BOOK REVIEWS


This study of the modern corporation is unusual in its attempt to fuse the point of view of the lawyer and the economist in a single work. That the fusion has been largely successful is due to the fact that both Mr. Berle and Mr. Means think in terms of the corporation as it actually exists today rather than of what legal or economic tradition has said about it. As a result they have produced a challenging survey which no one who desires to understand our greatest economic institution can afford to neglect.

The thesis of this joint study is that the modern large business corporation is no longer a mere legal device for carrying on private business, but a new economic institution giving rise to a substantially new form of property tenure—ownership almost completely divorced from control. Unlike many studies of big business, the book is not concerned except indirectly with the economic power of large corporations over wage earners, consumers, and the community generally, but rather with the changed relations between shareholders and management which have resulted from increase in the size of corporations and from the various legal devices which modern statutes and charters have placed at the disposal of promoters and managers. This modification of the position of those whom legal and economic theory alike insist upon treating as owners is, however, conceived of as having consequences of the most far-reaching kind affecting the whole institution of private property and the economic government of the community.

The study is divided into four books, the first of which, entitled "Property in Flux," is composed mainly of statistics relating to the two hundred largest American corporations. This limitation of the field is justified by data indicating both the steady increase in the proportion of the national wealth controlled by these great corporations and the length to which the process of canalizing that wealth into these channels has already proceeded. Although the figures given do not include the present depression, the preface, dated July, 1932, expresses the opinion that the process by which these large publicly financed corporations have been absorbing the greater part of the industrial wealth of the country will continue unabated.

Figures indicating the concentration of economic power in the hands of large corporations are followed by statistics indicating both the dispersion of stock ownership among millions of individuals and the extent to which, as indicated by income tax returns, the typical stockholder of today is a man of moderate means. In view of the extent to which the small investor participated in stock buying during the late boom, it is somewhat surprising to learn that the increase in the percentage of stock owned by those in the lower income groups, which was very marked during the period from 1916 to 1921, remained practically constant thereafter. The question whether this is more than a temporary arrest of the process by which stock ownership has been passing from the few to the many is left open, with the penetrating comment that there are now few choices open to the individual for the employment of his savings except their direct or indirect investment in corporate enterprise, with the result that the relative stake of the small investor in the corporate enterprise tends to be limited only by his relative share in the savings of the community.

† Originally published by the Commerce Clearing House, Inc., New York.
When we turn from ownership to control, however, the picture is altogether different. That the small investor has little de jure and less de facto control over "his" enterprise is notorious, but Mr. Means's studies have given us much more definite information than has heretofore been available about the ways in which our larger corporations are controlled. Legal control by a minority through some such device as the issue of non-voting stock, factual control by a compact minority as a result of the wide dispersion of the stock holdings of the other owners, and factual control by management by reason of the non-existence of any stockholder having a substantial proportion of the voting power are here shown to be the predominant types of large corporation control today, true majority control being so rare as to be almost negligible. No attempt is made to explore the problem of how far management, even where free from shareholder control, may be in bondage to bankers, a matter incapable of statistical proof and perhaps foreign to the authors' main purpose of indicating the divorce between stock ownership and management.

Ownership can thus no longer control management through its voting power. To what extent it can effectively do so through the courts is dealt with in Book II, entitled, "Regrouping of Rights". Some of the material contained herein has already appeared in Mr. Berle's law review articles but much of it is new. An introductory chapter traces the evolution of the American business corporation from an enterprise of limited scope with definitely fixed participations and a substantial degree of shareholder control, existing under a charter whose provisions were prescribed by the legislature, to the modern situation in which, through various devices, managerial powers have been increased and the rights of shareholders made much less specific. Succeeding chapters deal in detail with the particular powers which management today possesses under statutes such as that of Delaware, the uses which have been or might be made of such powers and the extent to which courts of equity have interfered or may be expected to interfere for the protection of shareholders.

These chapters are of great value in focusing attention on the extent to which modern statutes have broken down certain traditional safeguards of shareholders by allowing almost unlimited freedom to create classes of shares with unusual and sometimes undesirable incidents, by vesting in management broad powers as to such matters as the determination of capital, the persons to whom and the price at which shares may be issued, and by authorizing management, whenever it can obtain proxies from majority shareholders, to alter by amendment the relative participation rights of the various classes of shares. As an exposition of the existing legal position of shareholders, however, the reviewer has found this part of the study somewhat confusing, partly because of its arrangement but primarily because of its attempt to fuse accepted categories of contract and fiduciary relation into an all-embracing theory of trusteeship.

