through an actual trial with Abbott as his pilot may be permitted to say.

One may take at random the simplest or the most unusual and difficult of cases, and, with this work at his elbow, go into the task of preparing a trial brief with a confidence that each step towards establishing his claim or defense as the case may be will be made surer and more direct towards the particular goal he is seeking.

Suppose it be an ordinary action on a negotiable note—where in one work will the trial lawyer find the substantive law applicable to his particular situation defined, the pleading and practice explained, the rules of evidence set forth, and instructions as to the most effective methods of placing his case before the Court supplied? Yet this is just what has been achieved by the author and his revisers

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in the work which is modestly designated as a treatise on "The Rules of Evidence applicable on the trial of Civil Actions".

Supported by a plentitude of decided cases, so that seldom does a statement go without its accompanying citations, the trial lawyer will not lack for material upon which to build up his case.

Let us assume we are suddenly called upon to try a case for the plaintiff upon a note which he has taken from the payee and which the maker refuses to pay, alleging failure of consideration, that the plaintiff is not the real party in interest and that the payee made a special agreement as to its renewal upon the non-happening of certain events. We need at once and in quick time to lay out a plan for presenting the plaintiff's case. How far must our proof go (a) to make a prima facie case, (b) to meet and overcome the defenses, if the evidence is sufficient to destroy our prima facie case, or at least to prevent a directed verdict against us and get to the jury.

With Abbott as our guide and mentor let us then advance.

First we will have an order of proof and learn (Section 612) that we must—
1—Produce the paper sued on
2—Prove the signatures
3—Give any evidence in explanation of the paper if its appearance, possession or other feature requires
4—Prove presentment and demand and dishonor
5—Notice to the endorser

and that having put in the above proof we have made our prima facie case against both maker and endorser.

We have in our supposed case hurdled the multitude of issues which might have been raised had the defendant questioned the existence, execution, presentment, dishonor or notice to endorser—issues, each of which with its collateral field of controversy, and as related to the many classes of litigants, we find spread before us in detail in ninety pages of text and notes, so arranged as to be easily availed of for any given situation and so complete as to meet the need for a rule or precedent on substantially every imaginable case.

But to revert to our supposed case, we find that, if our opponent succeeds in adducing evidence sufficient to go to a jury to show that plaintiff had notice of the alleged infirmities in the note and of the equities in favor of the defendant as against the payee, then the burden is on the plaintiff of going forward with evidence to show the facts essential to his recovery, to wit, that he is a holder in due course, i.e., as prescribed by the Negotiable Instruments Law in force in most states: (1) that the note is complete and regular on its face; (2) that plaintiff became a holder before maturity; (3) that he took the note in good faith and for value; and (4) without notice of any infirmity (Section 718).

Thus by affirmative evidence must we keep the position which we first had by virtue of our prima facie case, and thus do we prevent a directed verdict against the plaintiff and get to the jury.

Here we have one of the simplest forms of action from the standpoint of the trial lawyer, and it is here noticed only as an illustration of the sort of nucleus around which Abbott builds a veritable storehouse of instructive material having to do with the substantive law and its application under the rules of evidence through the processes of trials to the almost limitless variety of cases with which the courts have to deal.

Follow through Abbott's development of this one field of trial work and one will find his own particular problem duplicated in text or note and so treated in relation to both substantive and adjective law as to set him on the right course of thought toward the solution of such problem.
Whether the case be one of a lost or destroyed instrument, alleged forgery, disputed ownership, partnership paper, collateral contract, fraud, bad faith, failure of consideration, or any one of a hundred other usual and unusual situations which arise with respect to negotiable instruments, here will be found in the one hundred and twenty pages of Chapter 21, grouped together in easily available form, just the information the trial lawyer needs.

Now for a moment let us glance at the other extreme and see how the scheme of the work meets the need of the trial lawyer in a field where neither the substantive law, pleading, procedure or methods of trial have become, as it were, standardized by repetition of decisions and similarity of statutory provisions in the several states. We refer to equitable actions relating to real property involving fraud, or for specific performance, actions for reformation of contracts, etc.

In these fields, it would be too much to expect the same precise and methodical charting of the course for the trial lawyer to follow. Nor do we find it. But the statement of the few generally recognized principles of law with the citation of certain leading cases in the different jurisdictions, is sufficient to serve as a beginning from which one may enter the field of research necessary to equip him adequately to meet the peculiar demands of the particular case in hand.

The rules of evidence after all are the same whether the case be simple or complex and, in the last analysis, the trial lawyer must find his own way to get his case before the court within the restrictions which those rules impose. While in certain fields of litigation the repeated application of the same rules in a large number of similar cases may enable the trial lawyer to function automatically with respect to the proof of his case, in other fields he must fall back on general principles and his own initiative in their application.

All of which argues not that Abbott's *Trial Evidence* is less useful and valuable as a guide and source of information, but merely that it is not to be allowed to substitute for brains, reasoning powers and initiative of the man who has to try the case and wants to win it.

Minor errors will creep into any legal work where citations and references form so large a part of the printed matter and this work is not free from its share. If, therefore, one be pointed out which was disconcerting to the writer of this review, it may be taken not as a criticism but as a noting of an item for correction.

Reference is made to note 25a on page 190 of the text which seems to have no corresponding number in the notes. The case if cited might have been helpful.

The arrangement of citations is perhaps an incidental feature of a work of this sort, and does not justify criticism. Nevertheless one may raise the question why, when many citations are used, both the original ones and those added by the revisers, are they not merged and listed in alphabetical order by States? Each lawyer using the book is primarily interested in the decisions in his own state, and it substantially increases the mechanical processes of selecting citations for examination or use when they must be culled out from a list printed hit or miss.

*New York City.*

*John Jay McKelvey.*


This work is a collection of separate papers. All of them had already been published (with one exception) in British periodicals (with one exception). The range of topics, as we translate them, is: (1) the meaning of jurisprudence; (2) status and capacity; (3) the judge as a standard man; (4) the pachydermatous
theory of legal harm; (5) abuse of rights; (6) Bentham; (7) Maine's "Ancient Law"; (8) legal duties; (9) the legal meaning of "crime"; (10) origin of the presumption of innocence.

None of these essays is unduly saisissant. They travel a road beaten by the footprints of hundreds of others. The older paths are followed in preference to the new. The book is characterized by a conservative conventionality of subject matter and treatment. It is a causeurie rather than an analysis, where Jurisprudence (whatever that may be), in Bentham's phrase, is made "to speak the language of the scholar and the gentleman".

The discursive chapter on Jurisprudence tells us that jurisprudence is the "scientific synthesis of the essential principles of law". These are, indeed, hard words. Perhaps it is an example of what Professor Ogden calls the "hypostatic subterfuge". If the author means here what Austin called "pervasive legal ideas", it may be suggested that use of the words "essential" and "principles" is not helpful. We get the impression that the author is more interested at this point in words than in what lies back of them. "Jurisprudence" as a term is an Alp which anyone may climb. At the top each one will see a vision of his own. It will mean one thing to a Louisiana lawyer; another to a Pennsylvania lawyer; and still another to a bar association orator.

In the chapter on Status we get another terminological bath. The author makes clear that the point of departure must be one of the following ideas: (i) condition; (ii) capacity; (iii) rights. To this list perhaps may be added a fourth—law or legal rules. For the author, Status is "the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both". The author does not make clear how, if at all, Status differs from the content of ius personarum or what Holland calls the law of abnormal persons. Persons having the quality of Status are, it might be objected, no more "particular" or "peculiar" than those other persons with whom they are contrasted. What is the standard? But what could more seriously be opposed is that Status does not essentially point out a "class" any more than a "right in rem" points out a class. That is a matter of statistics and not one of juristic logic. If there happened to be in any country at any given moment just one infant, or insane person, or felon, the law of Status would still operate. To this writer the question of the definition of Status is simply a matter of what use, if any, we wish to make of that term. We see no objection to defining Status as a legal condition of abnormal capacity, but like the terms Jurisprudence, Principles, and many others, it has become so infected with ambiguity that it had better be abolished in practical legal analysis. In a classification of law it would still be desirable, we think, to define Status as an aggregate of personal (i. e. non-proprietary) rights.

Rechtsfähigkeit is translated by the author as "capacity for enjoyment of rights". The emotive word "enjoyment" seems unnecessary and inaccurate. Handlungsfähigkeit is translated as "the capacity for exercise of rights". The word "exercise" also seems unnecessary and inaccurate. There is only one species of Right which can be exercised. The author quotes at this point from Binding's "Normen". He would have done well to adopt the definition there stated.

The chapter on Legal Duties is the most "jurisprudential" of the series. There is an interesting and informative statement of the juristic positions of Duguit and of Lundstedt (of Upsala). The author does not agree with either of them. Lundstedt's position in juristic results agrees with the views of that keen American thinker who has been a pioneer of much recent realistic legal thinking—Professor Bingham.¹

In reviving Austin's category of Absolute duties, it seems to us the author has taken a backward step. "It is difficult to see", says the author, "that there is any duty to prevent a dangerous thing from escaping through causes which have nothing to do with the maintainer's fault" (as in *Rylands v. Fletcher*). Again he says: "A man commits a criminal offense in ignorance that it is unlawful . . . how can it be said that he has committed a breach of duty when he was unaware that he was ever under the duty?" "There is" in such cases, says the author, "a liability, but it is a confusion of ideas to call it a duty". If the author is correct, it will be found that the Claim-Duty relation has a somewhat limited field. Thus, if a debtor fails to pay on the due date because he is unable to find the money, then how can it be said that he has committed a breach of duty through causes which have nothing to do with his fault? Thus a large section of Contract law also falls into the realm of Absolute duties. The position taken is reminiscent of the theory of Jhering on Passive rights. But does not the author's view, at least in part, return him to the camp of Lundstedt from which he sought to retreat? The author does not consider the Contract problem, but can he escape it? If he surrenders to it, he will in recompense find himself in pretty lively company. He will be taken by the hand by no less a personage than Oliver Wendell Holmes who will tell him that in the case of promise, the promisor "takes the risk of the event".

This is one of the corner stones of that new dispensation known in America as Legal Realism. The author's essays give no hint of it although he has been in America as recently as the year 1931. When this gospel reaches England, as is certain to result in due course, Jurisprudence in England, we venture to predict, will be roused out of that decrepitude into which the author hints it has fallen. It will be interesting to observe the reaction.

Among the lighter chapters is one on Bentham. It is interesting to learn that in the library of University College, London, there are some 50,000 loose sheets of unpublished Bentham MSS. The author refers to the disillusions of Miss Dunkly, and, outside the scope of this paper, he might have told that by Bentham's directions his body was dissected and dressed in his ordinary clothing and preserved at University College. On the authority of Dean Wigmore we are informed that, by like direction, the gruesome *reliquia* of this great man, for many years, were brought to the head of the table at official meetings of the college. The author, of course, must have his jibe at what may be called Benthamania (not to be confused with Benthamiania) for neologisms. This charge is pure defamation. Bentham did not invent a single technical term to take the place of another already in use by lawyers. He did invent many in fields where the mere lawyer does not enter. These outrages on Bentham are the exclusive privilege of English nationals. But they are only the façade for genuine admiration and pride. A lusty American author who writes eruditely and often with a pen dipped in nitric acid, some years ago experienced this fact and if he reads all that is said about Bentham, may still discover that among Englishmen, Bentham ranks as one of the great minds of the modern age.

Of the other essays, it is impossible here to give an account which will do justice to the learned author's industry and research. It will suffice to say that all of them without exception are interesting and valuable. They will much remind the reader, in general literary style and method, of Professor Gray's delightful volume on the "Nature and Sources of Law".

_A. Kocourek._

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2 F. DOGMATIK 387-580.
3 Holmes, Common Law (1881) 300.

When I told my friends that I was studying this book, they invariably asked me whether Soviet Russia had any semblance of a judicial system. Many Americans undoubtedly regard Russia as peopled by unwashed savages who are slowly emerging, if emergence is admitted at all, from the Stone into the Bronze Age, in the same way that some English people are reputed to believe that America is still populated by Red Indians.

