BOOK REVIEWS


This is a volume of essays written in honor of Professors Joseph Henry Beale and Samuel Williston by some of their present and former students, most of whom are members of the faculty of the Harvard Law School, and edited by Dean Pound. Only a few persons can contribute a paper to such a volume, but many will greet its appearance with high approval. Mr. Beale and Mr. Williston have taught law since 1890; not a long time in geological periods, but quite a spell in playing Socrates to successive groups of law students. Thousands of the latter have been Beale and Williston students in Harvard classrooms; thousands more in many other law schools have used their case books. All of them have read Beale and Williston in text books and law review articles and have had cited to them and cited back to their instructors, in whatever law school they attended, the Beale and Williston views of innumerable legal problems. Perhaps the contributors to the volume will let the thousands of us, who are not named on its contents page, but to whose legal education these veteran law teachers have contributed, join with them in the "congratulations and best wishes" which the book carries with it.

In addition to honoring two distinguished and beloved scholars the collection of essays is exceedingly interesting. No one has suggested a theme for the legal stories the contributors are to tell, so each has told a tale of his own choosing. Mr. Chafee, for instance, relates an interesting bit of New England legal and family history in Professor Beale's Ancestor; Mr. Macneil combines law and the fine arts in Some Pictures Come to Court (is this the functional approach?). Mr. Seavey speculates as to the why of respondeat superior; Mr. Morgan writes of constitutional limitations upon statutory presumptions; while Mr. Pound gives his ideas upon Twentieth-Century Ideas as to the End of Law. These are samples only: the essays are sixteen in number. Their varied subjects show there is no regimentation of ideas among the contributors.

Not the least interesting, the volume contains one excellent portrait of each of the persons honored by it, a short sketch of his career, and a compilation of his writings. A worthy volume to honor two great teachers.

Herbert F. Goodrich †


Save for a few pioneers like Shurtleff and Goodell, American legal scholars of the nineteenth century did not share the enthusiasm of the Rolls Series and Selden Society groups in exhuming the judicial records of the period of origins and early growth. The traditional attitude was well expressed by Sedgwick, who felt no regrets at the want of colonial reports dealing with complex procedures and archaic principles "now so happily exploded".1 In an age when American intellectual interests were so largely derivative, American institutional historians discovered the origin of our constitutional liberties among the Germans and

† Dean of the Law School and Professor of Law, University of Pennsylvania.

(102)
traced the source of our private law concepts in the post-Revolutionary period to Westminster.

The series of publications of eighteenth century court records by the American Historical Association, the intention of the newly-launched American Legal History Society to encourage research and the publication of documents in the period of origins, and the activities of regional societies, which have sponsored documentary publications such as the volumes under review, all testify to a changing focus in historical investigation and a revision of many a priori assumptions about American law. The editors of the present volumes, Professors Samuel Eliot Morison and Zechariah Chafee, have supplemented the information contained in the court records in the custody of the Boston Athenæum with additional notes of great interest to both social and legal historians and in many cases have appended full copies of papers now in the office of the clerk of the supreme judicial court of Suffolk County, Massachusetts. The necessary historical background has been provided by Mr. Chafee in his extended introduction to the records.

This fascinating collection of material brings into even more prominent relief the value of inferior court records to the legal as well as the social historian. Certainly a much clearer view of English life under the squirearchy can be obtained from a study of the records of her courts of quarter sessions, county, and borough, than from reading the reports of King’s Bench and Common Pleas. In colonial counties and boroughs, which in their chief essentials were organized on the plan of their English prototypes, the courts to a considerable extent administered justice by means of a legal procedure largely transplanted from local courts “at home”. The law merchant, borough custom, legal principles drawn from the central courts in England, Biblical precedents, and local adaptations are all present in these records. The Suffolk Court was an inferior quarterly court which combined a criminal jurisdiction similar to that of quarter sessions in England and a civil jurisdiction in many ways analogous to that of a mayor’s or recorder’s court in the mother country. The occasional use of equity powers, for which there was ample precedent in the contemporary London mayor’s court, and of admiralty and maritime jurisdiction—at least before the General Court had established a court of admiralty (p. 364)—add to the variety of the material presented. In the exercise of maritime and admiralty powers this Massachusetts court was far less aggressive than the mayor’s court of New York City in the same period. But in the records of the former references to the Lex Mercatoria and the maritime “custom of our Nation” are as frequent as the appeal in the latter tribunal to the laws of Oléron and the sea laws generally. As a matter of fact commercial and maritime disputes came up before the Suffolk court with much greater frequency than in the quarterly court of Essex County in the same period. On the other hand, for agrarian problems as reflected, for example, in suits to recover damages for trespass by cattle, we will find far more material in the pioneer collection of Essex court records edited by Mr. George F. Dow.