Mr. Berle's point of view may be briefly, though inadequately, stated as follows. By various devices modern statutes have given directors a wide choice of means by which they may favor one group of shareholders at the expense of another. The proper way in which the courts should deal with the situations thus presented is by broadening the doctrine of trusteeship as applied both to directors and to controlling shareholders. Theoretically this will solve all problems, but in practice the difficulty of applying the doctrine to complex situations and the expense of litigation are such as to leave the shareholder virtually helpless.

That directors are fiduciaries as well with respect to their newer statutory powers as with their older ones is so obvious that Mr. Berle's stressing of the point is scarcely necessary. That where the exercise of their discretion will affect different groups of shareholders in different ways they should act fairly
with respect to the interests of each group would not be questioned. Plainly, however, all problems of the rights of a particular class of shareholders cannot be solved by these principles. Thus, for example, whether a group have agreed that their dividends, once validly passed, are gone forever, is a question of interpretation which cannot be determined by talking about equitable control over trustees.

Mr. Berle is on surer ground in emphasizing the practical difficulties of effective judicial control in many of the situations in which it indubitably exists in theory, although his statement that “in any given instance the interests of the individual may be sacrificed to the economic exigencies of the enterprise as a whole, the interpretation of the board of directors as to what constitutes an economic exigency being practically final” is an obvious exaggeration. The more extreme examples of modification of shareholders’ rights which instances are possible only—even in Delaware—with the consent of a majority of the class affected, a safeguard which, though not wholly adequate, is certainly substantial.

Book III, entitled “Property in the Stock Markets”, deals with the economic function of the stock market as a device by which the value of the investor’s property may be measured and may serve him as a basis of credit and a method by which he may withdraw his capital from the enterprise, and also with the extent to which the law seeks to control the flotation of securities, the disclosure by the management to the market, and its participation therein. It is rather surprising to find that neither here nor in the preceding book is any mention made of administrative as distinct from judicial control of managerial delinquencies. Control of security issues by such a body as the Interstate Commerce Commission, although instituted primarily in the interest of the users of the railroads rather than of the investors therein, is in fact a substantial check on many modern managerial powers and in some cases has been exercised for the avowed purpose of protecting minorities against the dilution of their interests.

Despite the neglect of this factor and a certain confusion of thought and overemphasis on the insecurity of the shareholder’s position already noted, the picture given of the legal position of the investor in the modern corporation is, by reason of the sustained effort to describe the situation in terms of modern statutes and corporate practices, a more illuminating one than can be found elsewhere. That it is given almost entirely in terms of the shareholder rather than the bond holder is doubtless explained by the fact that the authors’ primary object is to show how the modern corporate structure does violence to orthodox theories as to the functions and rights of owners. For, whatever he may be in economic fact, the bond holder has always been in legal theory an outsider clearly differentiated from the shareholder, who is assumed to own the corporate enterprise.

Up to this point we have been given principally a description of the legal and economic situation as it now exists, although the facts are presented in such a way as to indicate the authors’ view of the significance of the changes which have been taking place. The final relatively brief book, entitled the “Reorientation of Enterprise”, is definitely speculative in character and poses some searching questions as to the effects of the system thus described on economic theory and social policy. Tradition, which the courts strive earnestly if somewhat unsuccessfully to maintain, assigns all profits to the investor-owners. Economic theory, however, has justified profits from a social standpoint partly as a reward for risking capital and partly as a stimulus to efficient management. This suggests the view that “if profits must be distributed either to the owners or to the control, only a fair return to capital should be distributed to the ‘owners’; while
the remainder should go to the control as an inducement to the most efficient ultimate management."

This latter conclusion the authors reject, not because they regard the claim of the absentee owners to unlimited profits as economically justified, but because the whole traditional theory of profits, which was developed on the basis of an individualistic society, is inadequate as an explanation of the functioning of enterprises which require cooperation of a large number of persons and give to those in control rewards by way of power and prestige that may well be greater incentives to effort than an additional million dollars or so of personal gain. If the claim of the investors to be the sole recipients of profits is no longer valid, the result ought not in the authors' judgment to be merely the partial diversion of profits into the pockets of the management. It should be rather the adoption of a new concept of the corporation by which the community may demand that it "serve not alone the owners or the control but all society".