If the Russians have done anything in the past thirteen years, they have proved beyond reasonable doubt that they are capable of creating system. How well or ill it may work is a matter for the judgment of time, in whose fulness alone can there be ascertained the truth of certain first principles in which the Russians believe. Regardless of their merits, we must admit these principles arguendo if we are to appraise with any mental integrity whatever the question of whether or not the system achieves the end for which it was created. That end, of course, is justice, as the Russians conceive it.

Our first admission is crucial. In Russia the judicial system is not designed, like ours, to be an independent arm of government, capable of protecting the rights of citizens not only against each other but against the government as well. It is one of the means which the government has to protect its policies and see that they are carried out. We must remember that Russia is ruled by a party which is animated by religious fervor and lashed by military discipline. No checks and balances are conceivable in a dictatorship. The philosophy of this arrangement is set forth in a letter of instruction issued in 1925 by the Supreme Court of the R. S. F. S. R., as follows:

"The courts must remember that the carrying out of the class attitude concerning the penal policy consists not in convicting the 'nepman' or the kulak, and not in acquitting the toiler or the poor or middle-class peasant, but in the clear understanding of the social danger of the act committed by the citizen brought to trial, appraised from the point of view of the interests of the proletariat as a whole."

Nearly all the judges are members of the party. All of the procurators are. The position of the latter is infinitely broader than that of our district attorneys. They stand as "guardsians of the revolutionary law"; they conduct the exhaustive and impartial investigation which precedes every criminal trial; they may appeal from a verdict of acquittal; they may secure an interpretation of any point of law; and have the impressive authority to inquire into the legality of the acts of all governmental organs, economic institutions, public and private organizations and of private persons.

The Supreme Court of the U. S. S. R. was created by the following words of the Soviet Constitution: "There shall be created a Supreme Court of the Union which shall be attached to the Union Central Executive Committee." In short, the Committee, which rules Russia, has the final word.

In practical operation, the Soviet system offers many interesting features. The jury is, of course, abolished, although a compromise to it may be seen in the fact that co-judges, elected by the people, sit with the regular judge at the trial. Before a case is placed on the list, it is thoroughly investigated. The aim of this inquiry is not only to establish guilt or innocence but also the circumstances under which the accused lived and the physical, mental and economic conditions which induced him to the crime. The Russians feel that circumstances, environment and motive are relevant to the proper disposition of the case and that the history of the accused is often a determining factor. All facts are, therefore, obtained, whether they are for or against him, and they are carefully recorded and made available to him as well as to the court. At the trial legal formalities
and rules of evidence do not exist. The accused takes part in the proceedings and always has the last word. Lawyers are tolerated but not welcomed. The accused may appeal by simply declaring that he is dissatisfied with the verdict, whereupon the entire case is sent to a higher court and reviewed not only on points of law and procedure but on the merits as well. Cases are disposed of simply and rapidly, at the average rate of about one hundred a month.

The system is intricate, and the provisions of the code are minutely detailed. Beginning with the complex preliminary examination and the trial, a case may take its appellate way up a three and in some cases a four-storied pyramid, and where it is appealed it does not become a final judgment or even a final verdict until the appellate decision has been rendered. At any point prior to that it may be sent back for further investigation, and thereupon begins de novo. At the apex of the pyramid stands the Supreme Court of the republic wherein the case originated, and above these Supreme Courts stands the Supreme Court of the Union. All of these Supreme Courts have within themselves a formidable organization, and are divided into a plenum, a presidium, a disciplinary department, and separate judicial and cassational departments for both civil and criminal cases. These Courts and their procurators also have the power to call at any time for any case in any lower court within their jurisdiction and review it by way of supervision. This is perhaps the final touch of flexibility in a system which is admittedly more concerned with the state as a whole than with the individual. A new code, however, written in 1931 and not yet passed goes far to simplify the whole system.

It is difficult to read Mr. Zelitch's book and not feel that the system is working with considerable efficiency towards the ends for which it was designed. The wonder is not that it works so well but that it works at all, for while it bears some necessary resemblance to the Tsarist system, which was in turn borrowed from the French, yet the personnel is wholly new. The bourgeois lawyers would not cooperate or were not permitted to, and the Bolshevki had not only to erect a new system but to train the whole staff as well. They have done this in such a way that while the system is in a developing state of flux and the staff in the position where it can learn only from actual experience and not from any theory of the past, it is firmly established and capable of dealing with hundreds of thousands of cases a year in a way which Mr. Zelitch reports on the whole as satisfactory to the public.

Mr. Zelitch has done a competent and useful work. He has written as concisely as is allowed by a subject which should be of absorbing interest to all lawyers. The principal legal systems of the world go back so far that it is hard to visualize precisely how they began. Here, in the midst of modern life, a system is growing before our eyes which is as new in its approach to social problems as anything we are likely to see for some generations to come. Whether or not we like this approach and call it by such names—communism, socialism or fascism—as appeal to our individual fancy, it is spreading its wings over the world and invites at least our recognition and the best of our comprehension.

Following his ungarnished explanation of the system, Mr. Zelitch adds a chapter of personal impressions and observations which is refreshing. Knowing the language, he was able to form them without the barrier of tongue. Equally refreshing is the absence of partiality within the covers of the book. I do not know, after a careful reading, whether Mr. Zelitch's personal bias leans towards or away from the stupendous human drama which he was reporting. In conclusion, I would like to express the hope that he may find the opportunity to write a companion book on the criminal law itself, showing the classification of crimes, their interpretation by the courts, the penalties they carry, and possibly a glimpse into the Russian system of penology.

Wm. Curtis Bok.

Philadelphia.

Here is a fascinating book, having as its background a dramatic chapter of American history. That background is the story of the railroads. But the book itself is a history of the establishment and development of the Interstate Commerce Commission, as shown in its legislative structure. However, the survey of legislation is not confined to a recital of statutory powers vested in the Commission and statutory duties imposed upon the carriers. Emphasis is placed upon the part played by the Commission in molding the development of these statutory powers and duties. The study is not only historical, it is also analytical, interpretative and expository. It deals not only with the frequently amended Act to Regulate Commerce, now forty-five years old, but also with a considerable mass of related legislation supplementing that act and enlarging the powers and augmenting the labors of the Commission.

The reader should bear in mind that the volume herein reviewed is the first of a series of four by this author, bearing the same title. Other volumes will deal respectively with the scope of the Commission’s jurisdiction, the character of the Commission’s activities and the Commission’s organization and procedure. Lawyer as well as economist, the author is eminently qualified to write this first comprehensive and scholarly study of the most significant administrative tribunal in the American governmental structure.

As we read the book we find evolving a great administrative organ now exercising not only administrative powers found in Congressional mandates, but also judicial functions in the determination of controversies and legislative powers in prescribing rules to govern the future. The story of this tribunal as here told is an illuminating one and gives a clear understanding of the nature and possibilities of the administrative method and ample proof that, in addition to the traditional three branches of government, a fourth potent branch has come into being. But that development is but the reflection of deeper movements and forces at work in the whole economic structure of the nation and the world. Behind it all we see the increasing division of labor, the growing dependence of the people of one region upon those of all others. We realize that improvement of transportation and communication inevitably develops commerce and that, in turn, the pressure of commerce calls for improved transportation. Increasing commerce means greater interdependence, which is reflected in greater local specialization, until eventually the transportation system becomes absolutely vital to the general welfare. This realization of its constantly growing importance is reflected in the legislative history of the Interstate Commerce Commission as unfolded in this book. Professor Sharfman succeeds admirably in focusing attention upon legislative trends which have served as a basis for the development of the Commission’s functions and processes.

In American transportation history there is a reason for the period of laissez faire and for the period of stimulated competition as a remedy for extortionate rates. The granger legislation of the agricultural states in the seventies of the last century was the forerunner of the report in 1886 by the Senate Committee on Interstate Commerce, largely the work of its able and aggressive chairman Shelby M. Cullom, then recently sent to the senate by the legislature of Illinois. In the same year the decision of the Wabash Case 1 limited the scope of state legislation by holding that the regulation of commerce whose origin or destination lay beyond the boundaries of a given state was exclusively a federal function.

1 Wabash Railway Co. v. Illinois, 118 U. S. 557 (1886).
This was the signal for federal action. Early in the following year the report of the Cullom Committee ripened into the Act to Regulate Commerce. Exactly a century had elapsed since the Philadelphia convention had decided that "the Congress shall have power to regulate commerce among the several states." Since its inception that power, for the most part, had lain dormant. Now it was being galvanized into action and invoked to correct evils against which the public outcry had become vociferous and irresistible. But the Commission thereby created was of the "weak" variety and its orders were in practice mere preliminary hearings because they became binding only upon being sustained by the court of last resort and because the courts asserted their right to hear each case de novo. The book clearly shows that the result of judicial interpretation of the Act during the first two decades of its existence was almost complete nullification of the Congressional purpose to prevent unjust discrimination not only in rates generally but even in the long-and-short haul clause. Aside from the Elkins Act of 1903, designed to remedy the evil of rebating, there was no far reaching amendatory legislation until the Hepburn Act of 1906. The author's appraisal of the Commission's work deals primarily with its activities since that time. In the section dealing with the Hepburn amendment we find a clear exposition of the new powers of the Commission, the inclusion therein of express companies, sleeping-car companies, pipe lines, switches, terminals, etc., the abolition of the free pass, a demoralizing source of political influence, and most vital of all we find the explicit delegation of rate-making power to the Commission. Here the Commission is found emerging from its period of feebleness into that of nascent strength. Even so, the basic legislation and the Commission's approach were still negative and restrictive in character. The long-and-short-haul clause was not revitalized until the Mann-Elkins Act of 1910, and the rate-suspension provision came in at the same time, likewise the ill-fated Commerce Court, sound enough in theory but extremely unfortunate in its practice.

The author is at his best in discussing the defects of the legislative structure prior to and including the 1910 amendments, showing that "the emphasis upon enforced competition among the carriers tended to stimulate some of the very evils which the Act sought to eradicate and to hamper the most effective utilization of the aggregate of transportation facilities." He discusses in illuminating manner the conflict between state and federal authority, the need of financial control, the neglect of service regulation, the Panama Canal Act, the Clayton Act, the Valuation Act and the Commission Reorganization Amendment.

Then comes the war experience of Federal Control, involving a sharp departure from established policy. The author states that the main goal of Federal control was to move a vast flow of traffic primarily for war purposes and that this goal was achieved in highly satisfactory fashion, notwithstanding the widely held popular belief to the contrary—"a belief erroneously based, in great measure, upon the financial outcome of the project, and nurtured in assiduous fashion by the carriers and their spokesmen."

However successful Federal Control for war purposes may have been, the author shows that this experience did not establish the desirability of government operation as a normal method, but that it did accentuate the shortcomings of the old scheme of regulation and paved the way for the passage of the Transportation Act of 1920, which marks the beginning of a totally different approach in railroad regulation—a shift of emphasis from mere restrictive safeguards to deliberate promotion of an affirmative transportation policy to serve public ends. In the longest chapter in the book, covering the Transportation Act, the author clearly sets forth the purposes and policies of that act, emphasizing the affirmative rate-making power therein conferred and the recapture clause, both of which
were designed for the rehabilitation of railroad credit. In this chapter we find also a clear exposition of a further far-reaching extension of the Commission's powers giving it supremacy over intrastate rates under specified conditions, thus carrying forward the centralization of rate-making to an unprecedented degree. The author severely criticizes two amendatory acts subsequent to the Transportation Act, namely: the act of August 18, 1922 requiring carriers to issue interchangeable mileage tickets, and the so-called Hoch-Smith Resolution of January 30, 1925 in which it is declared that: "In view of the existing depression in agriculture the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

The first of these amendments is said to be the result of pressure exerted by commercial travellers' organizations and in the author's opinion may prove to be the opening wedge of unwholesome influence upon the Commission. As to the Hoch-Smith Resolution the author says: "It represents a type of Congressional interference, for the advancement of special interests, which may seriously threaten the independent performance of the Commission's tasks and the unhampered adjustment of rate relationships on the basis of enduring principles, calculated to promote the general welfare." The author then shows that the Commission had repeatedly rejected the plea of economic adversity on the part of shippers, as sufficient ground, \textit{per se}, for ordering reduction of rates, because such a policy would tend to keep the rate structure in constant process of readjustment as though based upon shifting sands. In discussing the service provisions of the Act of 1920, the author shows that the complete unification of plant and equipment during the period of Federal Control demonstrated the fruitful possibilities of co-ordination and led to the conferring of new powers upon the Commission which make it, in a very real sense, the directing head of the railroad system. It yet remains to be decided by the Supreme Court in a pending case, whether or not a railroad company must comply with an order to construct two hundred miles of road across a region lacking railroad service.