A spirit of informality quite foreign to the central courts of common law in this period pervades these records. The action on the case is used freely and for a tremendous variety of disputes. Rules of evidence are not strictly enforced. We find the testimony of a plaintiff in his own case (pp. 16, 283), the admission of hearsay evidence (p. 653) which may have been ground for reversal by the Assistants (p. 656), and the use of account books in evidence when accompanied by the suppletory oath (p. 214). While in the English courts it

---

was not until 1707 that payment became a defense to a specialty, an appellant in the Suffolk court admitted that proof of payment could void a sealed instrument (p. 532). In numerous other respects the common law was observed. The doctrine of consideration was adhered to and bargains between man and wife declared invalid. Though the Suffolk records indicate an apparent reluctance on the part of the court to award damages for death by wrongful act (pp. 166, 404-408), other cases brought before the Court of Assistants during the same period of time reveal that the family of the dead victim might recover compensation as a by-product of a successful prosecution for criminal negligence.

Civil suits were habitually tried by juries unless the parties agreed to a determination by the bench, but a study of the records does not confirm the conclusion of Mr. Chafee that jury trials were a matter of course in criminal cases (p. xliv). As Mr. Mark Howe, Jr., has pointed out, unless the defendant specifically asked for a jury, criminal cases were customarily tried by the magistrates. On the other hand, juries were generally used on appeal. Only five years after the famous judgment of Chief Justice Vaughan in Bushel's Case, the Massachusetts Court of Assistants fined a recalcitrant juror for refusing to concur with the rest of the jury in sustaining the verdict of the lower court, probably, as the juror himself protested with a degree of vigor and courage quite unexpected among these records of drab conformity, because his "dissenting from the Rest of the Jury was not Soe hainously taken as dissenting from the Court".

The close study of law-in-action which these volumes provide should modify considerably the views of Reinsch and Hilkey of the superior authority of Biblical law in Massachusetts during this period, as evidenced in the writings of the fathers, the codes, and such celebrated pseudo-codes as "Moses his Judicialls". Mr. Chafee prudently steers a middle course between the Old Testamentarians and such writers as Francis C. Gray and more recently Theodore Plucknett who believe this influence should be largely discounted. But the chapter is not yet closed. The Suffolk county court, as an inferior tribunal, did not have jurisdiction in capital cases or in divorce, in both of which Biblical precedent was decisive, and in matters of inheritance (in which the Pentateuch seemed far more persuasive than the Year Books) and usury resort was frequently had to Scripture. In Holowell v. Butler (pp. 1034, 1037) a claimant to decedent's property successfully relied on the rules of inheritance laid down in the Book of Numbers. The appellant pointed out the dangers inherent in a consistent application of the Scriptural word, as Numbers provides that every fifty years there is to be a complete redistribution of the land. The governing class, however, had no intention of upsetting titles and applied the Bible in a most discriminating manner. Mr. Chafee seriously doubts the authoritative force of the Bible as law since half the litigants who relied on Scriptural precedents lost their cases. In the absence of opinions of the court and the consequent uncertainty as to the issue upon which the ultimate decision turned, it would seem that similarly invalid conclusions could be drawn from a great number of cases in which litigants unsuccessfully counted upon common law and custom. It would not be the first time an adversary had fought under the banner of Lucifer and counted upon the "word of God" to win.

4. 1 Records of the Court of Assistants 54, 60, 86, 114, 188, etc.
5. 7 New England Quarterly (1934) 311.
BOOK REVIEWS

For the social historian these legal records contain a wealth of data. The residents of Boston and surrounding towns shared at least one trait with inhabitants in other colonies. They were unusually litigious. 1,171 closely-printed pages are needed to report disputes extending over a brief period of ten years and involving a group of communities with a total population somewhere between seven and ten thousand. But of this litigation, as compared with New Amsterdam and New York City in the same period, very little was submitted to arbitration. The community depicted in these records was unusually homogeneous. Strangers, one of whom submitted that "the same Law should bee for the Stranger & sorjourner as for the Israelits" (p. 624), would find numerous legal fences erected to bar their way and the greatest difficulty in burying a past which was almost certain to be unearthed by some meddlesome busybody. These cases cast further light on the relation between sex repressions and sadistic manifestations in early New England (although the Essex records are much meatier on this topic), on the cruel and often unjust invasion of the rights of privacy, and on the control of the courts by the propertied class. The legal pendulum had not yet swung in the direction of the debtor, who generally reposed in jail during this period, while apprentices found that it was difficult to win suits against their masters before juries recruited from the small entrepreneur ranks; laborers who demonstrated against interlopers were fined for riotous conduct (p. 602), and the unemployed were punished for their sinful idleness by sentences of hard labor in the House of Correction (p. 89).