How such a demand might be made effectual is not considered, except for the suggestion that if corporate management should work out a reasonable program the courts would not allow the theoretical ownership claims of shareholders to stand in the way of its realization. No suggestion is made as to how society might compel a reluctant management to serve it. That judicial control, which, as the authors indicate, has proved inadequate to enforce the traditional claims of investors, would not unaided be able to establish and enforce claims of other classes which have no legal traditions to support them may be taken for granted. It is legislation which has created the business corporation as a device for private ownership of enterprise by investors. It is by legislative provision of effective administrative machinery that the concept of public service which has long existed in the utility field has been vitalized. If corporations generally are to be conducted in such manner as to give due regard to the interests of all classes in society, including wage earners and consumers as well as investors and management, it is primarily through legislation that the change can be brought about.

The present work makes no attempt to deal even with such legislative steps in this direction as have already been taken. Nevertheless, by indicating the opportunities which at present exist for unfair treatment of investors, it suggests the need of legislation for their protection; and by calling attention to the economic weakness of the investors' claim to full ownership rights it furnishes strong arguments for legislation for the protection of other classes. Despite its failure to deal with the possibilities of reform through legislation, the picture which it presents of the present state of things should prove of material assistance to the advocates of such reform.

E. Merrick Dodd, Jr.

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As for judicial supremacy, Dr. Haines is against it. He says in the closing chapter (p. 529), "As it now appears the warnings of the opponents of judicial review have been more than realized in the powers exercised by the judiciary. . . . They have in fact come to treat as unconstitutional practically all legislation which they deem unwise . . . the greatest barrier in the way of improvement of social and economic conditions is met with in the judiciary where lawyers and justices conservatively inclined insist on upholding the existing order."
There is a great deal more to the book, however, than these conclusions. Dr. Haines gives, in this second edition of his work, a thorough and scholarly discussion of both historical background and current practice with regard to judicial and legislative supremacy. He shows that the judicial check upon legislation, which United States lawyers almost take for granted, is not at all inevitable; that it is, in fact, doctrine almost peculiar to ourselves, for other countries, even with written constitutions, get along without it.

The most interesting part of the study is that in which Dr. Haines traces the development of the practice of judicial review. He finds its beginning in Coke’s theory that the common law courts were superior in authority to the King and to Parliament. He finds precedent, by analogy, in the review of colonial legislation by the Privy Council, and a favorable soil for the growth of the concept in the natural law doctrines voiced during the American Revolution. While it would be a mistake, says Dr. Haines, to claim that members of the Philadelphia Convention which drafted the constitution expressed any definite views on the main question of judicial review of legislative acts, still such men as Wilson, Ellsworth, Hamilton, Madison, Morris and King, had an important part in giving the constitution its final form, and they are all on record as favoring judicial review of legislation. Indeed the point for judicial review can hardly be put better than it was by Hamilton, quoted on page 139: "... when the will of the legislature, declared in the statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former.” Dr. Haines has marshalled, with great care, the state precedents prior to 1789, and the state and early federal precedents after that date, also the view of the opponents of the judicial supremacy theory—Jefferson, Mr. Justice Gibson, Judge Bland. The impression that his presentation makes is that the action by courts in disregarding legislative and executive action which they deemed unconstitutional fitted into the then prevailing legal thought as easily as did the doctrine of contributory negligence into the common law. Both may (or may not) be out-moded, but both fitted gracefully into the nineteenth century picture.

Indeed, had the problems involving judicial review of legislation remained unchanged, it is highly doubtful whether the practice would be the source of much controversy. In a family of forty-eight members surely it is desirable that somewhere be lodged authority to settle differences of the individual members, and that of the group. Mr. Justice Holmes states it: 1 "... one in my place sees how often a local policy prevails with those who are not trained to national views..." It is interesting to note that, in the various attacks on court action collected by Dr. Haines, that part of judicial activity which reviews state action in intergovernmental relations is hardly mentioned. The same is true with regard to a state court’s review of state legislative action. Nor is the federal court’s disregard of congressional action a major point of attack. The power is rarely exercised, as shown by Dr. Haines in a useful appendix which collects all the instances. Again, there are vast sums of money being spent on projects as to the value of which one may guess that some members of the court may be skeptical, but which the judicial eye has refused to examine because the question is regarded as political. Dr. Haines does not discuss Massachusetts v. Mellon, 2 in which the court was invited to invoke the constitution against expenditures under the Maternity bill, but he should have done so.