The development of safety legislation is traced from the Safety Appliance Act of 1923, through the Accident Report Act of 1901, the Hours of Service Act of 1907, the Boiler Inspection Act of 1911 and various train control provisions enacted at different times.

The text is abundantly documented and supported by copious annotations. Approximately one-half the entire space is occupied by excerpts from the decisions and annual reports of the Commission itself, from court reports, Senate and House documents, the Congressional Record, Committee hearings, treatises and law review articles. If the forthcoming volumes of this work maintain the high quality exemplified in this first volume, a very great service will have been rendered to all students of transportation problems.

Anyone who, before reading this book, may have retained the belief that America still holds fast to its traditional individualism, will find that, in the field of transportation at least, individualism has been subordinated to the promotion of social ends and that in this process, reaching back across more than two-score years, there has been no turning back.

At a later time the writer will offer a review of the second volume of Professor Sharfman's work.

\textit{Robert McNair Davis.}

\textit{University of Kansas School of Law.}

"In this volume we shall discuss only those cases which present problems of social, economic or political importance." This third volume in what has already become a standard series maintains fully the high character shown in the previous years. The grouping of subjects under railroads, insurance, taxation, trade regulation, etc., is a convenient one and the authors have carried it out with excellent results. Their judgment of what is important will commend itself to the busy reader. Here one finds every significant decision of the past term with intelligent comment showing how it compares with previous rulings. The treatment is most detailed in the railway and utility groups. Here the authors are at their best; they show the origin and development as well as the final decision of several important controversies. Outstanding among these is the long struggle of Los Angeles to force the interstate railways to erect a union station. This came for the third time before the Supreme Court, resulting in a final victory for the city in *Atchison, etc., Ry. v. California*, May 18, 1931. This case is notable in that the Interstate Commission had previously found that the public convenience and necessity would be served by a union station but that Congress had not given the Commission power to take such drastic action on matters chiefly of local concern. This the Court had upheld. Thereupon the California State Commission ordered the change and was upheld by the State Supreme Court as against the claims of the railways that this was an interference with interstate commerce. On appeal the United States Supreme Court now confirms the state's action.

Likewise noteworthy is the excellent description given of the Illinois *Bell Telephone* case, decided December 1, 1930. The authors well say that, though this did not decide a single issue presented by the original controversy, yet "it is undoubtedly one of the greatest opinions written on public utility questions", because it requires specific findings of fact and conclusions of law by the Federal courts in setting aside a state administrative order. When the Illinois Commission in 1923 reduced the telephone company's rates in the City of Chicago, it valued the company's local property, held that a special depreciation reserve of $26,000,000 built up in the Chicago area could not be included in the rate base, reduced the depreciation allowance by $1,800,000 and the allowance for payment to the parent A. T. & T. Co. by $360,000, and found that with the changes ordered the company would have a return of 7½ per cent. on a proper valuation instead of the 9 per cent. which it had earned in 1923.

To all of these steps the company objected on the ground of confiscation, and the Federal District Court enjoined the State Commission's order. The Supreme Court held that the court should have segregated the interstate and local revenues, should have allocated property values likewise, and should have made a finding on the revenues for each separate year since the beginning of the proceedings. These more detailed and specific findings of fact were all necessary before the order of the State Commission could be set aside. The authors rightly conclude that this decision will have a tonic effect in setting a higher standard for action by the District Courts.

In the field of insurance the outstanding decision, *O'Gorman and Young v. Hartford Co.* (January 5, 1931), has upheld the authority of the state to provide that no fire insurance companies doing business in the state may pay a greater commission to one agent than to another. Four justices dissented, contending that brokers' commissions were no different from other expenses such as supplies, stationery, etc., over which the state had no legislative control. The case was peculiar in that the insurance companies sought to uphold the law while the agents claimed that it was unconstitutional because it limited the freedom of contract of the companies.
Under Trade Regulation the authors consider the interesting and important Raladam case in which the Court holds that the Federal Trade Commission may not issue a cease and desist order unless there are other and honest competitors in the same line of business who suffer from the dishonest practice of the respondent, and this holds even though there is a public interest in the controversy. In a previous case, Klesner v. U. S., the Court had ruled that the Commission could not act when a competitor was injured unless there was such a public interest. These two cases the authors properly hold, present a narrow view of the Commission Act of 1914. They pointedly ask, Does the last decision of the Court mean "if there are no honest competitors in the same line of commerce, and the business is dominated by dishonest competitors, then the public must be altogether at their mercy, and the Commission is powerless to act?"

Under Political Rights the decisions in the Minnesota Newspaper and California Red Flag laws are considered with approval. The first of these decisions discourages "fine distinctions upon which some other legislatures, in their zeal for good order, might justify invasions of this important right". In reversing a conviction under the California Red Flag Law, the Court was influenced by the fact that the flag was not used as a stimulus to anarchistic action or seditious propaganda.

The administration of the Court which was so vigorously galvanized by Chief Justice Taft, continues to improve under Chief Justice Hughes, to whom the present volume is dedicated. A greater number of cases (900) has been disposed of than in any term since the passage of the Act of 1925. Also the smallest number of cases has been carried over into the next term (139). None of the cases argued during the 1930 term were carried over. The number of opinions grew to 160 from 134 in the previous term. In the sixteen weeks of argument 280 cases were heard. To this statement by the authors we might add that in October of the current term Court adjourned for several weeks in order to allow counsel to catch up.

The authors note a greater willingness of the Court to allow counsel to proceed with argument even though it does not appear to have much merit. There is also a change in the treatment of cases of similar nature. Chief Justice Taft grouped similar cases and heard them together. Chief Justice Hughes groups similar cases but hears them in series, each one separately, the decisions after the first being chiefly references to the original decision. This allows counsel in each case to be heard but saves time in preparing the decisions.

With convincing force the authors again urge that the Supreme Court should give reasons for the denial of certiorari. They do not advocate an opinion in each case but a general set of formal reasons for which the Court denies decisions and a note under each denial as to which of the reasons have governed the Court. Although the Court has repeatedly stated that a denial of certiorari is not a ruling on the merits of the case, yet it is apparent that denial is usually either because of the merits or because of the lack of public importance of the case. At every term counsel state to the Court that in a case like theirs the lower courts had decided in their favor and the Supreme Court had denied certiorari, to which the Court answers that it is in no wise bound by its former refusal to correct the lower court in other cases. Out of this situation there is growing up a widespread lack of uniformity which must sooner or later become serious. It was the purpose of the jurisdictional Act of 1925 and the rules of the Court made under it to render the Federal law more uniform and certain. Yet in such important matters as employers' liability on interstate railways a serious diversity of rulings on contributory negligence has now been set up.

Each year the authors add some new experimental feature to the book; this time it is a chapter of unalloyed humor, entitled "Liberalism and Conservatism in the Supreme Court". The advertising circular pertly asks, How would you like
to grade the Justices according to their liberalism? This happy thought is carried out albeit with the utmost difficulty. Here one learns that when Justice Hughes was formerly on the bench he was liberal in 83 per cent. of the cases, while Holmes and McReynolds ran a tie race at 48 per cent. During the 1930 term Hughes was liberal in 75 per cent., Holmes spurted to 88, and McReynolds, exhausted, fell back to 8. One can hardly withhold the eager question, Is there no way to tell this to the Justices so that they may try to do better? Of course there is difficulty in defining "liberal". The authors have five tests. "If you like a man's view you call him a liberal; if you are opposed to his views, and you consider yourself a liberal, then the other is a conservative." This popular standard being slightly inexact, we have to use "liberal" as did the Senators in their discussion of nominees for the Court. Many readers will be glad to learn with surprise of exactness in the Senate. The Senators, it seems, measure liberalism by—

1. How often does he dissent?
2. Does he agree with men like Holmes, Brandeis and Stone, or with "the others"? (!)
3. How does he line up in controversies between the privileged and the underdog, between public utilities and the people, etc.?
4. What are his ideas on the social and economic problems discussed above?

With much hesitancy we would offer a sixth test, Is he generous with other people's money?

The authors have great difficulty with their tests. In order to show that the right men are liberal and "the others" conservative the tests must be applied differently at different times. If a liberal is one who agrees with Holmes, Brandeis and Stone, what is he to do on those occasions when these three decide against the underdog as, alas, even they sometimes do? Then too in applying the infallible tests of human rights versus property rights, what are we to infer about *Truax v. Raich*, a former decision of Justice Hughes in which he protects the right to work as a property right and holds it "of the very essence of personal freedom and opportunity" and gets a citation of honor for it as "protector of human rights" in the present volume? We note with alarm that even the upholding of the state legislative power as against the 14th Amendment is not a reliable standard of liberalism unless it helps the right candidates in the race. A state tax on property outside its boundaries or on chain stores is "liberal", but a state effort to free us from the most vicious kind of newspaper blackmail is not.

Much effort is given to the rating of the newest member, Justice Roberts. His percentage is apparently 70.

We trust the authors will not discover a recent decision in the current term in *Southern R. R. v. Walters*, in which the Justice had a chance to uphold human rights against property but failed to do so and seriously impaired his percentage thereby. Edward Walters, aged five, ran into the side of a locomotive at a street crossing. His father properly sued the railway, and the boy testified that the train was coming from the opposite direction from that seen by all the other witnesses, while a little girl in the vestibule of a school house saw through a break in the fence and around the corner that the railway was clearly in the wrong. This confirms Einstein's view that space is bent.

The Court, however, took a narrow illiberal view and refused to give the railway's money to Edward's father. We are glad to state that this slip by the new Justice, regrettable as it is, will not lower his relative standing in the race since all the other Justices who participated made the same mistake. Applying the previous tests to Justice Roberts the authors conclude: "If there is any value in such classification, the probabilities are that he belongs to the left center." With the candid doubt expressed in the first half of this sentence, most readers will heartily agree.

*James T. Young.*

*University of Pennsylvania.*
To anyone who takes as a standard for judgment the monumental collection of cases by Professor Gray, the work under review must inevitably seem hopelessly inadequate. Whereas Professor Gray felt the subject warranted five volumes averaging somewhat over seven hundred pages per volume, the same ground is covered by Professor Walsh in two books each only slightly larger than the average Gray volume. In this new work, for example, 347 pages are devoted to future interests. Gray used about 900 pages; Kales rather reluctantly consented to produce the treatment in the American Casebook Series in 90 pages, but insisted upon his larger book of 1450 pages being published at about the same time; and Powell finds 968 pages necessary for covering that part of the law of Property. In other topics Professor Walsh naturally had to content himself with a treatment, quantitatively considered, much less than that customary in other casebooks. The matter of delivery of deeds, commonly regarded as excellent material for student mental discipline, is covered by three cases.

Of course, casebooks cannot be graded on a page basis. If they were to be judged that way, one may speculate on the size of the best one!

At best a casebook is only the foundation for a course. None has ever been made that would teach itself. A law teacher who is looking for the easiest way will lecture or use a textbook as the basis of his course; it takes real intelligence and hard work truly to teach law by the case method. While even a single decision will afford a basis for discussion and deductions as to probable future judicial action, certainly the case system in anything like effective operation necessitates a considerable number of decisions so selected and arranged that the student may deduce therefrom, more or less haltingly, of course, the sort of conclusions the text writer or lecturer abstracts from his study of a vast number of opinions and presents in his text or lecture. There is plenty of room for difference of opinion as to the minimum number of cases necessary for the effective use of the case method, and practical considerations in curriculum making may dictate a number well below those ideally demanded.