Richard B. Morris †


The First Amendment to the Federal Constitution provides:

"Congress shall make no law abridging the freedom of speech or of the press."

Justice Story once said: "That this Amendment was intended to secure to every citizen an absolute right to speak or write or print whatever he might please, without any responsibility, public or private, therefore, is a supposition too wild to be indulged in by any rational man." Obviously one has not the right to destroy at a whim or out of malice the reputation, peace or perhaps safety of others. The Blackstonian theory has been generally accepted—that freedom of the press merely involves freedom from previous restraints, with responsibility on the part of the publisher if he shall violate the law. Yet in some circumstances, as was said by Chief Justice Hughes in *Near v. Minnesota ex rel. Olson*, even "previous restraint is not absolutely limited". There are exceptions in time of war. Injunction may be had against obscene publications as well as "against incitements to acts of violence and the overthrow by force of orderly government".

These general questions, however, are ordinarily of little concern to the press. Practical experience involves rather the law of libel and of obscenity. A wise lawyer, when consulted by a client as to whether or not a publication is libelous or obscene, is likely to avoid a direct answer. He would advise that libel consists in defamation and obscenity is language that arouses sexual desire. He would let the client draw his own conclusions, knowing well that the advice was

† The College of the City of New York; Secretary, Committee on Legal History, American Historical Association.

1. 283 U. S. 697 (1931).
sought by the editor in the thought of shifting responsibility. A lawyer familiar with other cases might be better able to form a judgment as to the danger of publication that runs close to the border line. Yet, in general, one man's guess is as good as another's. The question is not merely whether an article is libelous or obscene, but how libelous, how obscene. In connection with libel, one must judge the likelihood of the claimant's bringing suit, the possibility, or the expense, of proving the truth. In connection with material alleged to be obscene, questions arise as to the age or classicism of the publication, the literary value and comparisons with other current literature. Even more important, one must judge (or guess) as to whether or not some crank will make a complaint to one of the "vice" societies which will involve the client at least in the expense of defending himself. These are practical rather than legal questions.

Indefinite laws are ordinarily regarded as within the ban of the Fourteenth Amendment on the theory that no one should be obliged to guess himself into trouble. Yet there is no field where correct guessing is of more importance than in connection with publications.

The historical battles for freedom of the press have centered around the right to criticize the government. In normal times that right is recognized, although occasionally some small radical paper is suppressed through the denial of postal privileges. This is on the theory that the publication advocates the overthrow of government by force. But militantly critical language is often interpreted by the post office as an advocacy of forcible action, and the determination of the post office is controlling unless clearly wrong.

The above suggestions show that there is a wide field for an exposition of the rights and privileges of the press. The author says that the book is intended "as a guide for practicing journalists" who "more than the members of any other profession not connected with the law need to know their rights and duties". The book is well arranged and indexed, contains the facts of illustrative cases and numerous citations. Yet the result is likely to be somewhat confusing. Just as one who reads a book on various diseases is likely to find many unsuspected symptoms in himself, this volume suggests so many pitfalls that the journalist is likely to be wary and worried. The work is a valuable hand book for lawyers, as it condenses a vast array of material in a small and readable volume.

Arthur Garfield Hays


It is significant of the place which the Permanent Court of International Justice has come to occupy in the organization of the international community that a commentary such as the present one should not only come to be written but be indeed indispensable to the lawyer seeking an understanding of the conditions under which the Court takes jurisdiction of a case and renders its judgments, orders and advisory opinions. So voluminous has the documentation of the Court become, more voluminous indeed than that of any other similar institution, that without a guide of this sort many months of research work would be needed to obtain an adequate grasp of the technical details of procedure before the Court. The work is published by the Institute of Foreign Public Law and International Law and appears in the dress of the recent volumes of the *Fontes Juris Gentium*. Because of differences in the form of presentation of the material, however, the editors felt that the work should not be issued as one

† Member of the Bar, New York City.
of the *Fontes* series but rather as a supplementary volume to it. A note in the preface indicates that the preparation of the volume was chiefly the work of Count von Stauffenberg, at that time a member of the staff of the *Institut* and later a member of the Registry of the Court.

The commentary, in undertaking to coordinate the various "materials of interpretation", omits all reference to the views of unofficial commentators and concentrates on the official acts of the Court itself. Taking the Statute of the Court as the primary document, the commentary follows it article by article, presenting in each case material showing the historical background of the subject-matter of the article and the practice that has developed in regard to it. The documentary material thus drawn upon includes, in addition to the acts of the Hague Conferences of 1899 and 1907, the minutes of the sessions of the Committee of Jurists which drafted the Statute, the records of the Council and of the Assembly of the League of Nations, the judgments, orders and advisory opinions of the Court itself, the minutes of the public meetings of the Court and the discussions attending the formulation of the rules of the Court and of other technical details of procedure. Some thirty-two pages, for example, are given over to the commentary on Article 36 of the Statute, presenting, under the heading "Precedents", the work of the Hague Conferences in connection with the Permanent Court of Arbitration, under the heading "History", the relevant articles of the Covenant of the League of Nations, the draft prepared by the Committee of Jurists and the discussion of the draft by the League, and under the heading "Interpretations by the Court and Practice", the various bases upon which jurisdiction has actually been assumed by the Court and the nature and problems of optional jurisdiction.