The attack on the American doctrine of judicial supremacy really comes down to a criticism of the United States Supreme Court because, under guise of due process or equal protection or something else, it has upset state statutes

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1 Collected Legal Essays (1920) 296.
ostensibly designed to promote social welfare. Without sharing for a minute the dictum of Dr. Haines that the judiciary "has come to treat as unconstitutional all legislation which they deem unwise", one can regret that on some occasions our judges have not shown a greater tolerance for social experimentation—the "state laboratory" theory of Holmes—and been a bit more generous in a presumption that when a state legislature passed a statute about hours of labor, or shoddy, or wages, it knew what it was talking about. We live now in swiftly moving times: our social panorama changes over night. Millions of people are out of work; banks are closed, commerce is paralyzed. Whatever legislative measures may be adopted to pull us out of the hole and help keep us from falling in again, they cannot possibly be subjected to the check of whether they fit eighteenth (or nineteenth) century notions of freedom of contract; neither can factory inspection acts nor hours of labor laws. Contra the point of view expressed by Dr. Haines, I do not think they will be. The justices of our highest court are able lawyers but they are also very wise men.

Dr. Haines has given us a useful book, a storehouse of historical information, opinion, citations, discussion. His history is better done than his legal analysis, but all of it is interesting. I hope it does not seem ungracious to conclude with a growl at the publishers who put out a seven hundred page book with a paper cover. A law to forbid that would certainly meet the approval of a judge who reads this volume through.

Herbert F. Goodrich.

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One of the most vivid, and at the same time most pleasant, recollections which the reviewer has of his freshman year in college is that of his experiences as a student of comparative government under the guidance and inspiration of Professor Lowell, better known these twenty-four years as President Lowell. Granting, of course, that Professor Lowell was most eminently fitted to assume the chief administrative office in our oldest university, and acknowledging his eminent success and far-reaching service in that role, the reviewer will always maintain that by that promotion, or demotion if you please, of Professor Lowell from the classroom to the administrative office the young men of Harvard this quarter century were thereby deprived of a great educational privilege, which can scarcely be counter-balanced to them in that broader but more remote and less tangible service rendered to them from the executive office.

The little book under review is characteristic of its author. It reflects the mature thought and the keen insight of a profound student of human relations. While the book is not primarily a book for lawyers, it is worthy of perusal by any lawyer, and while the author is not speaking primarily as a lawyer it is evident to any law-trained reader that the author is lawyer, as well as teacher and student and observer of what goes on in this intricate project we call civilization.

In his preface Mr. Lowell states that the "book contains no facts not perfectly well known to everyone", which is quite complimentary to his readers. It is true we might call the book a bit of "education in the obvious", but made so by the clear statement and convincing presentation of the materials of the volume. The author states also that the book "avoids expression of opinion on all matters whereon men differ in opinion". The book well-nigh attains that tantalizing objective. The reader may frequently wish for a fuller expression of the opinion of a student so mature as Mr. Lowell, especially upon controverted questions of the moment.
At the opening of his first chapter reference is made to Aristotle's familiar principle that "good in the moral world is destroyed by both defect and excess, and preserved by the mean between the two". It is stated that in Aristotle's day slavery was deemed both right and necessary because physical power was derived from the muscles of men or animals, a condition wholly changed by our mastery of the forces of nature, and by our mechanical devices for using them. "The worker", says the author, "is more and more engaged in directing power, less and less in supplying it from his own body." At this point the reader might surmise that he is reading an introduction to an exposition of "technocracy", but this is the nearest approach the author makes to that long-known problem so recently rechristened.

With manifold illustrations from the world of everyday human experience the author shows that many principles, which are too often assumed to be universal in their application, are quite limited and soon encounter other principles as valid but in conflict therewith, because they are opposites. No one knows this better than the thorough student of law. Inconsistent principles are often declared by their advocates to be universal, when it cannot be true of both and is not likely to be true of either. As his first illustration the author states that "Washington was right in conducting a revolution on the principle stated in the Declaration of Independence—generally believed by Americans to be of universal application—that all people are entitled to govern themselves, and hence to separate from a power whose rule they dislike. Lincoln was right in the principle that a nation is entitled to maintain its integrity by resisting and suppressing a revolt." All through the book such contradictory principles are termed "conjuge principles" and are defined as "mutually contradictory or inconsistent and yet each is partially, or under some conditions, true". The book deals with contests of principles earnestly held by good men to be right and is not concerned with selfish interests. It is said that the true problem in such situations is not to argue the inherent truth of principles but to discover their appropriate limits.

Among the fourteen chapter headings are the following: Economics, Political Theories, Law, Education, Personal Liberty and Uniformity, Consent and Force, The Punishment of Offenses, Patriotism and Humanitarianism, Compromise and Leadership, Personal Conduct, and Mental Patterns.