It would be folly to assert dogmatically that the number of cases in Professor Walsh's collection is too small for an effective course. Some instructors will give a highly worthwhile course almost regardless of the material or method used. Much of the present-day criticism of, and dissatisfaction with, the curriculum and instructional material is due, it is believed, to a misplacement of emphasis upon mere materials rather than upon the equipment and capacity of the instructor. One may, however, safely go this far: if Professor Gray's idea as to the right number of cases for a suitable presentation of the subject of Property were at all nearly correct, then this new collection must be inadequate for general use.

The order of topics and the pages devoted to each is as follows: Distinction between Real and Personal Property (47); Nature and Incidents of Ownership of Land (175); Possession and Ownership (80); Transfer of Title to Personal Property (32); Possessory Liens on Chattels (27); Freehold Estates (60); Development of Methods of Conveyancing (27); Marital Life Estate—Dower (59); Marital Life Estates by the Marital Right and Curtesy (53); Rights and Liabilities of Life Tenants (17); Interests or Tenancies Less Than
BOOK REVIEWS

Freehold (72); Relation of Landlord and Tenant (85); Estates in Partnership (7); Estates in Entirety (20); Incidents of Coownership (44); Estates Upon Condition (67); Estates Upon Limitation and Conditional Limitation (19); Future Estates (125); Powers (31); Rule Against Perpetuities (104); Profits (17); Easements in Gross (7); Creation of Easements (30); Natural Rights (100); Party Walls (20); Ways (17); Extinction of Easements (13); Covenants Running with the Land (59); Deeds and Conveyances (27).

Use is made of frequent quotations, occasionally as text material, from the editor's History of English and American Law. The annotations are intelligently done and fairly full. Anyone aiming to cover the subject of Property in seven or eight semester hours would find this collection of cases very useful.

Ralph W. Aigler.

University of Michigan Law School.


This book is the first volume, comprising an introductory survey, and the subject of marriage, of a series which will be "a comparative study of the family law of the forty-eight American states, Alaska, the District of Columbia and Hawaii". The next volume "will be devoted to the law of absolute and limited divorce, and separation". No definite announcement is made of the time when subsequent volumes, covering the other subjects in the field of Family Law and Persons, will appear.

The great value of this volume is in its collection and orderly tabulation and classification of the statutes relating to marriage. There is, at the beginning of each topic, a summary statement of the common law background of the statutes, and something of the purpose and tendency of the statutes. Then come the references to the statutes themselves, arranged in whatever form of tabulation they will best fit, with careful notes to indicate peculiar variations from the norm in which they have been classified. These arrangements themselves show a great deal of care and planning, and have succeeded in making the tables easy to follow and to interpret. Of great value, also, is the complete bibliography of books, periodical literature and annotations appended to each topic. The practicing lawyer, even though he had no interest in the law of any jurisdiction but his own, would find the book a useful handbook on the law of marriage, for its introduction to the basic law of each topic, its complete references to the statutes of his state, many of which are in some states effectively hidden against everything but the most arduous search, and the ready references to other sources where the lawyer can often find a useful brief of the law ready to his hand. He can also see at a glance what other jurisdictions have statutes similar to his own, and hence may know where to look for authoritative interpretations of matters not yet passed upon by his own courts.

To the serious student of the law of marriage and the person interested in reforming or improving the law by further legislation, this book should be an absolute essential. The variety of statutes is amazing, and since our states have so conveniently turned themselves into experimental laboratories for the benefit of their sisters, no move should be made without first becoming acquainted with the experiments which have been made elsewhere. The pity is that we cannot learn how those experiments have worked, in any authoritative way. But it is something to know that there has been experimental legislation and that it has at least been so tolerable as not to get itself repealed.
The enormous task of searching out the source material for this book is obvious and has, no doubt, been well done. But the proper classification and tabulation of statutes requires some interpretation of them, since frequently they do not mean what they say, and what they mean depends on local history and local precedents which a general work of this kind can hardly consider. For example, in the complete tabulation of “Grounds for Annulment” beginning on page 242, the law of Pennsylvania is shown as making “Lack of Understanding and Insanity” a ground for annulment. Such a marriage is void in Pennsylvania but it cannot be judicially annulled, and its nullity can be shown only by collateral attack. Force or duress are shown as grounds for annulment, but an appended note shows that they are so classified only because a criminal statute makes it a crime to bring about a marriage by force. In fact duress is given in the divorce statute as a ground for divorce, but it is probable that this and other grounds for “divorce” such as fraud, impotency and illegal relationship are really grounds for annulment. The ecclesiastical courts used the phrase, “divorce à vinculo”, in this sense and the Pennsylvania legislature and perhaps those of other states have been no more discriminating. The same observations can be made concerning fraud and impotency which are indicated as not being grounds for annulment in Pennsylvania.

The existence of certain diseases is said to be ground for annulment, the note stating that such marriages “are prohibited”. In fact the only limitation is upon the issuance of a license to diseased persons, and if they succeed in marrying, either by deceiving the license official, or by common law agreement, their marriage would seem not to be subject to annulment. Marriages of relatives are said to be void by statute, referring apparently to the criminal statute against incest; but the divorce statute prior to 1929 gave to them the same effect as at common law; viz., that they could not be attacked after the death of the parties. The statute of 1929 changed the language considerably, but the reviser’s notes indicate no change of intent. These are examples of statutes which can only with great difficulty be accurately tabulated, since one must write a brief to prove what they mean and where they belong in any classification. In the forthcoming volume on divorce an attempt should perhaps be made to indicate which so called grounds for divorce, in states like Pennsylvania, are really grounds for divorce à vinculo in the old sense of annulment.

In Section 29, relating to age, it is indicated that most states have increased the age below which parties “could make a binding contract of marriage”. In the table Pennsylvania is shown as having increased the age to sixteen. But the pertinent statute only forbids the issuance of a license to persons under sixteen, and they may, apparently, either deceive the license clerk or enter into a common law marriage, and in either case the marriage is apparently immune from attack if the parties are above the common law ages of twelve and fourteen for female and male respectively. This error might lead a Pennsylvania legislator to conclude that the law of his state was much more civilized than it is in fact.

There was hardly reason to hope that a master of this field such as Professor Vernier would have undertaken a task involving so much of irritating detail. But the work needed to be done and has been done exceptionally well, and the author, and those whose assistance made it possible, deserve and will have the gratitude of all future workers in this field. The printing and binding of the volume also are well up to the high standard of its contents. May the additional volumes come forth without delay.

University of Pittsburgh Law School.

Joseph W. Madden.

Too little effort has been made to ascertain and state the precise nature of the functions which courts and juries exercise in the trial of tort cases, and particularly negligence cases. Too much attention has been paid to the so-called principles and rules of law; too little to the administrative process by which these have been applied in litigation. Judge and Jury is one of the first books which even purports to deal with this so-important matter. Unfortunately a careful reading of it discloses that the author is too often stating not what courts and juries do but what in his opinion they should do. Too much attention is devoted to an elaborate analysis whereby the negligence problem is separated into a subsidiary problem in which the function of the court is said to be conclusive and final, and other subsidiary problems in which it is at best supervisory. There is a modernistic tendency to believe that what has been thought in the past is necessarily wrong and an equally modernistic tendency to prefer the free, individual judgment, or, as it is sometimes called, the "judicial hunch", of trial and appellate judges to a judgment confined by supposedly authoritative pre-existing legal rules within boundaries, sometimes admittedly vague, sometimes assumed to be definite. The style is eager and rhetorical. Words are often used not so much to define thoughts as to evoke emotional reactions. Like much modern art the book releases the author's personality but it often fails to give anything approaching a definite outline of the ideas which he intends to express. It is perhaps unfair to be overcritical of the author's habit of using the same term in contradictory senses and of using words which construed in their common acceptation are contradicted by later statements. After all, the book is a collection of essays written as the ideas bubbled up in the author's mind and under the pressure which every law teacher knows only too well of the insistent demands of editors of law school Reviews. Possibly these contradictions would have been absent or at least less marked had the book been written as a single monograph. However, since the articles are republished as a book, they must be criticised as a book.

Notwithstanding this, there is much in Judge and Jury which is valuable. Many of the ideas which it expresses differ only in the extent to which they are carried from those which are taught by the majority of present-day law teachers. The reviewer would be the last to quarrel with Professor Green's view that many of the various principles which he speaks of as "formulas" or "phrases" are so vague as to require the judgment of court or jury in order to reduce them to a sufficient particularity to be applicable to the facts of any given case. Most of his readers, at least those in the teaching branch of the profession, will agree with him that protection is refused to many interests which mankind holds dear because of the crowding of the court's calendar which would be necessary to vindicate the interest if it were given legal protection and so made the subject of a right. They will agree that courts, in determining whether a particular type of conduct subjects the actor to liability for harm which results from it, are influenced, and often exclusively influenced, by their economic predilections. They will agree that when courts define the vague standard of a reasonable man by determining the general type of conduct necessary to conform to it, they often have in mind the practical effects of their decisions and are loathe to burden valuable industries with precautions which are likely to prevent their being profitably carried on. They will also agree that these considerations are too seldom stated in the opinions of the courts whose decisions are obviously based upon them. They realize the immense help which is given by those comparatively few modern opinions in which courts confess that their decision is based upon their concept of economic expediency. Where such an opinion
is given it can be seen that the future weight to be attached to it depends upon whether changed conditions have outdated the economic concepts on which it was based. Thus the way is paved for an intelligent application of fundamental principles which will make the law suitable to a changing world. There can be little disagreement with the author's position that courts in instructing juries often forget that they are addressing laymen and too often express themselves in technical language and even worse, deliver elaborate essays, tracing the particular subsidiary principle, which it is the duty of the jury alone to apply, to its origin in some broad generalization from which they assume it is deduced. Appellate courts too frequently not only sanction but insist upon this practice. Cases are reversed because words which are more or less meaningless to the jury are omitted and more easily comprehended synonyms are used.

The author has done great service in pointing out these things. He has done even a better service by emphasizing his view that many common law duties are, like statutory duties, imposed only for the purpose of protecting the public or particular classes thereof from some fairly well-defined hazard or types of hazard. Thus, the duty imposed is to protect against that hazard and therefore the act is negligent only towards those who are exposed to the hazard and are injured by it. By pointing this out he has removed from the problem of so-called "proximate" causation, a constant source of confusion, not only in the decisions but even more in the elaborate and sophisticated language used in the opinions which treat of the matter as one of causation.

To this extent *Judge and Jury* is valuable, not so much for its novelty as for the fact that it states things which while taught in law schools, realized by judges and practitioners, are but rarely stated in essays, textbooks or opinions. However, the book in the reviewer's opinion has grave faults which make it dangerous if used by the overimpressionable or by those who have not investigated the subject matter sufficiently to be able to separate the wheat from the chaff. There is a constant overemphasis approaching, if not reaching, exaggeration. We know that courts can find a form of words to enable them to avoid any given dilemma. We know that courts, desiring to change the pre-existing law while appearing to apply it, have a method of squaring the circle which satisfies them and which from its very ingenuity is thought by many to be the perfection of legal reasoning. No harm is done so long as we look behind the words and realize that in fact the law has been changed. However, this does not mean that all "phrases", all principles, are, as Professor Green asserts, mere "devices".1 "a network of theories" 2 or constitute a "theology" 3 or "ritual".4 Professor Green says that "in defamation, libelous, slanderous, privileged statements, privileged occasions, malice, fair comment, truth and others supply another group of highly expansible and interchangeable phrases for the subjects classified under their heading".5 We may admit that some of these phrases are expansible. They are properly left vague since no wisdom of the present can so adequately forecast future events as to provide a definite code by which every conceivable set of circumstances can be judged. None the less these "phrases"

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1 See the discussion of materiality in the chapter dealing with deceit, pages 306-10, especially page 307. See also page 119, "Thus could contributory fault be translated into "proximate cause". In this way the pain given by the contributory negligence defense was somewhat dissipated by an anaesthetizing phrase."

2 Page 119.

3 On page 55 the author speaks of "the theology of a negligence case"; on page 95 he says, "Here is a healthy pragmatism which ought to encourage judges to observe the mocking emptiness of much of their theology."

4 "The law recites its ritual and stops"—page 178. On page 265, "The foreseeability of harm or probable consequence formula . . . probably serves as well as any other ritual that could be devised."