Once more the publishers of the *Fontes Juris Gentium* deserve our warm commendation for the scholarly character of their work and for the convenient manuals that they have placed at the disposal of the student. The standard they have set is a high one and it is to be hoped that they are receiving sufficient encouragement from the reception of their publications to enable them to continue.

C. G. Fenwick

---


Quasi Contract which for centuries (and to its infinite confusion) masqueraded under the name of implied contract and under that guise was listed as a stepchild of contract has until recently received the scant attention proverbially accorded to stepchildren. With the exception of William D. Evans' brief *Essay on the Action for Money Had and Received* (1802), not until the end of the last century did Quasi Contract attain the dignity of independent treatment. Keener's treatise was published in 1893, followed by Woodward in 1913. Of case books on the subject, only a few have appeared: Keener first ploughed the field in 1888, followed by James Brown Scott (1905), Woodruff (1905), and the little known but excellent brief volume of Judge Dibell in the Pattee Series (1911). Then came Thurston (1916), Woodruff's second edition (1917), and Volume III of Cook's *Cases on Equity* (1924) combining quasi contract cases with the corresponding equity material, of which a second edition appeared in 1932. Now Professor Laube presents a third edition of Woodruff's Cases, an interesting and important contribution to this difficult subject.

† Professor of Political Science, Bryn Mawr College.
Professor Laube has left untouched the plan of the earlier editions of Woodruff—indeed since the first edition there has been almost no change in the table of contents—and he seems to share Professor Woodruff's indisposition to use English cases, for of 113 new cases only 2 are English. To be sure, the recent English cases can well be dispensed with since there is great wealth of new material in our own reports. Most of the cases eliminated from the second edition are now found in the footnotes. The additional cases inserted by Professor Laube are uniformly well chosen. Indeed, he has unwittingly aroused this reviewer's envy by using a very large number of the cases already selected for a new edition of the latter's own case book on Quasi Contracts. In his footnotes the new material includes references not only to late cases of importance, but also to much of the recent material in the legal periodicals which should prove to be of great help to teachers and to the more industrious students. A well annotated case book is all the more welcome in this field since in the Digests the material is scattered under numerous headings ranging from "Actions" to "Work and Labor".

Among the most interesting of the new cases are Grand Lodge v. Towne,¹ Gaffner v. American Finance Co.,² Bessler Co. v. Bank of Leakesville,³ Jefferson Co. v. McGrath,⁴ and Holt v. Markham,⁵ all of which raise important problems of change of position and purchase for value in connection with the recovery of money paid under mistake. Indeed, it is perhaps unfortunate that Professor Laube has not made more of the defense of purchase for value. Even though Professor Langmaid may be correct in stating that this doctrine "rests upon and is merely a branch of a more general doctrine of change of position,"⁶ there is certainly much to be said in favor of Mr. Cohen's position that "although the defense of purchase for value may be nothing more than an instance of change of position grown doctrinaire, the differences in the approach to each defense today are too great to permit of argument that the defenses have important features in common."⁷ But each compiler of a case book is entitled to carry out his own ideas as to the analysis of the subject and the allocation of his material, so at best this criticism is of a very minor sort. As a whole, this case book is admirably conceived and executed and is a worthy successor to the first and second editions prepared by Professor Woodruff himself.

Edward S. Thurston†


A distinguished group of men met together in Philadelphia in January 1934 to analyze and explain America's efforts at economic recovery. The speeches delivered under the auspices of the American Academy of Political and Social Science represent a wide variety of opinion and of economic experience. It is not easy to summarize and appraise them together. They are almost all colored by a hope, not yet substantiated by a strong factual basis, that the many new

¹ 136 Minn. 72, 161 N. W. 403 (1917).
² 120 Wash. 76, 206 Pac. 916 (1922).
³ 140 Miss. 537, 106 So. 445 (1926).
⁴ 205 Ky. 484, 266 S. W. 29 (1924).
⁵ 1923 I. K. B. 504.
⁶ Langmaid, Quasi-Contract (1933) 21 CALIF. L. REV. 311, 319.
⁷ Cohen, Change of Position in Quasi-Contracts (1932) 45 HARV. L. REV. 1333, 1342.
† Professor of Law, Harvard University.
measures and changes in institutions inaugurated by the "New Deal" might bear rich and lasting fruit. Some are clouded with fears and a few are emphatic in their warnings against a dangerous line of policy.