In opening his chapter on Economics the author says: "Let us begin with a topic uppermost in many people's minds at the present day, that of economic organization and control. Here we find at the threshold two conjugate principles . . . laissez faire and state regulation, with their corollaries of competition and cooperation." In this connection we find mention of the Physiocrats and Jeremy Bentham with their then new doctrine of freedom, "absolute and infallible, destined to cure the ills from which mankind was suffering".

Under Personal Liberty and Uniformity, the author has this interesting comment: "Prohibition offers a very good illustration of the thesis I am seeking to maintain. . . . Many of its earnest advocates come from rural districts, or other places where restraint in the public sale of liquor has been beneficial. Many of its opponents come from societies where a moderate use of stimulants has been habitual and harmless. Within their own spheres both seem to themselves right, outside of them both may be wrong." It is like the two knights who dispute fiercely about the shield.

In discussing Political Theories it is said: "We laugh today at the divine right of kings . . . and yet there can be no doubt that the principle of legitimacy, which is expressed in an exaggerated way, did much to prevent violence and civil war." Again: "We do not now use the expression 'divine right of democracy', but it is commonly regarded as resting on the same inherent, natural moral basis that was attributed to the divine right of kings, . . . it may be that faith in democracy itself is in some places declining; but grievous distress lies ahead if
that faith is lost before another is acquired." Further: "The ideas of the present Soviet régime are not indigenous but derived from Karl Marx, who had in mind quite a different society from the overwhelmingly agricultural population of Russia."

The chapter on Law is not less interesting than the others. In fact it illumines, in very brief space, a very large field. It is shown that as civilization grows more complex law must lose something of its primitive precision and must be based more upon reason than upon form. Readers may question the jurisprudential soundness of the author’s statement to the effect that courts would be assuming functions that they do not possess if they should declare that the limit between competing rights shall be changed from what it has hitherto been, in case the Court has also found that conditions have so changed that what was just has become unjust. In that connection it is truly pointed out that “some decisions in the past made in complete ignorance of their future effect have clung to the law and could be reversed only by legislation”. As illustration the author states that mediaeval courts ruled that, although the owner of the fee owned to the center of the earth, precious metals should be excepted and vested in the crown. The author thinks that if those courts could have foreseen the vastly greater public value of iron and coal “the exception might have been broadened, and much perplexity saved to the present generation”.

The chapter on The Punishment of Offenses will prove interesting to lawyer and layman alike. In speaking of lynching, the author conceals a bit of subtle humor in the statement that, “The gang murders in Chicago and elsewhere are mainly a result of the inability of criminal justice to deal with the conditions, and they would probably have been followed by popular lynchings were it not that, except for casual inadvertence, the gangsters have confined themselves to killing one another.”

In pointing out the distinction between military and civil discipline it is stated that President Lincoln’s liberal policy of pardons for deserters tended “to relax discipline, promote the unfortunate number of desertions, and prolong the war”.

The chapter on Patriotism and Humanitarianism is multum in parvo, a nugget of gold, the best of the book, so apropos of humanity’s muddle today—humanity groping for the limits between the self-sufficiency of groups called nations, and the interdependence of those groups.

Tucked away in many of the pages of the book are other nuggets, as witness this: “One of the great difficulties in life is to know the eddy from the stream. Moreover the stream itself does not run straight. The man of his age thinks he is the man of the future; but he is not, for the future will be no more like the present than the present is like the past. If the present should create an enduring future the world would become stagnant.”

But this is already a long review of a little book which is itself quintessence. Let my readers read Mr. Lowell instead.

Robert McNair Davis.

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The purpose of this book as explained in the preface is to supplement Buckland’s Textbook, which confines itself to the private law between Augustus and Justinian. In consequence the public law and sources of all periods are covered, as in the first volume of Karlowa’s history, and in addition the private law of the Twelve Tables and the later Republic. More ingenuity was required to avoid trespassing on the preserves of Muirhead, the last edition of whose Historical
Introduction was brought up to date in 1916. This task has been accomplished with so much care and success that Professor Jolowicz could with almost equal reason have described his "Introduction" as a complement to that of Muirhead. The third factor conditioning the choice of subject matter is naturally the literature, chiefly European, of the last thirty years. In all of the widely separated topics with which he has to deal the author evinces an exhaustive familiarity with the results of the latest research, which are often narrated in some detail with the arguments pro and con. Where such discussion occurs, the student obtains a clear idea of the issues involved and hence of the significance of either doctrine, and where it is absent the existence of doubt or dispute is usually noted to induce in the student a healthy scepticism as to the certainty of any proposition in the field. As the exposition is clear and readable, the book should well serve its purpose as an aid to beginners and a source of reference for others.