5 Page 197.
are regarded and used as having relation only to specific subsidiary problems in
defamation. No properly qualified judge will use the "phrases" which determine
whether a written statement is prima facie libelous, if the question before him
is whether it is published on a privileged occasion, or vice versa. Nor will the
"phrases" describing malice be used today except when there is sufficient evidence
to warrant the jury in finding that the occasion is privileged. Professor Green
underestimates the practical as well as the theoretical value of subdividing the
questions that may arise in litigation into definite groups so that the particular
question involved in a particular case may be segregated and only so much of
the legal principles and rules as are appropriate thereto may be considered both
by court and jury; for after all judges are only men and only the very exception-
tional man can adequately decide any problem until the problem is sharply
presented to him.

Again the author himself tends to use words in ambiguous and even contra-
dictory senses. His mind, while creative and suggestive, revolts at the "tyranny
of words" of accurate definition or even of description. Thus, we find Pro-
fessor James Bradley Thayer labeled, by implication, as one of those "who
squirm at flexibility in words" because, not content to regard everything which
a court decides as being a question of law merely because the court decides it,
he pointed out the truth that judges in determining whether evidence was admis-
sible often had to decide preliminary questions of pure fact. The reviewer is
old enough to remember the outcry which this discovery of Professor Thayer's
created when it was announced. To find a reiteration of it is a refreshing proof
that dead dogs can still bark.

Throughout the book there is a strong predilection shown for an individual-
ized treatment of every case. The author constantly expresses his belief that
the individual judgment of the trial judge should be given the fullest possible
sway, at least in cases which have not been foreclosed by some previous expres-
sion of the individual judgment of some earlier judge. Thus he regards those
formulae as best which are so flexible and vague that they permit the judge
to give whatever judgment he desires while still appearing to follow the formula.

In an ideal state where only those are judges, in whose wisdom the community
has utter confidence, such a legal system might meet popular approval and so
might be the ideal system for such an ideal state, since the test of justice is that

The author's chapter on law and fact is perhaps the least satisfactory and stimulating
part of his book. He says on page 270, "But by and large the terms 'law' and 'fact' are
merely short terms for the respective functions of judge and jury. And to discover these
functions no a priori understanding of 'law' and 'fact' is sufficient." It may be granted that
no a priori or other understanding of "law" and "fact" is all-sufficient but to most of us it
would appear that if one could understand the two terms it would be at least helpful. Cer-
tainly no aid is given by such statements as these: "whatever sort of question the jury may
pass upon is normally called a question of fact, and properly so"; and, "in so far as jury trial
is concerned it ought to be equally acceptable to say that whatever sort of question the judge
passes upon is a question of law". It is extraordinary that an author who purports to give a
realistic picture of the functions of court and jury should be content with any such conclu-
sion. We wish to find what it is that a court passes on. We are told that it passes upon
questions of law. We ask what is a question of law and we are told that it is whatever the
court passes upon. It is difficult to see how this does more than conceal an extraordinarily
interesting question. That the question is difficult, the reviewer, who has tried to solve a
small part of it, (Mixed Questions of Law and Fact (1924) 92 U. of Pa. L. Rev., Studies
in the Law of Torts (1926) 601 realizes as fully as Professor Green.

The author, in his chapter on deceit in which he contends that negligent misrepresen-
tations can be more adequately dealt with under the deceit "formula" than under the negli-
gence "formula", says of the former on page 312, "whatever sort of judgment is desired,
the formula which have been evolved and their coteries of attendant phrases provide the
most flexible accommodations without in the least impairing their own integrity, if any, or
that of the judicial process. A science of law ask little better by way of intellectual
machinery . . . ." (The italics are the author's.)
it is satisfactory to impartial popular opinion. But we must cut our coat to our cloth. Our legal system is administered by fallible men and, under the system which prevails in the greater part of America of political appointments or elections to the Bench, we can not hope for such ideal conditions. A reasonable latitude of discretion must be provided in principles or rules which are intended to have something more than an ephemeral application, otherwise the dead hand of the past would be laid on the living present. But Jerome Frank to the contrary notwithstanding, Americans, like Englishmen, desire certainty and consistency in the adjudication of their disputes. They also desire uniformity. They would regard it as the height of injustice that under similar facts A should be required to pay B damage because his case was tried before Judge X, while C would not be required to pay D anything because his case came before Judge Y. In addition to this the conscientious judge, the very type who should sit upon the Bench, shrinks from the feeling that his own individual judgment, unrestricted by rules which confine it within reasonable limits, is to determine the fate of his fellowmen.

Even in that part of his work which is most original and valuable,—the part in which he emphasizes the fact that common law, as well as statutory, duties are often designed to prevent not injury in general, but injury resulting from certain hazards,—the author's tendency to enthusiastic extremes causes him to regard his discovery, which is a valuable specific for a limited number of situations, as a panacea which will solve all questions. Thus, he is led to carry his investigation into the purpose of a duty of care far beyond that to which any but his most devoted disciples will be apt to carry it. He criticises the analysis in the New Hampshire case of Johnson v. Boston & Maine R. R., in which the plaintiff while driving his car carefully collided with the defendant's negligently driven train at a level crossing. A statute provided that: "No person shall operate a motor vehicle upon any way in this state unless licensed." The plaintiff was non-suited on the ground that having no license he was a wrong-doer. The author approves of the court's concession that there was sufficient causal relation between the plaintiff's failure to take out the license and his injury. Now let us for a moment look at Professor Green's own theory that legislative acts are intended to protect against particular dangers. What was the danger against which the license was to make travel secure? Clearly the danger of careless driving, and that hazard never arose since the car was driven carefully. By his own analysis one would think that Professor Green would have disapproved of the decision on this ground. On the contrary his dissent from it is based upon the fact that the New Hampshire court did not discuss the question as to whether the statute while designed to protect travelers on the highway was also designed to protect railroads from their negligence at crossings. Thus, he suggests an entirely new basis for the defense of contributory negligence; that the plaintiff is required to act carefully in order that others may act carelessly without danger of liability. Many explanations have been given of contributory negligence. None is perhaps altogether satisfactory but this reason has never before been suggested. It has at least the modernistic merit of novelty.

The task of the reviewer is made difficult by the fact that the author is one of those who do not "squirm at flexibility in words". His predilection for vague and ambiguous phrases and for the use of words the primary and apparent meanings of which are contradicted by later statements, makes it exceedingly difficult to understand the nature of the duty problem and of the negligence issue and to see approximately where the author draws the boundary line be-

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83 N. H. 350, 143 Atl. 516 (1928).

9 See pages 219 to 221.
tween them. Thus, it is said that the duty problem may be stated in several ways, among others, "Is there any rule of law designed to protect the interest invaded".

Yet later the "danger test" is said to be no part of the duty problem but important only in the "negligence issue". Indeed, many pages are devoted to taking Chief Judge Cardozo to task for his failure to perceive this fact, which is so obvious to the author. Yet if words are used as having anything like their normal meaning, how can a rule of law be designed to protect a particular person or class of persons from harm, unless harm to them is foreseen as likely to result from its violation? Humpty-Dumpty, engaging as he is in "Alice Through the Looking Glass", would, one fears, be unsatisfying as a serious legal writer.

The greater part of the book is devoted to a new analysis of the negligence problem. The subsidiary problems into which it is divided are not novel. They correspond fairly accurately to those of the customary analysis, but the content and purpose of these problems are completely different. The purpose is to segregate into a single problem, which he calls the duty problem, all of those questions in which the judgment of the court is final and conclusive, or, perhaps, to be more realistic, in which the author feels that it should be final. This judgment, while final and conclusive, is only given effect by the concurrent opinion of the jury in passing upon the other issues as to which the court has only the supervisory power of determining "whether the evidence raises an issue". These issues are the negligence issue, the causation issue and the damage issue.

A catalogue is given of the considerations which the court should take into account in determining the duty problem. These comprise the following factors, the economic, administrative, prophylactic, ethical and justice. Apparently they are regarded as the most important factors, though it may be doubted whether the catalogue is intended to be exclusive. It may be said in passing that many of the considerations which move courts to determine that a duty of care exists or that care must be exercised in certain particulars are not considerations which take any of these factors into account. In many if not the majority of cases, courts, in deciding what it is proper to require in constantly recurring situations, are merely reacting to some salient characteristic of the situation in the way in which the great mass of mankind customarily react. It is difficult to perceive the influence of any of Professor Green's factors on the distinction almost universally drawn between the particulars in which one who gratuitously supplies a chattel for the use of another must exercise care and the particulars in which care must be exercised by those who for their business purposes supply chattels for such use to another. In the first case the supplier of the chattel is required to exercise care only to give adequate information of dangerous defects known to him and not likely to be known to the user of the chattel. In the other he must exercise reasonable care to discover the existence of defects so that he may give information of them. It is hard to see any economic or administrative basis for this distinction. To the reviewer it seems to be sufficiently explained by the old saying that "one must not look a gift horse in the mouth". Undoubtedly the economic factor often influences the court to

The idea of a duty designed to give a highly particularized protection is more fully expressed on pages 254-5 in the author's description of the many forms which the judge's "function of defining duty may take". Among these are: "(3) that if owed to plaintiff it (the duty) was not designed to protect the interest of plaintiff which was injured; (4) that if owed to plaintiff and designed to protect the interest which was injured, it was not designed to give protection against the hazard which was involved." (The italics are the reviewer's.)

Pages 65-73.
Chapter 8. The Palsgraf Case.
Page 76.
extend or restrict liability to particular classes of persons. The only possible justification for the rule which in many jurisdictions restricts the liability of a negligent manufacturer to his immediate vendee is the fear of checking productive activity by putting undue burdens upon it.  

The administrative factor seems greatly overstressed. Those who have studied the history of the law of defamation know that the flood of litigation which followed the action of the King's Court in taking jurisdiction over the law of defamation led to ridiculously restrictive rules defining actionable slander. Courts may properly refuse to give protection to interests, the vindication of which will crowd the court's calendar with trivial neighborhood disputes or require them to decide nice questions of family discipline and relations. The fact that certain facts are generally incapable of reliable proof may lead courts to refuse to recognize them as of legal importance, but to say that the tendency of courts to follow precedent is largely due to their reluctance to decide questions the reconsideration of which will require severe and burdensome effort, seems a distinct exaggeration. The moral, justice and prophylactic factors require only brief mention. Under the moral factor is discussed the propriety of requiring fault as the basis of liability. The justice factor requires that loss shall be placed "where it will be felt the least and can best be borne... Other factors being in equilibrium the hurt plaintiff captures the heart of judge and jury alike. This is justice."  

Taken together the author's discussion of the moral and justice factors may be roughly summarized as follows: The old concept of liability without fault is to him "more strictly moral than that of today". But as is so often the case we find the primitive concept dressed in a new garb of social purpose. The man who breaks must pay if he is able to do so without financial strain and the injured man needs the money. All activities are to bear the burden of the harm which they cause, particularly if they are gainful and profitable activities. If they are not so prosperous as to be able to bear the loss without undue strain they can by "a mere pittance" make themselves able to do so by insurance. Such a reorganization of the social fabric may or may not be advisable. Very possibly it may, but it is more than doubtful whether we can expect such a reorganization through judicial opinion. Indeed, judging by the enormous circulation of the Saturday Evening Post, one is inclined to doubt whether the average American would regard it with favor. 