The volume which appears to be slight in size is actually rich in suggestion and information. It is divided into five main sections. The first emphasizes the general nature of the Recovery movement, the second brings out certain changed aspects of the relation of business and government, the third discusses the status of labor, the fourth the position of the consumer, and the fifth describes some other special problems of agriculture and industry. The scope of the discussions is, however, much more inclusive than these general headings would imply. Inevitably financial problems are analyzed as an inextricable part of the whole group of measures. Unavoidably the opinions of these different authorities on the probable and the desirable nature of the future control of economic life comes into the exposition.

In spite of the diversity of subjects and the variety of points of view represented, however, it is interesting to find certain concepts and assumptions which are expressed or implied in most of the papers read. These ideas are sufficiently representative of current opinions to be worth noting here. First, there is a very real feeling behind almost every discussion that the United States had reached a new phase in its development even before the depression and that institutions and laws had lagged in their adaptation to this so that a very swift and comprehensive adjustment was made necessary in the late months of the depression and in the recovery period. Second, one outstanding aspect of the inadequate development of economic life in the new circumstances evident in the nineteenth century was the lack of industrial laws and codes which would cover the basic problems and recognize the extreme importance of production conditions to the bulk of the population. A third conclusion which seemed to be implicit in most of the discourses was that competition, though important as a regulating device, could no longer be allowed as much free play as formerly but must be kept between certain limits of decent standards of production and wages and minimum prices to prevent cutthroat conditions. Fourth, there was a general preoccupation with the importance of mass buying power in steadying industrial conditions, even though a few speakers pointed out the errors and disappointments which followed an easy assumption that industry would be stimulated at will by artificial injections of spending power.

There was in addition to these ideas a feeling not always clearly expressed but suggested in many telling phrases that a new concept of community of interests must be formulated in such a way as to show the intermeshing connections of agriculture, industry, consumer, producer, financier and all groups of economic life, and that these connections must be recognized and made a part of intelligent adjustment of differences to supersede the frequent warfare and bitter competition often prevailing in the past.

Some of the speakers, if not definitely hostile to the recovery measures, at least attempt to give warnings and cautions of the serious dangers which threaten. Among these are Mr. Harry Eaton, R. W. Robey, and a number of others. Several speaking from within the administration circles, such as Dr. John Dickinson, Dr. Dexter M. Keezer, Dr. Arthur E. Morgan, and three or four more are defending the new tendencies against general and specific attacks. Both critics and advocates analyze the question of the nature and importance of free initiative under the new conditions and one is forced to recognize the difference between the types of freedom desired and the points at which restrictions are advisable as varying greatly in significance from individual to individual.
It seems at the moment somewhat doubtful whether Professor Dickinson can justify his claim that the whole recovery program is a unified and closely coordinated plan. Too much diversity is shown even in these brief discussions to permit of a clear understanding of a carefully coordinated and harmonious set of plans. On the contrary, expediency which is justified in many of the articles is more properly taken as the explanation than any well-balanced and completely unified theory of economic functions and institutions.

It is interesting to note that one dilemma of the recovery program is reflected in the discussions of the protection of the consumer. The speeches convey no convincing idea of how his interests can be cared for in the immediate future. The attempt to use the term consumer to include the consumers of raw materials and semi-finished products by Dr. Keezer, seems to be a partial confession of inability to protect the ultimate consumer. In fact the substitution of the very important work of adjusting conflicting manufacturing interests is no answer to the urgent demands clearly expressed in Dr. Schlinck’s paper for attention to consumers’ needs. The consumer of finished products, however, is inevitably in a very weak position as compared with these group interests. It can hardly be otherwise with the increasing concentration of production under fewer managers and a deliberate effort to raise prices. There is in fact no suggestion of a solution which carries conviction in these discourses.

Another dilemma facing economic statesmen has been evident in the concern over possible shifts in power and opportunity of labor leaders or employers under the “New Deal”. Something of the confusion of thought and of the real difficulties of an equitable adjustment are reflected in the discussions at these meetings. Although the simpler aspects of the problem are clearly set forth, the pivotal issues are not, generally speaking, squarely faced and the reader is left very much in doubt both as to fundamental trends and probable results of recent changes in regard to labor status. One is forced to recognize again that most of the policies and plans in this realm are based on expediency and that there is very little in the nature of a scientific program or theory behind even the more striking changes.