The author's method offers very little scope of criticism, for he contents himself as a rule with describing the various theories without contributing much that is novel. Where a choice is made between competing views the grounds are usually judicious, although a tendency is perceptible in favor of the school of Mitteis and Wlassak, who in certain quarters enjoy an influence comparable to Papinian's in the Law of Citations. On the burning question of interpolations Professor Jolowicz stands a little to the left of the centre, deciding on the whole against Riccobono. Disagreement with his conclusions is bound to be presumptuous as they nearly always represent the communis opinio at the present moment. The one clear exception to this statement which has been noted is the approval (p. 214, n. 4) of Bioni's hypothesis that Gaius does not include the actio rei uxoriae in the category of bonae fidei judicia. The results of a new examination of the manuscripts in 1928 have convinced paleographers that the opposite is the case. Another remark on the same page to the effect that Schulz "has now shown" that the action quod metus causa was not scripta in rem in the classical law may serve to illustrate the danger of too measured acceptance of modern theses. In a work which appeared almost contemporaneously with the "Introduction" a very careful, and to the reviewer's mind triumphant, attempt is made to restore to the Romans this well-known example of a remedy personal in theory, but real in effect. The triviality of these points will, however, illustrate the high standard of accuracy which has been attained; it would be hard to find in any language a more adequate summary of the conclusions if not the advances, of scholarship since Mommsen.

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The Development of the Anglo-American Judicial System. (Part I.)

This reprint of articles that have appeared in the Cornell Law Quarterly is a compact outline of the history of the English Courts from the Anglo-Saxon period to the late nineteenth century and the enactment of the changes made by the Judicature Acts. Should a graduate student in any course, wearied by his

1 Gaius § 62.
2 Cf. 36 Bulletino dell' Istituto Romano 139; (1929) 49 Zeitschrift der Savigny Stiftung (R. A.) 473; (1932) 52 id. 110 n. 3.
3 See Maier, Praetorische Bereicherungsklagen, 91-155.
thesis, come to his adviser and say: “I want to get up some legal history and have only one week end to give to it,” the instructor could hand him this work and reply: “Here is the book for you—a survey of the organization and development of the English Judicial system, boiled down and digested from the longer works of the recognized modern authorities. It will give you a start, and if you should ever have the inclination or leisure to pursue the subject further, you will find in the footnotes specific references to the treatises and articles of many distinguished scholars whose names you should know if nothing more.”

The title of this study, which includes the familiar phrase “Anglo-American”, holds out the probability that in a forthcoming part the development of the American Courts, which have an interesting history of their own for almost three hundred years, may come in for discussion. In this part there are some references to American sources, mostly in the notes, but primarily the text relates to the English Courts. No writer has yet undertaken a general historical survey of American legal institutions, although there is abundant material in monographs on special topics, law review articles, and addresses at bar association meetings, not to mention the published records of a number of early courts and the colonial statutes, sufficient to form the basis of a tentative outline at the least. Up to this time in the collected essays and in most legal writing, “Anglo-American” has meant ninety-nine per cent. Anglo and one per cent. American. The superiority of the foreign material may be attributed partly to the fact that until very recently there were few persons properly qualified having the leisure to undertake such studies, and partly our obsession that we are a “new country” where nothing of importance has happened except elections, which of course fails to take into account the comparative maturity of our institutions.

On the whole Professor Thompson has done his work of condensation and adaptation with accuracy and care. The sources he relies on, such as Pollock and Maitland, Holdsworth, Plucknett and others, are the leading authorities in this field. But excessive condensation has a tendency at times to be misleading. Thus, speaking of the courts of chancery in the American colonies and quoting Pound as his authority, he says (p. 60): “... but in Massachusetts and Pennsylvania the discretionary jurisdiction of the chancellor was so repugnant to the puritanical concept of a justice of law and not of men that those colonists early rejected both the court and its equitable jurisdiction.” Whatever may be true of Massachusetts, puritanism as such had nothing directly to do with the failure to establish a court of chancery in the Quaker colony. The failure, in fact, resulted from a political struggle between the Proprietary party and the opposition in the Assembly as to who should exercise the office of chancellor, the Penn family favoring the governor and the Assembly the judges of the courts. The opposition in both colonies, no doubt, was fostered by similar currents of restiveness to external control, but puritanism had little influence in Pennsylvania until the Scotch-Irish ascendancy at the time of the Revolution. This criticism, needless to say, is only intended to illustrate the dangers of broad generalizations in a field subject to many important cross-currents of influence. Most of the material in this treatise, however obscure it may have been a generation ago, has been so thoroughly illuminated by modern scholarship that it can be abridged with comparative safety. A continuation of the history will be awaited with much interest.