Professor Green's analysis of negligence is original. It has the charm of novelty—that is, the selling value which newness confers upon an article. On the other hand, the fact that it is new does not necessarily mean that it may not be a

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14 Much harm has been done by the fact that even in those opinions in which this is given as a reason other and untenable legalistic grounds are also given for the decisions. Were the decision placed flatly on the economic grounds the fact that, in jurisdictions which have extended the liability much further, no harmful effects have followed would be sufficient to lead intelligent courts to overrule such cases. 
15 These cases are admirably discussed by Professor Green on pages 87-90. 
16 Pages 78-9. 
17 The prophylactic factor is considered, post, in that part of the review which deals with Professor Green's criticism of the American Law Institute's Tentative Restatement of the Law of Torts. 
18 Page 99. 
19 Page 104. It may be suggested that the change from liability based on harmful activity to liability based on improper conduct of activity is not as the author suggests a product of "those partly philosophic, partly religious, partly ethical tenets which reached their crest in the eighteenth and nineteenth centuries". These tenets may have aided in the development of the concept but it can hardly be the basis of it since it appears in the jurisprudence of every civilization at certain stages of its cultural development. 
20 Page 150.
distinct improvement upon the older analysis. However, those who wish to displace the old with the new must bear the burden of proving that the new is not only as good as, but better than, the old. In the reviewer's opinion Professor Green has not sustained this burden. The fact of the matter seems to the reviewer to be this: wherever a court believes that considerations of public policy should determine any legal question it will see to it that its judgment is made conclusive. This is not only natural but necessary. Considerations of public policy are based upon what is believed to be best to be done not only in the particular case but in other cases of the same general type. Courts, being permanent bodies, and therefore able to take a broad view, not only of the case before them but also of similar cases which have or are likely to come before them, are capable of attaching proper weight to these considerations. On the other hand, the jury summoned for a single trial are exclusively concerned with what appears to them to be fair between the two litigants. As the reviewer has elsewhere pointed out, it would be futile to instruct a jury to give consideration to the economic expediency of imposing too heavy a burden on productive industry when the jury has before it a single instance of an injury caused by, what seems to them, carelessness. As has been seen, courts, for good or evil, regard it as wise to evolve more or less definite principles or rules, call them what one pleases, which are to determine the general nature of the precautions to be taken under constantly recurring situations. Where the question before the court involves considerations of this sort the court will deal as they have dealt with them in the past, finally and conclusively, and will give the jury no part in their consideration.

Professor Green makes no serious attempt to ascertain or describe the nature of the function which he himself says that courts exercise in determining whether "the evidence raises an issue" as to "the violation of the duty", "causation" or "damage" problems. Thus his readers are apt to lose sight of the very effective control which the courts have over even these issues if they choose to exercise it. Had he appreciated the effectiveness of this function it is possible that he would not

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21 See Bohlen, Contributory Negligence (1908) 21 HARV. L. REV. 233, 251 n.; STUDIES IN THE LAW OF TORTS (1926), 500, 523, note 40.

22 On the other hand, where the negligence of the defendant's conduct depends upon the facts peculiar to the particular case, the matter is left to the jury except insofar as is necessary to prevent their natural prejudice in favor of the plaintiff from reaching a result which the court might regard as unfair between the parties. This is proper since the care which is required under the peculiar circumstances of the case is generally a matter which is as fully within the experience of such men as compose the jury as it is within the experience of those who sit on the Bench. This being so, the judgment of the jury would be as accurate an expression of public opinion as that of the judge if the jury were impartial, and what is less obvious but as important, if the popular concept of the proper basis of liability were in fairly close accord with that of the law as administered by the courts. Juries are by no means invariably impartial. Their sympathy with the injured man who is usually less able to bear the financial strain of his injury than the defendant creates a natural predisposition in his favor. In addition, the lay view of liability is even today likely to be substantially that of the primitive law; that he who breaks should pay, at least if he is financially able to do so, in which particular the author seems to be in sympathy with the attitude of juries rather than with that of courts. Where the contributory negligence of the plaintiff is involved and the negligence of the defendant is clear, it is repugnant to the lay mind to deny recovery because the plaintiff is himself in some slight fault. In such cases there is a pronounced tendency to judge the plaintiff's conduct more leniently than that of the defendant. Martin v. Herzog, 228 N. Y. 164, 129 N. E. 814 (1920), is a conspicuous instance of this. The plaintiff and defendant had each violated different sections of the highway act. Both sections were designed to prevent traffic accidents. The court instructed the jury that the breach of the statute was merely evidence of negligence and left it to them to say whether the breach of either or both of the parties constituted negligence. The jury found the defendant to be negligent but held that the plaintiff was not contributorily negligent. Courts interfere to prevent such predispositions of the jury from working what the court regards as injustice to the defendants. They withhold the case from the jury or set aside its verdict only where they believe that impartial men could not find for the plaintiff. Whether they always exercise their power wisely is another question.
have invented a new analysis to give the courts a power which they already possess. Courts do not hesitate to withhold a case from the jury or set aside a verdict for the plaintiff if they are firmly convinced that the defendant's conduct did not fall short of the standard to which it is proper to require him to conform. So too, they do the same where they are clearly of the opinion that the defendant though negligent should not be held responsible for the plaintiff's injury. The court's power, call it what one will, is exercised in every problem; it is quite immaterial whether we visualize it as being merely one of supervision over the jury in a matter in which the jury has a concurrent function or as an exclusive power over a matter in which the jury's concurrence is not necessary. Courageously exercised it gives ample scope for the court to enforce its opinion as to what is just and politic without any necessity for a new analysis of the negligence or indeed of any other tort problem. If courts, having this technique at their disposal, are timid in the exercise of it, it is not likely that Professor Green's new analysis will stiffen their backbone. What is needed is to bring to their attention the power that they already possess and to drive home to their consciousness the importance of using it.

In this particular the reviewer believes that the new analysis has no advantages over the old. In other particulars, the reviewer believes that it may be actually harmful and may make the present confusion worse confused. The present orthodox analysis has this advantage. Any action of negligence may involve a number of fairly distinct questions which may be briefly summarized as follows: What has actually happened? Was the defendant's conduct negligent, that is, socially improper? If so, for what results of it should he be held responsible? The first is a pure question of fact in which all agree that the jury's function is subject only to a comparatively slight supervisory power on the part of the court. The second depends upon the judgment of court or jury as to the character of the defendant's conduct when done. This again generally depends upon whether he should realize a likelihood or risk of injury to others out of proportion to the social value of his conduct, as advancing the interests of himself, third persons or of society. Since the realization of the likelihood of harm is an essential, though not the only essential, to liability, his conduct must be judged in the light of those circumstances existing at the time, of which he knew or of which he should have known. However, even after the wrongfulness of the defendant's conduct is established, the plaintiff's right to recovery still depends upon whether his injury results from the defendant's negligence in a manner which makes it just and politic to hold the defendant responsible for it. Here the point of view completely changes. It is centered upon what happens after the defendant's negligence is complete. That which is essential in the one question is taboo in the other. To the reviewer the orthodox analysis has great value. It separates the subsidiary problems in a manner helpful not only to the jury but to the court. Courts may be, by their training, the better able to form a satisfactory judgment as to the social value of the defendant's conduct, but even courts can do so far better by looking at the transaction not as a whole but as separated into successive parts, even though the facts of a particular case may require them to take up the various parts seriatim. The experience of every thinking man must convince him that it is exceedingly difficult to look at a problem, which is visualized as a single problem, from two different and conflicting standpoints; the one involving foresight and the other hindsight. Yet this is what the court must do under the duty problem as analyzed by Professor Green. His duty problem includes not only the determination as to whether the defendant owed a duty to act carefully so as to prevent some injury to the plaintiff's interests, but also an entirely different sort of duty; a duty to answer for a particular injury which has in fact resulted in a particular manner from the defendant's breach of the first type of duty.
The reviewer has no great quarrel with the author's treatment of causation except in comparatively minor particulars. The problem which is customarily treated as proximate causation is part and parcel of the larger problem of the defendant's responsibility for the particular injury which the plaintiff alleges to have resulted in some particular manner from some particular act or omission of the defendant. In one case the defendant's responsibility may turn upon whether his act or omission was wrongful towards the plaintiff. In another the wrongfulness of the defendant's conduct may be admitted or clearly proven, but even so the question remains whether the manner in which it brought about the plaintiff's injury is such as to make it proper to hold him responsible for it. This does not depend merely upon whether the actor's conduct did in fact cause the plaintiff's injury. The popular as well as the legal mind revolts from holding even the most culpable of defendants for everything which in fact results from his misconduct. The principles and rules which are customarily grouped under proximate causation are all principles and rules which limit responsibility at some point short of this. What functions do courts and juries exercise in determining the point at which responsibility is to be limited? Clearly the law does not extend liability further than the ordinary man regards it as fair to carry it. Perhaps there is no better way of referring this to the opinion of the ordinary man than by leaving to the jury the question as to whether the defendant's conduct is a substantial cause of the plaintiff's injury, or, to put it somewhat differently, is a substantial factor in producing it. But this is not the only limitation. For good or evil, courts tend to generalizations. They look not only to what is fair between particular litigants but to what is desirable in similar cases. Therefore, where the court is dealing with a type of situation which recurs constantly and which presents some salient characteristic common, or assumed to be common, to all such situations, courts do evolve definite rules or follow certain practices which stop liability short of the point to which a jury concerned only with the justice of the particular case might, indeed probably would, carry it. These rules are applied to or these practices followed in all subsequent situations which present this particular characteristic. The jury has nothing to do but apply the rules where the evidence is conflicting. It is immaterial whether we conceive of the court as exercising this function of controlling the jury by determining the duty problem or by deciding whether an issue is raised in the causation problem. The fact is that their decision can be made as effective in the one way as in the other. The considerations which move the courts to so act are only in the very broadest sense considerations of public policy. Frequently they merely make effective the court's view as to what is desirable in cases presenting some common and salient characteristic. At least where the question of causation as it is customarily understood is involved, they rarely have anything to do with the various factors which Professor Green catalogues. The economic factor—the undesirability of burdening valuable activities, has been given effect in only a few instances and those in no great repute even in their domicile of origin. Except in so far as punitive damages are concerned, the prophylactic factor has no effect in determining the extent of responsibility. The administrative factor has undoubtedly been the dominant influence which has led the courts of many, and those the most populous, of American states to deny recovery where illness is brought on through the internal operation of fright or other emotion. There is, however, no necessity of placing these considerations in the duty problem. They have been given effect and will continue to be given effect even though the limitation of liability, because of the manner in which the harm is brought about, continues to be regarded as a part of the causation problem.

23 Chapter 6. Rules of Causation, pages 186-225. Chapters 7 and 8 seem to the reviewer less satisfactory.
24 Ryan v. N. Y. Central R., 35 N. Y. 210 (1866).
25 See cases cited in Judge and Jury, pages 87-90.
To the reviewer there seem to be two objections to the author's analysis which places the judicial limitation of the extent of responsibility in the duty problem. First, until the professional mind is completely changed by a new technique of teaching it is confusing to use the word *duty* in a double sense; at one time as a duty to do or refrain from doing a particular thing, which is the customary concept of duty in negligence, and again as a duty to pay for a particular consequence of a particular act because it has occurred in a particular manner. It may not be improper to think and speak of a duty to pay damages when liability has accrued, but the duty of payment after liability has been established and the duty which is necessary to the existence of liability are still to the professional mind separate and distinct ideas and, for reasons into which space will not permit the reviewer to enter, the distinction between the two seems not only conceptually but practically valuable. There is, however, a more practical objection to the author's analysis. To join the two ideas into one concept of duty and to throw the whole matter without analysis or separation into the hands of the court is apt to lead to confusion. The purpose of the customary analysis which separates the negligence problem from the causation problem is to simplify the task of those who deal with negligence cases by separating those questions, which depend upon the foresight of the defendant under the circumstances which not only existed at the time he acted or omitted to act but of which, also at that time, he knew or should have known, from those questions in which the defendant's foresight is totally or comparatively immaterial and in which attention is focussed upon what took place after the defendant's negligence is complete, the very thing which must be completely ignored in determining the negligence of the act.