Mr. George Houston in his discussion of essentials of industrial recovery has brought to the foreground a number of very pertinent facts which tend to cast doubt on the advisability of efforts to increase artificially purchasing power in the hands of the ultimate consumers. Insofar as his five arguments obtain to recent economic conditions, one of the main objectives of the C. W. A., some of the arguments in favor of the P. W. A., and much of the reasoning behind purchasing power theories are discredited. He emphasizes the need for careful consideration of the different influences of production on producers' and consumers' goods and of durable and perishable commodities on economic relations. His brief discourse points out the need for clear-headed subdivision and analysis and his conclusions offer a timely warning of the factors which make normal credit operations difficult in an experimental period and show why the banks cannot easily supply credit on a generous scale to a stagnant industry.

Reviewing in the autumn of 1934 these articles after a lapse of some months it is clear to the impartial reader that neither the dire warnings nor the glowing hopes of the speakers have as yet been entirely justified. American economic life is still struggling to work out the definitive answers to the four questions which have been suggested above as preoccupying most of the speakers and to adjust and reshape its myriad institutions to what has been, not so much a revolution as a slow and painful transition to a highly industrialized, mechanized, mobile, and complex society.

Eleanor Lansing Dulles

† Research Associate, Department of Industrial Research, Wharton School, University of Pennsylvania.

This is a very readable and interesting little book of ninety-two pages. Comments and criticisms of court procedure are always of interest; they are particularly valuable when they come as these do from the pen of a distinguished and accomplished leader of the Bar.

In the seven chapters of his work, Mr. Taft sets forth many valuable and interesting suggestions. The most important of these is: "There are many fairly good lawyers in our courts who are not skilled in trial work." No one who has had wide experience in our courts, especially in the courts of a large city like New York, can fail to have been impressed by the truth of this assertion. Of the thousands of lawyers in New York City, I think it is safe to say that there are not more than ten who are really pre-eminent as advocates, and that there are not more than one hundred in addition to this first group who could be called really skilled and competent trial counsel. In my opinion there is an infinitely smaller proportion of able trial lawyers in New York City than that which will be found in the smaller cities and in the rural districts of the state. Nor is the reason far to seek. Some of our ablest and best paid members of the Bar are entirely absorbed in what in England would be called solicitors' work—the giving of advice in the office, the preparation of stock and bond issues and a vast number of other matters which do not bring practitioners before the court. In view of this it is not strange that many cases are handled in court by lawyers who show marked deficiencies for this kind of work.

At page 31 Mr. Taft says: "But even in those states where the standards fixing eligibility for admission to the bar are most exacting, there is no limitation upon the right of any lawyer, however fitted he may be to go into court and attempt to try a case. In this age of industrial and financial activities, it is probable that in the large cities of the country a substantial majority of lawyers never go into court at all." Some lawyers, says Mr. Taft, who realize their lack of experience or aptitude for trial work do not assay it. "But," says Mr. Taft, "there is a great number of lawyers who are not deterred by such considerations."

One of the commonest defects found among those not versed in trial work is the failure to possess or display ordinarily decent good manners. Mr. Taft speaks of the difficulty of the court in protecting a witness "from excesses of counsel's behavior, he may not be able to restrain ill-mannered, vociferous and inexperienced counsel" (p. 4).

Many lawyers in cities like New York, says Mr. Taft, are "devoid of trial technique, thorough preparation, good manners or a desire to save time" (p. 57). Judges, at another point he adds, are "subjected to severe strains upon their patience through the constant pressure of business, and by the inexperience, inefficiency and irritating manners of lawyers not adequately equipped for the trial work" (p. 85).

The author's comments on the English system where the bar is divided between solicitors and barristers are indeed interesting. I do not know that I entirely agree with the author in his statement that "it would be impossible to transplant the system of dividing our bar into two classes" (p. 30). In my judgment, the system could be transplanted, at least it would be an experiment worth making.

Mr. Taft's second chapter on Observation, Perception and Memory contains a very clear and simple statement of interest to lawyers as well as to laymen, although the former will find nothing very new in this chapter.

Mr. Taft's analysis of Professor Münsterberg's book is excellent and very refreshing. He subjects the Professor's theories to a lawyer-like analysis.
Professor Münsterberg’s theories do not come off with flying colors in the face of such a critique.

In his fourth chapter Mr. Taft discusses *The Witness Before He Takes the Stand*, and at page 56 makes a rather sharp comment about judges who he says “have rarely been zealous as reformers”. Perhaps one reason for this statement, if it is correct, is that judges in this state for many decades have been hampered by a failure to possess the rule-making power and have found themselves in the straight jacket of a procedure minutely devised by a legislature over which the courts have no control. I for one predict that when the new judicial council, authorized by recent legislation in this state, begins to function, many of our judges will be found at the forefront of procedural reform.