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This collection of materials is published under unusual auspices for a law school casebook. The publishers, well known for their excellent system of reports, also publish the Public Utilities Fortnightly, a periodical devoted to the discussion of utility management problems and recent important legal points. The articles are written by members of utility regulatory commissions, "public relations" officials of utility companies, and independent writers on business trends and management. The advertisers supporting Public Utilities Fortnightly include Henry L. Doherty & Company, the General Electric Company, The Philadelphia Electric Company, Standard Gas and Electric Company, American Electric Railway Association, the former National Electric Light Association and others which are leaders in the utility field. Mr. Francis X. Welch is the Legal Editor of Public Utilities Reports, Inc., and a member of the District of Columbia Bar, but he has had no experience as a teacher of law. He is assisted in the preparation of this casebook by a board of collaborators from several law school faculties: Professors Ballentine of the University of California, Maurer of Georgetown University, Tomkins of New York University, Rice of the University of Wisconsin and by Professor Richard Joyce Smith of Yale University as Editorial Advisor. According to the preface, "the members of the board of collaborators have exercised critical supervision over the selection and, to some extent, over the preparation of the cases, and have made revisions in the light of their teaching experience" (italics mine). A Teacher's Manual is to be provided free of charge to teachers using this book.

With such an intriguing setting one approaches this casebook with the zeal of a detective tracking down rumors of communist activities in a social organization. For we have been warned many times of the subtle attempts made by Utilities' associations to propagandize under the guise of presenting impartial educational information and apparatus. There is no doubt but that this is a successful attempt to combine the point of view of utility managements with citations to the opposing theories of their most severe critics of standing. For example it is hard otherwise to explain the inclusion in the bibliography and note material of citations to the work of Professor Frankfurter and to the articles of Messrs. Lilienthal and Richberg. Certain inclusions and omissions of significance will be discussed below.

One of the unsolved problems of casebook making is how to include all the important topics in a clear treatment and within the limits set by the tyrannies of publishers and/or law school professors who do not like a book of many pages. This book achieves a nice balance even if one does not agree with all the omissions. Part One presents the theories and constitutional aspects of The Public Utility Status in two chapters filling 92 pages. Part Two has two chapters on The Right to Service as a Public Utility and fills 81 pages. Part Three has four chapters on The Utility Obligations as to Service and fills 158 pages. Part Four has three chapters on The Obligations of a Utility as to Rates filling 68 pages. Part Five deals with the mystical subject of Valuation in six chapters filling 128 pages. Part Six has two chapters on Discrimination in Utility Rates filling 76 pages. Part Seven has the encyclopedic sweep of Regulation by Commissions in four chapters filling 122 pages. And Part Eight concludes the book with two chapters on the most newly pressing problem of Intercorporate Relations filling 62 pages. There is in addition to the bibliography already mentioned, a Table of Cases which is very complete, and a valuable Subject Index. The bibliography is called the Index of Authors and is con-
veniently placed after the table of contents. There are many useful chapter annotations as well.

The editor’s omission, in part or in whole, of the dissenting opinions in several important cases on valuation and the omission of some cases altogether from this collection give cause for reflection. For example the important and prophetic opinion of Mr. Justice Brandeis, dissenting from the reasoning but not the result, in Missouri ex rel. Southwestern Bell Telephone Co. v. Missouri Public Service Commission, has been cut to such an extent that his exposition of the historic bases for the use of the reproduction cost theory are not even to be guessed at. The setting for his prudent investment theory thus being taken away the difficulty of students understanding the latter is very great. The inclusion of St. Louis and O’Fallon Ry. Co. v. United States, without any indication of the nature of the discussion in the dissents in that case, makes what was at the time front page news look like such a simple problem that one wonders there ever was an argument on it before the Supreme Court of the United States. The dissenting opinions in that case are very long, but to the reviewer the arguments of dissenting Justices Brandeis and Stone are more important and more informative for an understanding of the whole problem of valuation than are the somewhat colorless majority opinions setting forth the main theories. Mr. Justice Stone’s fairly short opinion may be considered as an accurate précis of the full discussion given by Mr. Justice Brandeis. Perhaps the most serious omission of all is of the cases in the Ben Avon Borough v. Ohio Valley Water Co. series, to which there is not even a note reference by the editors. The fundamental question of final valuation by a court or by a commission in arriving at a rate base, which in that series was decided in favor of an independent court decision on issues of unconstitutional confiscation, is indispensable to a clear understanding of the problem of valuation. Both the decision of the Supreme Court of the United States and that of the Supreme Court of Pennsylvania should be included.