However, the reviewer has a second and more serious objection to Professor Green's treatment of causation. This is that on its face it promises a far more simple solution of the causation problem and of the respective functions of court and jury than on examination it is found to accomplish. The author's claim is that it leaves to the jury a very simple question which he describes as one of "scientific inquiry": namely, whether the defendant's negligence caused the plaintiff's injury. So far it would seem that the question is simply a matter of fact in its purest sense, but we find that the inquiry is not so simple. However, Professor Green goes on to say that the issue is whether the defendant's negligence "has a material, substantial or appreciable connection with the plaintiff's injury". None of these words are words of approximate, far less of precise definition. There is no formula by which it may be determined scientifically what share the defendant's act must have in producing the plaintiff's injury in order to make it a "material", "substantial" or "appreciable" cause of it. These words are at best words of vague description. As Professor Green himself recognizes, they are merely a method by which the jury can be made to understand that it is for them to say whether the effect of the plaintiff's act is sufficient to make them regard it as fair between the parties to hold the actor responsible. The reviewer is no unfriend to using the word "substantial" as a test of responsibility by describing the causal relation which justifies the imposition of liability. There are a multitude of events which have a part in bringing about every happening, but many, indeed most of them, have so slight an effect that to the popular mind,
which habitually thinks of cause as involving responsibility, it would seem altogether ridiculous to describe them as causes. The term "substantial" has the very real advantage of making it plain to the jury that its task is to determine whether the defendant's conduct is a cause of the plaintiff's harm as that word is popularly understood. But since the word merely invokes the opinion of the jury as laymen, the fair promise which the author holds out of a single issue, rarely or never likely to cause misunderstanding or to require the court to exercise its supervisory functions, goes aglimmering. Here as in every other issue in which the popular judgment is invoked by referring the question to the jury, the court does and will see to it that the jury is not so carried away by its sympathies as to make a finding which is contrary to the court's own firm convictions. Where a matter is, like this, a matter in which popular judgment is invoked, we must not forget that judges are themselves men and as men may have very definite and certain convictions.

The author's tendency to prefer the novel to the customary is exhibited in his vehement attack upon the reliance which courts often place upon the sine qua non formula. Thus, in determining whether a particular act or omission is an actual cause of a particular injury, the fact that the same effect would (not might) have been produced even had the defendant's act not been done is habitually regarded by the courts as decisive. This Professor Green brands as totally improper. He says, "This [the sine qua non] formula does not prevent the simple inquiry as to whether the defendant's conduct was a factor in the result." But how can an act be "a" factor, much less a "substantial", "material" or "appreciable" factor in bringing about an event which would (not might) have occurred had the act not been done. What justice can there be in requiring a defendant to pay for an injury which he has had no effect in producing? The world has not so changed that post-hoc has become equivalent to propter-hoc. So far from presenting an inquiry impossible of determination the sine qua non formula often presents the easiest and most convenient, sometimes the only practicable, method of determining whether the defendant's conduct was a factor in bringing about the plaintiff's injury. One cannot escape the feeling that loose language is the product of loose thinking. Perhaps the author's dissent from this customary practice is based upon his not only speaking but thinking in terms which he regards as synonymous but which in fact have very different meanings. To the author would not and might not seem to be the same. Thus, he says, "The assumption is that if the result would have happened anyhow, then the defendant is not a cause. Such an inquiry is vicious," because inter alia "the case is not what might have happened but what has happened".

Page 192.

In one peculiar situation the popular sense of justice does reject the "philosophic" concept of causation stated in the "but for" formula. This is where two forces are actively operating, each in itself sufficient to cause the plaintiff's harm but neither being the cause of the harm, if the word "cause" is used in the philosophic sense of a necessary antecedent. Yet the harm would not have been sustained but for the operation of the two forces. The difficulty may be expressed in the language of the "Beggar's Opera", "How happy could I be with either, were t'other dear charmer away." In such case courts permit juries to express their feeling that either or both should be held responsible by permitting the jury to say that either force is an appreciable factor in bringing about the harm.

The author furthermore says that "the inquiry while stated in terms of cause is in fact whether defendant should be held responsible." This is based upon his assumption that by leaving to the jury the question as to whether the defendant's act is a cause, a merely scientific question is involved and no appeal is made to the judgment of the jury as to whether the defendant's act has so contributed to the plaintiff's harm as to make it fair to hold him responsible. The author himself has deprived this assumption of any basis by requiring the jury to determine not only whether the defendant's act is a cause of the plaintiff's injury but also whether it is a substantial cause. As has been seen this requires the jury to express its opinion as to whether the defendant's act is not only an actual but a responsible cause.
be a cause of an event which *might* have occurred "anyhow", but it is quite a different thing to say that an act is a cause of an event which *would* have happened even had the act not been done.

The author has a tantalizing habit of tiptoeing over the pimples, as young Bailey would say. In the midst of the rush of ardent words one gets a glimpse of an important perhaps even vital problem. One hopes for some discussion of the matter, but on the author passes, leaving us unsatisfied. Even under Professor Green's analysis the court has other functions than merely that of determining whether a duty exists. They must determine whether "the evidence makes an issue" as to whether the defendant "has violated his duty" to the plaintiff. When and why does the court use this power? This all left vague and indefinite. All that is given us is the statement that "this question is resolved by the well understood [!] reasonable inference formula or its equivalent" 33 which tells the judge "to determine whether the evidence will support two reasonable inferences, whether reasonable minds can differ on the evidence." 34 This is after all only a form of words and sheds little or no light on the process by which a court determines whether the so-called inference which it thinks should be drawn is so clear that those who differ with it act unreasonably. The space at the reviewer's disposal is too limited to permit him to do more than to indicate the significant fact that in the elaborate discussion of the negligence issue no further attempt is made to indicate what is meant by the court's function of determining whether "the evidence makes an issue". Both in the negligence issue and the causal relation problem the matter needs intelligent investigation. It is regrettable that we have no inkling of Professor Green's views on the subject.

Even more serious is the failure to give any adequate picture of the author's conception of the content of his "negligence issue." Does it include only the finding of what the defendant did or omitted to do, or does it include a determination as to whether his particular act or omission fell below the legally required standard of the conduct of a reasonable man? This latter question, as everyone knows, is often left to the jury, subject to the court's supervisory power to keep the jury's judgment within reasonable bounds, but, particularly when the conduct of the plaintiff is alleged to constitute contributory negligence, courts do often determine what must be done or left undone in constantly recurring situations which run more or less true to type. When courts do this they are doing just what juries

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33 Page 158. Courts often do this by the manifest device (to use one of the author's favorite terms) of saying that a verdict for the plaintiff would be without evidence to support it. Yet it is very clear that it is not lack of evidence which is the reason for their action. They exercise their supervisory power although there is no conflict in the evidence and the testimony proves exactly what took place. The fact is that they withdraw a case from the jury because they distrust its judgment. They set aside a verdict because they differ radically with the opinion which the jury's findings express. It is significant that this supervisory function is generally exercised to protect in favor of the defendant. There must be reason for this. The fact that *Judge and Jury* deals only with the function of court and jury in determining the defendant's negligence and says nothing about their respective functions in determining the contributory negligence of the plaintiff precludes our finding any adequate discussion of this significant feature of judicial practice.

34 Note 15, page 162. Professor Green says that the negligence issue is left "to the jury unless there is some legislatively or judicially declared rule of conduct". Apparently a judicially declared rule of conduct states a duty. However, there can be no such judicially declared standard of conduct unless some court has previously determined what conduct is obligatory. What is the court, before which the question first comes and which lays down this rule, doing? Is it to this extent defining the vague duty of reasonable care under the circumstances or is it determining that this vague standard has been violated? The important thing is whether there is a duty to do or to leave undone the particular thing which the defendant has omitted to do or done. In the abstract there may be a general duty to exercise reasonable care; in the concrete there is a duty to do or to refrain from doing some particular thing. At times Professor Green used the word duty in the first sense and other times in the second. This makes his discussion of the "negligence issue" interesting but unsatisfying.
do when the same question is left to them. They reduce the necessarily and properly vague standard of reasonable care to the definiteness necessary for its application to the circumstances of the particular class of cases. Is such definition of the vague negligence standard part of the duty problem or is it part of the violation of the duty problem or its synonym, the negligence issue? If the first, why is it so often left to the jury? If the latter why do courts so often trench on the province of the jury and themselves dispose of it? Or perhaps, does it, like the chameleon, change its nature with its environment and become part of the "duty problem" when the court disposes of it and part of the "negligence issue" when it is left to the jury? If the reviewer were asked to state the author's answer to these questions he would be forced to say with Bunthorne in "Patience", "I cannot tell," at least with any certainty. The third solution seems more likely to be that of the author. However, the really important thing is that a book which purports to be a realistic description of the function of court and jury contains no discussion of this all-important matter.

At this point it may be apropos to call attention to another curious omission in a book which purports to give a realistic picture of the respective functions of court and jury. The book is exclusively concerned with the process by which the negligence of a defendant is established. No allusion is made to the very different manner in which courts exercise their power in such cases and in those cases in which the contributory negligence of the plaintiff is in question. Yet carefully considered, the cases which show this difference shed a flood of light upon the reason when and why courts take matters into their own hands and enforce their own view of justice under the guise of preventing the jury from acting unreasonably.

At the risk of unduly extending this review, the reviewer asks a personal privilege to take up a criticism which Professor Green makes of the Tentative Restatement of the Law of Torts of the American Law Institute for which the reviewer, as Reporter, is responsible. The book speaks of the "danger test" as though it had been adopted by the Institute as the sole and all-sufficient test of negligence. He completely misunderstands the adjective "unreasonable", which is constantly used, almost ad nauseam, as qualifying the risk, the realization of which by the actor is necessary to make his injurious conduct negligent. He says, referring to Torts Restatement Preliminary Draft, Number Twenty, (Tentative Draft Number Four, 1922): "Here the phrase unreasonable risk is substituted for dangerous conduct and similar phrases." It is difficult to see how even the most cursory reader could be guilty of such a misunderstanding. The Reporter believes that Sections 172 to 175 read in connection with the section quoted make it clear that while it is necessary to negligence that the defendant should have realized that his conduct was dangerous, this is only the first hurdle over which the plaintiff must pass to success. Section 172 requires that the recognizable risk shall be "unreasonable"—that is, "of such magnitude as to outweigh what the law regards as the utility of the act or the particular manner in which it is done". Section 173 sets forth both in Blackletter and Comment certain factors which are important in determining the utility of the actor's conduct. Section 174 sets forth factors important in determining the magnitude of the risk. It may be that the word unreasonable is somewhat overloaded. It may be that "undue" would have been preferable. It may be that on its face and without the aid of the explanatory sections and comments, it does not express all the ideas which it is intended to carry. However, at least one of the factors which Professor Green regards as important in determining the duty problem is not only dealt with but stressed, though not by the name which Professor Green gives to
it. After all, what is Professor Green’s economic factor? To the reviewer it seems to be nothing more or less than those considerations so ably discussed by Professor Terry and sloganized by Dean Pound in the striking phrase, “balancing of interests”. It is the weighing of the social utility of the defendant’s conduct against the risk which it involves; the old question as to whether “the game is worth the candle”. This concept is implicit if not explicit in the three sections just cited. The reviewer’s doubt is whether it has not been overemphasized rather than understressed. After all, the immense majority of dangerous acts and omissions have no conceivable social utility. Where this is the case the negligent character of the act depends only on a simple question: Is the risk which the actor should recognize as involved in his conduct sufficient without more to make it socially improper and therefore negligent? Enough is said in the Restatement to indicate that the “Economic” factor is important not only in determining the existence of a duty to use care but also in determining the particular precautions which must be taken for its exercise. The reviewer admits that Professor Green’s other factors are not mentioned except in so far as the “Administrative” factor is indicated by the statement that, in determining the care which a particular individual should exercise, allowances are made for those inferiorities which are clearly provable and the effect of which the ordinary man can understand, while none are made for minor deficiencies, which in the main must be proved by the doubtful testimony of experts and the effect of which is beyond the judgment of either court or jury. The so-called “Justice” factor as that factor is later explained by Dean Green—that is, the comparative ability of the respective litigants to bear the loss without financial strain—is omitted because it has no place in a restatement of the existing law of the United States and not that of Utopia. This factor has never consciously or, the reviewer believes, unconsciously influenced the decision of any court and our law does its poor best to prevent the jury from learning the economic inequality of the parties for fear that this “justice factor” might influence them to do what courts regard as an injustice. The “ethical” or “moral” factor raises the question as to whether there should be liability in the absence of moral or social fault, if the failure to reach a standard of conduct which unavoidable inferiorities make it impossible to attain can properly be so called. This factor was not mentioned since the subject matter of the particular part of the Restatement is Negligence, which by its very name excludes liability without fault. Whether or not there is or should be liability under some or many circumstances even though every practicable precaution has been taken is a distinct and separate question which should and will be considered in a separate part of the Restatement. The “Prophylactic” factor—the desirability of punishing conduct for the purpose of preventing its repetition—can not be a reason for imposing liability except upon conduct which is socially undesirable, and if the conduct is anti-social there is no need of any further reason for a duty to refrain from it. If the defendant’s conduct is socially valuable it would be the height of folly to attempt to prevent its repetition merely because in the one instance by some acci-

It is true Professor Green gives quite a different explanation for this, see pages 166-174. The reviewer remembers that, when it was suggested that the mental attitude of the defendant should determine his negligence, on of the wisest of American Appellate Judges warned against making an element so difficult of reliable proof determinative of liability.