In chapter five the author again sets forth what perhaps might be regarded as rather a tart comment on our state judges. At page 66 Mr. Taft says that some witnesses “regard judges with awe and respect; others (and this is often the case with highly educated and respectable citizens) visualize them as the jetsam and flotsam of a corrupt political system; and where personal or political interests are involved they do not go on the stand impressed with either the purity or the ability of the bench, and sometimes they even think their testimony will be distorted or discredited by unfriendly tactics in which the court will covertly participate. Courts are regarded by many witnesses in no idealistic way.” Despite the many newspaper strictures, my own experience has been that regardless of their selection, the judges of our state court measure up to a high standard of learning and ability. My own observation is that the average state court judge measures up very well indeed, by comparison, with the average federal court judge who holds office by appointment. Perhaps one of the reasons why some witnesses visualize judges “as the jetsam and flotsam of a corrupt political system” is that the “highly educated and respectable citizens” to whom Mr. Taft refers (which category may be deemed to include our leading lawyers) do not take the pains to disabuse witnesses and others of such adverse impressions.

Chapter six is entitled *Several Kinds of Witnesses Classified*. The comments here are good and would be interesting to the laymen, but would present nothing particularly new to lawyers.

In his last chapter of *Suggestions*, Mr. Taft says: “I would much prefer to try cases without any rules at all, except that which would exclude immaterial evidence, and would vest in the trial court the power, not subject to appeal, to rule upon its admissibility” (p. 90). Judge Crane's introductory comment on this book and upon this subject wherein he says: “We may not go as far as Mr. Taft in his advocacy of the abolition of all rules of evidence, with certain limitations” is one with which I personally concur. Despite popular strictures on the rules of evidence, it is my opinion that those who have had wide experience in the trial of cases are well convinced that most of the rules of evidence, worked as they have been through centuries of trial and error, promote and do not retard the due administration of the law. The worst injustices I have ever seen have occurred before bodies and boards who regard themselves as superior to the rules of evidence. The results of such judicial substitutes, in my opinion, are not good. Frequently justice is not well subserved and not infrequently greater delays are occasioned than would have happened had only legal evidence been permitted.

Mr. Taft's book is charmingly written. It is replete with many interesting and valuable anecdotes and is on the whole a very valuable contribution to the subject which he is so well qualified to treat.

*Lloyd Paul Stryker†*

† Member of the Bar, New York City.
BOOK NOTES


These books begin a projected series of ten or twelve volumes, and follow, as a sequel, the three-volume Diplomatic Correspondence of the United States, devoted to the period in which Latin American nations were achieving independent status. Their publication is one of those supererogatory tasks which, in our present state of enlightenment and civilization, fall to Endowments and Foundations—a work which is extremely desirable from a scholarly point of view, but which promises no return to the doughty entrepreneur, casting about for occupation but primarily for profits. The Carnegie Endowment has selected an able editor in the person of Dr. Manning; the care with which the work has been done speaks for the choice. To be sure, one useful editorial device—that of indicating the dates at which various incoming documents reached the Department of State—was not adopted until the fourth volume of the present series; but that is a minor criticism, in view of the thoroughness and skill with which the editing has been done.

The purpose of the work, needless to say, is not to provide material for light reading, but to render available to scholars much material which hitherto has been difficult of access. Many of the countries whose correspondence will ultimately be published have lost, in the turbulence of subsequent decades, the originals of these despatches; it is one of the purposes of the Carnegie Endowment to facilitate research in those countries by printing these materials.

To be sure, one who uses these volumes will be relying upon a second-hand source; but only the most meticulous and unusual scholarship will demand examination of the unimportant documents which have not been printed. The pages of official despatches written a century ago are not without dramatic interest, by reason of the light they shed upon interesting phases of history. Even a casual reader of these pages of polite circumlocution can trace through the tortuous channels of diplomacy the story of that bitter dispute over the Falkland Islands, which carried our relations with Argentina into such a precarious balance; again, William Walker, gun-runner and filibuster, casts his disturbing shadow plainly across the current of our international affairs.

Sometimes a report reveals an attitude of contemptuous paternalism toward Latin American nations which goes far toward an explanation of diplomatic difficulties; or perhaps we are afforded a brief glimpse of some character sufficiently picturesque to

1. The omission is noted candidly in the preface to volume four; see page vii.
2. A foreword summarizes the purposes behind publication. See volume one, page vii.
3. See volume one, page ix.
4. Correspondence relating the details of this controversy may be found throughout volume one.
5. Walker is the subject of much of the correspondence in volume four.
6. See, for example, the delicately diplomatic document beginning on page 128 of volume one. Instructions given to consuls frequently assumed a very moral and paternal tone. See volume two, page 4. The emissary to whom this particular essay was addressed searched for two months without finding the government to which he had been sent! See volume two, page 14.
suggest further research into his life. But these are occasional flashes in the midst of solid, factual substantiality; the content of these volumes foreshadows that they will be relegated to the limbo of "useful" works praised in bibliographies, to serve as the foundation rather than as the capstone of a study of our relations with our southern neighbors.