(Unfortunately the discussion of the function of judicial power as a regular part of utility regulation is ignored in the scheme of arrangement used in this book.) The references to this litigation found in the case of Bluefield Water Works & Improvement Co. v. West Virginia Public Service Commission, printed at pp. 371 ff. are not an adequate substitute for the cases themselves.

In the related field of Depreciation Charges one is stunned by the very short extract from United Railways and Electric Co. v. West, on pp. 505-6. Surely the whole question of the purpose of depreciation charges so brilliantly discussed in the dissenting opinions of Mr. Justice Brandeis and Mr. Justice Stone merits some recognition, even if only a notation that such opinions exist.

The attempted survey of the activities of the various state regulatory commissions and of the Interstate Commerce Commission arouses one’s admiration and approval. The chart analysis (p. 636) of state commission activities is useful in presenting a general picture of the extent of commission regulation, Delaware alone having no commission; and as a source of information on such questions as elected or appointed personnel and courts of immediate appeal it is most valuable. One notes with regret, however, how little space is devoted to a survey of the activities of the Interstate Commerce Commission; the cursory note on pp. 642-4 is very inadequate. Particularly unfortunate is the absence

1 262 U. S. 276, 43 Sup. Ct. 544 (1922); P. U. R. 1923C 193.
3 2 Pa. S. Comm. 733, 968 (1918); 68 Pa. Super. 561 (1917); 260 Pa. 289, 103 Atl. 744 (1918); 251 U. S. 542, 40 Sup. Ct. 583 (1920); 253 U. S. 287, 40 Sup. Ct. 527 (1920); 75 Pa. Super. 290 (1921); 271 Pa. 346, 114 Atl. 369 (1921).
of any cases on the rising monster, Reorganization. For reorganization now is a gloomy but inescapable stage in the adaptation of railroad transportation systems to the needs of a depression ridden continent. The inclusion of the Saint Paul Reorganization case\(^7\) would make available a device of very debatable desirability. Also it would, through the sharp conflict between the majority opinion of Mr. Justice Sutherland and the swordlike dissent of Mr. Justice Stone, present a very exciting discussion of an immediately pressing crisis. Mr. Justice Stone's classic exposition of the difference between the administrative and the judicial functions in that case should be read by every student of public law. In any survey of Interstate Commerce Commission activities, one also looks for the legerdemain opinion of Mr. Justice Holmes in the Pipe Line Cases,\(^8\) and conservatives would relish the dissent in that case by Mr. Justice McKenna. It is praiseworthy, however, that the editors have given space to the regulatory functions of other federal agencies such as the Secretary of Agriculture, the Federal Power Commission and the Federal Radio Commission, pp. 644-672.

The reviewer is much stimulated by the extensive survey of the problems of valuation despite the above criticisms, and notes with pleasure the section of recent cases dealing with utility corporate affiliations, particularly the important and realistic opinion of Mr. Justice Roberts in Western Distributing Co. v. Kansas Public Service Commission.\(^9\) It is to be hoped that in a new edition will be included another such opinion by Mr. Justice Roberts in dealing with compulsory extension of railroad systems at the order of the Interstate Commerce Commission.\(^10\)

From a teaching standpoint this casebook presents a nice balance between state and federal cases with a liberal sprinkling of commission opinions so necessary to an understanding of those of the regular courts. The opening chapters on the public utility status, despite the omission of common law authorities, present a most stimulating group of opinions. If the Liebman case had the full dissent included in this edition one's satisfaction would be almost complete. It is given, however, a fair recognition.

The teacher of public law subjects who is interested in contemporary problems probably will never be satisfied by any casebook. As one who leans to complete reports of public law cases, this book at times seems a little too keen to present merely one aspect of a problem. Considering the space available an excellent job has been done in covering many topics even if some have suffered in the lack of completeness of the treatment given them. Most important of all the book recognizes the very controversial nature of its materials and as such cannot be characterized as mere propaganda. It does however present a distinct point of view—a somewhat conservative approach to its problems. The question of the success of commission control of Utilities is not put in issue by the materials here presented, and quite properly the dread spectre of government ownership and operation of Utilities is therefore considered to be outside the scope of the subject matter treated. Such detachment is not always possible in class room discussions: once more the conservatism of the editing is indicated.

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\(^8\) 234 U. S. 548, 34 Sup. Ct. 956 (1914).