The reviewer may here confess sympathy with the tendency of modern English law to recognize liability for harm done by activities which, though so socially desirable that to engage in them can not be called socially improper, none the less contain an irreducible danger to others which can not be eliminated by any care which is practicable.

For it must be remembered that no court can pronounce or conduct until it has before it a specific instance of such conduct. Wherever there is an entirely new set of circumstances the actor’s judgment as to whether his conduct will subject him to liability is a forecast of the opinion which the court or jury will entertain in regard to it.
dent it had an unfortunate result. In a word, the prophylactic factor gives an additional justification for imposing liability to pay compensatory damages for, but only for, socially improper conduct. It can have no weight so long as the anti-social character of the conduct is in doubt. The preventive function of imposing liability for compensatory damages is its by-product rather than its purpose.40

Lack of space prevents anything more than a very cursory reference to the remainder of Judge and Jury. Deceit, Assault and Battery and Malicious Prosecution are accorded a treatment substantially similar to that given to Negligence.41 There is an excellent chapter on the modified special verdict which has been developed in North Carolina, Texas and Wisconsin. The volume concludes with a reprint of an article, "Why Trial by Jury?" first published in The American Mercury. After a vivid picture of a jury trial,42 the author asks, "What is the case in behalf of the jury? There is none, save such as lies in the reverence one may have for a venerable tradition." This comes as a shock to those who expect consistency and who recall the author's previous statement that as "an absorber of the discontent" of disappointed litigants the jury serves a "prime political function in democratic government", a function which "possibly is enough to warrant its retention in this stage of democracy's maturity".43 Professor Green has himself pointed out one very important fact, that the finding of a jury is "ephemeral"—good for this day and trip only. Thus the particular case can be disposed of without creating a precedent which might prove harmful or at the least embarrassing in the future. Furthermore he constantly shows his sympathy with the lay view of jurymen when it differs from the judicial view.44 One would think that for this reason, if no other, he would regard the jury as having a valuable place in the Judicial Process.

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40 There is a tendency to overemphasize the preventive function of tort liability. The fear of liability is a deterrent only to deliberate misconduct and then only to persons who know the law and therefore realize the penalty which they may incur. It can not have any effect in curing congenital incompetence nor in checking those thoughtless inadvertences from which even the most competent and careful are not immune. Nor will a decision penalizing A for conduct X deter B from doing likewise if he, like the great mass of mankind, does not learn of the decision until he has injured himself or others.

41 The chapter on Deceit demands a more extended examination than the space of this review permits. The reviewer hopes to take up the matter in a separate article in a forthcoming number of the Virginia Law Review in which this chapter was first published.

42 It is extraordinary how little the style of this "popular" article differs from that of the preceding "technical" portions of the book.

43 P. 376.

44 As has been seen, supra note 22, the author in his treatment of the moral and justice factors shows a distinct preference for the primitive view which also seems to be that of the jury, that he who breaks must pay. See also the importance he attaches to the "atmosphere" of the case as compared with the evidence; that is, to those things which juries learn despite the efforts of the law to prevent it (pages 181-2) as compared with those things which the law regards as proper for their consideration.
BOOK NOTES


De Kruif's "Microbe Hunters," André Tridon's "Psychoanalysis and Love," Dorsey's "Why We Behave Like Human Beings," Bazzoni's "Kernels of the Universe," and countless other books of that ilk, all evince a modern tendency to entice the "layman" to enter for a space the austere Lucretian citadels of "expert" knowledge. Miss Drummond's work doubtless is another tributary flowing out of this tendency. Her book is a laudable attempt to present to the layman untutored in the law the glinting high lights of the law of marriage and divorce. It is a bold gesture, done sincerely, with plenty of spice and modernistic verf.

After a cursory history of divorce the author plunges in medias res. There is fairly replete informal discussion of such topics as conduct which will furnish sufficient grounds for a divorce or annulment, the validity of a divorce rendered in a foreign tribunal, alimony, etc. While the book is a delightfully rambling discussion of the topics considered, the reader should not be surprised to find an occasional reference to a law review article; nor should he be surprised at the many cases cited in the footnotes (cited sometimes with formal precision and at other times with a lackadaisicalness surpassing the Spanish "mi venga la muerta . . ."). Indeed, often the text is merely a well-woven running chronicle of interesting or theatrical cases. And in the chapter "Conflict of Laws" is found a succinct account of the causes célèbres, Atherton v. Atherton and its deformed still-born progeny, Haddock v. Haddock. Our one complaint is that not enough is made of such modern cases as Di Lorenzo v. Di Lorenzo, Brown v. Scott, and Gatto v. Gatto: these decisions are a veritable holocaust shrivelling to nothingness the old dogma of the common law, and mere passing mention of them does not suffice.

The second half of the book purports to epitomize the divorce law of the forty-eight states, and of France, Cuba, Mexico and Sweden. This is done by considering the law of each state or country under the headings: Annulment; Divorce à vinculo; Divorce à mensà et thoro; Jurisdiction and Process; Procedure; Defenses; Alimony; Children; Property; Remarriage. And there is even a glossary of legal terms at the very end, including, among other things, the tsar of legal chameleons, the phrase in rem.

The book is written for the most in an informal, and even, colloquial style, crammed full of the crystals of humor, a humor which sometimes reaches hyperbolic slap-stick dimensions smacking of the Rabelaisian. See, for example, the pathetic account of the matrimonial divide between Mr. and Mrs. De Vide (p. 92). Little stripes of out and out jargon, even pugilistic similes and metaphors, are not missing. An apposite witticism culled and quoted from the proper source (not excluding the sally of the sun-flowered Oscar Wilde, "in married life three is company, and two is none") is never found lacking. Indeed, we were surprised not to find Nietzsche's "und sei die Frau das Spielzeug . . .", or at least a witty distortion of his trenchant apothegm: "Even concubinage has been corrupted—by marriage." The author's Voltairean treatment of the "clean hands" doctrine will also afford much food for the palate of risibilities.

That our present divorce laws are not adequate to meet domestic problems is a sentiment expressed more than once by Miss Drummond (p. 25): "Today is always the tomorrow of yesterday in the law's calendar of activities, for jurisprudence, like the bird that flew backward, is interested not so much in where it is going in as in where it has been. Especially is this reversionary tendency exhibited in the attempts at adaptation of ancient and dusty principles to the modern domestic

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affairs of husband and wife.” Again (p. 17): “... silently chanting a hundred times a day, ‘Those whom God hath joined together let no man put asunder’ can’t Coué away the tortures of a mismated union.” Surely, all but those who have fallen too piously in the clutches of ways outworn must agree. What, for example, could be more insensate than the jungle of statutes which prohibit the guilty party to a divorce proceeding from remarrying within a certain period? Such statutes are merely conducive to fornication and the production of bastards. No statute has yet made a fool a wise man, or a knave upright; and so, no statute will ever stem the free-flowing tide of natural human desires.

The layman should find unfathomed leagues of interest in this work; but the lawyer, with the same feeling that Professor Flaccus threw James Joyce’s Ulysses into the Atlantic, may be too apt to slam the book shut and say with our erstwhile crony, good old Publius Ovidius Naso: “Has poenas tibi garrula pennna dedit.”


Dr. Barnes is well equipped to discuss the problem of crime. The subject has long interested him, and he has considered it intelligently and impartially. In writing this book it has been his aim to present clearly and compactly a sane and constructive program directed towards the prevention of crime and the reformation of the criminal. In this he has succeeded admirably.

The book is divided into two parts. Part I deals with the scientific treatment of crime and criminals. Part II discusses highlights in crime repression. As in his recent work, The Story of Punishment, Dr. Barnes devotes much space to the subjects of prisons and punishment. He believes that society’s treatment of the captured criminal is stupid and cruel—consciously cruel—and criticises it vigorously. But his criticism is constructive also, and by far the most valuable part of the book is that in which the author describes the prison of the future.

Of special interest to the legal profession is the discussion of law as a cause of crime. Although he recognizes the necessity of some laws, the author has little sympathy for laws which conflict needlessly with liberty and decency, and he quotes approvingly the following statement by Chancellor Jones of Tennessee:

“Every good law will be obeyed, and there will be a hearty public opinion in favor of enforcing it. The poor laws will not be obeyed and they ought to be repealed.”

Some benefactor of humanity should send a copy of this statement, suitably framed, to every legislator in the country.

Dr. Barnes approaches the question of reformation of the criminal enthusiastically, but falls into the error, only too common, of overestimating the practical ability of specialists in medicine, psychology, psychiatry and social service to reform the criminal. It is true that he admits that certain criminal types cannot be reformed, and that even among the others, due allowance must be made for failures. Nevertheless, he paints too rosy a picture. The manifold and complex factors that bring out potential criminality, even admitting them to be within the comprehension of the scientists, are quite beyond their control. That the scientists cannot prevent crime, and that there will always be a crime problem, seems quite clear. This does not mean that nothing can be done to reduce crime. At present, society is engaged in the fruitless task of attempting to make man conform with stupid and artificial restraints. When the necessary restraints of civilization are moulded in conformity with the basic principles of human conduct, then, and then only, will the problem of crime be reduced to a minimum.
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No single group of enterprisers have done more to remedy the present unemployment situation than legal writers and publishers. Carpenters, painters and janitors have been employed by the thousand in a mad effort to provide book shelves and other facilities to take care of the perennial flood of legal literature. Even so, desks of law students, professors and lawyers are overflowing with the mass of new books, some valuable, some not so valuable, and some worthless. Legal scholars are working overtime in an effort to provide law reviews with reviews of the current books. Among this avalanche of legal writing the subject of public utility valuation stands first in quantity. There seems, therefore, little reason for further burdening the market with treatises on this subject unless the author contributes more than a rehash of time-worn ideas. This, unfortunately, Professor Smith does not do.

Some Phases of Fair Value and Interstate Rates is the sixth of a series of studies published under the auspices of Louisiana State University. Limited in scope (as the author is careful to point out in his preface), the monograph concerns itself only with an explanation of the several theories of valuation as used by the Interstate Commerce Commission (and sanctioned by the Supreme Court) in determining a rate base, a brief résumé of legislation by Congress leading up to the present Interstate Commerce Act and a somewhat cursory discussion of reasonable return. One cannot quarrel with the author’s discussion of rate base theories; he includes them all, even the so-called “exchange value” which he admits has long been discarded and rejected, both by court decisions and statutes. The author also correctly points out that it must be kept in mind that no one theory of valuation is alone used to establish a rate base. Reproduction cost, historical cost, cost of reproducing the service and prudent investment, are all used merely as an aid in determining the true present value of the property. All this Professor Smith discusses very lucidly. Once the rate base is established other problems arise: what rate should be allowed on the base in order to give the carrier a reasonable return? what should be done with excess profits made by the “advantageously situated” carrier? Of course, the question concerning excess profits is adequately taken care of by the “recapture clause” of the Transportation Act. However, the problem of what rate should be allowed cannot be disposed of so easily. A carrier or utility must be allowed a return on its investment which will attract fresh capital, otherwise the rate would surely be confiscatory. In determining what return will be sufficient to attract the necessary capital the return to investors in other fields must be considered. For example, the return must be greater than on United States bonds, because the investor in government bonds pays no taxes and his investment is practically devoid of risks. It is perhaps unfortunate that Professor Smith does not lay more stress on the rate of return, for the reasonable return to the carrier depends on the rate allowed just as much as on the valuation. But as this is primarily a question for economists it could hardly have been expected in a discussion by a lawyer.

On the whole this study is too elementary to be of much value. However, it does present a clear and well-written résumé of what the Supreme Court and Congress have done on the problems of valuation and interstate rates, and for this reason should find a useful place in the library of the student of valuation.