**Trade Associations and Industrial Control—A Critique of N. R. A.**


In contrast to the early part of its career the New Deal has lately not wanted critics, both rabble-raising epithet hurlers and calmer reasoners. Professor Whitney, who presents his analysis in the present book, is decidedly of the latter type. He "views with alarm", but his views are the result of a cool examination of the facts, and the alarm is a presentation of consequences supported by an argument. The special subject of the author's analysis and criticism is the National Industrial Recovery Act. He sees as its central theme the idea of industrial control, either through industry itself by means of trade associations, or by the government. The experience of a number of trade associations is reviewed at length, and mention is made of other forms of industrial supervision—the trusts, the cartels, government control of public utilities in this country, and the "planned economies" of other nations. The results of these efforts and an abstract analysis of the consequences of an industrial system bereft of competition lead Professor Whitney to the conclusion that the Recovery Act of 1933 not only will fail in its immediate purpose of dispelling the business depression, but if established as a permanent feature will lead to disastrous effects upon the national economy. The best course of action, in the author's opinion, is a return to free competition, unhampered by control either within industry or by the government.

Professor Whitney recognizes that a condition of free enterprise such as he recommends does not now exist and has not existed for at least the past decade. To follow his suggestion, therefore, would mean a social change, not fundamental perhaps, but drastic. It would seem that a necessary preliminary to intelligent action on this question is a consideration of the method, if any, by which industry could be converted from its present state of competition strongly diluted by monopolism and government supervision to pure competition, and an estimate of the difficulty and cost to society of making the change. It may be that it is less costly and dangerous to pursue a course leading toward controlled monopoly, with all its faults, than to revert to a state of unrestricted competition. A consideration of this question is not included in the present volume. A few suggestions, at least, on this point would have added greatly to the value of the book.


Anyone desiring a quick, yet complete, survey of the various forms of business units and combinations of business units prevailing in this country should find this book extremely valuable. Within its 649 pages, the author has managed to compress a statement of the historical development of each form of business unit and combination thereof, a description of its factual and legal characteristics, and a summary of the chief merits and defects of each form. The book classifies business units as Single Proprietorships, Partnerships, Joint Stock Companies, Massachusetts Trusts, and Corporations, and business com-
binations as Gentlemen's Agreements, Pools, Trusts, Communities of Interest, Consolidated Companies, Leased Companies, Holding Companies, Trade Associations, and Cooperatives. It concludes with a number of chapters on the regulation of business combinations, first by common law, then by state legislation, and finally by federal legislation, the last chapter dealing with the National Industrial Recovery Act.

Simplicity, clarity of expression, and a complete absence of argumentativeness or persuasiveness make the book particularly inviting to the reader. Even the evaluation of the various forms of business units and combinations is done impartially and from the various, and frequently conflicting, points of view of the business unit itself, the various individuals interested therein, and of the general public. Actually decided cases have been drawn upon wherever illustrations have been needed. Nowhere, however, is this done in such fashion as to make the book one of legal reference; it is, primarily, a book for college instruction or for the lay reader. It can, however, prove valuable to the lawyer by affording him the means of securing a quick survey of a vast field, to be followed up by his own more intensive study of the particular portion of it in which he happens to be interested.

The apportionment of space as between the various forms of business unit and combination is interesting in that it reflects the great change which has taken place in our economic structure. 150 pages are devoted to the corporation, while only 82 pages discuss all the other business forms; and fully 230 pages are devoted to the various types of business combinations—as many as to all the business units together.
BOOKS RECEIVED


STATEMENT OF OWNERSHIP, MANAGEMENT, CIRCULATION, ETC.

Pursuant to the regulation of the Federal Post Office, revised by the Act of August 24, 1912, herewith is published a Statement of Ownership, Management, etc., of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, published at Philadelphia, Pa.:

<table>
<thead>
<tr>
<th>Name of</th>
<th>Post Office Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>Student Editor, Harry E. Sprogell,</td>
<td>Philadelphia</td>
</tr>
<tr>
<td>Secretary, Louis J. Goffman,</td>
<td>Philadelphia</td>
</tr>
<tr>
<td>Treasurer, B. M. Snover,</td>
<td>Philadelphia</td>
</tr>
</tbody>
</table>

Owners: (If a corporation, give names and addresses of stockholders, holding 1 per cent. or more of total amount of stock.) University of Pennsylvania, Philadelphia, Pa.

Known bondholders, mortgagees and other security holders, holding 1 per cent. or more of total amount of bonds, or other securities. No bonds or mortgages outstanding.

LOUIS J. GOFFMAN,
Secretary.

Sworn to and subscribed before me this 25th day of September, 1934.

B. M. SNOVER,
(Seal) Notary Public.
My commission expires April 8, 1937.